



## Decision and Reasons for Decision

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**Citation:** *XX5WZ9 and Queensland Police Service [2019] QICmr 3 (14 February 2019)*

**Application Number:** 313758

**Applicant:** XX5WZ9

**Respondent:** Queensland Police Service

**Decision Date:** 14 February 2019

**Catchwords:** ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - DISCLOSURE PROHIBITED BY AN ACT - documents relating to a notification of suspicion of harm or suspected harm to a child - whether disclosure is prohibited by sections 186 to 188 of the *Child Protection Act 1999* (Qld) - whether information is exempt under section 67(1) of the *Information Privacy Act 2009* (Qld) and section 47(3)(a) and 48 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST INFORMATION - witness statements provided to police in criminal investigation - accountability, transparency and procedural fairness - personal information of the applicant - personal information and privacy of the witnesses - prejudice flow of information to the police - whether disclosure would, on balance, be contrary to the public interest under section 67(1) of the *Information Privacy Act 2009* (Qld) and section 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT DOCUMENTS - applicant submits an injury report should have been created - agency provided searches and explanation regarding nonexistence of further documents - whether there are reasonable grounds to be satisfied that further documents do not exist - whether access may be refused to non-existent documents under section 67(1) of the *Information Privacy Act 2009* (Qld) and section 47(3)(e) and 52(1)(a) of the *Right to Information Act 2009* (Qld)

## REASONS FOR DECISION

### Summary

1. The applicant applied<sup>1</sup> to the Queensland Police Service (**QPS**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for 'complete QPRIME records' in relation to two separate QPRIME reference numbers.<sup>2</sup>
2. QPS refused to deal with the application on the basis that the applicant had previously applied for and had, in part, been granted access to the same information.<sup>3</sup>
3. The applicant applied for internal review<sup>4</sup> and QPS varied the original decision and dealt with the application.<sup>5</sup> QPS did not locate any pages in relation to the first reference number provided by the applicant (**First QP Record**).
4. QPS located 132 pages relating to the second reference number provided by the applicant (**Second QP Record**) and released most of this information to the applicant. QPS refused access to information appearing on 8 full and 33 part pages on the basis that disclosure would, on balance, be contrary to public interest or deleted information on the basis of irrelevance.
5. In his external review application<sup>6</sup> the applicant contended that QPS failed to locate documents responding to parts of his access application. The applicant also sought review of some of the information to which access was refused.
6. Through the course of the external review, following additional searches conducted by QPS and correspondence between the Office of the Information Commissioner (**OIC**) and the applicant, several of the issues initially raised by the applicant have been resolved. I have made the following decision with respect to the following documents to which the Applicant continues to seek access:
  - two pages of information relating to the First QP Record located by QPS during additional searches conducted on external review
  - witness statements relevant to the Second QP Record; and
  - an injury report relevant to the Second QP Record.
7. For the reasons set out below, I vary QPS's decision and find that access to the information sought by the applicant may be refused under the IP Act on the grounds that:
  - the two pages in issue from the First QP Record are exempt as disclosure is prohibited by the *Child Protection Act 2009* (Qld) (**CP Act**)<sup>7</sup>
  - disclosure of the witness statements would, on balance, be contrary to the public interest;<sup>8</sup> and
  - an injury report relating to the Second QP Record does not exist.<sup>9</sup>

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<sup>1</sup> Application dated 9 November 2017.

<sup>2</sup> QPRIME stands for Queensland Police Records and Information Management Exchange and is the database used to capture and maintain records for all police incidents in Queensland. The applicant identified two specific collection of records on QPRIME that were identified by a unique QP Number assigned by QPS.

<sup>3</sup> Decision dated 14 December 2017.

<sup>4</sup> Application dated 3 January 2018.

<sup>5</sup> Internal review decision dated 1 February 2018.

<sup>6</sup> External review application received 16 February 2018.

<sup>7</sup> Section 47(3)(a) and 48 of the *Right to Information Act 2009* (Qld) (**RTI Act**).

<sup>8</sup> Section 47(3)(b) and 49 of the RTI Act.

<sup>9</sup> Section 47(3)(e) and 52 of the RTI Act.

## Background

8. The decision under review is QPS's internal review decision dated 1 February 2018.
9. Significant procedural steps taken by OIC in conducting the external review are set out in the Appendix. Evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (particularly footnotes and Appendix).
10. The applicant provided OIC with extensive written and oral submissions.<sup>10</sup> Some concerns that the applicant raises in these submissions are not matters which the Information Commissioner has jurisdiction to consider on external review. The limits of OIC's jurisdiction have been explained to the applicant in the course of this external review.<sup>11</sup> To the extent that the applicant's submissions are relevant to my considerations I have referred to or summarised them in this decision.

## Information in issue

11. The applicant's final submissions<sup>12</sup> to OIC indicate that he continues to seek access to the following information:
  - 2 pages relevant to the First QP Record (**Child Protection Information**)
  - 8 pages comprising 3 witness statements (**Witness Statements**); and
  - an injury report relating to the Second QP Record.<sup>13</sup>

## Child Protection Information

### Relevant Law

12. The IP Act provides that a person has a right to access government held documents to the extent that the documents contain the individual's personal information.<sup>14</sup> This right of access is subject to certain limitations including grounds for refusing access.<sup>15</sup> One such ground for refusal is where information is exempt.<sup>16</sup> Schedule 3 of the RTI Act sets out information the disclosure of which Parliament has determined would, on balance, be contrary to the public interest.<sup>17</sup>
13. Information is exempt if its disclosure is prohibited by a number of listed statutory provisions, including sections 186 to 188 of the CP Act.<sup>18</sup> Section 186(2) of the CP Act prohibits disclosure of information if the information identifies a person making a notification of a suspicion that a child has been or is likely to be harmed. This prohibition on disclosure is subject to the exceptions set out in section 186(2) of the CP Act and schedule 3, section 12(2) of the RTI Act.<sup>19</sup>

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<sup>10</sup> External review application dated 16 February 2018, written submissions dated 21 April 2018, 28 May 2018, 31 July 2018, 17 August 2018, 2 October 2018, 21 November 2018 and 10 January 2019 and oral submissions in telephone conversation on 3 October 2018.

<sup>11</sup> In OIC's letter to the applicant dated 22 March 2018 and in a telephone conversation with OIC on 3 October 2018.

<sup>12</sup> Contained in the applicant's letter dated 10 January 2019 and confirmed by OIC in an email dated 16 January 2019.

<sup>13</sup> In his submission dated 10 January 2019.

<sup>14</sup> Section 40 of the IP Act.

<sup>15</sup> Section 67 of the IP Act provides that an agency may refuse access to a document in the same way and to the same extent the agency could refuse access to the document under section 47 of the RTI Act.

<sup>16</sup> Section 47(3)(a) of the RTI Act.

<sup>17</sup> Section 48(2) of the RTI Act.

<sup>18</sup> Schedule 3, section 12(1) of the RTI Act.

<sup>19</sup> Schedule 3, section 12(2) of the RTI Act provides that information is not exempt information if it is **only** personal information of the applicant.

## Findings

14. I have considered the Child Protection Information and I am satisfied that it comprises notification/s to QPS about concerns held by the notifier/s about the safety of the applicant's children.
15. The applicant submits that this information may be released to him with '*relevant redactions to satisfy the RTI Act*'. I have considered whether the redaction of the Child Protection Information, such as the names of other individuals, would be sufficient. Due to the nature of the information contained in the notification, including notifier/s concerns, the way the information was obtained by the notifier/s and the date/s of the notification/s, I am satisfied that disclosure of any of the Child Protection Information may disclose the identity of the notifier/s. On that basis, I find that disclosure of the Child Protection Information is prohibited by the Child Protection Act.
16. The exceptions to the prohibition set out in section 186 of the CP Act allow disclosure of this information in particular circumstances.<sup>20</sup> I have considered these exceptions and I am satisfied that none of these exceptions apply here. Section 12(2) of the RTI Act also provides that an exception to the exemption applies if the information is only about the applicant. The Child Protection Information is about the applicant, however, it is also intertwined with information about the children and the notifier/s. Accordingly, I find that the Child Protection Information is not only about the applicant, and therefore, the exception to the exemption does not apply.
17. The applicant submits that '*the concealment of vital information*' contradicts OIC's view that QPS '*has been transparent and accountable*'<sup>21</sup> and that '*every individual should have the right to challenge any information placed on public record in relation to or against them*'.<sup>22</sup> He also argues that '*information must be identified/able through Right to Information process in order for such information to be accessible by the relevant Court via subpoena*'<sup>23</sup> and that procedural fairness requires that the information be released to him.<sup>24</sup> The applicant states that '*the public interest is also in justice*'.<sup>25</sup>
18. The applicant's submissions raise various public interest arguments in favour of disclosure. Where I am satisfied that the information in issue meets the requirements for a particular category of exempt information in schedule 3 of the RTI Act, I am unable to take into account any further public interest arguments. This is because Parliament has already decided that it is contrary to the public interest to disclose this type of information.<sup>26</sup>
19. In summary, I am satisfied that disclosure of the Child Protection Information is prohibited by section 186 of the CP Act, and therefore the Child Protection Information comprises exempt information to which access may be refused under sections 47(3)(a) and 48 and schedule 3 section 12(1) of the RTI Act.

<sup>20</sup> Section 186(2) of the CP Act provides that disclosure of notifier information may be made in the course of performing functions under the CP Act, under the *Child Protection (International Measures) Act 2003* (Qld), to the ombudsman conducting an investigation under the *Ombudsman Act 2001* (Qld), for the chief executives functions under the *Adoption Act 2009* (Qld), by way of evidence given in a legal proceeding under section 186(3) and 186(4), or to the litigation director performing a function under the *Director of Child Protection Litigation Act 2016* (Qld).

<sup>21</sup> Submission dated 10 January 2019.

<sup>22</sup> Submission dated 17 August 2018.

<sup>23</sup> Submission dated 17 August 2018.

<sup>24</sup> Submission dated 10 January 2019.

<sup>25</sup> Submission dated 17 August 2018.

<sup>26</sup> Section 48(2) of the RTI Act.

## Witness Statements

### Relevant law

20. An agency may also refuse access to information where its disclosure would, on balance, be contrary to the public interest.<sup>27</sup> The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest<sup>28</sup> and explains the steps that a decision-maker must take<sup>29</sup> in deciding the public interest as follows:

- identify any irrelevant factors and disregard them
- identify relevant public interest factors favouring disclosure and nondisclosure
- balance the relevant factors favouring disclosure and nondisclosure; and
- decide whether disclosure of the information in issue would, on balance, be contrary to the public interest.

### Findings

#### Irrelevant factors

21. No irrelevant factors arise in the circumstances of this case and I have not taken any into account.

#### Factors favouring disclosure

#### Applicant's personal information

22. If disclosing information could reasonably be expected to disclose the personal information of the individual applying for that information, a public interest factor favouring disclosure arises.<sup>30</sup> I am satisfied that the Witness Statements comprise the applicant's personal information as they identify the applicant and discuss incidents involving the applicant. As the Witness Statements include the personal information of the applicant that has been brought to the attention of QPS officers, this factor attracts significant weight. However, the way in which the information is presented means that it is not possible to separate the applicant's personal information from the personal information of others. Therefore, the relevant privacy interests of other people (which I explain below in the discussion about factors favouring nondisclosure) must be balanced against the public interest in disclosing to the applicant his own personal information.

#### QPS accountability and transparency

23. The RTI Act gives rise to factors favouring disclosure in circumstances where disclosing the information in issue could reasonably be expected to:

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<sup>27</sup> Section 47(3)(b) and 49 of the RTI Act. The term '*public interest*' refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.

<sup>28</sup> Schedule 4 of the RTI Act sets out the factors for deciding whether disclosing information would, on balance, be contrary to the public interest. However, this list of factors is not exhaustive. In other words, factors that are not listed may also be relevant.

<sup>29</sup> Section 49(3) of the RTI Act.

<sup>30</sup> Schedule 4, part 2, item 7 of the RTI Act. Section 12 of the *Information Privacy Act 2009* (Qld) (**IP Act**) defines 'personal information' as *information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.*

- promote open discussion of public affairs and enhance the Government's accountability<sup>31</sup>
  - contribute to positive and informed debate on important issues or matters of serious interest;<sup>32</sup>
  - inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct following by the Government in its dealings with members of the community;<sup>33</sup> and
  - reveal the reason for a government decision and any background or contextual information that informed the decision.<sup>34</sup>
24. The applicant submits that the public interest favours the '*free flow of information to the public so it can be scrutinised and contested*.'<sup>35</sup> The Witness Statements appear in the context of QPS investigation records and disclose the information that was available to QPS while it investigated and responded to concerns raised in relation to the applicant. I am satisfied that disclosure would enhance QPS's accountability and transparency regarding the investigation involving the applicant as well as reveal information that informed QPS decisions. In turn, I consider this could contribute to positive and informed debate in relation to investigation processes generally. For these reasons, I consider that some weight can be attributed to the above factors favouring disclosure.
25. In considering the weight to be attributed to these factors, I note that where details of the QPS investigations could be disclosed without releasing information provided by third parties, this has already occurred. While I am restricted from describing the precise content<sup>36</sup> of the Witness Statements, I consider that the applicant has received access to information in other documents<sup>37</sup> that significantly discharges the public interest with respect to enhancing the transparency and accountability of QPS's investigation and revealing the reasons for its decision to charge and prosecute the applicant.
26. Accordingly, I consider that the weight that can be afforded to these factors is reduced and I afford these factors low weight.

***Incorrect, misleading or unfairly subjective information***

27. The RTI Act gives rise to a factor in favour of disclosure where the information could reasonably be expected to reveal that the information was incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant.<sup>38</sup> This factor operates in relation to the specific information which an applicant seeks to access. In this case, that information comprises information provided to QPS by third parties and recorded in formal witness statements.
28. The applicant submits that the Witness Statements contain misleading and incorrect information.<sup>39</sup> The Information Commissioner has previously found that information provided by witnesses:

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<sup>31</sup> Schedule 4, part 2, item 1 of the RTI Act.

<sup>32</sup> Schedule 4, part 2, item 2 of the RTI Act.

<sup>33</sup> Schedule 4, part 2, item 3 of the RTI Act.

<sup>34</sup> Schedule 4, part 2, item 11 of the RTI Act.

<sup>35</sup> Submission dated 10 January 2019.

<sup>36</sup> Section 108(3) of the RTI Act provides that the Information Commissioner must not, in a decision or in reasons for a decision on external review, include information that is claimed to be exempt information or contrary to the public interest information.

<sup>37</sup> Including an activity log relating to the incident, the relevant court brief (also known as a QP9), bench charge sheets, five witness statements of involved police officers, relevant information recorded in officer notebooks, and a copy of the applicant's watch house medical record.

<sup>38</sup> Schedule 4, part 2, item 12 of the RTI Act.

<sup>39</sup> In his telephone discussion with OIC on 3 October 2018 and written submission dated 10 January 2019.

*... is by its very nature an individual's particular version of events, and will obviously be shaped by factors such as the individual's memory of relevant events and subjective impressions. This inherent subjectivity does not, however, mean that the resulting account or statement is necessarily incorrect or 'false and misleading'. It simply comprises a personal interpretation of relevant events, which an investigator must then balance against other (often competing) statements and other evidence in reaching a conclusion in a particular case.*

*While there may be circumstances in which disclosure of information of this kind may advance this particular public interest – such as, for example, where there is a clear discrepancy between evidence given orally and subsequently recorded, or some other objective material suggesting that an individual's account has been incorrectly or inaccurately recorded, or is itself a manifest fabrication – there is nothing in the material before me to suggest this is such a case.*

*In my view, all disclosure of this specific information would potentially reveal is that there exists a view of events differing from that the applicant holds.<sup>40</sup>*

29. The Witness Statements contain the observations and recollections of events by witnesses to the applicant's arrest in a public place. While I recognise the inherent subjectivity in information of this type, I am not satisfied that this necessarily means the information is misleading, incorrect, or unfairly subjective. Having considered the multiple accounts of the applicant's arrest, they appear to generally contain similar information. While the applicant may not agree with those recollections, this is not sufficient to establish that the Witness Statements are incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant. I am therefore satisfied this factor does not apply.

#### ***Pursuit of legal remedy and procedural fairness***

30. The RTI Act identifies a factor favouring disclosure where disclosure of information would contribute to the administration of justice generally, including procedural fairness.<sup>41</sup> A public interest factor favouring disclosure will also arise where disclosing the information in issue would contribute to the administration of justice for a person.<sup>42</sup> This factor applies when disclosure would enable pursuit or evaluation of an appropriate legal remedy.<sup>43</sup>
31. The applicant submits that he requires the Witness Statements to afford him procedural fairness.<sup>44</sup> The Witness Statements describe the observations of witnesses to events surrounding the applicant being charged with obstruction of justice and assaulting a police officer. I acknowledge that disclosure would allow the applicant to more thoroughly understand the information obtained by police in relation to these events, however, it is unclear to me how this understanding would promote procedural fairness for the applicant in the current circumstances.
32. The QPS records that have been released to the applicant suggest that a full QPS investigation was conducted and subsequent court proceedings transpired during which the applicant had the opportunity to respond to the substance of the allegations against him. The applicant's submissions indicate that there is an on-going appeal against the relevant criminal convictions. If this were the case, I consider that the applicant would be afforded procedural fairness through the relevant court processes. In this regard, the applicant contends that he requires information identifying the officer who prepared the

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<sup>40</sup> *Marshall and Department of Police* (Unreported, Queensland Information Commissioner, 25 February 2011) at [18] – [20].

<sup>41</sup> Schedule 4, part 3, item 16 of the RTI Act.

<sup>42</sup> Schedule 4 part 2 item 17 of the RTI Act.

<sup>43</sup> *Willsford and Brisbane City Council* (1996) 3 QAR 368.

<sup>44</sup> Submission dated 10 January 2019.

Witness Statements and the relevant dates, in order to request the information by subpoena.<sup>45</sup>

33. The details regarding the Witness Statements that the applicant has requested for the purposes of subpoena appear in the released information. OIC has explained this to the applicant during this external review.<sup>46</sup> I am satisfied that the applicant already possesses the information he identifies as necessary to subpoena the Witness Statements, and therefore, the disclosure of the Witness Statements will not further the administration of justice for the applicant in this regard.
34. The applicant has not provided any further evidence to suggest that access to the Witness Statements would enable him to pursue or evaluate any other legal remedy.
35. It is unclear to me how the disclosure of the Witness Statements to the applicant through the RTI process would promote procedural fairness or the administration of justice more broadly. Should the applicant have an ongoing appeal that relates to the Witness Statements then I am satisfied that the applicant has the necessary information to subpoena these records as part of that appeal. Aside from an ongoing appeal, I am unable to identify any other processes in which disclosure of the Witness Statements would promote procedural fairness for the applicant or the administration of justice broadly. I am therefore satisfied that the relevant public interest factors favouring disclosure do not apply.

***Possible deficiencies, misconduct or negligent, improper or unlawful conduct***

36. The RTI Act gives rise to factors favouring disclosure where disclosing information could reasonably be expected to:
  - allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official;<sup>47</sup> and
  - reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct.<sup>48</sup>
37. The applicant submits that QPS officers have engaged in misconduct,<sup>49</sup> information was withheld from him during his criminal trial and crimes have been committed against him and his children by state departments.<sup>50</sup>
38. It is not my role to determine whether there has been any maladministration or wrongdoing on the part of QPS in investigating or prosecuting matters involving the applicant. However, having carefully assessed the Witness Statements, I am unable to identify how disclosure of this specific and limited information could further the public interest factors set out above.
39. Having considered the content of the Witness Statements, which are essentially records of information provided by third parties to QPS about the circumstances surrounding the applicant's arrest, I am not satisfied that the disclosure of this information will advance the factors identified above. Accordingly, I consider that these public interest factors in favour of disclosure do not apply.

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<sup>45</sup> Submission dated 2 October 2018 and telephone discussion with OIC on 3 October 2018.

<sup>46</sup> OIC's letter to the applicant dated 4 October 2018.

<sup>47</sup> Schedule 4, part 2, item 5 of the RTI Act.

<sup>48</sup> Schedule 4, part 2, item 6 of the RTI Act.

<sup>49</sup> External review application dated 16 February 2018.

<sup>50</sup> Applicant submissions dated 10 January 2019. The applicant made similar submissions in emails dated 28 May 2018 and 31 July 2018.



## Factors favouring nondisclosure

### *Personal information and privacy*

40. The RTI Act recognises two factors favouring nondisclosure of information where:
- disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy;<sup>51</sup> and
  - disclosure of the information could reasonably be expected to cause a public interest harm if disclosure would disclose personal information of a person.<sup>52</sup>
41. The Witness Statements identify the witnesses to the events surrounding the applicant's arrest, including their names, and details about them such as their date of birth, age and occupation. The Witness Statements also detail the observations and recollections of these witnesses. I am satisfied that this information comprises the personal information of the witnesses, giving rise to a factor favouring nondisclosure.<sup>53</sup> The witnesses are members of the public that provided information to QPS, and I consider that the particular sensitivity of this context results in this factor carrying significant weight in favour of nondisclosure.
42. I also consider that disclosure could reasonably be expected to prejudice the witnesses' right to privacy.<sup>54</sup> The concept of 'privacy' is not defined in the RTI Act, however, essentially it can be viewed as the right of an individual to preserve their personal sphere free from the interference of others.<sup>55</sup>
43. I consider that the observations of members of the public and their decision to provide information to the police falls within their 'personal sphere', and the witnesses would have a reasonable expectation that QPS would use this information for the limited purpose of conducting enquiries and investigation into allegations against the applicant.
44. I also consider that the substance of the information provided to police to assist in investigations, such as a witness statement – consisting as it almost invariably will of an individual's impressions, opinions and even emotional responses to relevant events – comprises information of a private nature.
45. As a result, I am satisfied that disclosure of the Witness Statements through this process would be a significant intrusion into their privacy and therefore, I find that this factor carries significant weight in favour of nondisclosure.
46. The applicant submits that the witness statements can be disclosed to him with third party personal information redacted. I have considered this submission, however I am satisfied that information throughout the Witness Statements identifies the proximity of the third parties to the applicant and the events surrounding his arrest that could reasonably be expected to identify these individuals. On that basis, I consider that partial redaction would not be sufficient to de-identify the Witness Statements and would not reduce the significant weight I have attributed to these factors.

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<sup>51</sup> Schedule 4 part 3 item 3 of the RTI Act.

<sup>52</sup> Schedule 4 part 4 item 6 of the RTI Act.

<sup>53</sup> Schedule 4, part 4, section 6 of the RTI Act.

<sup>54</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>55</sup> Paraphrasing the Australian Law Reform Commission's definition of the concept, in "For your information: Australian privacy law and practice" *Australian Law Reform Commission Report No. 108* released 11 August 2008, at [1.56].

### **Prejudice flow of information to police**

47. The RTI Act recognises a factor in favour of nondisclosure where disclosure of the information could reasonably be expected to prejudice the flow of information to the police or another law enforcement or regulatory agency.<sup>56</sup>
48. QPS relies on the provision of information from members of the public in order to investigate and prosecute criminal matters, and the Information Commissioner has previously found that disclosure of information obtained by police in this way would likely discourage individuals from coming forward to QPS and communicating information they know,<sup>57</sup> resulting in prejudice to the free flow of information to police.<sup>58</sup>
49. The applicant submits that *'it is an utter disgrace that the "free flow" of information to the QPS can comprise of false statements and fabricated information that cannot be challenged by the individual being incriminated'*.<sup>59</sup> The Information Commissioner has previously recognised that the public interest in protecting the flow of information to police is recognised even in circumstances where such protection may result in the investigation of false or unsubstantiated allegations.<sup>60</sup> This is because agencies such as QPS rely on information from the public to be alerted to and investigate matters. Routinely disclosing this type of information may discourage individuals from freely raising concerns with QPS officers.
50. Police have certain coercive powers to collect information from individuals when investigating complaints. However, I consider that the effective conduct of investigations and use of QPS resources is facilitated when members of the community feel comfortable to come forward with information to police without the need for those coercive powers to be enforced. Routinely disclosing the type of information in issue in this review would tend to discourage individuals from coming forward with relevant information and concerns. This in turn would significantly prejudice QPS's ability to effectively discharge its functions in enforcing the law. I am satisfied that this public interest factor weighs very heavily against disclosure.

### **Conclusion on the balance of public interest**

51. In the circumstances of this review I consider there is a strong public interest in the applicant accessing his personal information. I also consider that disclosure of the Witness Statements would generally enhance QPS's accountability and transparency. However, I have attributed low weight to the relevant factors favouring disclosure in this regard. This is because the applicant has received a significant amount of information, appearing in documents other than the Witness Statements, that inform him of the relevant QPS investigations.
52. Balanced against the above identified factors in favour of disclosure, is the strong public interest in protecting the personal information and privacy of the witnesses as well as the key public interest in protecting the free flow of information to QPS from members of the community. I consider these strong public interest factors favouring nondisclosure tip the balance of the public interest in favour of nondisclosure of the Witness Statements. On that basis, I am satisfied that disclosure would, on balance, be contrary to the public interest and access may be refused under section 47(3)(b) and 49 of the RTI Act.

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<sup>56</sup> Schedule 4 part 3 item 13 of the RTI Act.

<sup>57</sup> For example, see *P6Y4SX and Department of Police* (Unreported, Queensland Information Commissioner, 31 January 2012) (**P6Y4SX**) at [35]-[40] and *SW5Z7D and Queensland Police Service* [2016] QICmr 1 (15 January 2016) at [28].

<sup>58</sup> Schedule 4, part 3, item 13 of the RTI Act.

<sup>59</sup> Submission dated 17 August 2018.

<sup>60</sup> *P6Y4SX* at [35]-[40].

## Non-existent information

### Relevant Law

53. An agency may refuse access to information that is non-existent.<sup>61</sup> To be satisfied that a document does not exist,<sup>62</sup> the Information Commissioner has found that an agency must rely on its knowledge and experience, having regard to various key factors such as:
- the agency's structure, functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and other legal obligations that fall to it)
  - the agency's practices and procedures (including, but not limited to, its information management approaches); and
  - other factors reasonably inferred from information supplied by the applicant, including the nature and age of requested documents, and the nature of government activity to which the request relates.<sup>63</sup>
54. In considering the above factors, an agency may determine that a particular document was not created because, for example, the agency's processes do not involve creating that specific document. In such instances, it is not necessary for the agency to search for the document. Rather, it is sufficient that the relevant circumstances that account for the non-existent document are adequately explained.<sup>64</sup> An agency may also rely on searches to satisfy itself that documents do not exist. If searches are relied upon to establish that the documents do not exist, all reasonable steps must be taken to locate the documents.<sup>65</sup>

### Findings

55. The applicant identified an *injury report* relevant to the Second QP Record as a missing document in an email to OIC on 21 November 2018.<sup>66</sup> The applicant contends he was '*seriously injured by QPS*'.<sup>67</sup> I note that the information released to the applicant includes a statement from a police officer that he sprayed the applicant's eyes with OC spray during the applicant's arrest,<sup>68</sup> and a subsequent watch house medical record.<sup>69</sup>
56. In requesting an *injury report*, the applicant referred to the QPS Operational Procedures Manual<sup>70</sup> (**OPM**) which provides that when a reportable use of force incident occurs,<sup>71</sup> a *use of force report* is to be created, and if a person other than the subject person is injured, an *injury report* is also to be completed in the relevant QPRIME occurrence.
57. During the external review, OIC requested that QPS undertake searches for an *injury report* in relation to the Second QP Record and provide OIC with signed search records as well as, if applicable, an explanation for why documents could not be located. In response to OIC's external review enquiries, QPS provided OIC with a search certification<sup>72</sup> indicating that searches had been conducted in QPRIME and no *injury*

<sup>61</sup> Section 47(3)(e) of the RTI Act.

<sup>62</sup> Under section 52(1)(a) of the RTI Act.

<sup>63</sup> *PDE and University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*) at [37]-[38]. The decision in *PDE* concerned the application of section 28A of the now repealed Freedom of Information Act 1992 (Qld). Section 52 of the RTI Act is drafted in substantially the same terms as the provision considered in *PDE*. See *Lester and Department of Justice and Attorney-General* [2017] QICmr 17 (16 May 2017) at [11] for the recent application of *PDE*.

<sup>64</sup> *Isles and Queensland Police Service* [2018] QICmr 27 (7 June 2018) at [16].

<sup>65</sup> As set out in *PDE* at [49]. See also section 137(2) of the IP Act.

<sup>66</sup> Submission dated 21 November 2018 and 2 December 2018.

<sup>67</sup> Submission dated 10 January 2019.

<sup>68</sup> Page 27 of the information released to the applicant.

<sup>69</sup> Page 133 of the information released to the applicant.

<sup>70</sup> See chapter 14.3.9 of the QPS Operational Procedures Manual.

<sup>71</sup> Use of force is defined to include an incident where an officer uses OC spray.

<sup>72</sup> Search certification dated 26 November 2018.

report was identified. QPS also submitted that an injury report did not exist 'as the criteria for reporting was not satisfied'.<sup>73</sup>

58. In considering whether QPS has taken all reasonable steps to identify an *injury report*, I have also considered the content of the report corresponding to the relevant QPRIME occurrence (**QP Report**).<sup>74</sup> This QP Report is not part of the documents in issue in this external review, however, it is relevant to my considerations here as it provides a summary of QPS actions in relation to the relevant QPRIME occurrence.<sup>75</sup> The following reference is recorded under the heading 'Associated tasks': 'Use of force report. "Start" this task, Review use of force report and injury report (if applicable)'. This is the only recorded action referring to an *injury report*.
59. The applicant submits that, given the circumstances of his arrest, the OPM requires police to complete an *injury report*, while QPS submits it was not necessary as the relevant criteria was not satisfied. It is unclear to me if QPS was required to create an *injury report* given the circumstances of the applicant's arrest. However, I consider it is not necessary to make a determination on this point in order to decide whether an *injury report* exists. It is sufficient to note that, had QPS created an *injury report*, the OPM indicates it will be stored in the corresponding QPRIME occurrence. I have reviewed the relevant QP Report setting out steps taken in relation to the QPRIME occurrence and there are no entries indicating an *injury report* was created. In addition, QPS has confirmed that searches of QPRIME failed to locate an *injury report*.
60. I have considered the applicant's submissions, content of the relevant QP Report, QPS submissions and search records as well as the relevant sections of the OPM. On this evidence, I am satisfied that the searches of QPRIME constitute all reasonable steps to locate an *injury report*, and the lack of entries in the relevant QP Report demonstrate that an *injury report* was not created. I am satisfied that an *injury report* does not exist and access to it may be refused on that basis under section 47(3)(e) and 52 of the RTI Act.

## DECISION

61. I vary QPS's decision and find that access may be refused to:
- 2 pages (Child Protection Information) under section 47(3)(a) and 48 and schedule 3, section 12(1) of the RTI Act on the basis that it is exempt information;
  - 8 pages (Witness Statements) under section 47(3)(b) and section 49 of the RTI Act on the basis that disclosure would, on balance, be contrary to the public interest
  - an injury report under sections 47(3)(e) and 52 on the basis that it is non-existent.
62. I have made this decision under section 123 of the IP Act as a delegate of the Information Commissioner, under section 139 of the IP Act.

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**Shiv Martin**  
**Acting Assistant Information Commissioner**

**Date: 14 February 2019**

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<sup>73</sup> Submissions dated 2 December 2018.

<sup>74</sup> Which was partially released to the applicant under a previous access application.

<sup>75</sup> Including, for example, a number of references to activities involving the creation of a *use of force report*, which was located and released to the applicant during the external review.

## APPENDIX

### Significant procedural steps

Date	Event
16 February 2018	OIC received the external review application.
19 February 2018	OIC notified QPS and the applicant that the review application had been received and requested procedural documents from QPS.
20 February 2018	OIC received the requested documents from QPS.
22 March 2018	OIC notified QPS and the applicant that the external review had been accepted and requested further documents from QPS.
19 April 2018	OIC advised the applicant that QPS was experiencing resourcing limitations due to staff deployment to the Commonwealth Games, which was causing delays in responding to OIC's request for further documents.
21 April 2018	OIC received written submissions from the applicant.
24 May 2018	OIC advised the applicant of further delays in receiving information from QPS.
28 May 2017	The applicant provided written submissions.
8 June 2018	OIC conveyed a preliminary view by telephone to QPS that previous application for same documents provisions did not apply and QPS accepted OIC's preliminary view.
11 June 2018	OIC requested QPS undertake further searches for information responding to the access application.
22 June 2018	OIC provided the applicant with an update.
4 July 2018	OIC received the requested information from QPS.
30 July 2018	OIC provided the applicant with an update.
31 July 2018	The applicant wrote to OIC about the delay in processing his application.
2 August 2018	OIC conveyed a written preliminary view to the applicant and invited the applicant to provide submissions in response.
17 August 2018	OIC received written submissions from the applicant.
4 September 2018	OIC provided the applicant with an update.
2 October 2018	OIC received written submissions from the applicant and OIC provided the applicant with an update on the progress of the external review.
3 October 2018	OIC received oral submissions from the applicant over the telephone and OIC explained the limitations of OIC's jurisdiction.
4 October 2018	OIC provided the applicant with an update.
10 October 2018	OIC wrote to QPS requesting that QPS undertake searches for additional information. OIC also conveyed a preliminary view that access to certain information may not be refused under the IP Act and invited QPS to provide submissions in response.

Date	Event
17 October 2018	QPS requested and OIC granted an extension to provide submissions in response to OIC's preliminary view.
12 November 2018	QPS requested and OIC granted an extension to provide submissions in response to OIC's preliminary view.
19 November 2018	OIC received written submissions from the applicant and OIC provided the applicant with an update.
21 November 2018	The applicant provided written submissions.
22 November 2018	OIC wrote to QPS requesting that QPS undertake further searches for additional information.
2 December 2018	OIC received the requested information from QPS. QPS also provided a submission in response to OIC's preliminary view and regarding the existence of some requested information.
13 December 2018	OIC conveyed a revised preliminary view to the applicant and invited the applicant to provide submissions in response.
19 December 2018	OIC conveyed a preliminary view to QPS and asked QPS to release information to the applicant that was no longer in issue.
10 January 2019	OIC received written submissions from the applicant. QPS requested and OIC granted an extension to release information to the applicant.
16 January 2019	OIC emailed the applicant and confirmed the information remaining in issue requiring determination by decision. OIC spoke with QPS about release of information to the applicant that was no longer in issue.
18 January 2019	QPS advised OIC that information no longer in issue had been released to the applicant.