



Decision and Reasons for Decision

Application Number: 210003

Applicant: Mr G Parsons

Respondent: Department of Police

Decision Date: 13 October 2010

Catchwords: **FREEDOM OF INFORMATION ACT — REFUSAL OF ACCESS – MATTER RELATING TO LAW ENFORCEMENT OR PUBLIC SAFETY – whether information obtained, or prepared for an investigation by a prescribed under section 42(3A) of the *Freedom of Information 1992 (Qld)* – whether matter excluded under section of the *Freedom of Information Act 1992 (Qld)***

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REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Police (**QPS**) for information including all records of an incident involving senior QPS officers and a journalist from the Cairns Post including interviews and summaries of interviews with QPS officers in the course of the resulting investigation undertaken by QPS' Ethical Standards Command.
2. After reviewing all of the relevant information, I find that QPS' decision should be varied as the information is exempt from disclosure under section 42(3A) of the *Freedom of Information Act 1992* (**FOI Act**).

Reviewable decision

3. The decision under review is QPS's undated internal review decision.

Evidence relied upon

4. In reaching this decision, I have taken the following into account:
 - the applications made by the applicant
 - the decisions issued by QPS
 - the information provided by the applicant, QPS and the CMC
 - the information sought by the applicant
 - relevant decisions
 - provisions of the FOI Act and *Crime and Misconduct Act 2001* (Qld) (**CM Act**).

The law

5. The issue for determination is whether the information sought is exempt from disclosure on the basis that it was obtained, used or prepared for an investigation by the Crime and Misconduct Commission (**CMC**), or QPS, in the performance of the CMC's misconduct function¹ which includes ensuring that a complaint about misconduct is dealt with in an appropriate way.²
6. The CMC must perform its misconduct function having regard to the principles of cooperation, capacity building, devolution and the public interest.³
7. Specifically, the principle of devolution provides that "*action to prevent and deal with misconduct in a unit of public administration should generally happen with the unit*".⁴
8. The CMC can perform its misconduct function in several ways, including by doing one or more of the following:
 - assessing information about misconduct
 - referring complaints to a public official to be dealt with by the public official and/or
 - performing its monitoring role for police misconduct or official misconduct.⁵

¹ Section 42(3A) of the FOI Act.

² Section 33(b) of the CM Act.

³ Section 34 of the CM Act.

⁴ Subject to the cooperation and public interest principles and the capacity of the unit of public administration.

⁵ Section 35 of the CM Act.

9. The CM Act defines 'misconduct' as 'official misconduct or police misconduct.'⁶

10. 'Police misconduct' is defined as:

... conduct, other than official misconduct, of a police officer that-

- (a) is disgraceful, improper or unbecoming a police officer; or*
- (b) shows unfitness to be or continue as a police officer; or*
- (c) does not meet the standard of conduct the community reasonably expects of a police officer.⁷*

11. 'Official misconduct' is defined as:

... conduct that could, if proved, be-

- (a) a criminal offence; or*
- (b) a disciplinary breach providing reasonable grounds for terminating the person's services, if the person is or was the holder of an appointment.⁸*

12. In respect of QPS specifically, the Commissioner of Police must notify the CMC of any complaint or information which he or she reasonably suspects involves police misconduct⁹ or may involve official misconduct.¹⁰

13. The Commissioner of Police may ask the CMC to deal with a complaint of police misconduct or official misconduct, or deal with the either type of complaint in cooperation with the Commissioner of Police.¹¹

14. The Commissioner of Police must also deal with a complaint about police misconduct or official misconduct (if the CMC refers the complaint to it), in the way the Commissioner considers most appropriate, subject to the CMC's monitoring role.¹²

15. To establish the relevant exemption, there must be evidence to show that the information was obtained, used or prepared for an investigation by the CMC or QPS, in the performance of the CMC's misconduct function.

Analysis of the evidence

16. The relevant incident occurred on 1 March 2005.

17. Paragraph 2.2 of QPS' Ethical Standards Command Investigation Report into the incident provides that:

As a result of this information verbal advice was provided by Assistant Commissioner Stewart to Mr S Lambrides of the CMC outlining the subject of information received. This occurred on the evening of Wednesday 2 March 2005. Mr Lambrides provided verbal approval for the Queensland Police Service to carry out an investigation of this matter.

⁶ Schedule 2 of the CM Act.

⁷ Schedule 2 of the CM Act.

⁸ Section 15 of the CM Act.

⁹ Section 37 of CM Act.

¹⁰ Section 38 of the CM Act.

¹¹ Section 42(4) and 42(6) of the CM Act.

¹² Sections 42(2) and 42(5) of the CM Act.

18. This notification was made by a senior officer from QPS' Ethical Standards Command. Mr Lambrides was the CMC's then Assistant Commissioner (Misconduct).
19. QPS has provided this Office with a copy of a letter dated 4 March 2005 from the Commissioner of Police to the Chairman of the CMC which states:

I refer to my recent telephone conversation with you regarding alleged comments made by senior police ... which were inadvertently recorded onto the voice mail of a Cairns journalist.

As I indicated an investigation has been launched in the circumstances of this matter headed by Assistant Commissioner Ian Stewart of the Ethical Standards Command.

...

Again, my thanks for your assistance in making Assistant Commissioner Vincent available to assist in this matter.

...

20. QPS has also provided this Office with a copy of the document dated 7 March 2005 titled "Appointment of Temporary Deputy Commissioner" signed by the Commissioner for Police, which provides that:

...

For the purposes of an investigation relating to Assistant Commissioner Barron, Assistant Commissioner Vincent is hereby appointed as an Acting Deputy Commissioner for and including a period of two days namely Monday, 7 March 2005 and Tuesday, 8 March 2005.

21. Neither QPS nor the CMC have been able to locate any evidence to establish that the ESC Investigation Report referred to above was provided to the CMC. However, QPS submits that it was provided to the Commissioner of Police and the CMC was 'probably' briefed through former CMC Assistant Commissioner (Misconduct) Lambrides.

Applicant's submissions

22. The applicant makes submissions¹³ including that:

...

... [the OIC] has no supporting evidence from the QPS or the CMC, that supports factually, that the CMC obtained, used or prepared for an investigation, information that related to Barron's actions concerning the Cairns matter.

Barron received only 'managerial guidance' concerning his actions. Managerial guidance is the absolute lowest form of disciplinary action that can be taken. This would support the supposition that he was never investigated for Official Misconduct by the CMC but for only Misconduct which the CMC leaves to the QPS to only investigate. I have been told many times by the CMC that they do not investigate Misconduct. Without factual evidence from either the CMC or the QPS as to a formal 'Official Misconduct' investigation, then I believe the QPS cannot rely on Section 42 provisions. I think your Office should only rely on factual evidence not the hearsay of the CMC or QPS.

...

¹³ Letter dated 20 September 2010.

Findings

23. Taking into account all of the evidence and information before me, I find that:

- by his delegate, the Commissioner of Police notified the CMC's Assistant Commissioner (Misconduct) of information concerning the incident involving senior QPS officers and a Cairns journalist, the day after the incident occurred
 - this notification is consistent with the Commissioner of Police's obligations under the CM Act to notify the CMC of information which is reasonably suspected to involve police misconduct or may involve official misconduct
 - it is reasonable to assume that the behaviour of the senior QPS officers falls within the CM Act's definition of 'police misconduct' and may also have been viewed at the relevant time as suspected 'official misconduct'
- the CMC's then Assistant Commissioner (Misconduct) provided verbal approval to the QPS Assistant Commissioner for QPS to investigate the matter
- the CMC provided QPS with assistance to conduct the investigation by making its Assistant Commissioner Vincent available for a period of two days during which time he was temporarily appointed Acting Deputy Commissioner.

24. On the basis of the matters set out above, I am satisfied that:

- there is sufficient evidence to establish that the CMC performed its misconduct function in relation to the notification by QPS on 2 March 2005 (whether the information related to police misconduct or official misconduct), by referring the matter to QPS to be dealt with by QPS and seconding a senior CMC officer to QPS for two days to assist with the investigation
- the information sought was obtained, used or prepared for an investigation by QPS' Ethical Standards Command, in the performance of the CMC's misconduct function which includes ensuring that a complaint about misconduct is dealt with in an appropriate way having regard to the principles of cooperation, capacity building, devolution and the public interest
- the final disciplinary outcomes for the QPS officers involved in the matter does not impact upon the findings set out above
- the information sought by the applicant is exempt from disclosure under section 42(3A) of the FOI Act.

25. In reaching this decision, I have considered whether section 42(3B) of the FOI Act applies and find that as the information sought does not consist of information about the applicant, the section 42(3B) exception does not apply in the circumstances.

DECISION

26. I vary the decision under review and find that the information sought by the applicant is exempt from disclosure under section 42(3A) of the FOI Act.

27. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

F Henry
Assistant Commissioner
Date: 13 October 2010