



Decision and Reasons for Decision

Citation:	<i>K78 and Queensland Police Service [2020] QICmr 65 (2 November 2020)</i>
Application Number:	315365
Applicant:	K78
Respondent:	Queensland Police Service
Decision Date:	2 November 2020
Catchwords:	ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION – application for access to information supplied by third party concerning weapons licensing – whether disclosure would reveal information that could reasonably be expected to identify a confidential source of information in relation to the enforcement or administration of the law – whether information is exempt from disclosure under section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(a) and 48 and schedule 3, section 10(1)(b) of the <i>Right to Information 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 ‘a copy of a recent application made to weapons licensing claiming that I am not fit and proper person to hold a weapons licence.’
2. QPS located one document, a single page (**Information in Issue**). QPS did not, however, make a decision within the timeframe prescribed in the IP Act.² Under section 66 of the IP Act, QPS was therefore taken³ to have made a decision refusing access to the Information in Issue (**Deemed Refusal**).⁴
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of QPS’ Deemed Refusal.⁵ During the review, QPS submitted that access to the Information in Issue may be refused on the ground it comprises exempt information, as information the disclosure of which would found an action for a breach of confidence.⁶

¹ Application received 3 March 2020.

² 25 business days: section 22 of the IP Act.

³ On 7 April 2020.

⁴ QPS notified the applicant of the Deemed Refusal by letter dated 16 April 2020.

⁵ The applicant forwarded to OIC a copy of QPS’s 16 April 2020 letter advising of the Deemed Refusal, and some related correspondence, which was received on 29 April 2020. OIC took this material to comprise an application for external review of the Deemed Refusal.

⁶ Sections 47(3)(a), 48 and schedule 3, section 8(1) of the *Right to Information Act 2009* (Qld). As explained further below, these provisions apply to applications made under the IP Act: section 67(1) of the IP Act.

4. Having examined the Information in Issue, and considered all relevant submissions and circumstances, I agree with QPS that the document comprises exempt information to which access may be refused. I find, however, that this is because the Information in Issue's disclosure could reasonably be expected to identify a confidential source of information in relation to the enforcement or administration of the law.⁷ I vary the decision under review accordingly.

Background

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

Reviewable decision

6. The decision under review is the Deemed Refusal QPS is taken to have made under section 66 of the IP Act.

Evidence considered

7. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and the Appendix).
8. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information as embodied in section 21 of that Act. I consider that, in observing and applying the law prescribed in the IP Act and RTI Act, an IP/RTI decision-maker will be '*respecting and acting compatibly with*' this right and others prescribed in the HR Act,⁸ and that I have done so in making this decision, as required under section 58(1) of the HR Act. In this regard, I note Bell J's observations on the interaction between the Victorian analogues of Queensland's RTI Act and HR Act: '*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*'.⁹

Information in issue

9. The Information in Issue comprises the one-page document located by QPS.

Issues for determination

10. The issue for determination is whether grounds exist for refusing access to the Information in Issue; specifically, whether its disclosure could reasonably be expected to identify a confidential source of information in relation to the enforcement or administration of the law.

Relevant law

11. An individual has a right to be given access to documents of an agency to the extent they contain the individual's personal information.¹⁰ While the IP Act is to be administered with a pro-disclosure bias,¹¹ the right of access is subject to a number of exclusions and limitations, including grounds for refusal of access.

⁷ Schedule 3, section 10(1)(b) of the RTI Act.

⁸ *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].

⁹ *XYZ*, at [573].

¹⁰ Under section 40(1)(a) of the IP Act.

¹¹ Section 64(1) of the IP Act, a bias I have kept in mind in making this decision.

12. Section 67(1) of the IP Act provides that access to a document may be refused on the same grounds upon which access to a document could be refused under section 47 of the RTI Act. Section 47(3)(a) of the RTI Act permits an agency to refuse access to documents to the extent they comprise 'exempt information'.¹²
13. Exempt information includes information the disclosure of which 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.¹³ Information will be exempt on this basis if:
 - there exists a confidential source of information
 - the information which the confidential source has supplied is in relation to the enforcement or administration of the law; and
 - disclosure of the information in issue could reasonably be expected¹⁴ to enable the existence or identity of the confidential source of information to be ascertained.¹⁵

Findings

14. I am satisfied that all the above requirements are met, as:
 - the Information in Issue was imparted to QPS subject to an implicit common understanding on both the part of the source and QPS that the former's identity would be treated as confidential
 - the Information in Issue relates to the enforcement or administration of the law, namely the *Weapons Act 1990* (Qld); and
 - disclosure of this information would reveal information that could reasonably be expected to enable the source's identity to be ascertained.
15. I have discussed each requirement below.

Confidential source of information

16. A 'confidential source of information' is a person who has supplied information on the understanding, express or implied, that their identity will remain confidential.¹⁶
17. There is no evidence before me of an express agreement as to confidentiality. Nevertheless, a common implicit understanding of confidentiality will, as noted above, be sufficient for the purposes of satisfying the first requirement for establishing exemption under schedule 3, section 10(1)(b) of the RTI Act.¹⁷ The Information Commissioner set out considerations that may be relevant to determining the existence of such an understanding in *McEnery*.¹⁸

The determination of whether the relevant information was supplied by the informant and received by the respondent on the implicit understanding that the informant's identity would remain confidential (and hence whether the informant qualifies as a confidential source of

¹² As further defined in section 48 and schedule 3 of the RTI Act.

¹³ Schedule 3, section 10(1)(b) of the RTI Act.

¹⁴ The phrase 'could reasonably be expected to' requires an objective consideration of all the relevant evidence and consideration of whether the expectation is reasonably based. A reasonable expectation is not irrational, absurd or ridiculous. *Sheridan and South Burnett Regional Council and Others* [2009] QICmr 26 (9 April 2009) at paragraphs [189] – [193] referring to *Attorney-General v Cockcroft* (1986) 64 ALR 97.

¹⁵ *McEnery and Medical Board of Queensland* (1994) 1 QAR 349 at paragraph [16]. *McEnery* considered the application of section 42(1)(b) of the *Freedom of Information Act 1992* (Qld), identical in terms to schedule 3, section 10(1)(b) of the RTI Act.

¹⁶ *McEnery*, at [21]-[22].

¹⁷ *McEnery*, at [20]-[34].

¹⁸ At [50].

information for the purposes of s.42(1)(b)) requires a careful evaluation of all the relevant circumstances including, inter alia, the nature of the information conveyed, the relationship of the informant to the person informed upon, whether the informant stands in a position analogous to that of an informer ..., whether it could reasonably have been understood by the informant and recipient that appropriate action could be taken in respect of the information conveyed while still preserving the confidentiality of its source, whether there is any real (as opposed to fanciful) risk that the informant may be subjected to harassment or other retributive action or could otherwise suffer detriment if the informant's identity were to be disclosed, and any indications of a desire on the part of the informant to keep his or her identity confidential (e.g. a failure or refusal to supply a name and/or address, cf. Re Sinclair, McKenzie's case, cited in paragraph 36 above).

18. It is clear from the Information in Issue that the source sought to have the confidentiality of the source's identity preserved. Other pertinent considerations are:
 - the nature of the information communicated and the context of its communication
 - the actual identity of the source
 - QPS' treatment of the source's identity;¹⁹ and
 - the fact that it was possible for QPS to take appropriate action in respect of the information conveyed,²⁰ while preserving the confidentiality of its source.
19. Having regard to all relevant circumstances, I am satisfied that there existed a common implicit understanding that the identity of the source would be treated confidentially by QPS.
20. The first requirement stated in paragraph 13 is met.

'In relation to the enforcement or administration of the law'

21. The phrase "*in relation to the enforcement or administration of the law*" is broad in scope.²¹ I am satisfied information contained in the Information in Issue, pertaining as it does to the regulation of weapons licensing under the *Weapons Act 1990* (Qld), falls well within that scope.
22. The second requirement stated in paragraph 13 is therefore fulfilled.

Enable identification of source

23. The identity of the source is apparent on the face of the Information in Issue. I am satisfied from my examination of that information that its disclosure could reasonably be expected to enable the identity of the source to be ascertained.
24. The third requirement for establishing the exemption prescribed in schedule 3, section 10(1)(b) of the RTI Act is, therefore, also met.

Conclusion

25. Schedule 3, section 10(1) of the RTI Act is subject to several exceptions, as stated in schedule 3, section 10(2)(a)-(e). None are applicable in this case.

¹⁹ Ie, keeping it confidential.

²⁰ Including conveying an overview of that information to the applicant: see QPS letter to applicant dated 12 February 2020.

²¹ See the judgment of Jones J in *Re Croom and Accident Compensation Commission* (1989) 3 VAR 441, discussed and cited with approval in *McEniery* (at [36]-[43]).

26. As all requirements for exemption under schedule 3, section 10(1)(b) of the RTI Act are satisfied, and none of the exceptions in section 10(2) have any application, the Information in Issue therefore comprises exempt information.
27. Accordingly, QPS may refuse access to the Information in Issue, under sections 47(3)(a) and 48 of the RTI Act and section 67(1) of the IP Act.

Applicant's submissions

28. I conveyed the thrust of the above reasoning to the applicant by letter dated 4 September 2020. Most of the applicant's submissions in reply²² canvass issues that are beyond my remit, or not relevant to the issues I am empowered to determine under the IP Act and RTI Act.
29. The applicant did, however, submit that the information contained in the Information in Issue is 'false'. There is nothing before me to confirm this submission. In any event, as I advised the applicant by letter dated 15 October 2020, the accuracy or otherwise of information is not relevant to the application of schedule 3, section 10(1)(b) of the RTI Act.²³ I am, as noted, satisfied that the Information in Issue is exempt under this provision.

DECISION

30. I vary QPS's Deemed Refusal under section 123(1) of the IP Act, by finding that the Information in Issue is exempt information under sections 47(3)(a), 48 and schedule 3, section 10(1)(b) of the RTI Act. Access to that information may be refused, under those sections and section 67(1) of the IP Act.
31. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

Louisa Lynch
Right to Information Commissioner

Date: 2 November 2020

²² Dated 29 September 2020.

²³ This provision is '*...not concerned with whether the confidential source of information supplies information which is false or erroneous*': *McEnery*, at [64]. See also *Christophers and Redland City Council* (Unreported, Queensland Information Commissioner, 6 August 2009), at [51]-[53].

APPENDIX

Significant procedural steps

Date	Event
29 April 2020	OIC received the applicant's application for external review.
6 and 18 May 2020	OIC asked QPS to advise whether it wished to apply for further time to deal with the applicant's access application under section 106(1)(b) of the IP Act.
23 May 2020	QPS declined to apply for further time to deal with the access application.
1 June 2020	OIC wrote to QPS, requesting procedural documents and information. OIC emailed the applicant, acknowledging receipt of the application for external review.
2 June 2020	OIC received requested documents and information from QPS.
5 June 2020	OIC advised the applicant and QPS that the application for external review had been accepted. OIC asked QPS for a copy of the Information in Issue.
24 August 2020	QPS supplied a copy of the Information in Issue and submissions.
27 August 2020	OIC requested from and QPS supplied additional information.
31 August 2020	OIC wrote to QPS advising next steps in the review. The applicant wrote to OIC, enquiring as to the status of the external review. OIC replied to the applicant, providing the requested update.
4 September 2020	OIC wrote to the applicant conveying the preliminary view that access to the Information in Issue may be refused under schedule 3, section 10(1)(b) of the RTI Act and inviting submissions in reply.
6 September 2020	The applicant requested additional time to reply to OIC's 4 September 2020 preliminary view.
7 September 2020	OIC granted the applicant additional time, as requested.
29 September 2020	OIC received the applicant's submissions.
15 October 2020	OIC wrote to the applicant, reiterating OIC's 4 September 2020 preliminary view. OIC provided QPS with an update on the status of the review.