



Decision and Reasons for Decision

Citation:	<i>Werthenbach and Queensland Police Service</i> [2017] QICmr 16 (12 May 2017)
Application Number:	312893
Applicant:	Werthenbach
Respondent:	Queensland Police Service
Decision Date:	12 May 2017
Catchwords:	ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION – INVESTIGATION BY PRESCRIBED CRIME BODY – information concerning the investigation of a complaint made by the applicant about police officers – whether information was obtained, used or prepared for an investigation by a prescribed crime body or another agency in the performance of the prescribed functions of the prescribed crime body – whether information is about the applicant – sections 47(3)(a) and 48 and schedule 3, section 10(4) of the <i>Right to Information Act 2009</i> (Qld) – exception in schedule 3, section 10(6) of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant¹ applied to the Queensland Police Service (**QPS**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to various documents relating to the investigation of a complaint made by the applicant about certain QPS officers.
2. The Public Safety Business Agency (**PSBA**), on behalf of QPS,² decided to refuse access to all documents requested by the applicant on the basis that they comprise exempt information under schedule 3, section 10(4) of the RTI Act.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of QPS's decision. During the course of this review, QPS agreed to release some documents to the applicant and the applicant agreed to exclude some documents from consideration.

¹ At all times during the processing of the access application and this external review, the applicant has been represented by her authorised legal representative.

² At the time of the access application and the decision under review, PSBA provided corporate and business services on behalf of QPS, including delegated decision making under section 30 of the RTI Act.

4. For the reasons set out below, I affirm the QPS decision with respect to the documents that remain in issue.

Background

5. Significant steps taken during the external review process are set out in the Appendix.

Reviewable decision

6. The decision under review is the decision by PSBA on behalf of QPS dated 20 June 2016.

Information in issue

7. QPS agreed to release some documents to the applicant during the external review.³ The applicant also agreed to exclude some documents from consideration.⁴
8. The information remaining in issue consists of documents relating to an investigation into the actions of QPS police officers initiated by the applicant's complaint and conducted by QPS's Ethical Standards Command (**Investigation Documents**).⁵

Issue for determination

9. The issue for determination is whether the Investigation Documents may be refused⁶ on the ground that they are exempt information under schedule 3, section 10(4) of the RTI Act and, more particularly, whether the exception in schedule 3, section 10(6) of the RTI Act applies, and prevents the Investigation Documents from qualifying as exempt information of this nature.

Evidence considered

10. The evidence, submissions, legislation and other material considered in reaching this decision are disclosed in these reasons (including footnotes and appendix).

Relevant law

11. The RTI Act confers a right to access documents of government agencies.⁷ This right is subject to other provisions of the RTI Act, including grounds on which access may be refused. Relevantly, an agency may refuse access to documents to the extent they comprise exempt information.⁸ Schedule 3 of the RTI Act sets out the various types of exempt information.⁹
12. One type of exempt information is set out in schedule 3, section 10(4) of the RTI Act—namely, information obtained, used or prepared for an investigation by a prescribed crime body, or another agency, in the performance of the prescribed functions of the prescribed crime body.

³ Pages 13 and 20 of the 22 pages considered in QPS's decision and an additional page located on external review (as agreed in correspondence from QPS to OIC dated 12 December 2016 and provided by QPS to the applicant on 25 January 2017).

⁴ Pages 11, 12, 14 to 19, 21 and 22 of the 22 pages considered in QPS's decision (as agreed in telephone conversations between OIC and the applicant on 28 October 2016 and 20 January 2017).

⁵ Pages 1 to 10 of the 22 pages considered in QPS's decision.

⁶ Under section 47(3)(a) of the RTI Act.

⁷ Section 23 of the RTI Act.

⁸ Section 47(3)(a) of the RTI Act.

⁹ Section 48(2) of the RTI Act.

13. However, schedule 3, section 10(6) of the RTI Act provides that this type of information is *not* exempt information if the investigation has been finalised and the information is about the applicant.

Findings

14. The applicant's submissions¹⁰ are directed at one issue—that is, whether the documents remaining in issue are 'about' the applicant. The applicant submits that the Investigation Documents are 'about' the applicant, and that the exception in schedule 3, section 10(6) of the RTI Act therefore applies, and prevents these documents from comprising exempt information under schedule 3, section 10(4) of the RTI Act.

Are the requirements of schedule 3, section 10(4) satisfied?

15. Given the focus of the applicant's submissions is on the exception to the exemption, the applicant is taken to accept that the requirements of the exemption itself are satisfied. QPS's position, as set out in its decision and confirmed on external review, is that the requirements of the exemption are satisfied.
16. In absence of any submissions to the contrary, and on careful consideration of the material before me, I too am satisfied that the Investigation Documents comprise the type of information set out in schedule 3, section 10(4) of the RTI Act.
17. In this regard, I note that the Investigation Documents were used during an investigation by QPS's Ethical Standards Command of the applicant's complaint about alleged actions by certain QPS officers, and that the alleged actions would, if proved, amount to police misconduct as defined in the *Crime and Corruption Act 2001* (Qld) (**CC Act**). Further, I am satisfied that the investigation was devolved to QPS by the Crime and Corruption Commission (**CCC**) and was subject to the CCC's monitoring, in accordance with the requirements of the CC Act. It is on this basis that I find that the Investigation Documents were obtained, used or prepared by QPS in the performance of a prescribed function¹¹—namely, the corruption function¹²—of a prescribed crime body¹³—that is, the CCC.

Does the exception in schedule 3, section 10(6) apply?

18. No, for the reasons that follow.
19. The parties agree that the investigation prompted by the applicant's complaint is finalised. On the material before me, I also consider this to be the case. Therefore, I find that the second requirement of the exception¹⁴ is satisfied.
20. However, for the exception to apply, the first requirement must also be satisfied—that is, the Investigation Documents must be about the applicant.¹⁵

¹⁰ In the application for external review dated 12 July 2016 and submissions dated 31 August 2016 and reiterated on 16 November 2016.

¹¹ As defined in schedule 3, section 10(9) of the RTI Act.

¹² See section 33 of the CC Act and definitions of 'corruption' and 'police misconduct' in schedule 2 of the CC Act.

¹³ As defined in schedule 3, section 10(9) of the RTI Act.

¹⁴ Schedule 3, section 10(6)(b) of the RTI Act.

¹⁵ Schedule 3, section 10(6)(a) of the RTI Act.

Applicant's submissions

21. The applicant submits:¹⁶

As our client ("the applicant") was directly involved in the incident giving rise to the complaint, and made the complaint which was the subject of the investigation, as such the documents requested consist of information about the applicant.

22. The applicant further submits:¹⁷

Distinguishing this matter and G8KPL2

In your preliminary decision of 29 August 2016 you made reference to the decision of G8KPL2 and the Department of Health. Unfortunately the factual circumstances of our application are different.

In G8KPL2, the complainant merely made the complaint against hospital staff without having any connection to the alleged misconduct subject of the investigation, other than to witness it.

In our client's case, in contrast, there is a connection about her in that the conduct of the officers involved her during the police actions at [address removed] on the 23 February 2013. We further note that our client participated in interviews with the police on 14/12/2015 relating to those incidents that were the subject of her complaint.

Therefore, because of this connection, the information we requested is 'about' our client.

Definition of 'About'

In the preliminary decision of the Assistant Commissioner of 29 August 2016 reference is made to the decisions of G8KPL2 and the Department of Health, Darlington and Queensland Police Service and Cameron and Queensland Police Service.

Unfortunately none of these decisions provide any detail on the factual situation they relate to so it is difficult to compare, however in both G8KPL2 and Cameron reference is made to the explanatory memorandum of the Freedom of Information and Other Legislation Amendment Bill 2005 (Qld) ("the Bill") which states:

A person could receive information about information given about them in the course of an interview and conclusions made about them in a report.

Therefore, applying the interpretation of 'about' using the explanatory memorandum information would have been given about our client in the course of an interview because she was directly involved in the police actions and she also conducted an interview with police during the course of their investigations. No doubt there were also conclusions in the report that we expect to have eventuated about our client.

Reference is also made in the aforementioned decisions to the Bill's Second Reading Speech which states that reference to the word "about" means investigation reports would only be released to either public officials or criminals of whom the investigation is about.

We submit that in the appeal to the Queensland Civil and Administrative Tribunal, Justice Carmody held in Darlington v Office of the Information Commissioner & Queensland Police Service that there is "nothing in the statutory context suggesting that a narrower, broader or materially different meaning should be adopted relative to its natural and ordinary meaning."

¹⁶ In the application for external review dated 12 July 2016.

¹⁷ Submission dated 31 August 2016. Footnotes have been omitted.

His Honour also stated the definition of 'about' stated in G8KPL2 should be construed to mean that there is a substantial connection with the allegation or investigations. He further went on to state

"The degree of connection required to satisfy that an object is about a subject will vary depending on the purpose and function of the relevant connection or relation, and the context within which the connection or relation is considered".

In light of this, we submit the following

- *Clarifying the definition of 'about' with reference to the Second Reading Speech is not conclusive as to meaning and substituting the words of the minister for the text of the law.*
- *The definition of about should be confined to its ordinary meaning.*
- *There is a sufficient or substantial connection with the allegations giving rise to the report because the police officers' conduct was directly related to our client and our client provided an interview to further the investigation. It is confirmed the client's complaint to the police was only about what occurred to her during the police action.*

Analysis

23. The Investigation Documents relate to a finalised investigation initiated by the applicant's complaint about the alleged actions of certain QPS officers. The applicant contends that her connection with the allegations and investigation is sufficient or substantial enough to render the Investigation Documents 'about' her, and to therefore enliven the exception to the exemption.
24. Neither the RTI Act nor the *Acts Interpretation Act 1954* (Qld) (**AI Act**) include a definition of 'about'. Consequently, the exception—including the word 'about' in schedule 3, section 10(6)(a)—is to be interpreted so as to best achieve¹⁸ and further¹⁹ the RTI Act's primary object of giving a right of access to government information unless, on balance, it is contrary to the public interest to do so.²⁰
25. Schedule 3, section 10(4) and 10(6) both accord with aspects of this object. The RTI Act indicates that Parliament considers that disclosure of the type of information in schedule 3, section 10(4) is, on balance, contrary to the public interest.²¹ However, the exception in schedule 3, section 10(6) evidences Parliament's intention that, in certain circumstances, giving access to information that meets the requirements of schedule 3, section 10(4) is, nevertheless, in the public interest and should occur.
26. In these circumstances, to give effect to the intention of the exception, OIC applies the ordinary meaning of 'about'—that is, *'of; concerning; in regard to ... connected with'*.²² This ordinary meaning is construed in accordance with Parliament's intention regarding the exception, as evidenced in extrinsic material²³—namely the **Explanatory Notes** to a Bill²⁴ which inserted provisions into the repealed *Freedom of Information Act 1992* (Qld)²⁵

¹⁸ Section 14A(1) of the AI Act.

¹⁹ Section 3(2) of the RTI Act.

²⁰ Section 3(1) of the RTI Act.

²¹ Section 48(2) of the RTI Act.

²² *Macquarie Dictionary Online* at <www.macquariedictionary.com.au>.

²³ Section 14B(1) of the AI Act.

²⁴ The Freedom of Information and Other Legislation Amendment Bill 2005 (Qld).

²⁵ At section 42(3A) and (3B). These provisions commenced on 31 May 2005.

that are now replicated in schedule 3, section 10(4) and (6) of the RTI Act; and the **Debate**²⁶ following the Second Reading of that Bill.²⁷

27. The applicant's submissions acknowledge that much of the Debate in Parliament that discussed the FOI Act predecessors of schedule 3, section 10(4) and (6) proceeded on the basis that those provisions would render investigation reports available only to persons who were the subjects of investigations.²⁸ The applicant's submissions contend, however, that in stating '[a] person could receive information about information given about them in the course of an interview and conclusions made about them in a report', the Explanatory Notes support a finding that the information in this matter is 'about' the applicant.

28. This statement appeared in the Explanatory Notes in the following context:

... The exemption is only to apply where the investigation is in performance of the [then Crime and Misconduct Commission's] crime function and misconduct functions ...

This exemption is to apply to the information obtained, used or prepared in the course of the investigation and the consideration of, and reporting of the investigation.

*This exemption does not apply if a person seeks information about themselves, including personal, professional, business and work-related information. However, a person can only receive such information once the investigation has been finalised. **For example, and subject to the other exemptions in the FOI Act, a person could receive information about allegations made against them, information given about them in the course of an interview and conclusions made about them in a report.***

[emphasis added]

29. When considered within the context of the surrounding discussion, the statement in the Explanatory Notes raised by the applicant does not, in my view, support the applicant's contention that the Investigation Documents are 'about' her. Instead, the Explanatory Notes, like the Debate, indicate Parliament's intention that the word 'about' be construed so as to enable a person the subject of an investigation to obtain information about that investigation once it has been finalised.
30. The question of whether information regarding an investigation is 'about' a complainant applicant for the purpose of schedule 3, section 10(6) of the RTI Act has been considered in several cases by OIC.²⁹ In these cases, OIC has interpreted 'about' in the manner noted above. Accordingly, the proposition that information regarding an investigation is 'about' an applicant, because the investigation was initiated by that applicant's complaint, has been consistently rejected.
31. The applicant submits that the present circumstances may be distinguished from those considered in one OIC decision—namely, *G8KPL2*. The applicant's submission is premised on an understanding that, in *G8KPL2*, the complainant applicant's only

²⁶ See Parliament's Record of Proceedings (Hansard) for 11 and 25 May 2005 at <<https://www.parliament.qld.gov.au/work-of-assembly/hansard>>.

²⁷ Given the replication of section 42(3A) and (3B) of the FOI Act in schedule 3, section 10(4) and (6) of the RTI Act, and the brevity of the Explanatory Notes to the Right to Information Bill 2009 (Qld) regarding the RTI Act provisions, I am satisfied that the above extrinsic materials remain apposite.

²⁸ Specifically, public officials investigated under what was, at the time, referred to as the misconduct function, and criminals investigated under the crime function.

²⁹ See *G8KLP2* and *Department of Health* (Unreported, Queensland Information Commissioner, 31 January 2011) (**G8KLP2**). The Queensland Civil and Administrative Appeal Tribunal (**QCAT**) dismissed an appeal against this decision: see *Minogue v Office of the Information Commissioner Queensland and Anor* [2012] QCATA 191. See also *Darlington and Queensland Police Service* (Unreported, Queensland Information Commissioner, 11 April 2014) (**Darlington**). Again, an appeal against this decision was dismissed by QCAT: see *Darlington v Office of the Information Commissioner and Queensland Police Service* [2015] QCATA 167. Also, see *Cameron and Queensland Police Service* (Unreported, Queensland Information Commissioner, 7 August 2012) (**Cameron**), *Magin and Department of Environment and Heritage Protection* [2016] QICmr 26 and *Cronin and Crime and Corruption Commission* [2017] QICmr 13.

connection to the investigated conduct was as a witness; whereas in the present circumstances, the conduct of the QPS officers involved the applicant, she was interviewed about this conduct, and conclusions about her would have been made in the course of the investigation. In essence, the applicant submits that her connection with the allegations and investigation is relatively substantial, and this connection is sufficient to render the Investigation Documents ‘about’ her.

32. In terms of the applicant’s contention that her connection with the allegations and investigation is relatively substantial, I consider it relevant to note that OIC’s decision in *G8KPL2* refers to the complaint that initiated the investigation in that matter as a ‘grievance’ lodged by that applicant.³⁰ In my view, this background information indicates a somewhat greater connection to the investigation than the role of witness contemplated in the applicant’s submissions and, to this extent, diminishes the distinction advanced by the applicant.
33. Further, I note that other OIC decisions—which have also rejected the proposition that investigation information is ‘about’ a complainant applicant—have, like the present circumstances, considered investigations of QPS officers—for example, OIC’s decisions in *Cameron* and *Darlington*. While I acknowledge the applicant’s observation³¹ that such decisions contain limited detail regarding the nature of the complaints, I consider it reasonable to conclude that the conduct of QPS officers raised by the applicants in *Cameron* and *Darlington* was, most likely, experienced by those applicants. Similarly, I consider it reasonable to conclude that the degree of connection between the applicants in *Cameron* and *Darlington*, and the investigations considered in their decisions, is comparable to that between the applicant and the investigation in the present circumstances—that is, the investigators obtained information from the complainant applicants about the alleged conduct, and considered this information during the investigations. In these circumstances, I am unable to conclude, as suggested by the applicant, that her connection with the allegations and investigation in this case is relatively substantial when compared with previous OIC decisions regarding the exception.
34. In terms of the applicant’s contention that her connection with the allegations and investigation is sufficient to render the Investigation Documents ‘about’ her, the applicant relies on the following observations made in the QCAT appeal regarding *Darlington*:³²

... there is nothing in the statutory context suggesting that a narrower, broader or materially different meaning should be adopted relative to its natural and ordinary meaning....

...

*... As the appellants [in G8KPL2] were not the subject of, or **substantially connected** with, the allegations or investigation, but were merely complainants, the excluded material the subject of the access application was not “about” them.*

...

...the degree of connection required to satisfy that an object is about a subject will vary depending on the purpose and function of the relevant connection or relation, and the context within which the connection or relation is considered.

[emphasis added]

35. It is my understanding that the applicant submits that these observations support construing ‘about’ as meaning not only the subject of an investigation, but also other persons ‘substantially connected’ with the allegations or investigation (including, according to the applicant’s submissions, the applicant³³). I note that the second of these

³⁰ *G8KPL2* at [23].

³¹ Second paragraph under the heading ‘Definition of ‘About’’ in submissions dated 31 August 2016.

³² [2015] QCATA 167 at [52], [56] and [57].

³³ In this regard, I reiterate the conclusion set out in paragraph 33 above.

observations, and the wording I have emphasised in particular, appears to form the basis for the applicant's submissions in this regard. However, I consider it relevant to note that the paragraph in QCAT's decision in which this observation appears comprises a paragraph summarising OIC's interpretation of 'about', rather than a statement of QCAT's interpretation of 'about'. Further, I note that QCAT's summary of OIC's approach characterises the applicant in *G8KPL2* as merely a complainant, and therefore lacking the requisite substantial connection, despite the investigation in that matter arising from the lodgment of a grievance by that applicant.³⁴

36. On consideration of the entirety of the reasons relevant to the observations,³⁵ I do not agree that these observations support the interpretation of 'about' proposed by the applicant. Rather, I consider that these observations, along with QCAT's comments in the appeal of *G8KPL2*,³⁶ indicate that *'[w]here the statute uses words according to their ordinary meaning, and the question is whether the facts as found fall within those words ... the question is one of fact'*.³⁷ I also note that QCAT did not overturn OIC's interpretation of 'about' in either *Darlington* or *G8KPL2*, and both appeals were dismissed.
37. In summary, while I have carefully considered the applicant's submissions, they do not persuade me that 'about' in schedule 3, section 10(6) of the RTI Act should be interpreted so as to reach a conclusion that the Investigation Documents are 'about' the applicant. I am, for the reasons outlined above, satisfied that 'about' should be afforded its ordinary meaning, construed in accordance with Parliament's intention.
38. In applying this interpretation of 'about', I acknowledge that the applicant feels aggrieved by the conduct of certain QPS officers. I also acknowledge that, having made a complaint about the officers' alleged actions, information regarding the ensuing investigation is of significant personal interest to her. Further, I note that the Investigation Documents were created as a result of the applicant's complaint and contain some incidental references to the applicant.
39. However, despite these considerations, I am not satisfied that the Investigation Documents can be properly characterised as information 'about' the applicant. The substance of these documents concerns or is connected with—in other words, is 'about'—the QPS officers who were the subject of the investigation that occurred as a result of the applicant's complaint. In these circumstances, I am satisfied that the Investigation Documents are 'about' these officers, and not 'about' the applicant. Accordingly, I find that the exception in schedule 3, section 10(6) of the RTI Act does *not* apply.

Conclusion

40. I am satisfied that the exception in schedule 3, section 10(6) of the RTI Act does *not* apply, and that the Investigation Documents therefore comprise exempt information under schedule 3, section 10(4) of the RTI Act.

DECISION

41. With respect to the documents remaining in issue—that is, the Investigation Documents—I affirm the decision under review and find that access may be refused under section 47(3)(a) of the RTI Act, on the basis that the Investigation Documents are exempt information under section 48 and schedule 3, section 10(4) of the RTI Act.

³⁴ As noted in paragraph 32 above.

³⁵ [2015] QCATA 167 at [56]-[61].

³⁶ [2012] QCATA 191 at [6]-[9].

³⁷ [2012] QCATA 191 at [8].

42. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

A Rickard
Assistant Information Commissioner
Date: 12 May 2017

APPENDIX

Significant procedural steps

Date	Event
13 July 2016	OIC received the applicant's application for external review.
26 July 2016	OIC notified the participants that the external review application had been accepted and explained the procedure to be adopted on external review.
9 August 2016	OIC received the information considered by QPS in its decision, including the Investigation Documents.
19 August 2016	OIC received information from QPS confirming that the investigation of relevant QPS officers was complete.
29 August 2016	OIC conveyed a preliminary view to the applicant.
5 September 2016	OIC received submissions from the applicant dated 31 August 2016.
22 September 2016	OIC requested that QPS provide additional information.
12 October 2016	OIC received additional information from QPS.
28 October 2016	By telephone, the applicant advised OIC that she did not wish to pursue access to certain information.
3 November 2016	OIC conveyed a preliminary view to the applicant.
4 November 2016	OIC conveyed a preliminary view to QPS.
16 November 2016	OIC received further submissions from the applicant.
12 December 2016	OIC received submissions from QPS, in which QPS advised that it agreed to release of some information.
19 December 2016	OIC reiterated its preliminary view to QPS.
13 January 2017	OIC received further submissions from QPS.
20 January 2017	By telephone, the applicant advised OIC that she did not wish to pursue access to certain information.
25 January 2017	QPS released information to the applicant in accordance with its submissions dated 12 December 2016.