



Decision and Reasons for Decision

Citation:	<i>Q93 and Department of Transport and Main Roads [2020] QICmr 70 (25 November 2020)</i>
Application Number:	315199
Applicant:	Q93
Respondent:	Department of Transport and Main Roads
Decision Date:	25 November 2020
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - applicant seeks the name and address of the person who reported allegedly smoky vehicle - whether disclosure would reveal information that could reasonably be expected to identify a confidential source of information in relation to the enforcement or administration of the law - whether information is exempt from disclosure under section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(a) and 48 and schedule 3, section 10(1)(b) of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Department of Transport and Main Roads (**Department**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for all documents relating to complaints made in relation to her vehicle, including '*smoky vehicle program complaints*' or '*not roadworthy complaints*' over a 12 month period.²
2. The Department located three pages in response to the application and released two full pages and part of one page to the applicant. It refused access to the name and address of the individual who made a notification of a smoky vehicle to the Department (**Complainant Information**).³ This information was refused on the basis that its disclosure could reasonably be expected to enable the existence or identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained.

¹ On 23 December 2019.

² The 12 months prior to the date of the application.

³ Decision dated 21 January 2020.

3. The applicant applied for internal review⁴ of the Department's decision. On internal review⁵ the Department upheld its original decision to refuse access to the Complainant Information,⁶ and located and released a further ten pages.
4. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision, '*seeking notice of whether the notifier... was a police officer, and their name or confirmation that it was [Person X] or [Person Y].*'⁷
5. For the reasons set out below, I affirm the Department's decision to refuse access to the Complainant Information under section 67(1) of the IP Act and sections 47(3)(a) and section 48 of the *Right to Information Act 2009* (Qld) (**RTI Act**).⁸

Reviewable decision

6. The reviewable decision is the Department's internal review decision dated 18 February 2020.

Evidence considered

7. Significant procedural steps relating to the external review are set out in the Appendix.
8. The evidence, submissions, legislation and other material I have considered in reaching my decision are set out in these reasons (including footnotes and the Appendix).
9. Generally, decision makers must have regard to the *Human Rights Act 2019* (Qld) (**HR Act**). However, section 11(1) of the HR Act provides that '[a]ll individuals in Queensland have human rights' (my emphasis). Given the applicant resides in a State other than Queensland, I have not had direct regard to the HR Act. I have, of course, observed and respected the law prescribed in the IP and RTI Acts in making this decision. In doing so, my decision can be construed as '*respecting and acting compatibly with*' the rights prescribed in the HR Act.⁹ Accordingly, had it been necessary for me to have regard to the HR Act in this review, the requirements of section 58(1) of that Act would be satisfied, and the following observations of Bell J about the interaction between the Victorian analogues of Queensland's IP and RTI Acts and HR Act would apply: '*it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act*'.¹⁰

Information in issue

10. The only information in issue is the Complainant Information, being the name and address of the individual who made a notification of a smoky vehicle to the Department.

Issue for determination

11. The issue for determination is whether access to the Complainant Information may be refused on the basis that disclosure could reasonably be expected to enable the identity

⁴ Confirmed by the Department on 23 January 2020.

⁵ Decision issued 18 February 2020.

⁶ The Department also considered the application of schedule 3, section 10(1)(f) of the *Right to Information Act 2009* (Qld). However, given my findings it is not necessary for me to consider this alternative reason for refusal.

⁷ On 19 February 2020.

⁸ Because the information is exempt under schedule 3, section 10(1)(b) of the RTI Act.

⁹ *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

¹⁰ *XYZ* at [573].

of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained.¹¹

Relevant law

12. Under the IP Act, a person has a right to be given access to documents of an agency to the extent they contain the individual's personal information.¹² That right is subject to certain limitations set out in the IP Act and RTI Act.
13. One such limitation is that an agency may refuse access to a document to the extent it comprises exempt information.¹³ Relevantly, information is exempt if its disclosure could reasonably be expected to enable the existence or identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained.¹⁴
14. In evaluating this exemption, a decision maker must also consider the exceptions outlined in schedule 3, section 10(2) of the RTI Act, in accordance with the comments of Chief Justice Holmes in *Commissioner of the Police Service v Shelton & Anor*:¹⁵

an agency cannot reach the view necessary...in relation to information which may be exempt under sch 3 s 10 without a consideration of the documents the subject of the application to ascertain whether they fall within s 10(2).

Applicant's submissions

15. The applicant submitted that she considered the informant to be one of two police officers and that she requires this information to:¹⁶

...prosecute agencies for systemic and egregious human rights abuses which are based on protected attributes, hate based persecution and abuse of power...using public office and directing large numbers of public servants to use their position to persecute.
16. The applicant has also indicated that she wishes to '*join the name of the person to a lawsuit already afoot*'.¹⁷
17. To the extent that these submissions raise for consideration the exceptions set out in schedule 3, section 10(2) of the RTI Act, this is addressed at paragraph 33 below.
18. To the extent that the applicant's submissions raise public interest arguments in favour of disclosure, I am not able to take these into account.¹⁸ The categories of exempt information set out in schedule 3 of the RTI Act represent the types of information which Parliament has already decided, would, on balance, be contrary to the public interest to disclose. As such, once the requirements of an exemption have been established, the RTI Act does not allow for the analysis of applicable public interest factors, no matter how compelling an applicant may consider their arguments to be.

¹¹ Section 67(1) of the IP Act, sections 47(3)(a) and 48, and schedule 3, section 10(1)(b) of the RTI Act.

¹² Section 40 of the IP Act.

¹³ Under section 67(1) of the IP Act, sections 47(3)(a) and 48 of the RTI Act.

¹⁴ Schedule 3, section 10(1)(b) of the RTI Act.

¹⁵ [2020] QCA 96 at [47] per Holmes CJ.

¹⁶ Emails received on 30 June 2020 and 6 July 2020.

¹⁷ Email dated 6 July 2020.

¹⁸ Section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act. These submissions raise for consideration factors favouring disclosure under schedule 4, part 2 of the RTI Act, including, for example, that disclosure could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official, or could reasonably be expected to advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies. The applicant's submissions concerning the lawsuit give rise to the factors concerning the administration of justice.

19. Although I am not able to formally consider these matters, in effort to promote settlement of the review,¹⁹ OIC wrote to the applicant to confirm that the Complainant Information was not either of the two names she had included in her external review application.²⁰ However, the applicant was not satisfied with this, and continued to seek access to the Complainant Information.
20. The applicant contends that she has been unable to participate in a '*written only process*' and that this process has been used by OIC '*to cause [her] disadvantage and deception*'.²¹ The procedure to be followed on external review is, subject to the IP Act, within the discretion of the Information Commissioner.²² To ensure procedural fairness,²³ OIC routinely issues a written preliminary view to an adversely affected party. This allows the party to understand the case against them and allows them to provide information in reply supporting their case.
21. During this review, our Office twice conveyed a written preliminary view to the applicant.²⁴ The applicant provided written submissions in response.²⁵ In these circumstances, I am satisfied that the applicant has been afforded procedural fairness throughout the review process and has been given reasonable opportunities to put forward her views, of which she has availed herself.

Findings

22. Information will be exempt under schedule 3, section 10(1)(b) of the RTI Act if:
 - there exists a confidential source of information
 - the information supplied is in relation to the enforcement or administration of the law
 - disclosure of the information in issue could reasonably be expected²⁶ to enable the existence or identity of the confidential source of information to be ascertained;²⁷ and
 - none of the exceptions to the exemption apply.
23. I consider each of these factors are satisfied in this case, as set out below.

Is the source of the information confidential?

24. Yes, for the following reasons.
25. A confidential source of information supplies information on the understanding that their existence or identity will remain confidential.²⁸ This understanding may arise as a result of an express agreement between the parties.²⁹ Alternatively, the surrounding

¹⁹ As required under section 103(1) of the IP Act.

²⁰ OIC letter to applicant dated 5 June 2020, and email to the applicant on 2 July 2020.

²¹ Submissions dated 4 September 2020.

²² Section 108(1)(a) of the IP Act.

²³ As required by section 110 of the IP Act and common law.

²⁴ Once by letter on 5 June 2020, and once, as requested by the applicant, in the body of an email on 2 July 2020.

²⁵ By email on 6 July 2020.

²⁶ The phrase 'could reasonably be expected to' requires an objective consideration of all the relevant evidence and consideration of whether the expectation is reasonably based. A reasonable expectation is not irrational, absurd or ridiculous. *Sheridan and South Burnett Regional Council and Others* [2009] QICmr 26 (9 April 2009) at paragraphs [189]-[193] referring to *Attorney-General v Cockcroft* (1986) 64 ALR 97; see also *Nine Network Australia Pty Ltd and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 14 February 2012) at [31].

²⁷ *McEnery and Medical Board of Queensland* (1994) 1 QAR 349 (**McEnery**) at [16]. *McEnery* considered the application of section 42(1)(b) of the *Freedom of Information Act 1992* (Qld), identical in terms to schedule 3, section 10(1)(b) of the RTI Act, and has been relied upon in subsequent decisions applying schedule 3, section 10(1)(b) of the RTI Act, including *94HQWR and Queensland Police Service* [2014] QICmr 45 (10 November 2014) (**94HQWR**) at [16]-[31] and *Shirirone Pty Ltd and Department of Agriculture, Fisheries and Forestry* [2014] QICmr 46 (18 November 2014) at [13]-[45].

²⁸ *McEnery* at [20]-[22].

²⁹ *McEnery* at [35].

circumstances may indicate an implicit mutual understanding of confidentiality of the identity of the source between the parties.³⁰

26. There is no evidence before me to indicate that an express assurance of confidentiality was given by the Department in this case. It is therefore necessary to consider the surrounding circumstances to determine whether a mutual understanding of confidentiality of the identity of the source can be implied. In evaluating this issue, I have considered the information on the Department's website relating to smoky vehicles.³¹ When a user logs on to the website and follows the prompts to submit an online report about a smoky vehicle, the following statement appears at the top of the electronic form:

Transport and Main Roads collects the information supplied by you for the purpose of assisting the department in detecting smoky vehicles on our roads. This information is required under the Transport Operations (Road Use Management) Act 1995. Only authorised officers have access to this information. Your personal details will not be disclosed to any third party without your consent, unless required by law.

27. I also consider the source could reasonably expect to remain confidential given that the Department is able to independently verify whether or not a vehicle is smoky without revealing the identity of the complainant (and, in most cases, without the necessity of contacting them for further information). In this regard, I note the Information Commissioner's previous comments that:³²

The most common situation in which a source of information and the agency receiving the information could reasonably expect that confidentiality could be preserved in respect of the identity of the source, is where the information provided can be independently verified by the agency's own investigators, or the source draws the agency's attention to the existence of physical or documentary evidence which speaks for itself (i.e. which does not require any direct evidence from the source to support it). Thus a person may inform the proper authority that a neighbour is illegally carrying on an unlicensed business from the neighbour's premises, and that investigators can observe this for themselves if they visit the premises at certain hours; or a source may alert the revenue authorities to precisely where they may discover the second set of accounting records which will establish that a business has been fraudulently understating its income.

28. This accords with the Department's initial decision, in which it stated that it 'does not generally reveal the identity of a notifier unless it is necessary or relevant to the management of the information being provided. This is in accordance with the complaints handling process, which aims to handle information in line with privacy obligations.'³³
29. Having regard to all the circumstances outlined above, I am satisfied there is an implied mutual understanding of confidentiality between the Department and the source who reported the smoky vehicle regarding the source's name and address.³⁴

Was the information supplied in relation to the enforcement or administration of the law?

30. Yes, the information was provided to the Department for the enforcement or administration of regulation 291(1) of the *Transport Operations (Road Use Management—Road Rules) Regulation 2009* (Qld).

³⁰ *McEniery* at [50].

³¹ Department of Transport and Main Roads, 'Report Smoky Vehicle', *Queensland Government* (Web page) <<https://www.service.transport.qld.gov.au/reportsmokyvehicle/application/EnterDetails.xhtml?dswid=4146>> accessed on 21 October 2020.

³² *McEniery* at [27].

³³ Dated 21 January 2020.

³⁴ *94HQR* at [18]-[23].

Would disclosure of the Complainant Information be reasonably expected to enable the identity of the confidential source of information to be ascertained?

31. Yes, because the Complainant Information comprises the name and address of the person who reported the applicant's vehicle to the Department.

Do any of the exceptions apply?

32. The applicant contends that reporting her vehicle was an act of intimidation, harassment, persecution and stalking by police, and that it was a false complaint from a police officer (or other public servant) as retaliation for reports/complaints that she has made:³⁵

Police can pull over the vehicle themselves. They did not because it was a false complaint in a series of falsified propaganda about me, designed to malign and persecute me.

33. I have considered this submission in light of the exception in schedule 3, section 10(2)(a) of the RTI Act, which provides that information is not exempt if it consists of matter revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law. Other than the applicant's unsubstantiated allegations, there is no information or evidence before me that supports this contention. In any event, the nature of the Complainant Information is such that it is not capable of revealing the scope of any law enforcement investigation. It consists only of the name and address of a complainant.
34. I have also considered the remaining exceptions listed in schedule 3, section 10(2) of the RTI Act and do not consider that any apply to the Complainant Information.

DECISION

35. As a delegate of the Information Commissioner,³⁶ I affirm the Department's decision to refuse access to the Complainant Information under section 67(1) of the IP Act, and section 47(3)(a), section 48 and schedule 3, section 10(1)(b) of the RTI Act.

S Martin
Assistant Information Commissioner

25 November 2020

³⁵ Submission dated 6 July 2020.

³⁶ Under section 139 of the IP Act.

APPENDIX**Significant procedural steps**

Date	Event
19 February 2020	The applicant applied for external review.
13 March 2020	The Office of the Information Commissioner (OIC) wrote to the applicant and the Department, and accepted the application for external review. OIC requested the information in issue from the Department.
13 March 2020	The Department provided the information in issue to OIC.
1 June 2020	OIC wrote to the applicant concerning procedural issues (including in relation to the applicant's other external reviews)
5 June 2020	OIC conveyed a preliminary view to the applicant, and to promote settlement, also confirmed that the Complainant Information was not comprised of either of the two names the applicant had raised in her external review application. ³⁷
30 June 2020	OIC issued a closure letter to the applicant as she had not responded to the preliminary view in the timeframe provided. The applicant then contested OIC's closure of the review.
2 July 2020	OIC conveyed the preliminary view to the applicant again, in the body of an email as requested.
6 July 2020	The applicant provided submissions.
3 September 2020	OIC updated the applicant concerning the review.
4 September 2020	The applicant raised concerns about OIC's processes.

³⁷ The Department was consulted regarding this settlement proposal.