



## Decision and Reasons for Decision

---

**Application Number:** 310355

**Applicant:** Ferguson

**Respondent:** Department of Police

**Decision Date:** 1 December 2011

**Catchwords:** **RIGHT TO INFORMATION – application for access to information about a murder investigation and a witness statement – refusal of access – section 47(3)(b) of the *Right to Information Act 2009* (Qld) – whether disclosure of the information would, on balance, be contrary to the public interest**

### Contents

REASONS FOR DECISION .....	2
Summary .....	2
Background.....	2
Reviewable decision .....	2
Evidence considered .....	2
Information in issue.....	3
Issue for determination .....	3
Relevant law .....	3
Applicant’s submissions.....	3
Findings .....	3
Relevant factors favouring disclosure of the Information in Issue .....	4
Relevant factors favouring nondisclosure of the Information in Issue .....	4
Balancing the relevant factors.....	4
DECISION .....	6
APPENDIX .....	7
Significant procedural steps.....	7

## REASONS FOR DECISION

### Summary

1. In 2001, Mr Mark Ferguson and Mr Neil Ferguson were charged with murder. Mark Ferguson was committed to trial. At trial, the jury was unable to reach a verdict and a retrial was ordered. Mark Ferguson passed away shortly after being granted bail and before the commencement of the retrial. Neil Ferguson was not committed to trial and subsequently commenced a civil action for false and unlawful imprisonment in which he was ultimately unsuccessful.
2. The applicant is the father of Mark and Neil Ferguson and made an application under the *Right to Information Act 2009 (Qld)* (**RTI Act**) to the Department of Police<sup>1</sup> (**QPS**) for access to a range of information relating to the investigation.
3. In its decision, QPS relied on section 55 of the RTI Act to neither confirm nor deny the existence of the requested documents. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of QPS's decision.
4. During the course of the external review, QPS withdrew its claim under section 55 of the RTI Act and submitted that disclosure of the remaining information in issue would, on balance, be contrary to the public interest.
5. For the reasons set out below, I find that access to the remaining information in issue should be refused under section 47(3)(b) of the RTI Act on the basis that its disclosure would, on balance, be contrary to the public interest.

### Background

6. Significant procedural steps relating to the application are set out in the Appendix.

### Reviewable decision

7. The decision under review is QPS's decision dated 18 August 2010.

### Evidence considered

8. In making my decision, I have considered the following:
  - the access application and QPS's decision
  - other correspondence between QPS and the applicant relevant to the access application
  - the applicant's external review application to OIC
  - file notes of telephone conversations between the applicant and staff members of OIC
  - file notes of telephone conversations between staff members of QPS and OIC
  - QPS's submissions
  - the applicant's submissions
  - the documents remaining in issue
  - relevant provisions of the RTI Act
  - previous decisions of OIC as identified below; and
  - the decision of Justice Lyons in *Ferguson v State of Queensland & Anor.*<sup>2</sup>

---

<sup>1</sup> The Department of Police is commonly known as the Queensland Police Service.

<sup>2</sup> [2007] QSC 322.

## Information in issue

9. A number of issues have been informally resolved during the course of this external review and the chronology of events has been partially disclosed to the applicant. The information remaining in issue in this review (**Information in Issue**) comprises:
- chronology of events (remaining parts)
  - running sheet for Operation Spent; and
  - witness statement provided by another individual.

## Issue for determination

10. The issue for determination is whether disclosure of the Information in Issue would, on balance, be contrary to the public interest.

## Relevant law

11. Section 44(1) of the RTI Act provides that if an access application is made to an agency for a document, the agency should decide to give access to the document unless giving access would, on balance, be contrary to the public interest.
12. 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 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. However, in some circumstances public interest considerations can also apply for the benefit of particular individuals.
13. To decide whether disclosure of the Information in Issue would be contrary to the public interest, I must:<sup>3</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.

## Applicant's submissions

14. The applicant provides reasons for requesting access to the Information in Issue and explains how, in his view, the contents of the Information in Issue will support certain theories that he has about the QPS investigation. The applicant has concerns about several aspects of the QPS investigation, and makes allegations about QPS deliberately ignoring or covering up certain evidence, or distorting the time at which it was identified.

## Findings

15. I have carefully considered the applicant's correspondence with QPS and OIC and note the applicant's serious concerns about certain aspects of the police investigation. OIC does not have jurisdiction to consider the applicant's theories about QPS's handling of

---

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

the investigation and therefore, to the extent the applicant's submissions relate to this issue, I have not considered them in this review.

16. No irrelevant factors arise in this case. I will now consider the relevant factors favouring disclosure and non disclosure of the Information in Issue.

***Relevant factors favouring disclosure of the Information in Issue***

17. I am satisfied that the factors favouring disclosure of the Information in Issue include:

- disclosure of the information could reasonably be expected to:
  - promote open discussion of public affairs and enhance the Government's accountability<sup>4</sup>
  - allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official<sup>5</sup>
  - reveal the reason for a government decision and any background or contextual information that informed the decision,<sup>6</sup> and
- some of the information is the personal information of an individual who is deceased and the applicant is an eligible family member of the deceased person.<sup>7</sup>

***Relevant factors favouring nondisclosure of the Information in Issue***

18. I am satisfied that the factors favouring nondisclosure of the Information in Issue include:

- disclosure of the information could reasonably be expected to:
  - prejudice the protection of an individual's right to privacy<sup>8</sup>
  - cause a public interest harm because disclosure would disclose personal information of a person, whether living or dead<sup>9</sup>
  - prejudice the flow of information to the police or another law enforcement or regulatory agency,<sup>10</sup> and
- the information is the personal information of an individual who is deceased, the applicant is an eligible family member of the deceased person and the disclosure of the information could reasonably be expected to impact on the deceased person's privacy if the deceased person were alive.<sup>11</sup>

***Balancing the relevant factors***

19. I acknowledge that the applicant has concerns about the integrity of the QPS investigation. In my view, there is a strong public interest in QPS being accountable to the public for the conduct of a complex murder investigation and the decision to charge particular individuals. To the extent that disclosure of the Information in Issue could identify any procedural or substantive issues concerning the conduct of the

---

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

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

<sup>6</sup> Schedule 4, part 2, item 11 of the RTI Act.

<sup>7</sup> Schedule 4, part 2, item 9 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 6(1) of the RTI Act.

<sup>10</sup> Schedule 4, part 3, item 13 of the RTI Act.

<sup>11</sup> Schedule 4, part 3, item 5 of the RTI Act.

investigation, or reveal the reasons for the decision to charge the particular individuals, I consider these factors are relevant.

20. However, the purpose of the murder trial in the Supreme Court was to determine whether there was sufficient evidence for Mark Ferguson to be convicted of murder. As the prosecution bears the onus of proof in such matters, a criminal trial is a way of testing the strength of the evidence gathered by QPS and reveals the reasons for the decision to charge the accused. I note that the jury in that trial could not reach a verdict and a retrial was ordered.
21. I also note that the issues surrounding the arrest and imprisonment of Neil Ferguson were considered by the Supreme Court in 2007. The Court decided that the arrest and imprisonment were not unlawful or negligent and that the arrest was made after a proper assessment of the evidence.<sup>12</sup>
22. Therefore, in my view, the relevant issues have previously been determined by a jury at the conclusion of a criminal trial and by the Supreme Court in a civil context. As a result, the weight of the factors favouring disclosure is reduced considerably and, in my view, they should be afforded limited to moderate weight.
23. I am satisfied that the majority of the Information in Issue comprises personal information<sup>13</sup> of individuals including Mark and Neil Ferguson, the victim, his family, witnesses, informants, persons of interest and members of the public. In my view, the disclosure of this information could reasonably be expected to prejudice the protection of the right to privacy of these individuals<sup>14</sup> and cause a public interest harm.<sup>15</sup> These are factors which favour nondisclosure of the information and should be afforded significant weight in the circumstances of this case.
24. As noted above, some of the information comprises Mark Ferguson's personal information. As he is deceased and the applicant is his father, the applicant is recognised as an "eligible family member", as defined under schedule 6 of the RTI Act. This gives rise to a public interest factor favouring disclosure of Mark Ferguson's personal information.<sup>16</sup> However, the RTI Act also gives rise to a public interest factor favouring nondisclosure of information in circumstances where:
  - the information is the personal information of an individual who is deceased
  - the applicant is an eligible family member of the deceased person; and
  - disclosure of the information could reasonably be expected to impact on the deceased person's privacy if the deceased person were alive.<sup>17</sup>
25. I am satisfied that the Information in Issue is highly sensitive in nature and its disclosure could reasonably be expected to impact on Mark Ferguson's privacy if he were alive. Accordingly, I have afforded this factor moderate weight in the circumstances.
26. The information in the running sheet and witness statement and most of the information in the chronology of events comprises information provided to QPS by witnesses or informants. Disclosure of this type of information could, in my view, reasonably be

<sup>12</sup> *Ferguson v State of Queensland & Anor* [2007] QSC 322 at paragraphs 133 and 134.

<sup>13</sup> Section 12 of the *Information Privacy Act 2009* (Qld) defines personal information 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>14</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>15</sup> Schedule 4, part 4, item 6 of the RTI Act.

<sup>16</sup> Schedule 4, part 2, item 9 of the RTI Act.

<sup>17</sup> Schedule 4, part 3, item 5 of the RTI Act.

expected to prejudice the flow of information to QPS.<sup>18</sup> I am satisfied that this factor should be afforded very significant weight.

27. On careful consideration of the factors set out above, I am satisfied that disclosure of the Information in Issue would, on balance, be contrary to the public interest under section 49 of the RTI Act.

## **DECISION**

28. For the reasons set out above, I vary QPS's decision in relation to the Information in Issue and find that access can be refused under sections 47(3)(b) and 49 of the RTI Act on the basis that disclosure would, on balance, be contrary to the public interest.
29. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

---

**A Rickard**  
**Acting Assistant Information Commissioner**

**Date: 1 December 2011**

---

<sup>18</sup> Schedule 4, part 3, item 13 of the RTI Act.

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

<b>Date</b>	<b>Event</b>
23 July 2010	The applicant makes an access application to QPS under the RTI Act.
3 August 2010	QPS issues a preliminary view to the applicant and requests submissions addressing public interest factors.
12 August 2010	The applicant provides QPS with submissions in support of his case.
18 August 2010	QPS decides to rely on section 55 of the RTI Act to neither confirm nor deny the existence of the requested documents.
1 September 2010	The applicant applies to OIC for external review of QPS's decision.
7 September 2010	QPS provides OIC with information relevant to the external review.
23 September 2010	OIC notifies the applicant and QPS that the application for external review has been accepted. OIC requests that QPS provide further submissions on section 55 of the RTI Act by 11 October 2010.
30 September 2010	QPS provides OIC with further submissions in relation to section 55 of the RTI Act.
8 October 2010	The applicant provides OIC with submissions in support of his case.
12 October 2010	OIC requests that QPS conduct searches for any documents which may exist and are relevant to the access application and provide a copy by 26 October 2010.
26 October 2010	QPS provides documents relevant to the review.
19 August 2011	A staff member of OIC meets with a staff member of QPS and conveys a preliminary view in relation to section 55 of the RTI Act. QPS requests a written preliminary view.
23 August 2011	OIC conveys a written preliminary view to QPS and requests further submissions by 6 September 2011.
24 August 2011	QPS requests an extension of time to provide submissions.
29 August 2011	QPS notifies OIC that it withdraws its claim under section 55 of the RTI Act in relation to some of the requested information.
30 August 2011	In a telephone conversation with a staff member of OIC, the applicant indicates that he no longer seeks access to certain information and provides submissions in support of his case.
31 August 2011	The applicant provides submissions in support of his case.
1 September 2011	OIC requests that QPS provide submissions in relation to the relevant documents in issue by 15 September 2011.
16 September 2011	QPS provides submissions in support of its case and agrees to partially release the chronology of events to the applicant.
19 September 2011	A staff member of OIC telephones QPS to request further submissions.
20 October 2011	QPS provides further submissions in support of its case.
25 October 2011	OIC requests that QPS provide the applicant with the relevant parts of the chronology of events by 4 November 2011.
25 October 2011	The applicant provides further submissions in support of his case by telephone to a staff member of OIC. OIC requests that QPS provide further submissions in support of its case.

<b>Date</b>	<b>Event</b>
1 November 2011	QPS provides further submissions in support of its case.
3 November 2011	OIC conveys a preliminary view to the applicant and invites the applicant to provide submissions in support of his case by 24 November 2011 if he does not accept the preliminary view. The applicant notifies OIC that he does not accept the preliminary view.
3, 7 November 2011	QPS provides further submissions in support of its case.
8, 30 November 2011	The applicant provides further submissions in support of his case.