



Decision and Reasons for Decision

Application Number: 311184

Applicant: Together Queensland, Industrial Union of Employees

Respondent: Department of Transport and Main Roads

Decision Date: 1 February 2013

Catchwords: ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL TO DEAL WITH APPLICATION – applicant seeking all documents in relation to the recruitment for the position of Departmental Liaison Officer within the Department of Transport and Main Roads – whether access application expressed to relate to a stated subject matter – whether all documents to which the application relates appear to comprise exempt information – whether agency may refuse to deal with the application under section 40 of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Transport and Main Roads (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to all documents relating to the recruitment of a named officer for the position of Departmental Liaison Officer within the Department of Transport and Main Roads between 1 March 2012 and 24 July 2012.
2. The Department refused to deal with the application under section 40 of the RTI Act, on the basis that the access application was expressed to relate to all documents that contain information of a stated kind or relate to a stated subject matter and it appeared that all of the requested documents were comprised of exempt information under schedule 3, section 10 of the RTI Act.
3. Schedule 3, section 10 contains various subsections prescribing separate exemption provisions. The Department's decision did not, however, specify the subsection on which it relied in invoking section 40 of the RTI Act.
4. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision.
5. For the reasons set out below, it appears that all of the requested documents would comprise exempt information under schedule 3, section 10(4) of the RTI Act. The Department is therefore entitled to refuse to deal with the access application under section 40 of the RTI Act. Accordingly, the Department's decision is affirmed.

Background

6. Significant procedural steps relating to the application and external review are set out in the Appendix to these reasons.

Reviewable decision

7. The decision under review is the Department's decision dated 29 August 2012.

Evidence considered

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

Relevant law

9. Section 39 of the RTI Act provides that where an access application is made, an agency should deal with the application unless this would, on balance, be contrary to the public interest. Section 40 of the RTI Act sets out one of the sets of circumstances in which Parliament has considered it would, on balance, be contrary to the public interest to deal with an access application as follows:

40 Exempt Information

(1) *This section applies if—*

- (a) *an access application is expressed to relate to all documents, or to all documents of a stated class, that contain information of a stated kind or relate to a stated subject matter; and*
- (b) *it appears to the agency or Minister that all of the documents to which the application relates are comprised of exempt information.*

(2) *The agency or Minister may refuse to deal with the application without having identified any or all of the documents.*

10. In effect, section 40 of the RTI Act allows an agency to refuse to deal with an application if:
 - the application requests all documents, or all documents of a particular class, that contain information of a stated kind or relate to a stated subject matter; and
 - it appears to the agency that all of the documents to which the application relates are comprised of 'exempt information', as defined in section 48 of the RTI Act and described in schedule 3 of the RTI Act.
11. If an agency relies on section 40 of the RTI Act, it is not required to identify any or all of the documents. The agency is, however, required under section 54(2)(f) of the RTI Act to set out:
 - the provision of schedule 3 of the RTI Act under which it is said the information in the documents sought would comprise exempt information; and
 - why the documents sought would comprise exempt information under such provision.
12. Exempt information is information the disclosure of which Parliament has proclaimed would, on balance, be contrary to the public interest. Relevantly, information is exempt

if it consists of information obtained, used or prepared for an investigation by a prescribed crime body, or another agency, in performing the prescribed functions of the prescribed crime body.¹

13. Accordingly, if all documents sought by the applicant comprise information obtained, used or prepared for an investigation by a prescribed crime body, or another agency, in performing the prescribed functions of the prescribed crime body, the Department may refuse to deal with the access application under section 40 of the RTI Act.

Findings

Is the access application expressed to relate to all documents that contain information of a stated kind or relate to a stated subject matter?

14. Yes. The applicant's access application requests all documents relating to a stated subject matter, being the recruitment of a named officer.

Does it appear that all of the requested documents would comprise exempt information?

15. Yes. For the reasons set out below, it appears that all of the requested documents would comprise exempt information under schedule 3, section 10(4) of the RTI Act.
16. For schedule 3, section 10(4) to apply, the following requirements must be satisfied:
- the information must have been obtained, used or prepared for an investigation;
 - the investigating body or agency must be a prescribed crime body or other agency performing a prescribed crime body's functions; and
 - the exception set out in schedule 3, section 10(6) of the RTI Act must not apply.

Have the requested documents been 'obtained, used or prepared' for an investigation?

17. The terms '*obtained, used or prepared*' are not defined in the RTI Act or the *Acts Interpretation Act 1954* (Qld), and so are to be given their ordinary meaning.² The relevant term in this case is '*obtained*', in other words, '*to come into possession of; get or acquire; procure, as by effort or request*'.³
18. The applicant's access application requests copies of all documents relating to a specific recruitment process. The Crime and Misconduct Commission (CMC) has requested⁴ that the Department provide it with all documents concerning that process. I understand that the Department has complied with that request.⁵ The CMC has thus '*obtained*' from the Department documents concerning the selection process, which I am satisfied would include all documents requested in the access application.
19. I am further satisfied relevant documents have been obtained by the CMC for an investigation, for the reasons explained below.

¹ Schedule 3, section 10(4) of the RTI Act.

² *Springborg, MP and Crime and Misconduct Commission* (2006) 7 QAR 77 at [58].

³ Macquarie Dictionary Online (accessed 3 December 2012).

⁴ By letter to the Department dated 7 August 2012, a copy of which the CMC provided to OIC on 7 September 2012 in the course of a separate external review (involving an access applicant other than the applicant in this review) concerning the same recruitment process.

⁵ The Department advised an OIC officer on 17 December 2012 that all documents relating to the relevant appointment had been supplied to the CMC.

Are the investigations being conducted by a prescribed crime body, or another agency, in performing the prescribed functions of the prescribed crime body?

20. The CMC is a prescribed crime body⁶ under the RTI Act and the CMC's prescribed functions include its '*crime function*', '*intelligence functions*' and '*misconduct functions*' as defined in the *Crime and Misconduct Act 2001* (Qld) (**CM Act**).⁷
21. OIC has obtained and independently assessed correspondence from the CMC to the Department⁸ in which the CMC:
- advised that a complaint had been made regarding the selection process and that the CMC is performing its misconduct functions under section 33 of the CM Act in handling this complaint; and
 - requested that the Department provide the CMC with all documents relevant to the selection process to allow the CMC to assess the complaint.
22. From my review of this correspondence, I am satisfied the CMC has initiated an investigation⁹ into the relevant selection process.
23. I am also satisfied that the balance of the requirements of schedule 3, section 10(4) are met in this case. The CMC, as a prescribed crime body, is performing its misconduct functions in relation to the selection process under section 33 of the CM Act, which is a prescribed function¹⁰ for the purposes of schedule 3, section 10(4) of the RTI Act.

Does the exception to schedule 3, section 10(4) of the RTI Act apply?

24. No. The exception to schedule 3, section 10(4) of the RTI Act as contained in schedule 3, section 10(6) only applies where the investigation is finalised and the information is about the applicant. As the information is not about the applicant, the exception does not apply.

Conclusion

25. The requirements of schedule 3, section 10(4) of the RTI Act are met and I am satisfied the documents sought by the applicant would comprise exempt information. As the access application is expressed to relate to all documents of a stated subject matter, namely the recruitment of a named Departmental Liaison Officer, and it appears that such documents would comprise exempt information, the Department is entitled to refuse to deal with the application under section 40 of the RTI Act.

The applicant's submissions

26. The substance of my reasoning as set out in paragraphs 9-25 above was conveyed to the applicant by letter dated 17 October 2012, accompanied with an invitation for the applicant to provide submissions in response. In reply, the applicant advised that it did not accept that the Department was entitled to refuse to deal with the application, principally on the basis that the applicant does not accept schedule 3, section 10(4) of

⁶ Schedule 3, section 10(9) of the RTI Act.

⁷ Schedule 3, section 10(9) of the RTI Act.

⁸ See footnote 4.

⁹ The definition of 'investigate' in schedule 2 of the CM Act is broad: 'investigate includes examine and consider'.

¹⁰ Schedule 3, section 10(9) of the RTI Act.

the RTI Act operates in the manner I have outlined above, so as to render any requested documents exempt.¹¹

27. The applicant essentially submits that schedule 3, section 10(4) of the RTI Act is not a discrete or 'stand-alone' provision, but that it must be read together with section 10(1) of the RTI Act (and the latter's requirement for a reasonable expectation that disclosure of information would give rise to a specific prejudice).
28. The applicant argues that, consequently, schedule 3, section 10(4) of the RTI Act only operates to exempt information the disclosure of which could reasonably be expected to prejudice a CMC investigation;¹² essentially, information comprising the 'work product' of a CMC investigation. The applicant relevantly submits:¹³

5. There is conflict between 10(1) and 10(4) of schedule 3 of the act. 10 (1) clearly states that the access to documents are exempt if they could compromise an investigation about the contravention of law (when read in conjunction with 10 (8) it is clear that this includes investigation of misconduct which is clearly the purview of the CMC.

...

7. The [OIC preliminary view letter dated 17 October 2012] reads this provision widely, however its true construction is to provide an exemption for work product of an investigation, not to prevent the release of public documents already in existence and created for routine functions of public administration that have been provided to the CMC.

8. The decisions referred to us by officers of OIC, namely G8KPL2 and Department of Health and T5Q2EE and Department of Police support this narrow construction of 10 (4) that it is an exemption of work product of the prescribed function not the broad view that all documents looked at by the CMC in performing its prescribed function.

29. The applicant further submits¹⁴ that interpreting schedule 3, section 10(4) so as to encompass anything other than CMC 'work product' would result in an interpretation 'repugnant to the legislative scheme [of the RTI Act] to enable members of the community access to documents created by public agencies'. The applicant argues that 'thus the Golden Rule of interpretation is enlivened ...':

The classic statement of the Golden Rule is given by Lord Wensleydale in Grey v Pearson (1857) 6 HLC 61 at 106:

...the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity and inconsistency, but no farther.

¹¹ The applicant in its submissions dated 1 November 2012 (originally lodged 31 October 2012 – 'corrected' version resubmitted on 1 November 2012) – and again in a telephone conversation with an OIC officer on 16 November 2012 – suggested that it 'may be prudent' for the interpretation of the schedule 3, section 10(4) of the RTI Act to be referred under section 118 of the RTI Act to the Queensland Civil and Administrative Tribunal (QCAT). Section 118 confers a discretion on the Information Commissioner to refer questions of law to QCAT on the Commissioner's own initiative or at the request of a participant. As will be apparent from these reasons, the Commissioner did not consider the interpretation and application of schedule 3, section 10(4) of the RTI Act warranted referral to QCAT.

¹² Submissions dated 26 October 2012. The applicant also submitted (in both its submissions dated 26 October 2012 and 1 November 2012) that guidelines prepared by OIC on the operation of schedule 3, section 10(4) of the RTI Act, a copy of which were forwarded to the applicant in the course of this review, were 'ultra vires'. I do not comprehend the exact nature of this submission, however insofar as it may be intended to suggest I am, in making my decision, preferring these guidelines to the actual text of the RTI Act, I reject it. My decision is based entirely on my interpretation of schedule 3, section 10(4) of the RTI Act, as explained in these reasons.

¹³ Submissions dated 1 November 2012.

¹⁴ As above.

30. The applicant thus, as I understand, essentially contends that I should apply the ‘golden rule’ so as to overlook the wording of section 10(4) and instead adopt a construction that is in keeping with the arguments it advances in paragraph 28 above. The applicant further contends¹⁵ that as the RTI Act is beneficial legislation, any ambiguity in schedule 3, section 10(4) of the Act (which the applicant argues exists) should be interpreted so as to favour the applicant, as a member of that class of persons – the general community – the Act is intended to assist.
31. Whilst I agree that the RTI Act is beneficial legislation, I do not accept the applicant’s submissions that schedule 3, section 10(4) of the RTI Act must be read together with section 10(1) of the RTI Act, nor do I accept that any ambiguity arises in interpreting this provision. I consider that schedule 3, section 10(4) of the RTI Act comprises a discrete provision to be construed and applied independently of section 10(1). The very use of the word ‘also’ in the provision clearly, in my view, distinguishes the provision from the balance of this section.
32. My view in this regard is confirmed by the Explanatory Memorandum to the Bill¹⁶ inserting the predecessor to schedule 3, section 10(4) of the RTI Act,¹⁷ which expressly records that the purpose of the section was to introduce a ‘*new exemption which exempts information obtained, used or prepared for investigations by the Crime and Misconduct Commission (CMC) or another agency.*’
33. As I am satisfied that schedule 3, section 10(4) of the RTI Act is to be read as a specific, discrete provision, and not in conjunction with schedule 3, section 10(1),¹⁸ it is not relevant to assess whether disclosing the information sought could reasonably be expected to have a prejudicial effect, as is required when considering one of the various subsections of section 10(1).
34. Schedule 3, section 10(4) of the RTI Act operates to provide that information falling within a defined class or category will comprise exempt information to which access may be refused, irrespective of whether disclosure of specific information in issue would have any prejudicial consequences. All that is required is satisfaction of the several requirements enumerated in paragraph 16. The applicant’s contentions to the contrary are simply not open on the plain language of the provision.¹⁹
35. It follows, therefore, that the words ‘*obtained, used or prepared*’ are to be construed as I have explained at paragraph 17 above. This is the clear, express language of the provision, and there is no ambiguity nor anything else in the text of the section – read as a discrete exemption provision – that in any way permits me to replace these words with ‘work product’ or something similar as argued by the applicant.

¹⁵ As above.

¹⁶ *Freedom of Information and Other Legislation Amendment Bill 2005* (Qld), a provision equivalent to schedule 3, section 10(4) of the RTI Act having originally been inserted into the now-repealed *Freedom of Information Act 1992* (Qld). While, as noted, that latter Act was repealed, this provision was preserved and enacted in materially equivalent terms in the RTI Act, and I am therefore satisfied the Explanatory Memorandum continues to have relevance in considering schedule 3, section 10(4).

¹⁷ Into, as noted, the *Freedom of Information Act 1992* (Qld) (repealed).

¹⁸ A conclusion which also disposes of another of the applicant’s submissions – that ‘the latter general provisions [of] 10(4) do not repeal or implicitly amend 10(1)...’ (submissions dated 1 November 2012). This submission is as I understand founded on the principle that where conflict exists between a general and a specific provision, the latter prevails. It is not a matter I need consider further, on the basis I am, as noted, satisfied that 10(4) is itself a specific provision, which operates entirely independently of (and harmoniously with) schedule 3 section 10(1) of the RTI Act. Accordingly, schedule 3 section 10(4) of the RTI Act does not ‘repeal’, ‘amend’ or otherwise modify schedule 3 section 10(1), but merely inserts a further category or class of exempt information, to which access may be refused. While some of this latter information might conceivably also qualify for exemption under one or more of the subsections of section 10(1), a mere overlap of this kind does not amount to a ‘conflict’ between provisions nor comprise a ‘repeal’ or ‘amendment’ by the later provision of the earlier.

¹⁹ And would, if accepted, require me to very much ‘strain or exceed’ the words of the provision, contrary to the authority on which the applicant relies in part in making these submissions: relevantly, Al MacAdam and TM Smith, *Statutes – Rules and Examples*, 3rd edition, (1993). The applicant’s submissions relevantly refer to page 298 of this text.

36. Due to the way in which schedule 3, section 10(4) of the RTI Act is framed, I acknowledge the potential for the result suggested by the applicant; that is, exemption of a document otherwise in the public domain, where such a document has subsequently been 'obtained' by the CMC in the course of conducting an investigation.²⁰ While I recognise that this may be a somewhat anomalous²¹ result, it does not, however, of itself amount to an 'absurdity', 'repugnance' or 'ambiguity' of the kind that would permit me to depart from the otherwise literal meaning of schedule 3, section 10(4) of the RTI Act.
37. While the general intent of the RTI Act is to confer a right of access on persons to government held information, that right is not an unqualified right. There are a number of qualifications and limitations to the right as prescribed in the Act itself. Schedule 3, section 10(4) is one of these qualifications. Although schedule 3, section 10(4) of the RTI Act is framed in broad terms, such breadth does not comprise a 'repugnance' of the kind understood to permit a decision maker to depart from what is otherwise clear statutory language. To the contrary, it merely reflects the operation of the access scheme set out in the RTI Act – a right of access the Parliament has seen fit to confer, and, equally, seen fit to qualify, including by way of schedule 3, section 10(4) of the RTI Act.
38. I am satisfied schedule 3, section 10(4) of the RTI Act is to be interpreted and applied according to its plain and literal meaning, in other words, as I have explained at paragraphs 16-17 above. I am further satisfied that, as I have found at paragraphs 18-25, it does so apply in this case, such that any documents requested by the applicant would comprise exempt information.

Discretion to release information

39. The applicant also noted the discretion expressly conferred²² on an agency or Minister to release documents, even where those documents otherwise satisfy the requirements for refusing access, stating:²³

If we are wrong in the construction and interpretation of section 10 of schedule 3 there exists extraordinary circumstances to ensure public confidence that the appointment of senior positions of the Public Service are done so in accordance with the legislation and free of any taint of possible cronyism, so much so that the agency, that is [the Department], should consider the release of the documents sought in conjunction with section 39(3) of the [RTI Act].

40. The exercise of the discretion to release documents to which access may otherwise be refused is exclusively reserved to agencies such as the Department – I have no such discretion.²⁴ More significantly, the discretion only arises where an agency has determined to refuse access to documents. That is not the case in this review. As noted above, the Department did not decide to refuse access to documents, but to refuse to deal with the applicant's application for access to documents, under a provision that allowed it to do so without having identified any documents.²⁵ In these circumstances, the discretion to release documents under the RTI Act can obviously have no operation.

²⁰ The applicant in its submissions gave the example of a gazettal notice of an officer's appointment.

²¹ Although certainly not, unique or unprecedented – the Cabinet exemption as it applied under the *Freedom of Information Act 1992* (Qld), for example, could also operate to exempt from disclosure otherwise public information: see, for example, the Information Commissioner's observations in *Woodyatt and Minister for Corrective Services* (1995) 2 QAR 383, at [12].

²² Section 48(3) of the RTI Act.

²³ Submissions dated 1 November 2012.

²⁴ Section 105(2) of the RTI Act.

²⁵ Section 40(2) of the RTI Act.

DECISION

41. I affirm the decision under review and find that the Department may refuse to deal with the application under section 40 of the RTI Act on the basis that the access application is expressed to relate to all documents that relate to a stated subject matter, and that all of the documents, where such documents exist, would comprise exempt information under schedule 3, section 10(4) of the RTI Act.
42. I have made this decision as a delegate of the Acting Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

Suzette Jefferies
Assistant Information Commissioner

Date: 1 February 2013

APPENDIX**Significant procedural steps**

Date	Event
25 July 2012	The applicant applied to the Department for access to documents relating to the recruitment for the position of Departmental Liaison Officer within the Department.
29 August 2012	The Department issued a notice of decision to the applicant.
21 September 2012	The applicant applied to the OIC for external review of the Department's decision.
4 October 2012	OIC informed the applicant and the Department that the applicant's external review application had been accepted.
17 October 2012	OIC conveyed a preliminary view to the applicant and invited the applicant to provide submissions supporting its case by 31 October 2012 if it did not accept the preliminary view.
26 October 2012	OIC received submissions from the applicant.
30 October 2012	An OIC officer discussed the preliminary view with the applicant.
31 October 2012	The applicant lodged further submissions in support of its case for access.
1 November 2012	The applicant submitted a 'corrected' version of the 31 October 2012 submissions.
16 November 2012	An OIC officer confirmed the applicant did not accept OIC's preliminary view. An OIC officer explained the next step would comprise a formal decision.
17 December 2012	An OIC officer confirmed with the Department that it had complied with the CMC request for the Department to supply the CMC with copies of all documents concerning the recruitment process.