



## Decision and Reasons for Decision

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**Application Number:** 310289

**Applicant:** AQU1L6

**Respondent:** Crime and Misconduct Commission

**Third Party:** 7G5BAL

**Decision Date:** 19 October 2011

**Catchwords:** **INFORMATION PRIVACY ACT – section 67(1) of the *Information Privacy Act 2009* (Qld) – application for access to a workplace investigation report by the complainant – grounds on which access may be refused — an agency may refuse access to a document of the agency in the same way and to the same extent the agency could refuse access to the document under section 47 of the *Right to Information Act 2009* (Qld) were the document to be the subject of an access application under that Act**

**RIGHT TO INFORMATION ACT – section 47(3)(b) of the *Right to information Act 2009* (Qld) – grounds on which access may be refused – whether the relevant parts of the investigation report comprise information the disclosure of which would, on balance, be contrary to the public interest under section 49 of the *Right to Information Act 2009* (Qld)**

### Contents

REASONS FOR DECISION .....	2
Summary .....	2
Background.....	2
Reviewable decision .....	2
Evidence considered .....	2
Issue for determination .....	3
Information in issue.....	3
Access applicant’s submissions .....	3
CMC’s submissions .....	3
Would disclosure of the Information in Issue be contrary to the public interest?.....	3
Relevant law .....	3
Findings.....	4
Balancing the public interest - accountability and procedural fairness .....	4
Balancing the public interest - personal information and privacy.....	5
Balancing the public interest - confidential information.....	6
DECISION .....	7
APPENDIX - Significant procedural steps.....	8

## REASONS FOR DECISION

### Summary

1. The access applicant<sup>1</sup> applied to the Crime and Misconduct Commission (**CMC**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) seeking access to a range of information relating to their former employment including an investigation report dealing with a number of complaints made about other CMC employees (**Investigation Report**).
2. The CMC notified several third parties about the possible disclosure of the Investigation Report and took steps to obtain their views.
3. A number of third parties objected to disclosure of the Investigation Report.
4. The CMC decided to disclose the Investigation Report to the access applicant subject to the deletion of a small amount of personal information. A number of third parties applied for internal review of the CMC's decision.
5. On internal review, the CMC refused access to a small amount of additional information in the Investigation Report.
6. One of the third parties applied to the Office of the Information Commissioner (**OIC**) for external review of the CMC's internal review decision.
7. For the reasons set out below, I set aside the CMC's decision and find that disclosure of some information in the Investigation Report would, on balance, be contrary to the public interest under section 49 of the *Right to Information Act 2009* (Qld) (**RTI Act**).

### Background

8. Significant procedural steps relating to the application are set out in the appendix to this decision.

### Reviewable decision

9. The decision under review is the CMC's internal review decision dated 10 June 2010.

### Evidence considered

10. In making this decision, I have considered the following:
  - the access application to the CMC
  - correspondence between the access applicant and the CMC
  - correspondence between the relevant third parties and the CMC
  - the CMC's initial decision and internal review decision
  - the external review application to OIC
  - file notes of telephone conversations between the access applicant and a staff member of OIC
  - the access applicant's submissions to OIC
  - correspondence between the relevant third parties and OIC
  - the Investigation Report
  - relevant provisions of the IP Act and RTI Act; and
  - previous decisions of the Information Commissioner identified in this decision.

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<sup>1</sup> The access applicant is the third party in this external review.

### **Issue for determination**

11. A number of issues have been informally resolved during the course of this external review and I note that the Investigation Report has been partially disclosed to the access applicant. The only issue remaining for determination is whether access can be granted to the remainder of the Investigation Report.

### **Information in issue**

12. The remaining information comprises the following types of information set out in the Investigation Report (**Information in Issue**):
- information which would identify the individuals against whom allegations were made
  - information provided in the course of the investigation by third parties
  - opinions or reports about how well other officers perform their duties; and
  - recommendations about action to be taken in response to the allegations.

### **Access applicant's submissions**

13. The access applicant makes submissions including that:<sup>2</sup>
- whistleblower status is a relevant factor which should be taken into account
  - a complainant is entitled to know if their claims have been substantiated
  - the investigator was not independent<sup>3</sup>
  - the investigation was not conducted according to the principles of natural justice; and
  - disclosure of the Investigation Report would enable the public, including their elected representatives, to scrutinise and ensure that the CMC is accountable for the investigation process and outcome.

### **CMC's submissions**

14. The CMC agrees that disclosure of the Information in Issue would, on balance, be contrary to the public interest.

### **Would disclosure of the Information in Issue be contrary to the public interest?**

15. The answer to this question is 'yes' for the reasons set out below.

### ***Relevant law***

16. Section 67(1) of the IP Act provides that access to a document may be refused on the same basis upon which access to a document could be refused under section 47 of the RTI Act.
17. Relevantly, sections 47(3)(b) and 49 of the RTI Act provide a ground for refusal of access where disclosure of information would, on balance, be contrary to public interest.
18. The term 'public interest' is not defined in the RTI Act. Instead the RTI Act recognises that many factors can be relevant to the concept of the public interest. The public interest refers to considerations affecting the good order and functioning of the

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<sup>2</sup> Some of the access applicant's submissions are highly sensitive in nature and cannot be set out in any detail in these reasons for decision.

<sup>3</sup> Please note that the OIC's jurisdiction does not extend to investigating and assessing the independence of an investigator.

community and governmental affairs for the well-being of citizens. The notion of the public interest is usually treated as separate from matters of purely private or personal interest. Usually, a public interest consideration is one that is available to all members or a substantial segment of the community should they choose to access it. Although, in some circumstances public interest considerations can apply for the benefit of particular individuals.

19. To decide whether disclosure of the Information in Issue would be contrary to the public interest, I must:<sup>4</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, on balance, would be contrary to the public interest.

### **Findings**

20. In the circumstances, the access applicant's submissions regarding whistleblower status do not give rise to a relevant public interest factor favouring disclosure. Accordingly, I have not taken this factor into account in making this decision. No other irrelevant factors arise on the information before me.
21. After carefully considering all of the information before me, I am satisfied that the public interest factors favouring disclosure include that disclosure of the Information in Issue could reasonably be expected to:
- promote open discussion of public affairs and enhance the Government's accountability;<sup>5</sup> and
  - contribute to the administration of justice (both generally and for a person), including procedural fairness.<sup>6</sup>
22. After carefully considering all of the information before me, I am satisfied that the public interest factors favouring nondisclosure include that disclosure of the Information in Issue could reasonably be expected to:
- cause a public interest harm if disclosure would disclose personal information of a person, whether living or dead<sup>7</sup>
  - prejudice the protection of an individual's right to privacy;<sup>8</sup> and
  - prejudice an agency's ability to obtain confidential information.<sup>9</sup>

### **Balancing the public interest - accountability and procedural fairness**

23. I accept in a general sense that there are public interest factors favouring the disclosure of information about the way in which an investigation is conducted, including the evidence relied upon and the conclusions reached. These factors are consistent with ensuring the accountability of agencies expending public funds, monitoring the performance of public servants and ensuring that decisions are fair and based on sound reasoning.<sup>10</sup>

<sup>4</sup> Section 49(3) of the RTI Act.

<sup>5</sup> Schedule 4, part 2, item 1 of the RTI Act.

<sup>6</sup> Schedule 4, part 2, items 16 and 17 of the RTI Act.

<sup>7</sup> Schedule 4, part 4, item 6 of the RTI Act.

<sup>8</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>9</sup> Schedule 4, part 4, item 8(1) of the RTI Act. See also schedule 4, part 3, item 16 of the RTI Act.

<sup>10</sup> *Pope and Queensland Health* (1994) 1 QAR 616 at paragraph 96.

24. In my view the CMC is accountable for the expenditure of public funds in initiating the relevant investigation and for its process and outcomes. I also accept that disclosure of certain information about the investigation may further the CMC's accountability in this regard.
25. The RTI Act also gives rise to a public interest factor favouring disclosure in circumstances where disclosure could reasonably be expected to contribute to the administration of justice generally, including procedural fairness.<sup>11</sup> In the context of this review, where the access applicant has made complaints against other officers, there is a public interest in providing the complainant with an adequate explanation of the outcomes of the investigation and the basis for those outcomes.
26. In this respect, I am mindful that the CMC has:
- corresponded directly with the access applicant about the investigation; and
  - provided the access applicant with a partial copy of the Investigation Report.
27. In summary, the access applicant has been provided with:
- information about how the investigation was conducted (including process issues)
  - copies of correspondence to and from the access applicant
  - information directly related to the access applicant's performance
  - general information and recommendations about the effectiveness of a CMC work unit
  - a summary of the Commissioner's determinations
  - the Investigation Report findings including whether each allegation was substantiated; and
  - information about the action taken in response to the access applicant's complaints.
28. Taking into account the matters set out above, I am satisfied that:
- disclosure of the Information in Issue could not reasonably be expected to enhance the CMC's accountability or contribute to the administration of justice (including procedural fairness); and
  - these factors favouring disclosure should be afforded little weight in the circumstances.

### **Balancing the public interest - personal information and privacy**

29. The RTI Act gives rise to a factor favouring disclosure where the information is the applicant's personal information.
30. Personal information is defined 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>12</sup>

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<sup>11</sup> Schedule 4, part 2, items 16 and 17 of the RTI Act. See also *Godwin and Queensland Police Service* (1998) 4 QAR 70 at paragraph 52; *Villanueva and Queensland Nursing Council and Others* (2000) 5 QAR 363 at paragraphs 93, 137 and 141; *Daw and Queensland Rail* (Unreported, Queensland Information Commissioner, 24 November 2010) at paragraph 24 and *Jackson and Queensland Health* (Unreported, Queensland Information Commissioner, 10 February 2010) at paragraphs 42 and 47.

<sup>12</sup> Section 12 of the IP Act.

31. However, the RTI Act also recognises that:
- disclosure of information could reasonably be expected to cause a public interest harm if disclosure would disclose personal information of a person, whether living or dead;<sup>13</sup> and
  - a factor favouring nondisclosure will arise in circumstances where disclosure of information could reasonably be expected to prejudice the protection of an individual's right to privacy.<sup>14</sup>
32. Given that the Investigation Report deals with complaints which arose in a workplace context, it is necessary to distinguish between the routine personal work information and non routine personal work information of relevant individuals. In this respect, I am mindful that information which is not wholly related to the routine day to day work activities of a public service officer is considered non routine personal work information, including:
- complaints made by or about a public service officer
  - opinions about another public service officer; and
  - opinions or reports about how well an officer performs their duties.
33. After carefully considering the content of the Information in Issue, I am satisfied that it comprises the non routine personal work information of various individuals.
34. I also acknowledge that parts of the Information in Issue comprise the access applicant's non routine personal work information. However, this information is interwoven with that of others in such a way that it cannot be separated and is properly characterised as 'mutual personal information'. As this information cannot be separated, the access applicant's information cannot be released without also releasing the non routine personal work information of others.
35. Given the sensitive content of the Information in Issue,<sup>15</sup> it is reasonable to expect that its disclosure would cause significant public interest harm and represent a significant incursion into the privacy of relevant individuals.
36. Taking into account the information which has already been provided to the access applicant and the matters set out above, I am satisfied that:
- the release of the Information in Issue would not advance the public interest in any significant way; and
  - the factors favouring nondisclosure (including the public interest in preventing prejudice to the privacy of relevant individuals) should be afforded significant weight in the circumstances.

### **Balancing the public interest - confidential information**

37. Any undertakings to treat information confidentially or the presence of circumstances giving rise to an implication of confidence will affect the balancing of the public interest.
38. The relevant public interest factor favouring nondisclosure also requires that the decision-maker be satisfied that:<sup>16</sup>

<sup>13</sup> Schedule 4, part 4, item 6 of the RTI Act.

<sup>14</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>15</sup> Which relates to complaints made by the access applicant about others.

<sup>16</sup> Schedule 4, part 4, item 8(1) of the RTI Act. See also schedule 4, part 3, item 16 of the RTI Act.

- the information was of a confidential nature
  - it was communicated in confidence; and
  - disclosure of the information could reasonably be expected to prejudice the future supply of information of this type.
39. In this respect, three relevant third parties advise that the information they provided during the course of the investigation was given on a confidential basis. The Investigation Report also shows that the individuals involved in the investigation were given an assurance of confidentiality by the investigator. On this basis, I am satisfied that there is sufficient evidence to demonstrate that the Information in Issue comprises information of a confidential nature which was communicated in confidence.
40. The sensitivity of the issues raised by the relevant allegations lends weight to the view that release of the Information in Issue could reasonably be expected to prejudice the future supply of information of this type, in that, if this type of information were routinely disclosed, individuals may be far less willing to be forthcoming in future investigations of this nature. On this basis, I am satisfied that disclosure of the Information in Issue could reasonably be expected to prejudice the future supply of information of this type.
41. On the basis of the matters set out above, I am satisfied that this public interest factor favouring nondisclosure should be afforded significant weight in the circumstances.
42. Having carefully considered all of the relevant information before me and on the basis of the matters set out above, I am satisfied in the circumstances that:
- the public interest factors favouring nondisclosure of the Information in Issue outweigh those favouring disclosure; and
  - on balance, disclosure of the Information in Issue is contrary to the public interest under section 49 of the RTI Act.

## **DECISION**

43. For the reasons set out above, I set aside the CMC's decision and find that:
- disclosure of the Information in Issue would, on balance, be contrary to the public interest; and
  - access to the Information in Issue should be refused under section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.
44. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

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**F Henry**  
**Assistant Information Commissioner**

**Date: 19 October 2011**

**APPENDIX - SIGNIFICANT PROCEDURAL STEPS**

<b>Date</b>	<b>Event</b>
2 March 2010	The access applicant applies to the CMC for a copy of a number of documents including the Investigation Report.
17 March 2010	The CMC takes steps to obtain the views of a number of third parties about possible disclosure of the Investigation Report.
31 March 2010	One of the third parties (the external review applicant) notifies the CMC that they object to disclosure of the Investigation Report and provides submissions in support of their case.
20 April 2010	The CMC notifies the access applicant of its original decision on the requested documents and decides to disclose the Investigation Report in part.
21 April 2010	The CMC notifies the external review applicant of its original decision in relation to the Investigation Report.
17 May 2010	The external review applicant applies to the CMC for internal review of the original decision.
10 June 2010	The CMC notifies the access applicant and the external review applicant of its internal review decision and decides to vary the original decision by refusing access to additional information from the Investigation Report.
8 July 2010	The external review applicant applies to OIC for external review of the internal review decision.
19 July 2010	OIC notifies the CMC and the external review applicant that the external review application has been accepted and requests a copy of the Investigation Report from the CMC.
26 July 2010	The CMC provides OIC with a copy of the Investigation Report.
16 November 2010	The access applicant confirms that access is sought to the Investigation Report in its entirety and applies to be a participant in the external review.
7 December 2010	The CMC provides OIC with further information relevant to the external review.
8 June 2011	OIC notifies two relevant third parties about the possible release of parts of the Investigation Report and seeks their views on the possible disclosure of the information.  OIC conveys a preliminary view to the external review applicant, access applicant and the CMC in relation to the relevant parts of the Investigation Report and invites these participants to provide submissions in response to the preliminary view by 21 June 2011.
10 June 2011	The CMC accepts the preliminary view.
16 June 2011	A relevant third party advises OIC that they do not object to disclosure of the relevant parts of the Investigation Report.
17 June 2011	A relevant third party advises OIC that they do not object to disclosure of the relevant parts of the Investigation Report.
20 June 2011	The access applicant notifies OIC by telephone that the preliminary view is not accepted and requests an extension of time to provide submissions.
20 June 2011	OIC agrees to an extension of time and requests any submissions from the access applicant by 29 June 2011.
25 June 2011	The access applicant provides submissions in support of their case.
30 June 2011	OIC asks the CMC to forward a copy of the Investigation Report to the access applicant redacted in accordance with OIC's preliminary view.