



## Decision and Reasons for Decision

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**Citation:** *Stafford and Queensland Police Service [2021] QICmr 21 (14 May 2021)*

**Application Number:** 100112

**Applicant:** Stafford

**Respondent:** Queensland Police Service

**Decision Date:** 14 May 2021

**Catchwords:** ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - LAW ENFORCEMENT OR PUBLIC SAFETY INFORMATION - report about a review of a murder investigation - whether disclosure could reasonably be expected to enable the existence or identity of a confidential source of information to be ascertained or prejudice a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law - whether access may be refused under sections 47(3)(a) and 48 and schedule 3, sections 10(1)(b) and (f) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST INFORMATION - report about a review of a murder investigation - accountability and transparency considerations - personal information of other individuals - confidential information and the future supply of information of that type - unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct - whether disclosure of information would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

### REASONS FOR DECISION

#### Summary

1. In September 2014, the applicant applied to the Queensland Police Service (**QPS**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) to access documents relating to a QPS review of the investigation into the 1991 murder of Leanne Holland (**Review**).

2. QPS did not make a decision within the relevant processing period<sup>1</sup> and was therefore taken to have made a decision refusing access to the requested information.<sup>2</sup>
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review<sup>3</sup> of the deemed refusal of access decision. During that external review, the applicant narrowed the application to the report prepared by QPS in respect of the Review (**Report**). OIC decided, on 18 February 2016, that access to the Report may be refused,<sup>4</sup> as it comprised exempt information under schedule 3, section 7 of the RTI Act (**OIC's 2016 Decision**).
4. The applicant appealed OIC's 2016 Decision to the Queensland Civil and Administrative Tribunal (**QCAT**). By decision dated 10 May 2019, QCAT allowed the applicant's appeal and remitted the matter to OIC.<sup>5</sup> A subsequent appeal of the QCAT Decision was dismissed by the Court of Appeal on 18 October 2019.
5. OIC then reopened the external review and I have considered the matter afresh. During this reopened review, QPS disclosed parts of the Report to the applicant and objected to disclosure of the remaining information in the Report on various grounds.
6. The applicant continues to seek access to an unredacted copy of the Report.
7. For the reasons set out below, I vary QPS' deemed decision and find that access may be refused to the remaining information in the Report, on the grounds it is exempt information, or because disclosure would, on balance, be contrary to the public interest.

## Background

8. In 2017, before QCAT had issued its decision, the QCAT appeal proceedings were reopened as a result of media reporting which indicated a news outlet had obtained a copy of the Report.<sup>6</sup> In those appeal proceedings:<sup>7</sup>
  - the applicant contended that QPS had impliedly waived legal professional privilege in the Report as a result of media programs broadcasting what were said to be parts of the Report and QPS failing to take steps to assert legal professional privilege; and
  - QPS argued that the Report was confidential within QPS; the Report was not authorised for release under the *Police Service Administration Act 1990* (Qld); QPS had not verified whether the copy held by the media outlet was in fact a copy of the Report; and if the document held by the news outlet was a copy of the Report, it was a leaked version which was not authorised by QPS.
9. Sheridan DCJ did not accept the QPS submissions and made the finding that the Report was not subject to legal professional privilege.<sup>8</sup>

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<sup>1</sup> Set out in section 18 of the RTI Act. By letter dated 13 February 2015, QPS purported to issue a decision refusing to deal with the access application under section 41 of the RTI Act.

<sup>2</sup> Under section 46(1)(a) of the RTI Act.

<sup>3</sup> Application dated 10 March 2015.

<sup>4</sup> Under section 47(3)(a) of the RTI Act.

<sup>5</sup> *Stafford v Information Commissioner & Anor* [2019] QCATA 61 (**QCAT Decision**).

<sup>6</sup> QCAT Decision at [27]-[29].

<sup>7</sup> While the parties maintained similar positions during the appeal of the QCAT Decision, the Court of Appeal did not make any findings about these matters.

<sup>8</sup> QCAT Decision at [60].

## Conduct of external review following QCAT remittal

10. The QCAT Decision set aside OIC's 2016 Decision and remitted the matter to OIC to be '*reconsidered on the other grounds of exemption*'.<sup>9</sup> There were no further directions issued by QCAT as to the Information Commissioner's reconsideration of this matter.<sup>10</sup>
11. In accordance with QCAT's orders, I have conducted a fresh external review process, and considered the question of access to the information sought by the applicant in accordance with all relevant provisions of the RTI Act.
12. In the QCAT Decision,<sup>11</sup> Sheridan DCJ noted that '*the public interest exemption*' had been '*raised and relied upon*' by QPS during the initial external review, however, the only ground OIC relied upon at that time was that the Report was exempt on the ground of legal professional privilege.<sup>12</sup> In the context of these observations, the applicant:
  - raised concerns that I had invited QPS to provide '*further*' submissions in this reopened external review addressing the issue of whether access to the Report may be refused under the RTI Act<sup>13</sup>
  - contends that '*there is no proper basis in the circumstances of this case that warrant the reconsideration of the other grounds now relied on*'<sup>14</sup>
  - argues that it is '*grossly unfair to [the applicant] for the Commissioner to now embark upon a reconsideration of the other grounds*';<sup>15</sup> and
  - submits that '*[i]t is for the Commissioner to confirm the legal basis for reconsideration of the other grounds for refusal that were previously known to her*'.<sup>16</sup>
13. The applicant's submissions are unfounded and go against the QCAT's express direction that the matter be '*reconsidered on the other grounds of exemption*'.
14. In OIC's 2016 Decision, the Information Commissioner<sup>17</sup> did not address other grounds for refusal of access that had been raised by QPS during the initial external review, because the Report was found to comprise exempt information. This approach was first endorsed by QCAT in 2012,<sup>18</sup> and was again recently confirmed as correct by QCAT in *Dawson-Wells v Office of the Information Commissioner & Anor*<sup>19</sup> where McGill SC, DCJ agreed that when information is found to comprise exempt information, it is unnecessary to consider the public interest balancing test in section 49 of the RTI Act.
15. The procedure to be followed on external review is, subject to the RTI Act, within the Information Commissioner's discretion.<sup>20</sup> An external review must be conducted with as little formality and technicality as the requirements of the RTI Act and proper consideration of the matters before me allow.<sup>21</sup> Given the nature of the Information in issue in this case, it is simply not possible to conduct an external review process, as

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<sup>9</sup> QCAT Decision at [67].

<sup>10</sup> When dismissing the appeal of the QCAT Decision, the Court of Appeal also made no directions as to the Information Commissioner's reconsideration of this matter.

<sup>11</sup> At [62]-[66].

<sup>12</sup> It was also noted, at [64], that while certain of those grounds were mentioned in written submissions, those grounds were not argued before QCAT in the appeal proceedings.

<sup>13</sup> Submissions dated 4 June 2020.

<sup>14</sup> Submissions dated 12 March 2021.

<sup>15</sup> Submissions dated 12 March 2021.

<sup>16</sup> Submissions dated 28 September 2020.

<sup>17</sup> By delegate.

<sup>18</sup> *BL v Office of the Information Commissioner, Department of Communities* [2012] QCATA 149 at [15]-[16].

<sup>19</sup> [2020] QCATA 60 at [16]-[17].

<sup>20</sup> Section 95(1)(a) of the RTI Act.

<sup>21</sup> Section 95(1)(b) of the RTI Act.

anticipated by the RTI Act, without seeking further submissions from QPS as to other grounds of refusal. I have also afforded the applicant sufficient opportunity to make submissions in response to QPS' submissions in this external review,<sup>22</sup>

### Reviewable decision

16. The decision under review is the decision QPS is deemed to have made refusing access to the Report.
17. Significant procedural steps relating to this review are set out in the Appendix. The process that has been followed in this review accords with the usual process of enquiry undertaken in an external review process before the Information Commissioner.
18. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and the Appendix).
19. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the rights to seek and receive information, privacy and reputation.<sup>23</sup> I consider a decision-maker will be '*respecting and acting compatibly with*' that right and others prescribed in the HR Act, when applying the law prescribed in the RTI Act.<sup>24</sup> I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between equivalent pieces of Victorian legislation:<sup>25</sup> '*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.*'<sup>26</sup>

### Information in issue

20. The information in issue appears on 454 pages and comprises the information QPS redacted from the copy of the Report disclosed to the applicant (**Information in Issue**). I am constrained about the level of detail I can provide about this information,<sup>27</sup> however, I can confirm that it broadly comprises:
  - information refused as exempt information on 10 pages (**Investigation Procedure Information**);<sup>28</sup> and
  - identifying information (such as names, addresses and a photo) and other personal information of individuals other than the applicant (**Third Party Information**).

### Issues for determination

21. The remaining issues for determination are whether access may be refused to the information which QPS has redacted from the disclosed copy of the Report on the basis that:
  - the Investigation Procedure Information comprises exempt information;<sup>29</sup> and

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<sup>22</sup> By letter dated 11 February 2021, the applicant was invited to provide submissions responding to OIC's preliminary view about the grounds upon which information had been redacted from the partially released copy of the Report.

<sup>23</sup> Sections 21 and 25 of the HR Act.

<sup>24</sup> *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].

<sup>25</sup> *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>26</sup> *XYZ* at [573].

<sup>27</sup> Section 108(3) of the RTI Act, which relevantly prevents OIC from revealing information claimed to be contrary to the public interest information.

<sup>28</sup> Being pages 6, 89-90, 259-261 and 293-296.

<sup>29</sup> Section 47(3)(a) and 48 of the RTI Act.

- disclosure of the Third Party Information would, on balance, be contrary to the public interest.<sup>30</sup>
22. I consider these to be the relevant issues for determination, as QPS bears the onus of demonstrating that access to any information can be refused, or that I should give a decision adverse to the applicant.<sup>31</sup> These are the two grounds of refusal raised by QPS.

### Relevant law

23. While the RTI Act is to be administered with a pro-disclosure bias,<sup>32</sup> the right to access documents of an agency<sup>33</sup> is subject to certain limitations, including grounds for refusal of access.<sup>34</sup> Access to a document can be refused to the extent that it comprises exempt information<sup>35</sup> and information will qualify as exempt where 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;<sup>36</sup> or
  - prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law.<sup>37</sup>
24. For these exemptions to apply, there must be a *reasonable expectation* that disclosing the relevant information could enable the existence or identity of a confidential source to be ascertained or could prejudice a lawful method or procedure. When assessing whether an outcome could reasonably be expected, I must distinguish '*between what is merely possible ... and expectations that are reasonably based*' and for which '*real and substantial grounds exist*'.<sup>38</sup>
25. Exceptions to the above exemptions are set out in schedule 3, section 10(2) of the RTI Act.
26. The RTI Act also provides that access may be refused to information where its disclosure would, on balance, be contrary to the public interest.<sup>39</sup> 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.<sup>40</sup>

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<sup>30</sup> Sections 47(3)(b) and 49 of the RTI Act.

<sup>31</sup> Section 87(1) of the RTI Act.

<sup>32</sup> Section 44 of the RTI Act.

<sup>33</sup> Section 23(1)(a) of the RTI Act.

<sup>34</sup> These grounds of refusal are identified in section 47(1) of the RTI Act. Section 47(2)(a) confirms that it is Parliament's intention that these refusal grounds are to be interpreted narrowly.

<sup>35</sup> Sections 47(3)(a) and 48 of the RTI Act. Schedule 3 of the RTI Act sets out various types of exempt information.

<sup>36</sup> Schedule 3, section 10(1)(b) of the RTI Act.

<sup>37</sup> Schedule 3, section 10(1)(f) of the RTI Act.

<sup>38</sup> *B and Brisbane North Regional Health Authority* [1994] QICmr 1, a decision of the Information Commissioner analysing the equivalent exemption in the repealed *Freedom of Information Act 1992* (Qld), at [154]-[160]. Other jurisdictions have similarly interpreted the phrase '*as distinct from something that is irrational, absurd or ridiculous*': See *Smolenski v Commissioner of Police, NSW Police* [2015] NSWCATAD 21 at [34], citing *Commissioner of Police, NSW Police Force v Camilleri* (GD) [2012] NSWADTAP 19 at [28], *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 at [61] and *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 at [190].

<sup>39</sup> Section 47(3)(b) of the RTI Act.

<sup>40</sup> However, there are some recognised public interest considerations that may apply for the benefit of an individual. See Chris Wheeler, 'The Public Interest: We Know It's Important, But Do We Know What It Means' (2006) 48 AIAL Forum 12, 14.

27. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision maker must:<sup>41</sup>
- 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.

## Investigation Procedure Information

### Findings

28. The applicant submits that:
- any confidentiality in the Report content has been lost by QPS leaking the Report to the media; a media outlet giving the applicant's previous lawyer an opportunity to read the Report in its possession; and '*further dissemination*';<sup>42</sup> and
  - '*it is without doubt that the report "leaked" to the media*' is the Report and QPS have taken no steps to prove otherwise.<sup>43</sup>
29. While there may be information in parts of the Report that is known publicly, there has been no general publication of the Report itself. On the information available to me, there is no evidence that this particular Investigation Procedure Information is in the public domain or is otherwise generally known.<sup>44</sup>
30. The relevance of this provision was put to the applicant in a preliminary view letter on external review.<sup>45</sup> The applicant did not provide any objective evidence to demonstrate that the Investigation Procedure Information was known to him.
31. I accept that revealing a police informant was involved in a QPS investigation may not, of itself, enable the informant's identity to be ascertained or prejudice the effectiveness of a method or procedure.<sup>46</sup> However, given the particular nature of the Investigation Procedure Information, I am satisfied there is a reasonable expectation that its disclosure would allow the identity of the involved informant to be ascertained.<sup>47</sup> I am also satisfied that the Investigation Procedure Information reveals an identifiable lawful method or procedure used by QPS. Further, given the nature of the information, I am satisfied that the effectiveness of this method or procedure could reasonably be expected to be reduced in future criminal investigations if the public were to be alerted to the manner in which confidential informants can be used in QPS investigations. In these circumstances, I find that disclosing the Investigation Procedure Information could reasonably be expected to prejudice the effectiveness of a lawful QPS method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law.

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<sup>41</sup> Section 49(3) of the RTI Act.

<sup>42</sup> Submissions dated 28 September 2020.

<sup>43</sup> Submissions dated 12 March 2021. The applicant raised a similar argument in submissions dated 28 September 2020.

<sup>44</sup> The material filed by the applicant in the appeal proceedings references a range of published commentary about the Report (including published articles and podcasts), however, those referenced publications are not of the specific Investigation Procedure Information being considered in this review.

<sup>45</sup> On 11 February 2021.

<sup>46</sup> In this regard, I note that information disclosed by QPS contains references to the involvement of a police informant, who is identified only by a pseudonym.

<sup>47</sup> Further bearing in mind that the risk of identification actually occurring need only be reasonable, not substantial: *Re Maskell and Chief Executive Officer, Centrelink* [2004] AATA 522, at [15].

32. There is nothing on the evidence available to me, including within the Information in Issue itself, to suggest that any of the exceptions in schedule 3, section 10(2) of the RTI Act apply in the circumstances of this matter.
33. On this basis, I find that the Investigation Procedure Information meets the requirements for exemption under schedule 3, sections 10(1)(b) and (f) of the RTI Act and access may be refused on that basis.<sup>48</sup>

### Third Party Information

34. I am constrained as to the level of detail I can provide about the Third Party Information,<sup>49</sup> however, it comprises the personal information<sup>50</sup> of individuals other than the applicant. It identifies, or is about, other individuals and information QPS obtained from other individuals, including:
  - information redacted from 91 pages<sup>51</sup> concerning 15 other individuals investigated by QPS as persons of interest (**POI Information**)
  - the report findings and considerations which do not relate to the applicant<sup>52</sup> (**Other Report Findings**)
  - a photograph of an individual other than the applicant
  - information specifically relating to the victim, including observations and opinions provided by other individuals about the victim<sup>53</sup> (**Victim Specific Information**)
  - information about another QPS investigation which did not relate to, or involve, the applicant<sup>54</sup> (**Other Investigation Information**)
  - names and other identifying information of individuals other than the applicant; and
  - information (including observations and opinions) other individuals provided to QPS during its investigation, and reinvestigation, processes.
35. The applicant's submissions generally contend that it is unfair to deny access to the entire Report.<sup>55</sup> The applicant did not identify specific categories of Third Party Information that he considered should be disclosed, and rather made general submissions as to further disclosure of all information.

### Findings

36. In deciding whether disclosure of the Third Party Information would, on balance, be contrary to the public interest, I have taken no irrelevant factors into account in making my decision.

### Factors favouring disclosure

37. The RTI Act recognises that public interest factors favouring disclosure will arise where disclosing information could reasonably be expected to:

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

<sup>49</sup> Section 108(3) of the RTI Act, which relevantly prevents OIC from revealing information claimed to be contrary to the public interest information.

<sup>50</sup> 'Personal information' is defined in section 12 of the *Information Privacy Act 2009* (Qld) (**IP Act**) 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'.

<sup>51</sup> Being pages 429-471 and 479-526.

<sup>52</sup> On pages 19 and 527-530.

<sup>53</sup> The Report index notes that the section concerning the victim is from pages 150-206. Additionally, small portions of sensitive information about the victim have been refused (for example, on pages 7, 75 and 120-121).

<sup>54</sup> Pages 93-97.

<sup>55</sup> Submissions dated 12 March 2021.

- enhance the Government's accountability<sup>56</sup>
  - inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by Government in its dealings with members of the community;<sup>57</sup> and
  - reveal the reason for a government decision and any background or contextual information that informed the decision.<sup>58</sup>
38. The applicant submits that these transparency and accountability factors favouring disclosure should be afforded much weight.<sup>59</sup> Disclosing the Third Party Information would give the applicant a more complete picture of the information QPS obtained during the Review and reveal all of the Review findings and considerations. However, QPS has partially disclosed the Report to the applicant and this disclosed information has substantially advanced QPS' accountability and transparency. Taking into account the nature of the Third Party Information and the information which has been disclosed to the applicant, I am satisfied that disclosure of the Third Party Information would, to some extent, further advance QPS' accountability and transparency. In these circumstances, I attribute moderate weight to these factors.
39. There is a public interest in individuals being able to obtain access to their own personal information held by government. Although this factor favouring disclosure<sup>60</sup> was not specifically raised by the applicant, I have considered whether it applies, given some (but not all) of the Third Party Information relates to the applicant. I have reviewed the Third Party Information and I am satisfied that, to the extent it relates to the applicant, it is the applicant's personal information. Accordingly, this disclosure factor applies to the applicant's personal information within the Third Party Information and I afford it significant weight. However, this information relating to the applicant is intertwined with the personal information of other individuals to such an extent that it cannot be disclosed without also disclosing the personal information of those other individuals (giving rise to the nondisclosure factors discussed below).
40. The RTI Act gives rise to factors favouring disclosure in circumstances where disclosing information could reasonably be expected to:
- advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies<sup>61</sup>
  - contribute to the administration of justice generally, including procedural fairness;<sup>62</sup> and
  - contribute to the administration of justice for a person.<sup>63</sup>
41. In December 2009, the Court of Appeal quashed the applicant's murder conviction and ordered a retrial. Following subsequent evidential reviews, it was announced in April 2014 that the applicant would not be retried. In these circumstances, and taking into consideration the nature and age of the Third Party Information, I am not satisfied that there is a reasonable expectation its disclosure would advance the fair treatment of the applicant (or any other individual) or contribute to the administration of justice, whether generally, for the applicant or for any other individual. Accordingly, to the extent these disclosure factors apply, I afford them only low weight.

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<sup>56</sup> Schedule 4, part 2, item 1 of the RTI Act.

<sup>57</sup> Schedule 4, part 2, item 3 of the RTI Act.

<sup>58</sup> Schedule 4, part 2, item 11 of the RTI Act.

<sup>59</sup> Submissions dated 12 March 2021.

<sup>60</sup> Schedule 4, part 2, item 7 of the RTI Act.

<sup>61</sup> Schedule 4, part 2, item 10 of the RTI Act.

<sup>62</sup> Schedule 4, part 2, item 16 of the RTI Act.

<sup>63</sup> Schedule 4, part 2, item 17 of the RTI Act.



42. The public interest also favours disclosure where disclosing information could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest<sup>64</sup> and reveal that the information was incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant.<sup>65</sup> Although these disclosure factors were not specifically raised by the applicant—who, as noted, made only broad or general submissions in this review on remittal—for completeness, I have considered whether they apply.
43. I acknowledge there is substantial information in the public domain concerning QPS' murder investigation, associated court processes and the Review. Taking into account the particular nature of the Third Party Information and the age of the Report, I do not consider disclosing the Third Party Information would significantly contribute to any further public debate on these issues. Accordingly, to the extent this factor applies,<sup>66</sup> it deserves only low weight. There is nothing within the Third Party Information, nor in any other information before me, to suggest that it is not correct or that it is misleading, gratuitous, unfairly subjective or irrelevant. On this basis, I do not consider that disclosure of the Third Party Information could reasonably be expected to reveal that it is incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant. I am therefore not satisfied that this factor<sup>67</sup> carries any weight in favour of disclosure of the Third Party Information.
44. The applicant submits that the Report should be disclosed in its entirety because he considers that any confidentiality which may have existed in it has been lost by QPS leaking the Report and its further dissemination.<sup>68</sup> The question of confidentiality is, as I have noted above and discussed further below, contested. In any event, even accepting the applicant's submissions on this point, I do not think that general dissemination or publication outside of the RTI process, *of itself*, gives rise to any factor favouring disclosure. I have, however, considered below whether these submissions by the applicant have an impact on the application of certain nondisclosure factors,<sup>69</sup> and the weight to be attributed to applicable factors favouring nondisclosure.
45. I have carefully considered all factors listed in schedule 4, part 2 of the RTI Act and the entirety of the applicant's submissions. Having done so, I can identify no other public interest considerations favouring disclosure of the Third Party Information.<sup>70</sup>

### Factors favouring nondisclosure

46. The RTI Act recognises that there is a public interest harm<sup>71</sup> in disclosing the personal information of a person, whether living or dead, and that disclosing information which could reasonably be expected to prejudice the protection of an individual's right to privacy gives rise to a public interest factor favouring nondisclosure.<sup>72</sup>

<sup>64</sup> Schedule 4, part 2, item 2 of the RTI Act.

<sup>65</sup> Schedule 4, part 2, item 12 of the RTI Act.

<sup>66</sup> Schedule 4, part 2, item 2 of the RTI Act.

<sup>67</sup> Schedule 4, part 2, item 12 of the RTI Act.

<sup>68</sup> Submissions dated 28 September 2020 and 12 March 2021.

<sup>69</sup> See paragraphs 53-54.

<sup>70</sup> Taking into consideration the nature of the Third Party Information and the information that has already been disclosed, I cannot see how its disclosure could, for example, further allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official (schedule 4, part 2, item 5 of the RTI Act); reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct (schedule 4, part 2, item 6 of the RTI Act); or contribute to the enforcement of the criminal law (schedule 4, part 2, item 18 of the RTI Act). In the event that further relevant factors exist in favour of disclosure, I am satisfied that there is no evidence before me to suggest that any would carry sufficient weight to outweigh the significant weight I have afforded to the public interest factors that favour nondisclosure.

<sup>71</sup> Schedule 4, part 4, section 6 of the RTI Act.

<sup>72</sup> Schedule 4, part 3, item 3 of the RTI Act. The concept of '*privacy*' is not defined in either the IP Act or RTI Act. It can, however, essentially be viewed as the right of an individual to preserve their '*personal sphere*' free from interference from others (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 12 August 2008, at paragraph 1.56).

47. The Third Party Information appears in the context of a murder investigation review and broadly comprises information which identifies, or is about, individuals other than the applicant and information which was provided to QPS by other individuals.<sup>73</sup> I am satisfied that it comprises the personal information of these other individuals. Most of this Third Party Information is of a highly sensitive and highly personal nature<sup>74</sup> and, as noted above, some of it is intertwined with the applicant's personal information.
48. Given the nature of the Third Party Information and the context in which it appears, I consider that its disclosure would be a significant intrusion into the privacy of these other individuals. The applicant submits that details of experts engaged by QPS in the Report cannot be refused.<sup>75</sup> It is evident from the information which has been disclosed to the applicant that the Third Party Information includes the names of individuals who provided expert evidence to QPS.<sup>76</sup> However, I do not consider the fact these individuals provided information in an expert capacity obviates the intrusion into their privacy that would arise from disclosure.
49. The applicant argues that:<sup>77</sup>
- for people who gave evidence at his trial, their names and the evidence they provided are already in the public domain; and
  - any public interest harm that could arise from disclosure of the Report has already been occasioned by the QPS leaking the Report.
50. I accept that the applicant will be aware of some of the Third Party Information, as a result of his trial and the ensuing appeal processes. I also acknowledge that the identities of certain individuals; some of the information they provided to the murder investigation and details of the evidence they provided (or which was referenced) in the applicant's court processes is publicly accessible (whether in published decisions or media reporting). However, I do not consider this reduces the weight of these nondisclosure factors to any significant degree, particularly as there can be no restriction on the use, dissemination or republication of information disclosed under the RTI Act. I also note that there is no evidence before me that the Report itself, and the Third Party Information as it appears within the Report, has been published or is in the public domain. The Third Party Information also includes additional information QPS obtained subsequent to completion of the applicant's court processes and the information appears in a context outside of Court proceedings. In these circumstances, I consider the extent of the harm that could reasonably be expected to arise from disclosing the Third Party Information would be significant, taking into account the nature of this personal information and the context in which it appears.
51. For these reasons, I afford these personal information and privacy factors favouring nondisclosure<sup>78</sup> significant weight.
52. Where disclosure of information could reasonably be expected to prejudice security, law enforcement or public safety, a factor favouring nondisclosure will arise.<sup>79</sup> Some of the Third Party Information references or comments upon the Investigation Procedure Information and, in that context, could reveal certain investigation procedures and

<sup>73</sup> Section 108(3) of the RTI Act prevents me from providing further detail about the nature or content of the Third Party Information.

<sup>74</sup> Such as an individual's photograph, the Victim Specific Information, the POI Information, the Other Report Findings and the Other Investigation Information.

<sup>75</sup> Submissions dated 28 September 2020.

<sup>76</sup> Details of the expert evidence obtained by QPS has mostly been disclosed to the applicant.

<sup>77</sup> Submissions dated 28 September 2020.

<sup>78</sup> Schedule 4, part 4, section 6 and schedule 4, part 3, item 3 of the RTI Act.

<sup>79</sup> Schedule 4, part 3, item 7 of the RTI Act.

methods employed by QPS. Disclosing information of this nature could allow individuals to use the information to modify their behaviour in order to avoid detection, thereby compromising the ongoing effectiveness of those procedures and methods. The Third Party Information also includes information that was obtained from individuals as part of the Review. It is generally recognised that there is very strong public interest in protecting the ability of QPS to obtain information which is relevant to its investigations.<sup>80</sup> Although the police possess certain coercive powers when investigating criminal matters such as suspicious deaths, the efficient and effective use of public resources is facilitated by police being able to cooperatively seek and obtain information, including from witnesses, informers or persons of interest in an investigation. I consider that routinely disclosing information which QPS obtains or receives in this context would tend to discourage individuals from coming forward with relevant information or participating openly in future QPS investigations, particularly where information is of a sensitive nature. Accordingly, I find this factor deserving of significant weight in favour of nondisclosure.

53. A public interest factor favouring nondisclosure also arises where disclosing information could reasonably be expected to prejudice an agency's ability to obtain confidential information.<sup>81</sup> The RTI Act also recognises that there is a public interest harm in disclosing information of a confidential nature that was communicated in confidence where its disclosure could reasonably be expected to prejudice the future supply of information of that type.<sup>82</sup>
54. As I have already noted, the applicant submits that any confidentiality in the Report has been lost and its disclosure would cause no public interest harm. Taking into account the information available in published decisions and media reporting, I accept that not all the Third Party Information can be characterised as being confidential in nature or comprising confidential information. However, some of the Third Party Information (such as parts of the POI Information and the Other Report Findings)<sup>83</sup> was communicated in confidence or is inherently confidential in nature. There is no evidence before me which confirms the applicant's submission that such information, as it appears within the Report, has been published, disseminated or that confidentiality in it has otherwise been lost.<sup>84</sup> In circumstances where a decision was made not to retry the applicant and QPS has taken no action in respect of the Other Report Findings, I consider disclosure of these components of the Third Party Information under the RTI Act could be expected to prejudice QPS' ability to effectively discharge its investigative functions, as it would tend to discourage individuals from participating openly in future QPS investigations. On this basis, I afford these nondisclosure factors significant weight in respect of the components of the Third Party Information that have retained their confidential nature.
55. Where disclosing information about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct could reasonably be expected to prejudice the fair treatment of individuals, a factor favouring nondisclosure will arise.<sup>85</sup> The Third Party Information contains information about a significant number of individuals QPS investigated as persons of interest and findings or considerations which relate to a

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<sup>80</sup> See for example: *P6Y4SX and Queensland Police Service* [2015] QICmr 25 (11 September 2015) at [29]-[31], *P6Y4SX and Department of Police* (Unreported, Queensland Information Commissioner, 31 January 2012) at [35]-[40], *SW5Z7D and Queensland Police Service* [2016] QICmr 1 (15 January 2016) at [27]-[31], and *Marshall and Department of Police* (Unreported, Information Commissioner of Queensland, 25 February 2011) at [29].

<sup>81</sup> Schedule 4, part 3, item 16 of the RTI Act.

<sup>82</sup> Schedule 4, part 4, section 8(1) of the RTI Act.

<sup>83</sup> Section 108(3) of the RTI Act prevents me from identifying this information in any further detail.

<sup>84</sup> The material filed by the applicant in the appeal proceedings references a range of published commentary about the Report (including published articles and podcasts), however, those referenced publications are not of these specific parts of the POI Information and the Other Report Findings being considered in this review.

<sup>85</sup> Schedule 4, part 3, item 6 of the RTI Act.

number of individuals other than the applicant.<sup>86</sup> Although the applicant generally maintains that the Report should be disclosed in its entirety, his submissions also appear to accept that access may be refused the identities of individuals referred to as persons of interest.<sup>87</sup> As there is no evidence before me indicating that QPS has pursued any action against any of the individuals about whom the POI Information or Other Report Findings relate, I consider disclosure of these components of the Third Party Information could reasonably be expected to substantially prejudice the fair treatment of those individuals. Taking into consideration the particular content of this information, I afford this nondisclosure factor significant weight in respect of the POI Information or Other Report Findings.

### ***Balancing the public interest***

56. I have taken into account the pro-disclosure bias in deciding access to documents under the RTI Act.<sup>88</sup> I have afforded significant weight to the factor favouring disclosure of the applicant's personal information within the Third Party Information,<sup>89</sup> however, that personal information of the applicant is inextricably intertwined with the personal information of other individuals. In addition, and for the reasons outlined above, I have found that factors favouring disclosure of the Third Party Information relating to QPS' transparency and accountability<sup>90</sup> are deserving of moderate weight, taking into account the nature of the Third Party Information and the information which has been disclosed to the applicant. In circumstances where the applicant's murder conviction has been quashed and a decision has been taken not to retry the applicant (and taking into consideration the nature and age of the Third Party Information), I have afforded only low weight to considerations of fair treatment, the administration of justice and contributing to an informed debate.<sup>91</sup>
57. On the other hand, I have found that the nondisclosure factors which relate to protecting the personal information and right to privacy of other individuals and ensuring the fair treatment of individuals, in a highly sensitive context, are deserving of significant weight.<sup>92</sup> To the extent the Third Party Information includes information of a confidential nature, I have also afforded significant weight to nondisclosure factors relating to the ability of agencies to obtain confidential information.<sup>93</sup> It is also my view that disclosure of some of the Third Party Information could be expected to prejudice law enforcement and I have afforded significant weight to the factor which arises in that regard.<sup>94</sup>
58. To the extent possible, QPS has released parts of the Report to the applicant which, for the reasons above, I consider strikes an appropriate balance between competing public interests. On balance, I am satisfied that the public interest factors favouring nondisclosure of the Third Party Information outweigh the factors favouring disclosure. Accordingly, I find that disclosure of the Third Party Information would, on balance, be contrary to the public interest and access may be refused on that basis.<sup>95</sup>

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<sup>86</sup> Being the POI Information and the Other Report Findings.

<sup>87</sup> In submissions dated 28 September 2020, the applicant noted that '*The redactions of any names would not apply to other persons (e.g. experts, police officers, witnesses' [sic] or other deceased persons) who are not specifically referred to as persons of interest in the report.*

<sup>88</sup> Section 44 of the RTI Act.

<sup>89</sup> Schedule 4, part 2, item 7 of the RTI Act.

<sup>90</sup> Schedule 4, part 2, items 1, 3 and 11 of the RTI Act.

<sup>91</sup> Schedule 4, part 2, items 2, 10, 16 and 17 of the RTI Act.

<sup>92</sup> Schedule 4, part 4, section 6 and schedule 4, part 3, items 3 and 6 of the RTI Act.

<sup>93</sup> Schedule 4, part 3, item 16 and part 4, section 8(1) of the RTI Act.

<sup>94</sup> Schedule 4, part 3, item 7 of the RTI Act.

<sup>95</sup> Under section 47(3)(b) of the RTI Act.

## DECISION

59. For the reasons set out above, I vary<sup>96</sup> QPS' deemed decision and find that access may be refused to:
- the Investigation Procedure Information as it comprises exempt information;<sup>97</sup> and
  - the Third Party Information as disclosure would, on balance, be contrary to the public interest.<sup>98</sup>
60. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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**S Martin**  
**Assistant Information Commissioner**

**Date: 14 May 2021**

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<sup>96</sup> Under section 110(1)(b) of the RTI Act.

<sup>97</sup> Sections 47(3)(a) and 48 and schedule 3, sections 10(1)(b) and (f) of the RTI Act.

<sup>98</sup> Sections 47(3)(b) and 49 of the RTI Act.

**APPENDIX****Significant procedural steps**

<b>Date</b>	<b>Event</b>
10 May 2019	QCAT set aside OIC's decision dated 18 February 2016 and remitted the matter to OIC.
18 October 2019	The Court of Appeal dismissed an appeal of the QCAT Decision.
24 October 2019	OIC advised the applicant and QPS that the review had been reopened (as external review 100112) and asked QPS to provide information and submissions addressing the issue of whether access to the Report (or any part of it) may be refused under the RTI Act.
25 October 2019	OIC received the applicant's letter questioning the basis upon which QPS was being given an opportunity to make further submissions.
6 November 2019	OIC confirmed to the applicant that, as OIC's 2016 Decision did not make any findings on other grounds of refusal, OIC would consider whether any other grounds of refusal apply, which QPS may seek to raise.
10 February 2020	OIC received a marked up copy of the Report reflecting the information to which QPS considered access may be refused.
11 February 2020	OIC provided an update to the applicant.
4 June 2020	OIC received the applicant's request for an update and submissions.
9 June 2020	OIC asked QPS to consider partial release of the Report in the interest of informal resolution.
10 June 2020	OIC advised the applicant that, in the interests of informal resolution, QPS had been asked to partially release the Report, reflecting the information to which QPS considered access may be refused.
24 August 2020	OIC received QPS' submissions.
8 September 2020	QPS partially disclosed a copy of the Report to the applicant.
9 September 2020	OIC asked the applicant to identify whether he wished to access the redacted information or specific parts of it.
28 September 2020	OIC received the applicant's request to access the Report in its entirety and the applicant's submissions.
11 February 2021	OIC conveyed a preliminary view to the applicant concerning the information removed from the partially disclosed Report.
24 February 2021	The applicant requested an extension of time to respond to the preliminary view.
25 February 2021	OIC granted the requested extension to the applicant.
12 March 2021	OIC received the applicant's further submissions.