



Decision and Reasons for Decision

Application Number: 310548

Applicant: Phyland

Respondent: Department of Police

Decision Date: 31 August 2011

Catchwords: **RIGHT TO INFORMATION – INFORMATION AS TO EXISTENCE OF PARTICULAR DOCUMENTS - where agency neither confirms nor denies existence of a document - whether document, if it existed, would be a document to which access would be refused under section 47(3) of the *Right to Information Act 2009* Qld – whether document , if it existed, would be comprised of prescribed information**

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REASONS FOR DECISION

Summary

1. By application dated 6 December 2010, the applicant applied to the Department of Police¹ under the RTI Act for access to 'documents showing the criminal record' of a named individual.
2. By letter dated 11 January 2011, Senior Sergeant MB McGhie, Freedom of Information and Privacy Unit, QPS, decided to neither confirm nor deny the existence of the requested documents under section 55 of the RTI Act.
3. By letter dated 27 January 2011, the applicant applied to the Information Commissioner for external review of the QPS decision.
4. For the reasons set out below, I affirm QPS's decision to neither confirm nor deny the existence of the documents sought by the applicant under section 55 of the *Right to Information Act 2009 (Qld) (RTI Act)* on the basis that if the documents did exist, access to the documents would be refused under section 47(3) of the RTI Act because they would be comprised of prescribed information.

Reviewable decision

5. The decision under review is the decision of Senior Sergeant McGhie dated 11 January 2011 to neither confirm nor deny the existence of the requested documents, under section 55 of the RTI Act.

Steps taken in the external review process

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

Evidence considered

7. Evidence, submissions, legislation and other material I have considered in reaching my decision is as disclosed in these reasons (including footnotes and appendix).

Relevant law

8. Section 23 of the RTI Act relevantly provides that a person has a right to be given access to documents of an agency (which includes the QPS). This right of access is subject to other provisions in the RTI Act, including section 55, which provides:

55 Information as to existence of particular documents

- (1) *Nothing in this Act requires an agency or Minister to give information as to the existence or non-existence of a document containing **prescribed information**.*
- (2) *For an access application for a document containing **prescribed information**, the agency or Minister may give a prescribed written notice that does not include the details mentioned in section 191(a) or (b) but, by way of a decision, states that—*

¹ Known as the Queensland Police Service (QPS).

- (a) *the agency or Minister neither confirms nor denies the existence of that type of document as a document of the agency or a document of the Minister; but*
 - (b) *assuming the existence of the document, it would be a document to which access would be refused under section 47(3) to the extent it comprised **prescribed information**.*
- (3) *The prescribed written notice may be given in a schedule of relevant documents.*

[my emphasis]

9. The rationale for the inclusion of a provision in the nature of section 55 of the RTI Act has been explained as follows:²

A particular problem that arises in relation to the giving of reasons and particulars ... is the position of the decision-maker when ... confronted with a request for a document which is manifestly exempt from disclosure, but where the character of the document is such that the mere acknowledgment of its existence, albeit accompanied by a denial of access, will itself cause the damage against which the exemption provision is designed to guard. One obvious example would be a request for a Cabinet paper recommending a devaluation of the currency; another might be a request for a criminal intelligence record disclosing the activities of a particular police informant.

...

We agree that there will, on occasion, be a need for an agency to refuse to acknowledge the very existence of a document. However ... it ought to be confined to a very narrow set of exemptions, namely those relating to classes of documents which by their very nature are likely to be widely accepted as especially sensitive.

Findings

10. A review of a decision in which the agency has relied on section 55 of the RTI Act presents procedural challenges. As the Information Commissioner explained in *EST*:³

In a review of an ordinary refusal of access decision, the applicant for access is necessarily disadvantaged, in the extent to which meaningful submissions can be made about the exempt status of matter in issue, by a lack of precise knowledge as to the nature of the matter in issue. That disadvantage is exacerbated in a review of a decision to invoke a s.35 "neither confirm or deny" response. The review must largely proceed in private between the Information Commissioner and the respondent ...

11. The Information Commissioner went on in the paragraph of *EST* excerpted above to note that where requested documents do exist, they would be called for and examined. In many cases, this will often be an appropriate course of action. However, in a case such as this, where the nature of any documents, if they do exist, is evident from the terms of the access application, it is unnecessary to require the agency to confirm the existence of any relevant documents. Therefore, in this review, I have not asked QPS to indicate to me whether or not the documents sought actually exist.⁴

² *EST and Department of Family Services and Aboriginal and Islander Affairs* (1995) 2 QAR 645 at paragraph 11 (*EST*, citing the 1979 Report by the Senate Standing Committee on Constitutional and Legal Affairs [SSCCLA] on the Freedom of Information Bill 1978 at page 121, point 9.27).

³ At paragraph 20.

⁴ My approach in this regard is consistent with the procedure adopted by the Information Commissioner in *Tolone and Department of Police* (220006, 9 October 2009) (see paragraph 28).

Prescribed information

12. Section 55 of the RTI Act essentially permits an agency to give no information as to the existence or non-existence of documents that would, assuming their existence, contain 'prescribed information'. When relying on section 55, however, an agency must demonstrate that the documents requested by the applicant would, if they exist, contain the requisite prescribed information.
13. 'Prescribed information' is relevantly defined in schedule 6 of the RTI Act:

prescribed information means—

...

(b) *personal information the disclosure of which would, on balance, be contrary to the public interest under section 47(3)(b).*

14. In accordance with this definition, I must be satisfied that the documents requested by the applicant would, if they existed, contain:
- i. personal information
 - ii. the disclosure of which would, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act.

(i) personal information

15. 'Personal information' is defined as follows:⁵

Personal information is 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.

16. The access application seeks access to a named individual's criminal record. It is clear that the requested documents, if they exist, would contain information – name, date of birth, offence history, for example – about an individual whose identity is apparent from the information (the individual named in the access application). I am satisfied the documents, if they exist, would comprise the personal information of the relevant individual.

(ii) contrary to the public interest

17. For personal information to comprise 'prescribed information', it must also be information the disclosure of which would, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act.⁶
18. In determining whether disclosure of information, would, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act, I must:⁷
- 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

⁵ See Schedule 6 of the RTI Act and section 12 of the IP Act.

⁶ Section 47(3)(b) relevantly permits an agency to refuse access to a document to the extent the document comprises information the disclosure of which would, on balance, be contrary to the public interest under section 49 of the RTI Act.

⁷ In accordance with section 49(3) of the RTI Act.

- decide whether disclosure of the information would, on balance, be contrary to the public interest.

Irrelevant Factors

19. I have not taken any irrelevant factors into account in making this decision.

Factors favouring disclosure

20. The applicant contends that she requires access to the requested documents for the purposes of Family Court proceedings involving children, between herself and the individual named in the access application.
21. It is arguable that the applicant's submissions in this regard go toward the public interest in disclosing information that may contribute to the administration of justice for a person.⁸ An individual's criminal record, if such documents exist, may be relevant to Family Court proceedings. I am prepared to consider this public interest factor in making my determination in this case.
22. The applicant also submits that she has limited financial resources which have prevented her from obtaining legal representation in the Family Court proceedings noted above, and from availing herself of alternative court processes that may allow her to access the requested documents (should they exist).⁹ The applicant contends that:
- *'RTI should provide a viable right of access to individuals irrespective of financial capacity'*,¹⁰ and
 - *'the RTI Act was set up to avoid complicated and expensive legal action by individuals who simply cannot afford them.'*¹¹
23. While I note the applicant's submissions, her personal financial capacity does not give rise to a public interest factor telling in favour of disclosure.¹² Her submissions in this regard essentially amount to an argument that while alternative routes of access may exist, she is not in a financial position to pursue these, and that consequently she should be permitted access by way of the less-expensive mechanisms contained in the RTI Act.
24. The RTI Act was not, however, designed to serve as an adjunct to court processes, but to comprise a stand-alone mechanism for enabling public access to government-held information. Obviously, the applicant is entitled to elect to pursue access under the right of access conferred by the RTI Act. In doing so, however, she must accept the qualifications upon and limitations to that right imposed by the Act itself, including refusal of access where, as I have discussed below, disclosure would disclose personal information or infringe upon an individual's right to privacy.
25. The applicant also contends that a criminal record should effectively be seen as a public record, as criminal cases are conducted in public and reported publicly and the *'public have a right to know about criminal proceedings and convictions'*.¹³

⁸ Schedule 4, part 2, factor 17 of the RTI Act. I should note that, technically, the 'persons' in whose favour this prodisclosure should be seen to operate in this context would be relevant children, given the 'child paramountcy principle' governing proceedings under the *Family Law Act 1975* (see further note 18).

⁹ Such as by way of the subpoena process prescribed in Part 15.3 of the *Family Court Rules 2004*.

¹⁰ External review application dated 27 January 2011.

¹¹ Submissions dated 8 April 2011.

¹² Noting that, in general terms, a public interest consideration is one common to all members or a substantial segment of the community, as distinct from matters concerning purely private or personal interests.

¹³ External review application dated 27 January 2011.

26. I do not consider that there is a general right for the public to 'know about criminal proceedings and convictions', as the applicant contends. The public has a right to expect that judicial proceedings will be conducted openly and transparently, although even this principle is not absolute.¹⁴
27. The expectation of open justice, however, is distinct from a general right to know about and have access to a specific individual's particular offence and conviction history, as is clearly demonstrated by the existence of the *Criminal Law (Rehabilitation of Offenders) Act 1986 Qld (CLROO Act)*. This legislation entitles offenders to suppression or nondisclosure of 'spent convictions' – a criminal record as it relates to particular offences, of a certain age, where the offender has not subsequently reoffended.¹⁵ In the CLROO Act, Parliament has provided that, contrary to the applicant's contentions, the public does not have a right to openly access the criminal records of offenders (insofar as the requirements of the Act are met).
28. Accordingly, I do not consider that the applicant's submissions concerning a 'public right to know' about individual criminal records give rise to a public interest factor favouring disclosure of the requested documents (if they exist).

Factors favouring nondisclosure

29. I have identified two factors favouring nondisclosure of the requested documents (if they exist):
- disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy;¹⁶ and
 - disclosure of the information could reasonably be expected to cause a public interest harm if disclosure would disclose personal information of a person.¹⁷
30. I am satisfied that if the requested documents exist, disclosing those documents would disclose the personal information of the individual identified in the access application. I am also satisfied that such disclosure could reasonably be expected to prejudice¹⁸ the named individual's right to privacy.¹⁹
31. In reaching this conclusion, I accept that there may be offences detailed in a given criminal record that have been the subject of public trial and reporting, arguably diminishing the privacy interest in information of that kind.²⁰

¹⁴ For an overview of the range of exceptions to the principle of open justice in Queensland, see 'Closed Court Exceptions to the General Principle of Openness', Queensland Supreme and District Courts Benchbook, <http://www.courts.qld.gov.au/Benchbook/SD-61-ClosedCourtExceptionsToTheGeneralRuleOfOpenness.pdf> (accessed 12 August 2011).

¹⁵ The CLROO Act relevantly prohibits disclosure of certain convictions where the rehabilitation has expired in relation to a conviction recorded against any person and the conviction has not been revived in respect of the person: see CLROO Act, section 6.

¹⁶ Schedule 4, part 3, item 3 of the RTI Act.

¹⁷ Schedule 4, part 4, item 6 of the RTI Act.

¹⁸ Adopting the ordinary meaning of the term 'prejudice': see *Daw and Queensland Rail* (220020, 24 November 2010) at paragraph 16 for a succinct exposition of the meaning of 'prejudice' as used throughout the RTI Act.

¹⁹ The concept of 'privacy' is not defined in either the RTI or IP Acts; it can, however, be viewed as the right of an individual to preserve their personal sphere free from interference from others (Paraphrasing the Australian Law Reform Commission's definition of the concept in "For your information: Australian Privacy Law and Practice" *Australian Law Reform Commission Report No. 108* released 11 August 2008, at paragraph 1.56).

²⁰ And noting that privacy interests attaching to historical material of this kind are protected by a degree of 'practical obscurity', i.e. the practical barriers – researching newspaper and court record archives in this case – to access, such that it could not be said relevant privacy interests were completely destroyed by contemporary publication.

32. A given criminal record may, however, also contain details of 'spent offences' subject to the CLROO Act. Disclosure of this information would clearly defeat the privacy protections intended by this legislation (not to mention occasion an offence against the Act), and prejudice the individual's right to privacy.

Public interest balancing exercise

33. As noted above, I have identified one factor favouring disclosure of the requested documents, and two favouring non-disclosure. In this case, I consider that:
- the public interest in the administration of justice should be afforded marginal weight;
 - the public interest in:
 - safeguarding personal information and;
 - protecting an individual's right to privacy and thus avoiding public interest harm,

should each be afforded substantial weight. I will briefly discuss my reasoning in this regard.

34. In assessing the balance of the public interest, I note that there is no great detail before me as to the nature of the Family Court proceedings in which the applicant is involved, nor the potential relevance of the requested documents (if they exist). In any case, regardless of the particulars of the relevant litigation, I anticipate that the Family Court, applying legislation in which the interests of children are paramount,²¹ would be reluctant to make determinations about parenting without a complete record before it, should there exist any suspicions or concerns as to the suitability of a particular individual. In this regard, I note that the Family Court may order a State agency to provide information to the Court concerning child abuse or family violence where allegations of this kind have been raised in given proceedings.²² In this context, I do not consider the single prodisclosure public interest factor noted above should be afforded significant weight.
35. Conversely, I consider the privacy interests identified above should be afforded substantial weight. I acknowledge that many criminal prosecutions are conducted (and subsequently reported) openly, arguably diminishing the privacy interest in a criminal record insofar as it records such a conviction. As noted above, however, there are numerous criminal proceedings that are subject to suppression.
36. I am also highly conscious of the not inconsiderable range of offences potentially subject to the privacy protections afforded offenders by the CLROO Act which may well appear in a criminal record of the kind requested. The policy considerations underlying that Act indicate that it is proper to afford privacy protection to relevant criminal records.
37. Having balanced factors favouring disclosure and nondisclosure, I am satisfied that disclosure of the requested documents (if they exist) would, on balance, be contrary to the public interest.
38. I have found that the requested documents (if they exist) would comprise personal information, the disclosure of which would, on balance, be contrary to the public interest. Accordingly, I am satisfied that the relevant documents (if they exist) would be

²¹ *Family Law Act 1975*, section 60CA .

²² *Ibid*, sections 60K and 69ZW.

documents to which access would be refused under section 47(3) of the RTI Act as documents comprised of prescribed information

39. The QPS is therefore entitled to neither confirm nor deny the existence of the requested documents under section 55 of the RTI Act.

DECISION

40. I affirm the decision of QPS to neither confirm nor deny the existence of the documents requested by the applicant, on the basis that if such documents did exist they would be documents to which access would be refused under section 47(3) of the RTI Act as documents comprised of prescribed information.
41. I have made this decision as a delegate of the Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

Jenny Mead
Right to Information Commissioner

Date: 31 August 2011

APPENDIX**Significant procedural steps**

Date	Event
6 December 2010	Applicant applied to QPS for access to criminal record of named individual.
11 January 2011	QPS decided to neither confirm nor deny existence of requested document under section 55 of the RTI Act.
27 January 2011	Applicant applied to OIC for external review of QPS decision.
16 March 2011	OIC conveys to applicant written preliminary view QPS entitled to neither confirm nor deny existence of requested document under section 55 of the RTI Act.
8 April 2011	Applicant's representative advises applicant does not accept OIC's preliminary view, lodges written submissions in support of applicant's case.