



## Decision and Reasons for Decision

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Citation:	<i>Shirirone Pty Ltd and Department of Agriculture, Fisheries and Forestry</i> [2014] QICmr 46 (18 November 2014)
Application Number:	311972
Applicant:	Shirirone Pty Ltd
Respondent:	Department of Agriculture, Fisheries and Forestry
Decision Date:	18 November 2014
Catchwords:	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - applicant seeks access to the name of the complainant who made a complaint to respondent - 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 sections 47(3)(a) and 48 and schedule 3, section 10(1)(b) of the RTI Act</b>

### REASONS FOR DECISION

#### Summary

1. The applicant applied to the Department of Agriculture, Fisheries and Forestry (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to information about a complaint made to the Department about cattle in poor condition on the applicant's property (**the complaint**).
2. The Department located 10 pages of information in response to the applicant's access application and decided to release six pages in their entirety and parts of four pages. It deleted some information irrelevant to the terms of the access application from two of these four pages,<sup>1</sup> and refused access to some information on three of the four pages on the ground that disclosure would, on balance, be contrary to the public interest<sup>2</sup> as disclosure could reasonably be expected to:
  - prejudice the protection of an individual's right to privacy;<sup>3</sup> and
  - cause a public interest harm if disclosure would disclose personal information of a person.<sup>4</sup>

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<sup>1</sup> Section 73 of the *Right to Information Act 2009* (Qld) (**RTI Act**).

<sup>2</sup> Sections 47(3)(b) and 49 of the RTI Act.

<sup>3</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>4</sup> Schedule 4, part 4, section 6 of the RTI Act.

3. The applicant applied to the Department for internal review of the Department's decision to refuse access to the name/s of the complainant/s.<sup>5</sup>
4. On internal review, the Department varied its original decision and refused access to the name of the source/s on the ground that it was exempt information, as its disclosure could reasonably be expected to enable the identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained (**the confidential source exemption**).<sup>6</sup>
5. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's internal review decision.
6. On external review, the applicant made submissions that the confidential source exemption was not applicable or, if it was, an exception to this exemption applied.
7. For the reasons set out below, I affirm the Department's internal review decision and find that access to the name/s of the complainant/s may be refused on the ground that this information is exempt information, as the confidential source exemption applies.<sup>7</sup>

### **Background**

8. Significant procedural steps are set out in the Appendix.

### **Reviewable decision**

9. The decision under review is the Department's decision dated 5 March 2014.

### **Evidence considered**

10. Evidence, submissions, legislation and other material considered in reaching this decision are disclosed in these reasons (including footnotes and the Appendix).

### **Information in Issue**

11. The applicant seeks disclosure of the name/s of the complainant/s.<sup>8</sup>

### **Does the confidential source exemption apply to the name/s?**

12. Yes, for the reasons that follow.

### **Relevant law**

13. Section 23 of the RTI Act confers upon an applicant a general right to access documents of an agency. The applicant's right, however, is subject to a number of exclusions and limitations, including the grounds on which an agency may refuse access.<sup>9</sup>

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<sup>5</sup> The applicant did not seek a review of other aspects of the Department's decision – that is, the deletion of irrelevant information or the refusal of access to other information (a mobile telephone number and two paragraphs of personal information about a person or persons other than the applicant).

<sup>6</sup> Sections 47(3)(a) and 48 of the RTI Act and schedule 3, section 10(1)(b) of the RTI Act.

<sup>7</sup> Sections 47(3)(a) and 48 of the RTI Act and schedule 3, section 10(1)(b) of the RTI Act.

<sup>8</sup> Page 7 of external review application dated 19 March 2014. The name/s appear twice in the information identified by the Department as responsive to the access application - on pages 4 and 9 of the 10 pages.

<sup>9</sup> Under section 47(3) of the RTI Act.

14. An agency may refuse access to information on the ground that it comprises exempt information.<sup>10</sup> Exempt information includes information the disclosure of which 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.<sup>11</sup> Information will be exempt on this basis if:
- there exists a confidential source of information
  - the information which the confidential source has supplied is in relation to the enforcement or administration of the law; and
  - disclosure of the information in issue could reasonably be expected<sup>12</sup> to enable the existence or identity of the confidential source of information to be ascertained.
15. These requirements were first set out by the Information Commissioner regarding a provision in the now repealed *Freedom of Information Act 1992 (Qld) (FOI Act)*.<sup>13</sup> Given that the confidential source exemption in the RTI Act employs the same wording as its FOI Act predecessor,<sup>14</sup> the requirements remain apposite under the RTI Act.<sup>15</sup>
16. As well as considering the requirements, it is necessary to consider whether any exception to the confidential source exemption<sup>16</sup> applies.

### ***The exception to the confidential source exemption***

17. If the information in issue consists of certain types of information set out in the RTI Act, then it cannot be exempt information.<sup>17</sup> In these circumstances, an exception applies, and examination of whether the requirements of the exemption are met is unnecessary.
18. The applicant submits<sup>18</sup> that an exception to the confidential source exemption applies on the basis that the information in issue is:
- a report prepared in the course of a routine law enforcement inspection or investigation by an agency whose functions include that of enforcing the law (other than the criminal law or the law relating to corruption under the Crime and Corruption Act 2001).*<sup>19</sup>
19. The information in issue is the name/s of the complainant/s. This information appears in two contexts – on a page of a departmental officer's handwritten diary and on the first page of a three page document titled "Incident Report".<sup>20</sup> In both contexts, surrounding information (other than a mobile telephone number and some personal information about a person or persons other than the applicant<sup>21</sup>) was released to the

<sup>10</sup> Sections 47(3)(a) and 48 of the RTI Act.

<sup>11</sup> Schedule 3, section 10(1)(b) of the RTI Act.

<sup>12</sup> 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.

<sup>13</sup> *McEniery and Medical Board of Queensland* (1994) (**McEniery**) 1 QAR 349 at paragraph [16].

<sup>14</sup> Section 42(1)(b) of the repealed FOI Act provided 'Matter is exempt matter if its disclosure could reasonably be expected to ... (b) enable the existence or identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained'. Schedule 3, section 10(1)(b) of the RTI Act provides: 'Information is exempt information if its disclosure could reasonably be expected to ... (b) enable the existence or identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained'.

<sup>15</sup> For example, the requirements were recently applied in *JA14YM and Crime and Misconduct Commission* [2014] QICmr 13 (10 April 2014) (**JA14YM**).

<sup>16</sup> In schedule 3, section 10(2) of the RTI Act.

<sup>17</sup> Schedule 3, section 10(2) of the RTI Act.

<sup>18</sup> Page 5 of the applicant's submissions dated 14 May 2014.

<sup>19</sup> Schedule 3, section 10(2)(d) of the RTI Act.

<sup>20</sup> Page 9 and 4 respectively of the 10 pages identified by the Department as responsive to the access application.

<sup>21</sup> The applicant did not pursue access to this information on review.

applicant by the Department following the Department's original decision in response to the application.

20. I am satisfied that the name/s themselves, as they appear in the diary and the "Incident Report", do not comprise a report prepared in the course of a routine law enforcement inspection or investigation by the Department, or any of the other types of information listed as exceptions. I am also satisfied that this is the case regarding the handwritten diary page as a whole.
21. With respect to the "Incident Report" as a whole, I am satisfied that the document was created by an officer of the Department in the exercise of the officer's functions under the *Animal Care and Protection Act 2001* (Qld) (**ACP Act**). However, on careful consideration of the nature of the investigation, I note that it was in response to a complaint, rather than part of the Department's ongoing, regular activities to ensure regulatory compliance. In these circumstances, I am not satisfied that the document was prepared in relation to a "routine" law enforcement inspection or investigation.<sup>22</sup> I also note that the information contained in the "Incident Report" simply records the information provided by the complainant<sup>23</sup> and the level of priority assigned to the complaint.<sup>24</sup> In other words, the document records first-contact, intake information and identifies that an investigation should commence. In my view, the document precedes and instigates the investigation and, accordingly, cannot be taken to be "prepared in the course of" the ensuing investigation. Further, despite the document's title of "Incident Report", I am not satisfied that the document comprises a "report", given that the document records only one piece of information more than the complaint itself (that is, the level of priority assigned to the complaint). For a document to be characterised as a "report", the document should, in my view, contain more than limited, pre-investigative information of this nature.
22. Consequently, while I acknowledge that the exception to the confidential source exemption raised by the applicant could potentially render the exemption inapplicable to some information about the investigation of a civil complaint, I am not satisfied that the "Incident Report" relates to a "routine" investigation, that it was prepared "in the course" of the investigation, or that it is actually a "report". In these circumstances, I find that the document titled "Incident Report" does not comprise a report prepared by the Department in the course of a routine law enforcement inspection or investigation. I am also satisfied that the "Incident Report" does not comprise any of the other types of information listed as exceptions.
23. In conclusion, I am satisfied that no exception to the confidential source exemption applies. I will now examine whether the requirements of the confidential source exemption are satisfied.

### ***Existence of a confidential source of information***

24. A confidential source of information supplies information on the understanding that their existence or identity will remain confidential.<sup>25</sup> This understanding may arise as a result of an express agreement between the parties.<sup>26</sup> Alternatively, the surrounding

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<sup>22</sup> Given this conclusion, it is unnecessary for me to consider whether or not (despite its title of "Incident Report") the document actually comprises a "report" for the purpose of the exception.

<sup>23</sup> That is, information under the following headings: 'Source of Information', 'Complainant Details', 'Incident Detected at', 'About the Animals', and 'Alleged Offender'.

<sup>24</sup> Under the heading 'Incident Priority'.

<sup>25</sup> *McEnery* at [20-22].

<sup>26</sup> *McEnery* at [35].

circumstances may indicate an implicit mutual understanding of confidentiality of the identity of the source between the parties.<sup>27</sup>

25. On the information before me, there is no evidence to indicate that that an express assurance of confidentiality was given by the Department to the person/s who made the complaint. It is therefore necessary to consider the surrounding circumstances to determine whether a mutual understanding of confidentiality of the identity of the source/s can be implied between the parties.
26. I consider that the surrounding circumstances include information on the Department's website<sup>28</sup> about how complaints under the ACP Act are handled:

*Wherever possible, personal information provided by the complainant will remain confidential. However, if a matter goes to court and is defended, the court processes may require that the names of complainants are revealed.*

27. I also note section 85 of the ACP Act which requires the Department's officers to maintain confidentiality regarding complaints received by them. Further, I note the relevant departmental officer's confirmation that, in accordance with this provision, he does not disclose information about complaints, including who complainants are, to anyone.<sup>29</sup>
28. I also consider that the surrounding circumstances include the Department's ability to independently verify the information provided to it in complaints by conducting its own investigations in accordance with the ACP Act. In this regard, I note the Information Commissioner's comments that:

*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.<sup>30</sup>*

29. Finally, I note that the source/s of the information have not provided consent for their personal information to be disseminated.
30. I am satisfied that these circumstances demonstrate that there was an implied mutual understanding between the parties that the identity of the source/s would remain confidential.
31. The applicant has asserted knowledge that a particular person made the complaint.<sup>31</sup> The confidential source exemption cannot apply if the identity of a complainant is known, or can easily be ascertained independently of the information in issue.<sup>32</sup> However, there is no evidence before me to suggest that the identity of any

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<sup>27</sup> *McEniery* at [50].

<sup>28</sup> At <<http://www.daff.qld.gov.au/animal-industries/welfare-and-ethics/animal-welfare/complaints-in-queensland/how-complaints-are-handled>>.

<sup>29</sup> By telephone conversation with departmental officer on 22 July 2014.

<sup>30</sup> *McEniery* at [27].

<sup>31</sup> By telephone on 24 April 2014 and in submissions dated 18 November 2014.

<sup>32</sup> *McEniery* at [17].

complainant has been confirmed by that complainant or an official source, or can be easily discovered in some other way. In these circumstances, the RTI Act does not operate to confirm or deny an applicant's suspicions.<sup>33</sup>

32. In conclusion, I am satisfied that the source (or each source) was and remains a confidential source of information.

**Information provided by source relates to enforcement or administration of the law**

33. The Right to Information Commissioner has previously found that:

*The Confidential Source Exemption only requires that the relevant information 'relates' – is connected<sup>34</sup> – to enforcement or administration of the law; not that it results in a substantiated breach of same. The provision does not require a confidential source to accurately particularise a specific law, nor that the information they supply comprise conclusive evidence of a breach of that law. It operates simply to protect the identity of sources supplying information relating to or connected with either the enforcement or administration of the law.<sup>35</sup>*

34. The information provided by the source/s to the Department was connected to the enforcement or administration of laws regarding the alleged mistreatment of cattle. As a result of receiving the information, the Department conducted an investigation to determine whether there had been a breach of the ACP Act.
35. In these circumstances, I am satisfied that the information supplied by the source/s to the Department was in relation to the enforcement or administration of the law.

**Disclosure could enable identity of source to be ascertained**

36. The Information in Issue is the name of the source/s of the information provided to the Department. I am, therefore, satisfied that disclosure could reasonably be expected to enable the identity of a confidential source of information to be ascertained. Accordingly, I am satisfied the third requirement of the exemption is made out.

**False information**

37. Part of the "Investigation Report" released to the applicant states as follows:

*False complaint – no problems ... This owner is looking after his cattle very well.<sup>36</sup>*

38. The applicant submits that the complaint made by the source/s was not only false – it was misleading, malicious and derogatory. The applicant cites the clear, direct "ferocity" of language employed by the source/s when making the complaint (as recorded in the information that the Department has released to the applicant) as providing evidence of a malicious motive.<sup>37</sup>

<sup>33</sup> *Saunders and Department of Housing* [2007] QICmr 22 (18 July 2007) at [32].

<sup>34</sup> Paraphrasing the *Macquarie Dictionary Online* definition (accessed 11 March 2014).

<sup>35</sup> *JA14YM and Crime and Misconduct Commission* [2014] QICmr 13 (10 April 2014) at [19].

<sup>36</sup> Page 8 of the 10 pages identified by the Department as responsive to the access application.

<sup>37</sup> Page 4 of the external review application dated 19 March 2014. While the language recorded in the information could arguably be construed in this manner, it may also be the case that the departmental officer's notes of his conversation with the source/s and subsequent entry of information into an "Incident Report" did not record all nuances or qualifying comments made by the source/s.

39. On this premise, the applicant makes extensive submissions that, in essence, source/s who knowingly make false complaints in bad faith should not be afforded the same level of protection as persons whose complaints are substantiated.<sup>38</sup>
40. On the information before me, it is not possible to determine whether the source/s acted in bad faith when making the complaint or not. The language recorded in the information released to the applicant could arguably be construed as so direct and incorrect as to be indicative of a malicious motive (as submitted by the applicant); however, it could equally be the case that the departmental officer's notes of his conversation with the source/s and subsequent entry of information into an "Incident Report" did not record all nuances or qualifying comments made by the source/s.
41. In any event, both in Queensland and elsewhere, it is a long standing position that a complainant's motives are irrelevant when applying provisions like the confidential source exemption. Provisions of this type are '*...clearly designed to protect the identity of informers and does not differentiate between the good, the bad or the indifferent*',<sup>39</sup> and an informant can be regarded as a confidential source of information, notwithstanding that person may have been prompted by an improper motive.<sup>40</sup>
42. Further, once it has been determined that the confidential source exemption applies, public interest arguments cannot be used to mitigate the effect of the exemption. Exempt information under the RTI Act is a category of information that Parliament decided would, in all instances, be contrary to the public interest to release,<sup>41</sup> and the Information Commissioner does not have the power to consider public interest considerations that may ameliorate application of the exemption in circumstances involving complainants who act in bad faith.
43. While Parliament has given precedence to the public interest in protecting and encouraging the free flow of information to investigative and regulatory authorities, it has also provided mechanisms for action to be taken against complainants who knowingly make false or misleading complaints. I note that section 167 of the ACP Act is one such provision, and that action may be taken against the source/s if there is sufficient evidence to demonstrate that the complaint was made in bad faith.
44. In conclusion, while I acknowledge the frustration and concern expressed in the applicant's submissions about having to endure an investigation prompted by a complaint subsequently assessed as false,<sup>42</sup> I am satisfied that the confidential source exemption applies to the name/s, despite the departmental officer's assessment of the complaint as a false complaint.

## Conclusion

45. I am satisfied that all requirements of the confidential source exemption are met and that no exceptions to the exemption apply. Therefore, I am satisfied that access to the name/s of the complainant/s may be refused on the ground that the information is exempt information.<sup>43</sup>

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<sup>38</sup> Page 4 and 6 of external review application dated 19 March 2014, page 2-4 of submissions dated 14 May 2014, and by telephone on 24 April 2014 and 3 September 2014.

<sup>39</sup> *Re Richardson and Commissioner for Corporate Affairs* (1987) 2 VAR 51, cited in *McEniery* at [64] and *Bayliss and Queensland Health* (1997) 4 QAR 1 at [33].

<sup>40</sup> *McKenzie v Secretary, Department of Social Security* (1986) 65 ALR 645, also cited in *McEniery* at [64]. In making this observation, I am recording no finding as to the motives of the source/s in this case.

<sup>41</sup> Section 48(2) of the RTI Act.

<sup>42</sup> In making this observation, I am recording no finding as to the motives of the source/s in this case.

<sup>43</sup> Sections 47(3)(a) and 48 of the RTI Act and schedule 3, section 10(1)(b) of the RTI Act.

## **DECISION**

46. For the reasons set out above, I affirm the Department's internal review decision and find that the Department is entitled to refuse access to the name/s of the complainant/s under section 47(3)(a) and 48 and schedule 3, section 10(1)(b) of the RTI Act.
47. I have made this decision as a delegate of the Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

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**A Rickard**  
**Assistant Information Commissioner**

**Date:**



## APPENDIX

### Significant Procedural Steps

Date	Event
3 January 2014	The Department received the access application.
28 January 2014	The Department located 10 pages and decided to release six pages in their entirety and parts of four pages. It deleted some information irrelevant to the terms of the applicant's application from two of the four pages and refused access to some information on three of the four pages on the ground that disclosure would be contrary to the public interest.
1 February 2014	The applicant applied for internal review of the Department's decision to refuse access to the name/s of the complainant/s. The applicant did not seek review of the Department's decision to delete irrelevant information or refuse access to other information (a mobile telephone number <sup>44</sup> and two paragraphs of personal information about a person or persons other than the applicant <sup>45</sup> ).
5 March 2014	The Department made an internal review decision to release six pages in full and parts of four pages. It deleted some information considered to be irrelevant on one page, and refused access to some information on the three remaining pages the name/s name/s of the complainant/s on the ground that the information was exempt information.
19 March 2014	The applicant applied to OIC for external review of the Department's internal review decision to refuse access to the name/s of the complainant/s.
25 March 2014	OIC requested that the Department provide procedural documents in relation to the application.
1 April 2014	The Department provided OIC with the requested procedural documents.
8 April 2014	OIC notified the applicant and the Department that OIC had accepted the external review application.
15 April 2014	The Department provided OIC with copies of three pages responsive to the access application containing the information in issue – that is, the name/s of the complainant/s.
24 April 2014	By telephone, OIC conveyed a preliminary view to the applicant that the name/s of the complainant/s was exempt information.
28 April 2014	OIC sent the applicant a link to the Department's webpage regarding its complaints processes.
7 May 2014	By correspondence, OIC conveyed a preliminary view to the applicant.
14 May 2014	The applicant advised that it did not accept OIC's preliminary view and made submissions.
5 June 2014	OIC made enquiries with the Department about its complaint handling processes and the nature of its response to the complaint.
22 July 2014	OIC made enquiries with the departmental officer who attended the applicant's property in response to the complaint about complaint handling processes and the nature of the Department's response to the complaint.

<sup>44</sup> On page 4 of the 10 pages identified by the Department as responsive to the access application.

<sup>45</sup> One paragraph appears in typed form on page 4; and the other paragraph is handwritten and appears on page 9 of the 10 pages identified by the Department as responsive to the access application.

<b>Date</b>	<b>Event</b>
3 September 2014	By telephone, OIC confirmed with the applicant that, on consideration of the applicant's submissions and the information provided by the Department, it remained OIC's preliminary view that the information in issue was exempt information.
18 November 2014	By correspondence, the applicant made further submissions, outlining in detail circumstances following the complaint made against it to the Department, and citing information which, in the applicant's view, indicates that a particular person made the complaint.