



Decision and Reasons for Decision

Citation:	<i>T19 and Queensland Police Service [2023] QICmr 2 (30 January 2023)</i>
Application Number:	316728
Applicant:	T19
Respondent:	Queensland Police Service
Decision Date:	30 January 2023
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - INFORMATION AS TO EXISTENCE OF PARTICULAR DOCUMENTS - request for access to documents relating to potential allegations against the applicant - whether requested documents would comprise prescribed information - neither confirm nor deny - section 69 of the <i>Information Privacy Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Queensland Police Service (**QPS**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to documents relating to allegations that the applicant made threats to harm witnesses/judges in a case involving the applicant's son (**Requested Documents**).²
2. QPS decided³ to neither confirm nor deny the existence of the Requested Documents, pursuant to section 69 of the IP Act.
3. The applicant then applied⁴ to the Office of the Information Commissioner (**OIC**) for external review of QPS's decision.
4. For the reasons set out below, I affirm QPS's decision and find that QPS was entitled to neither confirm nor deny the existence of the Requested Documents.⁵

Background

5. Significant procedural steps relating to the external review are set out in the Appendix.

¹ Access application dated 18 November 2021.

² Date range between 2019-2021.

³ Decision dated 26 May 2022.

⁴ External review application dated 29 May 2022.

⁵ Under section 69 of the IP Act.

Reviewable decision

6. The decision under review is QPS's decision dated 26 May 2022.

Evidence considered

7. Evidence, submissions, legislation and other material I have considered in reaching this decision are referred to in these reasons (including footnotes and Appendix).
8. I have also had regard to the *Human Rights Act 2019 (Qld) (HR Act)*, in particular, the right of the applicant to seek and receive information.⁶ I consider that a decision-maker will, when observing and applying the IP Act and *Right to Information Act 2009 (Qld) (RTI Act)*, be '*respecting and acting compatibly with*' these rights and others prescribed in the HR Act.⁷ I further consider that, having done so when reaching my decision, I have acted compatibly with and given proper consideration to relevant human rights, as required under section 58(1) of the HR Act.⁸

Issue for determination

9. The issue for determination in this review is whether QPS may neither confirm nor deny the existence of the Requested Documents under section 69 of the IP Act.

Relevant law

10. Section 69 of the IP Act allows a decision-maker to neither confirm nor deny the existence of a document which, if it exists, would contain '*prescribed information*'. '*Prescribed information*' is defined⁹ as including exempt information.¹⁰
11. The Information Commissioner has previously decided¹¹ that the neither confirm nor deny provision will apply where, due to the particular way the access application is framed, acknowledging the existence or non-existence of the requested information is liable to cause the very kind of detriment that the prescribed information provisions are intended to avoid.
12. On external review, a 'neither confirm nor deny' response presents procedural challenges as the decision-maker is unable to confirm the existence of information. As the Information Commissioner explained in *EST and Department of Family Services and Aboriginal and Islander Affairs*:¹²

In a review of an ordinary refusal of access decision, the applicant for access is necessarily disadvantaged, in the extent to which meaningful submissions can be made about the exempt status of matter in issue, by a lack of precise knowledge as to the nature of the matter in issue. That disadvantage is exacerbated in a review of a decision to invoke a ... "neither confirm or

⁶ Section 21 of the HR Act.

⁷ See *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; and *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

⁸ I note the observations by Bell J on the interaction between equivalent pieces of Victorian legislation in *XYZ*, [573]: '*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.*' I also note that OIC's approach to the HR Act set out in this paragraph has recently been considered and endorsed by the Queensland Civil and Administrative Tribunal in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23] (noting that Judicial Member McGill saw '*no reason to differ*' from our position).

⁹ In schedule 5 to the IP Act.

¹⁰ As mentioned in schedule 3, section 1,2,3,4,5, 9 or 10 of the RTI Act.

¹¹ *Tolone and Department of Police* (Unreported, Queensland Information Commissioner, 9 October 2009) at [47]-[50], *Phylard and Department of Police* (Unreported, Queensland Information Commissioner, 31 August 2011) at [30] and *Winchester and Queensland Police Service* [2017] QICmr 56 (4 December 2017) at [16].

¹² (1995) 2 QAR 645 (**Est**) at [20].

deny" response... The review must largely proceed in private between the Information Commissioner and the respondent ...

Discussion

13. The applicant submitted that the information should be accessible as '*public access to government information is important in a healthy democracy*' and to deny access would be an abuse of process and a denial of natural justice.¹³
14. As QPS's decision contained limited information in support of its decision,¹⁴ I requested additional submissions from QPS detailing the reasons for their decision to neither confirm or deny the existence of the Requested Documents. I have considered those additional submissions, together with the wording of the applicant's access application and the applicant's submissions.
15. As noted in paragraph 1, the applicant seeks access to information concerning allegations made against him. Having considered the evidence before me, I am satisfied that if such documents existed with QPS, they would be classed as 'intelligence holdings' and would therefore comprise exempt information.¹⁵
16. Intelligence holdings are intelligence logs/reports/submissions collected by QPS relating to criminal activity or suspected criminal activity. I am satisfied that the collection of information of this nature forms part of QPS's methods and procedures for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law.
17. I also am satisfied that, disclosure of this type of information (if it exists), would reasonably be expected to prejudice the effectiveness of QPS's methods or procedures for investigating such an incident, by revealing any intelligence gathered by QPS (or, equally importantly, the *lack* of any intelligence gathered). In this case, merely revealing whether QPS holds such information will result in the prejudice to QPS's methods. That is, by revealing whether any such threats have been detected by QPS or alternatively, whether any such threats made by the applicant have not been detected by QPS. Due to the specific type of information that the applicant seeks, I find that merely confirming or denying the existence of such information will prejudice QPS's method of detecting and investigating such serious matters by revealing to the applicant whether QPS has any knowledge of any such threats that he may have made.
18. On this basis, I am satisfied that, if the Requested Documents exist, they would comprise exempt information under schedule 3, section 10(1)(f) of the RTI Act. Accordingly, the Requested Documents would satisfy the definition of *prescribed information* under section 69 of the IP Act.
19. Therefore, I am satisfied that section 69 of the IP Act applies and QPS is entitled to neither confirm nor deny the existence of the Requested Documents.

DECISION

20. For the reasons set out above, I find that QPS was entitled to neither confirm nor deny the existence of the Requested Documents pursuant to section 69 of the IP Act. I therefore affirm QPS's decision.

¹³ Submission dated 19 October 2022.

¹⁴ In accordance with section 69(2) of the IP Act.

¹⁵ Pursuant to schedule 3, section 10(1)(f) of the RTI Act.

21. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

S Martin
Assistant Information Commissioner

Date: 30 January 2023

APPENDIX**Significant procedural steps**

Date	Event
29 May 2022	OIC received the application for external review.
30 May 2022	OIC requested preliminary documents from QPS.
7 June 2022	OIC received the preliminary documents from QPS.
12 July 2022	OIC advised the applicant and QPS that the external review application had been accepted. OIC requested a submission from QPS.
28 July 2022	QPS provided a submission to OIC.
12 August 2022	OIC requested further information from QPS.
29 August 2022	OIC received a response from QPS.
18 October 2022	OIC conveyed a preliminary view to the applicant.
19 October 2022	The applicant provided submissions, contesting OIC's preliminary view.
1 December 2022	OIC provided the applicant and QPS with an update.