Office of the Information Commissioner
Queensland

Decision and Reasons for Decision

Application Number: **2005 F0442**

Applicant: **Mr R Price**

Respondent: **Queensland Police Service**

Decision Date: **29 June 2007**

Catchwords: **FREEDOM OF INFORMATION – section 77(1) of FOI Act – matter the subject of previous reviews – refusal to deal with part of application – vexatious.**

FREEDOM OF INFORMATION – section 42(1)(ca) of FOI Act – serious act of harassment or intimidation.

FREEDOM OF INFORMATION – section 42(1A) of FOI Act – information given in the course of an investigation of a contravention or possible contravention of the law – information given under compulsion under an Act that abrogated the privilege against self-incrimination.

Contents

Reasons for Decision

Background

1. By letter dated 13 May 2005, the applicant applied to the Queensland Police Service (the QPS) for access to documents under the *Freedom of Information Act 1992* (the FOI Act) as follows:

> *…all documents related to my complaints/myself to police in Toowoomba regarding Const. Jim McDonald of the then Gatton Police, re letter etc from Toowoomba Assistant Commissioner Southern Region, CM McCallum, dated the 05.05.2005. I also request all documents and files and reports the police considered in these recent investigations. A copy of the transcript of interviews of all parties is requested also. This also includes a copy of all tapes of records of conversations with all parties related to these matters. This also includes a copy of all records of contact with the Queensland Nominal Defendant and documents obtained from this agency and the Gatton Shire Council etc.*
>
> *This includes a request of all intelligence reports etc, related to myself, and or my family and or my property etc. Nominal Defendant documents show the QPS have photographs of my property as an example.*
>
> *This includes all documents related to the traffic conviction in 1991. Nelson v Price etc.*
>
> *This includes all documents related to McDonald v Price. ETC.*
>
> *All documents related to myself and the Department of Veteran Affairs including staff of the Vietnam Veterans Counseling Service.*
>
> *All documents related to the so called Prohibition Order of 1991 signed by the then Inspector Gerry Stevens. This includes the complaints he acted on including all documents related to the Department of Veteran Affairs/Vietnam Veterans Counseling Service etc. You already have an authority to release same from this department. The Information Commissioner and the CMC have previously released documents under this authority.*
>
> *This application is to include all documents related to Assistant Commissioner McCallum's letter to me dated the 05.05.2005. Reference numbers are SRC 2004/ ESC 2005/00284. Inspector Ron Van Saane stated he was looking at matters including the Driving Conviction 1991 and the Assault convictions 1993/94.*
>
> *I also request all documents related to the following letters from the QPS. Letter dated 09.02.1990, Regional Superintendent's Office Southern Region Toowoomba. Reference numbers 90/238 – 9 FEB 1990. Other parties reference number to this letter is 90/1353. And letter dated the 05.03.1990, District Inspector's office Toowoomba Reference number 90/1353. All documents related to these letters are requested.*
>
> *Const. Chris Nelson states in documents release to me, refers to orders he received to attend meetings with my neighbours etc to discuss me. Documents related to these meetings have not been discovered to me. I also request all documents related to me and parts of documents, not released including all references to mental health. An example are the documents related to the matter of Smith v Price etc.*
>
> *Medical reports stated by Const. Nelson on his report in January 1993 relating to Daniel Morgan are missing from the records. The search warrant used in the matter of Smith v Price has as yet not been disclosed.*
>
> *I also request the QPS produce all previously requested police diaries and or notebooks etc. This includes all diaries and notebooks Brennan states are not located at the Gatton Police Station etc.*

> *I also specifically request all diary entries of Const. Jim McDonald for the period between 1986 and now. Const. Jim McDonald would know when the entries were made. (**Amended on second letter and faxed same day as well)**. Related to myself etc.*

2. On 25 July 2005, having received no decision from the QPS, the applicant applied to this Office for external review of the deemed refusal of access by the QPS.

Steps taken in the external review process

3. On 16 August 2005 Assistant Commissioner Barker of this Office wrote to the applicant confirming receipt of his application and the commencement of the external review.

4. By letter dated 16 August 2005 Assistant Commissioner Barker notified the QPS that this Office was to review the deemed refusal by the QPS to provide access to documents requested by the applicant. Assistant Commissioner Barker sought a copy of the documents in issue and submissions from the QPS as to which documents it claimed were exempt in full or in part and which documents it was willing to release to the applicant.

5. On 18 August 2005 the applicant faxed 40 pages of material to this Office, the majority of which related to another application on foot with this Office at the time.

6. By letter dated 26 April 2005 (which is assumed to be a typographical error), received in this Office on 30 August 2005, the QPS submitted that the applicant was again seeking access to material that he had sought access to in numerous previous FOI applications to the QPS, some of which had been the subject of decisions by this Office.

7. On 21 August 2006 Assistant Commissioner Barker wrote to the applicant setting out her preliminary view that:

> *…to the extent that* [the applicant's] *application for external review seeks review of the QPS' deemed refusal of access to documents which have been the subject of previous decisions and reviews by the QPS and this office, or to revisit issues of 'sufficiency of search' which have been determined in previous reviews,* [Assistant Commissioner Barker] *should refuse to deal further with it on the grounds provided by s.77(1) of the FOI Act.*

Assistant Commissioner Barker advised the applicant that therefore, she had written to the QPS:

> *….asking it to locate any relevant documents relating to* [the applicant, his family] *or property dated from 14 January 2004 to 13 May 2005 and to advise* [her] *which of those documents it is prepared to disclose to* [the applicant]*, either in full or subject to the deletion of matter claimed to be exempt.*

Assistant Commissioner Barker stated that this was on the basis that documents created between those dates would not have been the subject of any of the applicant's previous FOI access applications to the QPS.

8. Additionally, in her letter to the applicant dated 21 August 2006 Assistant Commissioner Barker invited the applicant to advise her whether he accepted her preliminary view in relation to the application of section 77 of the FOI Act and was prepared to withdraw his application for external review in relation to that part of his

application that dealt with material previously requested, or if he did not accept her preliminary view, to make submissions in response on or before 13 September 2006.

9. On 30 August 2006 the applicant wrote to this Office rejecting Assistant Commissioner Barker's preliminary view.

10. On 31 August 2006 Assistant Commissioner Barker wrote to the QPS outlining her preliminary view in relation to the application of section 77 of the FOI Act and advising that the applicant had not accepted this view and that accordingly it would be necessary to proceed to a formal decision on the issue. Additionally, Assistant Commissioner Barker required the QPS to undertake searches for any documents dated from 14 January 2004 (being the last FOI access application made by the applicant to the QPS) to 13 May 2005 (being the date of the application the subject of this review).

11. By facsimile letter dated 7 September 2006, received on 8 September 2006, the applicant again submitted that section 77 of the FOI Act should not be applied to exclude parts of his application.

12. On 6 November 2006 this Office received a letter from the QPS enclosing documents located in response to Assistant Commissioner Barker's letter of 31 August 2006 (23 folios and two cassette tapes) and setting out exemptions claimed in relation to certain documents.

13. By letter dated 8 November 2006 the applicant was provided with a full copy of folios 1–9, 14–23 and 29 and parts of folios 10 and 13. He was also advised of the exemptions claimed in relation to parts of folios 10 and 13 and the whole of folios 11 and 12.

14. By letter dated 27 November 2006 Assistant Commissioner Moss advised the applicant of her preliminary view that parts of folios 10, 11 and 13, being a précis of a tape recorded interview between Inspector R. Van Saane and a third party witness, and the corresponding tape recording of the interview, were exempt pursuant to section 46(1)(b) of the FOI Act. The applicant was asked to advise Assistant Commissioner Moss by 21 December 2006, whether he accepted her preliminary view. If he did not accept her preliminary view he was invited to make submissions as to the application of section 46(1)(b). The applicant was advised that if he did not respond to Assistant Commissioner Moss by 21 December 2006, it would be assumed that he accepted her preliminary view in relation to folios 10, 11 and 13 in respect of matter concerning the interview between Inspector Van Saane and a third party witness.

15. On 4 December 2006 Assistant Commissioner Moss wrote to the QPS seeking submissions as to their claim for exemption in respect of sections 42(1)(ca) and 42(1A) in relation to folio 12 and parts of folios 11 and 13, being a precis of a tape recorded interview between Inspector R. Van Saane and Sergeant J McDonald (McDonald), and the corresponding tape recording of the interview.

16. On 7 December 2006 the applicant telephoned Assistant Commissioner Moss and indicated that he felt there were documents responsive to his application that had not been located by the QPS, namely, typed transcripts of the tape recorded interviews between Inspector Van Saane and the third party witness and McDonald, and also an interview with the applicant.

17. Assistant Commissioner Moss wrote to the QPS on 11 December 2006 and advised that the applicant had raised issue with the sufficiency of the searches conducted by

the QPS. Assistant Commissioner Moss required the QPS to undertake searches to ascertain whether full transcripts of the three interviews were prepared.

18. On 22 January 2007 Assistant Commissioner Moss wrote to the applicant enclosing a copy of the QPS' submissions in relation to the application of section 42(1)(ca) and section 42(1A) to the tape recording of the interview with McDonald and the typed summary of that interview and invited the applicant to provide submissions in response.

19. By letter dated 30 January 2007 QPS advised that no transcripts of the three interviews had been made.

20. In a telephone conversation with Assistant Commissioner Moss on 1 February 2007 the applicant contended generally that further documents responsive to his application should exist with the QPS that had not been located.

21. By letter dated 5 February 2007 Assistant Commissioner Moss notified the applicant of her preliminary view that no further documents existed within the possession or control of the QPS that were responsive to his application. The applicant was invited to advise Assistant Commissioner Moss whether he accepted her preliminary view in relation to this issue. Assistant Commissioner Moss invited the applicant to make submissions in response and advised him that if he did not respond by 23 February 2007 it would be assumed that he agreed with the preliminary view and withdrew on the issue.

22. In a telephone conversation with me on 13 February 2007 the applicant requested and I granted a further opportunity to make submissions in relation to the preliminary view of Assistant Commissioner Barker (21 August 2006) concerning the application of section 77 of the FOI Act. At that time it was agreed that the applicant's responses to the preliminary views of Assistant Commissioner Moss set out in her letters dated 22 January 2007 and 5 February 2007 would be held in abeyance pending the receipt of his submissions concerning section 77 of the FOI Act. The applicant was allowed until 23 February 2007 to provide his submissions on the application of section 77 of the FOI Act.

23. By facsimile transmission dated 20 February 2007 the applicant sought an extension of time within which to make submissions concerning the application of section 77 of the FOI Act.

24. By letter dated 27 February 2007 I advised the applicant that no extension of time within which to make further submissions concerning section 77 of the FOI Act would be granted because the applicant had been afforded prior opportunities to make submissions on the issue and he had not provided any reasonable basis for seeking the extension of time.

25. Additionally, by letter dated 27 February 2007 I advised the applicant that his submissions in response to Assistant Commissioner Moss's letters of 22 January 2007 and 5 February 2007 were now required by 20 March 2007. The applicant was advised that if no submissions were received by that date he would be taken to have accepted Assistant Commissioner Moss's preliminary views on those matters and they would no longer be in issue in this review.

26. On 5 March 2007 the applicant advised that he would not provide a submission in response to the QPS' claim that the record of interview of McDonald was exempt under sections 42(1)(ca) and 42(1A) (as per Assistant Commissioner Moss's letter to the applicant of 22 January 2007) as a preliminary view had not been issued by this Office.

27. On 14 March 2007 the applicant wrote to the Information Commissioner with information about his service with the Australian Regular Army in the Vietnam War, a Peace and Good Behaviour Order issued by the Magistrates Court at Gatton in relation to an application made by the applicant against a Mr Wit, documents of the Criminal Justice Commission and the cover page of the Court of Appeal judgment in the matter of *R v Price.* However, the applicant did not make submissions as to the relevance of these documents to the issues in this review and the documents did not appear to have any relevance to the issues in this review.

28. The applicant sent two facsimiles on 19 March 2007, neither of which contained submissions concerning Assistant Commissioner Moss's preliminary view of 5 February 2007 on the issue of the sufficiency of the QPS's searches to locate documents responsive to the applicant's application.

29. In making my decision in this matter I have taken the following into account:

- The documents in issue
- The applicant's initial and external review applications dated 13 May 2005 and 25 July 2005 respectively
- Correspondence from QPS dated 26 April 2005 (received 30 August 2005), 3 November 2006, 3 January 2007 and 30 January 2007
- Correspondence from the applicant dated 17 August 2006, 30 August 2006, 7 September 2006, 20 February 2007, 14 March 2007 and 19 March 2007
- Telephone conversations with the applicant dated 7 December 2006, 18 December 2006, 1 February 2007, 13 February 2007 and 5 March 2007
- All relevant case law

Matter in issue

30. As the applicant did not respond to the matters set out in Assistant Commissioner Moss's letters dated 27 November 2006 and 22 January 2007 concerning the application of section 46(1)(b) of the FOI Act to exempt parts of folios 10, 11 and 13 and the issue of the sufficiency of the QPS' searches, respectively, the applicant is taken to have resiled from those issues. Accordingly, those parts of folios 10, 11 and 13 concerning the précis of a tape recorded interview between Inspector R. Van Saane and a third party witness and the corresponding tape recording of that interview and the issue of the sufficiency of the agency's searches are no longer in issue in this review.

31. Thus the issues remaining for my consideration in this review are:

a) The application of section 77 of the FOI Act to the applicant's application;

b) Whether matter contained on part of folio 11 and the whole of folio 13, consisting of a précis of the QPS interview with McDonald, and the corresponding tape recording of that interview, is exempt pursuant to sections 42(1)(ca) and 42(1A) of the FOI Act.

Findings

Section 77

32. The first issue for my consideration is whether section 77 of the FOI Act applies to exclude that part of the applicant's application that has been addressed in previous

external reviews before the Office of the Information Commissioner involving the applicant and the QPS.

33. Section 77 of the FOI Act relevantly provides:

> ***77 Commissioner may decide not to review***
>
> *(1) The commissioner may decide not to deal with, or not to further deal with, all or part of an application for review if—*
>
> *(a) the commissioner is satisfied the application, or the part of the application, is frivolous, vexatious, misconceived or lacking substance;*

34. In *Price and Local Government Association of Queensland* (S 111/01, 29 June 2001, unreported) Deputy Information Commissioner (DC) Sorensen found that:

> *13. … Any responsive documents that were in the possession or control of the LGAQ prior to 10 April 2001 have been dealt with in finalised, or soon-to-be finalised, applications for review to my office.*
>
> *14. There is a suggestion in the fourth paragraph of Mr Price's letter dated 18 June 2001 that, because he applied again for all documents of the LGAQ related to himself et cetera, he is entitled to have reconsidered, in this application for review, the issues that were resolved by my decision dated 17 May 2001 which finalised application for review no. S 52/00 (which stemmed from Mr Price's first FOI access application to the LGAQ, dated 11 February 2000).*
>
> *15. Such an application by Mr Price would clearly be vexatious, and contrary to the principle that a decision by a court or tribunal resolves the issues in dispute between the parties. A litigant cannot seek multiple hearings of the same issues between parties - that is vexatious and oppressive to the other party and to the relevant court or tribunal, and unfair to other citizens waiting their turn to use the dispute resolution services, provided from public funds, by courts and tribunals. To the extent that Mr Price is seeking to re-open the issues that were dealt with in my decision dated 17 May 2001, which finalised application for review no. S 52/00, I decide, under s.77(1) of the FOI Act, not to review further those issues on the ground that the application is vexatious.*
>
> *16. The LGAQ has (in my view, quite properly) treated each successive FOI access application lodged with it by Mr Price as one for responsive documents that came into the possession or control of the LGAQ in the intervening period since lodgment of Mr Price's most recent prior FOI access application. It is equally vexatious and oppressive to agencies to make repeated applications for the same documents, and, although agencies do not have a power similar to s.77(1) of the FOI Act enabling them to refuse to deal with a vexatious FOI access application, the agency is entitled to seek to persuade the Information Commissioner (or his delegate) to apply s.77(1) of the FOI Act if an actual or constructive refusal by an agency to process a vexatious part of an FOI access application becomes the subject of an application for review under Part 5 of the FOI Act.*

35. In this case there have been 12 reviews in which decisions have been made by former Information Commissioners or their delegates on access to documents held by the QPS, including decisions on whether the QPS has made sufficient searches and inquiries for documents which the applicant contended should have been in its possession or control. Table 1 below sets out the various reviews conducted by this Office that predate the application the subject of this review and the documents sought by the applicant in those reviews:

Table 1. Applications predating the matter currently under review		
Review no.	**Date of review decision**	**Documents applied for**
S 188/95	18 Dec 2000	Summons and hearing in Gatton Magistrates Court in 1991; file in *Smith v Price*; file in *McDonald v Price*; prohibition order by Insp. Stevens (Toowoomba QPS)
S 168/96 S 183/96	29 Jun 2001	22 categories of documents relating to yourself
S 132/97	27 Oct 2000	All documents relating to the applicant, his family and property
S 174/97	29 Oct 2002	Various categories of documents relating to the applicant and other persons
S 50/99 S 193/99	30 Oct 2002	Various categories of documents relating to the applicant and other persons Various categories of documents relating to the applicant
S 260/99	31 Oct 2002	Documents relating to the applicant
S 262/99	6 Feb 2003	Records of persons who have accessed QPS information concerning the applicant
S 74/01 S 75/01	13 Nov 2002	Various categories of documents relating to the applicant
F 227/04	26 Jul 2004	All documents relating to the applicant, his family and property

36. It is apparent to me that the majority of the documents sought by the applicant in this review (excluding those created since 14 January 2004 [being the date of the applicant's initial application to QPS in review 227/04] and before 13 May 2005 [the date of the applicant's initial application in this review]) have clearly been dealt with in previous reviews by this office. In each of the matters listed in Table 1 a decision was issued by this office setting out a view as to either the appropriateness of the exemption claimed by the QPS or the adequacy of the QPS's searches in locating documents responsive to the applicant's application.

37. In bringing this application for external review the applicant has sought to initiate another 'hearing' of the issues previously addressed in the earlier external reviews of this Office.

38. Accordingly, I consider that, to the extent that the applicant's application for external review seeks review of the QPS' deemed refusal of access to documents which have been the subject of previous reviews by this office, or to revisit issues of 'sufficiency of search' which have been determined in previous reviews, it is vexatious.

39. I note that in communication with this office the applicant has submitted that Kirby J in the High Court, in the matter of his application for special leave to appeal against a judgment of the Court of Appeal of Queensland given on 25 October 1994 (Price v McDonald B50/1994 (27 June 2001)), found that he was not vexatious.

40. I gather from such submissions that he considers that this finding by Kirby J prevents a finding by this office that an aspect of the application under review is vexatious.

41. I have reviewed the case referred to by the applicant. In the context of a discussion about the respondent's non-attendance before the Court, Kirby J, addressing the applicant, made the following statement:

> *KIRBY J:* *The respondent might take the view that this is just the latest of your attempts to harass him by litigation and that he can trust the Court to protect him from that.*

42. An exchange between his honour and the applicant ensued concerning whether the applicant had pursued litigation against the respondent. Which lead to the following dialogue:

> *[Applicant]:* *I am entitled to appeal. That is not – you are not inferring I am vexatious.*
> *KIRBY J:* *I did not say vexatious.*
> *[Applicant]:* *I am not vexatious, your Honour.*
> *KIRBY J:* *No, I did not say vexatious. I said he might have taken the view that he has had enough, that he won before the magistrate and the Court of Appeal said there was ample material and he can rely on this Court to defend it.*

43. Setting aside the issue of whether Kirby J's dialogue with the applicant can be said to be a finding that the applicant is not vexatious (which I do not believe it can), I consider that the statements of Kirby J were clearly made in the context of the case in which he was presiding and do not have any bearing on the consideration of whether an aspect of the applicant's application in this review is vexatious for the purpose of section 77(1) of the FOI Act.

44. Therefore, pursuant to section 77(1) of the FOI Act I have decided not to deal with that part of the applicant's application that revisits matters that have previously been addressed in decisions of this Office (as set out in Table 1).

45. Thus this review encompasses only those documents responsive to the terms of the applicant's application that came into existence from 14 January 2004 to 13 May 2005.

Section 42(1)(ca)

46. The QPS submit that the matter in issue (the summary of the QPS' interview with McDonald and the corresponding tape recording of that interview) is exempt under section 42(1)(ca) of the FOI Act.

47. I note that at the time when the applicant made his initial application for access to documents to the QPS (13 May 2005), section 42(1)(ca) did not exist. Section 42(1)(ca) was inserted into the FOI Act in 2005 and commenced operation on 31 May 2005 as a result of amendments to the FOI Act in the *Freedom of Information and Other Legislation Amendment Act 2005.* However, by virtue of section 114(2) of the FOI Act section 42(1)(ca) has retrospective operation. Thus it is open for the QPS to claim exemption pursuant to section 42(1)(ca).

48. I note that the Freedom of Information legislation in other Australian jurisdictions have no equivalent provision to section 42(1)(ca) of the Queensland Act.

49. Section 42(1)(ca) states as follows:

> ***42 Matter relating to law enforcement or public safety***
>
> *(1) Matter is exempt matter if its disclosure could reasonably be expected to—*
>
> *…*
>
> *(ca) result in a person being subjected to a serious act of harassment or intimidation;*

50. The term 'harassment' has been considered by the courts in various contexts. In the Australian Capital Territory Supreme Court matter of *Longfield v Glover* (2005) 191 FLR 332 (at 335) Connolly J said:

> *[10] It seems to me that the learned chief magistrate was quite correct to conclude that the persistent telephone calls and letters, after the complainant made it clear that she did not want contact with the appellant, amounted to harassment. Harassment is not defined in the Crimes Act, but the ordinary plain meaning of the word, as defined in the Macquarie Dictionary (2nd ed) is:*
>
> *to disturb persistently; torment as with troubles, cares etc.*

51. This is consistent with a definition adopted by Hill J in Australian Competition and Consumer Commission v Maritime Union of Australia (2001) 114 FCR 472 in the context of Trade Practices legislation where he said (at 485):

> *The word "harassment' in my view connotes conduct which can be less serious than conduct which amounts to coercion. The word "harassment" means in the present context persistent disturbance or torment.*

52. In *Minister for Immigration and Multicultural Affairs v Respondents* (2004) CLR 1 at 25 – 26, para [72] McHugh J stated:

> *In its ordinary meaning, persecution involves selective harassment or oppression of any kind. The terms "harassment" and "oppression", particularly the former, imply repetitive, or the threat of repetitive, conduct.*

53. In *Murphy and Queensland Treasury* (1995) 2 QAR 744 (at paragraphs 53 and 90-91) (Murphy), the Information Commissioner noted that the term harassment was defined in the Collins English Dictionary, Third Australian Edition, to mean to trouble, torment or confuse by continual, persistent attacks.

54. The term 'intimidation' has also been considered in various contexts. In the matter of *Ratanyake v Chief Executive Officer, Department of the Registrar, Western Australian Industrial Relations Commission* (1998) 78 IR 335 at 338-339 Heenan J of the Western Australian Supreme Court stated:

> *As the* New Shorter Oxford English Dictionary *(1993 reprint) shows, the word "intimidate" means "terrify, overawe, cow" and is used frequently these days in the context of interference with the free exercise of political or social rights. In the unreported case of* Scales v Thorpe*, delivered in the Industrial Magistrates Court at Perth on 12 June 1997, Mr P S Michelides SM considered the meaning of "intimidation" as the word is used in s.68. His Worship said:*
>
> > *"The term, "intimidation", in my view in normal parlance involves the creation of a fear in the mind of the subject that he or she will suffer a detriment either directly to him or herself or to some other person about whom the person the subject of the intimidation cares."*

55. In the matter of *Meller v Low* (2000) 48 NSWLR 517, Simpson J, when considering the term 'intimidation' in the context the *Crimes Act,* found:

> *9. …it is, first, an ordinary English word, readily understood, with no technical or complex or concealed meaning. The Oxford English Dictionary, 2nd ed and the Macquarie Dictionary are in agreement that "intimidate" means to render timid, to inspire with fear, to overawe, to cow, or to force to or deter from some action by threats or violence or by inducing fear.*

56. In the matter of *Bottoms v Rogers* [2006] QDC 80 (13 April 2006) the terms 'intimidation' and 'harassment' were considered in the context of domestic violence. In that matter the Court held that:

> *Intimidation refers to a process where the person is made fearful or overawed, particularly with a view to influence that person's conduct or behaviour…. Harassment on the other hand involves a repeated or persistent form of conduct which is annoying or distressing rather than something which could incite fear.*

57. In light of the above cases and decisions, I consider that for the purpose of section 42(1)(ca) of the FOI Act, the ordinary meaning of the terms 'intimidation' and 'harassment' should be adopted.

58. The phrase '*could reasonably be expected to'* has been considered by the Information Commissioner in the context of section 42 in the matter of *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279. In that case the Information Commissioner noted that the phrase *'could reasonably be expected to'* requires a reasonably based expectation, namely, an expectation for which real and substantial grounds exist. A mere possibility, speculation or conjecture is not enough. The term '*expect*' means to regard as likely to happen.

59. Thus for the purpose of section 42(1)(ca) of the FOI Act the question to be asked is whether there are real and substantial grounds to expect that disclosure of the matter in issue would result in a person being subjected to a serious act of harassment (repeated or persistent conduct which torments or disturbs) or intimidation (conduct designed to make a person fearful or overawed).

60. I consider that the matter of *Murphy*, while it deals with section 42(1)(c) of the FOI Act, affords useful guidance in the interpretation and application of section 42(1)(ca) (particularly in light of the fact that 42(1)(ca) was introduced in to the FOI Act to remedy the perceived shortcoming of section 42(1)(c)).

61. In *Murphy* the Information Commissioner found that whether disclosure could reasonably be expected to endanger a person's life or physical safety is to be objectively judged in light of all relevant evidence, including any evidence obtained from or about the claimed source of danger.

62. The Information Commissioner observed that:

> *52. … the relevant words require an evaluation of the expected consequences of disclosure in terms of endangering (i.e. putting in danger) a person's life or physical safety, rather than in terms of the actual occurrence of physical harm.*
>
> *…*
>
> *The risk to be guarded against is that of a person's life or physical safety being endangered by disclosure of the information in issue.*

63. In this case the risk to be guarded against is that of a person being subjected to a serious act of harassment or intimidation. I consider that, whether disclosure of the matter in issue in this case could reasonably be expected to result in a person (namely, Sergeant McDonald) being subjected to a serious act of intimidation or harassment should be objectively judged in the light of all relevant evidence, including any evidence obtained from or about the claimed source of intimidation or harassment.

64. In relation to its claim that section 42(1)(ca) applies to exempt the matter in issue the QPS have submitted that:

With respect to the previous actions and behaviour of [the applicant] it is reasonable to expect that, such an act may be possible.

65. I have no evidence before me as to precisely what previous actions and behaviour of the applicant the QPS considers would result in a conclusion that 'such an act may be possible'.

66. In order to ascertain what actions or conduct of the applicant might give rise to such a conclusion I have reviewed both the material already released to the applicant in this review and the matter in issue. Those documents reveal that the applicant made a complaint about McDonald arising out of an encounter between the two on a street footpath. The material before me suggests a certain amount of antagonism between the applicant and McDonald, resulting in insulting comments from the applicant about McDonald in the exchange the subject of the complaint by the applicant.

67. Additionally, I have reviewed the material provided by the applicant in the course of the review. The material discloses that the applicant sought special leave to appeal against a judgment of the Queensland Court of Appeal, given on 25 October 1994, which itself was an appeal against a magistrate's decision that resulted in a criminal conviction against the applicant. It is evident from the material that McDonald was the arresting officer and that the applicant was of the view that McDonald committed perjury.

68. Certainly, it is clear from the material before me that there has been ongoing contact between the applicant and McDonald over a period of time. However, that contact appears to be in the context of McDonald's actions in his official capacity (both as a Police Officer and an elected official in the Gatton Shire Council) and the applicant's pursuit of legal remedies or redress of formal complaints. This is not to say that it is not possible to be subjected to harassment or intimidation when conducting official duties. I articulate the point to highlight that the actions of the applicant do not appear to have been overly unreasonable.

69. Certainly, there is nothing before me to suggest the applicant has engaged in serious acts of harassment or intimidation, such as for example, repeated telephone calls to McDonald at home and or work over an extended period of time, threatening letters to his home or work, following McDonald when engaged in his private pursuits or conducting his professional life. On the material before it would seem reasonable to conclude that the applicants conduct may have been a source of annoyance or inconvenience for McDonald. The applicant has made it know in public that he dislikes and/or distrusts McDonald and has made insulting remarks. While, such conduct might amount to harassment it is does not amount to intimidation and it certainly does not amount to a serious act of harassment or intimidation.

70. The question remaining to be addressed is whether it is reasonable to conclude that release of the matter in issue could reasonably be expected to result in McDonald being subjected to a serious act of harassment or intimidation following such release. As previously noted the matter in issue is a précis of the QPS interview with McDonald and the corresponding tape recording of that interview. I note that the matter in issue generally corroborates the version of the events leading to the complaint by the applicant to QPS about McDonald. As such, I fail to see how the disclosure of the information could reasonably be expected to result in the applicant subjecting McDonald to a serious act of harassment or intimidation. As discussed above, the applicant has pursued a course of action *vis-à-vis* McDonald over a number of years that while annoying and inconvenient for McDonald and which may amount to

harassment, could not be considered to be serious harassment and certainly would not amount to intimidation. There is nothing in the submissions of the QPS or the material submitted by the applicant to suggest that his course of conduct would change such that his conduct would become seriously harassing or intimidatory.

71. Accordingly, I am of the view that disclosure of the matter in issue could not reasonably be expected to result in McDonald being subjected to a serious act of harassment or intimidation and thus it is not exempt pursuant to section 42(1)(ca).

Section 42(1A

72. The QPS have submitted that the matter in issue is exempt under section 42(1A).

73. Section 42(1A) states:

> ***42 Matter relating to law enforcement or public safety***
>
> *(1A) Matter is also exempt matter if—*
>
> *(a) it consists of information given in the course of an investigation of a contravention or possible contravention of the law (including revenue law); and*
>
> *(b) the information was given under compulsion under an Act that abrogated the privilege against self-incrimination.*

74. The key issues regarding the application of section 42(1A) of the FOI Act are:

- whether the information over which the exemption is claimed was given in the course of an investigation of a contravention or possible contravention of the law;
- whether the information was given under compulsion;
- whether a claim of privilege is available; and
- whether the information was given under an Act that abrogated the privilege against self-incrimination.

75. The requirements of section 42(1A) of the FOI Act are not mutually exclusive. Consequently, each of the four limbs of the provision, set out above, must be established in order for matter to qualify for exemption under section 42(1A) of the FOI Act.

In the course of an investigation of a contravention or possible contravention of the law

76. In relation to the first limb of the provision, I am satisfied that the investigation was of a contravention or possible contravention of the law.

77. In the matter of *T and Queensland* (1994) 1 QAR 386 Commissioner Albietz considered the term 'contravention or possible contravention of the law' with reference to section 42(1)(e) of the FOI Act. In that matter Commissioner Albietz held that:

> *…contraventions or possible contraventions of the law need not be confined to the criminal law.*
>
> *There is no reason why the words [contravention or possible contravention of the law] should not be read as extending to any law which imposes an enforceable legal duty to do or refrain from doing some thing. I note in this regard that s.36 of the Acts Interpretation Act 1954 Qld provides that in an Act:*

'contravene includes:
(a) breach; and
(b) fail to comply with;'

A law may be contravened in circumstances where the breach does not attract a sanction of a penal nature. There are many instances of a statute imposing a legal duty of general or specific application but imposing no criminal penalty for a breach of the duty, usually because enforcement of the duty is intended to be achieved by other means, which are often specifically provided for in the statute itself.

78. Section 7.4 of the *Police Service Administration Act 1990* (the PSAA) provides that officers are liable to disciplinary action in respect of conduct considered to be misconduct or a breach of discipline on such grounds as are prescribed by the regulations. Regulation 9(1) of the *Police Service (Discipline) Regulations 1990* (the Regulations) provides as follows:

> ***9. Grounds for disciplinary action***
>
> *(1) For the purposes of section 7.4 of the Act, the following are grounds for disciplinary action:*
>
> *(a) unfitness, incompetence or inefficiency in the discharge of the duties of an officers' position;*
>
> *(b) negligence, carelessness or indolence in the discharge of the duties of an officers' position;*
>
> *(c) a contravention of, or failure to comply with, a provision of a code of conduct, or any direction, instruction or order given by or caused to be issued by, the commissioner;*
>
> *(d) a contravention of, or failure to comply with, a direction, instruction or order given by any superior officer or any other person who has authority over the officer concerned;*
>
> *(e) absence from duty except-*
>
> *(i) upon leave duly granted; or*
>
> *(ii) with reasonable excuse;*
>
> *(f) misconduct*
>
> *(g) conviction in Queensland of an indictable offence, or outside Queensland of an offence which, if it had have been committed in Queensland would have been an indictable offence.*

79. Breach of discipline is defined in section 1.4 of the PSAA as:

> *a breach of this Act, the Police Powers and Responsibilities Act 2000 or a direction of the commissioner given under this Act, but does not include misconduct.*

80. Misconduct is defined in section 1.4 of the PSAA as conduct that:

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

81. Section 7.2 of the PSAA makes it clear that a breach of discipline or misconduct relate to conduct, wherever and whenever occurring, whether the officer is on or off duty.

82. The Queensland Parliament has passed legislation (the PSAA) to provide for the regulation in the public interest of the police service including prescribing requirements

for continued service as a police officer. The effect of the above noted provisions of the PSAA is to impose a legal duty upon officers of the QPS to refrain from engaging in conduct that would amount to a breach of discipline or misconduct and to enforce that duty through disciplinary action.

83. On the material before I am satisfied that the investigation being conducted by QPS was an investigation of a breach of discipline.

84. I have listened to the tape recording of the QPS interview with McDonald. The tape recording makes it clear that the purpose of the interview was to determine if there were grounds for disciplinary action pursuant to the PSAA.

85. The nature of the allegations made by the applicant against McDonald is such as would amount to a breach of discipline or misconduct had they been proven. I consider that the first limb of section 42(1A) is satisfied.

Under compulsion

86. The second limb of the provision requires that the information be given under compulsion.

87. The tape recording of the interview with McDonald confirms that McDonald was given a warning that he was required to answer questions pursuant to the direction of the Commissioner given under section 4.9(1) of the PSAA and contained in part 18.2.4.4.9 of the HRM Manual, and failure to do so would amount to grounds for disciplinary action.

88. Part 18.2.4.4.9 of the QPS *Human Resources Management Manual* (the HRM Manual) states in part:

> *Pursuant to ss. 4.9(1) and 2.5 of the* Police Service Administration Act 1990, *all members of the Police Service (including police officers, police recruits and staff members), are instructed to truthfully, completely and promptly answer all questions directed to them by a member responsible for conducting an Inquiry or Investigation on behalf of the Commissioner.*

89. The effect of the Commissioner's direction is to require the officer to answer questions. Accordingly I consider that McDonald was compelled to give the information required of him and the second limb of section 42(1A) is satisfied.

Can privilege be claimed

90. It should be noted that the law distinguishes between the privilege against self-incrimination (or exposure to criminal prosecution) and the penalty privilege (or privilege against exposure to a penalty or forfeiture). Penalty in the context of the penalty privilege includes a pecuniary penalty, dismissal from employment in the public service or disqualification from engaging in a professional activity.

91. The High Court case of *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 (Pyneboard) established the precedent that a provision which expressly abrogates the privilege against self-incrimination will also, by implication, abrogate the penalty privilege (at 345).

92. Until the recent High Court cases of *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 (Daniels) and

Rich and Anor v Australian Securities and Investments Commission (2004) 209 ALR 271 (Rich) the High Court was of the view that the penalty privilege could be relied upon in non-judicial proceedings.

93. In the *Pyneboard* case Mason ACJ, Wilson and Dawson JJ said they were, *'not prepared to hold that the privilege is inherently incapable of application in non-judicial proceedings'* (at 341). This case was subsequently interpreted to establish a precedent that the penalty privilege was available in non-judicial proceedings in the matter of *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 547 per McHugh J (Caltex).

94. However, in the more recent High Court decision of *Daniels,* the High Court rejected the *Caltex* interpretation of *Pyneboard*. In *Daniels* per Gleeson CJ, Gaudron, Gummow and Hayne JJ, the Majority noted that:

> *…[the statement in Pyneboard] does not amount to a holding that the privilege is available in non-judicial proceedings.* [at 15]

and in relation to the penalty privilege:

> *…there seems little, if any, reason why that privilege should be recognised outside judicial proceedings. Certainly, no decision of this court says it should be so recognised, much less that it is a substantive rule of law...* [at 31]

95. The High Court has also recently cited the *Daniels* case with approval in *Rich*.

96. These recent High Court decisions indicate a narrower application of the penalty privilege than previously applied by the High Court. Therefore, it must be said that the penalty privilege is now not available to a person to claim in non-judicial matters. Section 42(1A) of the FOI Act can have no application where there is no valid claim of privilege.

97. Thus, for the purpose of determining whether section 42(1A) of the FOI Act applies to exempt information, the distinction between the privilege against self-incrimination and the penalty privilege is an important one in non-judicial proceedings.

98. The distinction between the penalty privilege and the privilege against self-incrimination is relevant to this matter when one considers that disciplinary investigations by the QPS are non-judicial proceedings and not all disciplinary investigations will result in the risk of exposing an officer to self-incrimination. An officer may only risk being exposed to a penalty.

99. The range of disciplinary actions that can be taken against an officer is outlined in section 7.4(3) of the PSAA. That section states that:

> *(3 Without limiting the range of disciplines that may be imposed by the prescribed officer by way of disciplinary action, such disciplines may consist of—*
>
> *(a) dismissal;*
> *(b) demotion in rank;*
> *(c) reprimand;*
> *(d) reduction in an officer's level of salary;*
> *(e) forfeiture or deferment of a salary increment or increase;*
> *(f) deduction from an officer's salary payment of a sum equivalent to a fine or 2 penalty units.*

100. I consider that the disciplinary action outlined in section 7.4(3) of the PSAA is punitive in nature and therefore falls within the scope of the penalty privilege.

101. Accordingly, as disciplinary interviews are non-judicial proceedings, in cases where the only risk to an officer is exposure to a penalty, the penalty privilege would not be available for an officer to claim and therefore section 42(1A) would have no application.In the present case McDonald was directed to answer questions put to him.

102. in relation to an allegation of misconduct. He was advised that failure to answer the questions would result in disciplinary action. The allegation against McDonald was not such as to potentially expose him to a risk of criminal sanction. Thus I do not consider that the privilege of self incrimination was available to him to claim.

103. Accordingly, I consider that the third limb of section 42(1A) has not been satisfied and thus the matter in issue is not exempt under that provision.

Under an Act that abrogated the privilege against self-incrimination

104. The final limb of the provision that must be satisfied is that the information was given under an Act that abrogated the privilege against self-incrimination.

105. In light of the fact that the third limb of the provision has not been satisfied it is not strictly necessary to consider the final limb, however, for the sake of completeness I have considered the fourth limb below.

106. It is an accepted principle of law that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect (*Potter v Minahan* (1908) 7 CLR 277 at 304 per O'Connor J).

107. The High Court in *Pyneboard* found that where there are no express words of abrogation, the question of whether the privilege has been abrogated by implication will depend upon *'the language and character of the provision and the purpose which it is designed to achieve'* (at 341).

108. There are no provisions in the PSAA or the Regulations that expressly abrogate the privilege against self-incrimination. However, as noted above, section 4.9(1) of the PSAA and part 18.2.4.4.9 of the HRM Manual operate to require an officer to answer questions as directed, which may amount to an implied abrogation of the privilege. Legislation with similar operation was considered in the matter of *Police Service Board and Another v Morris and Martin* (1985) 58 ALR 1 (Morris).

109. The Morris case dealt with provisions of the *Police Regulation Act 1958 (Vic)* and the *Police Regulations 1957 (Vic)* that had a similar operation to the Queensland PSAA and the HRM Manual, in that refusal to answer questions when ordered to do so resulted in disciplinary action. In that case the High Court held that the character and object of the relevant legislative provisions and the nature of the police force provide a sufficient indication that it was not intended that the privilege against self-incrimination should apply.

110. Thus, in light of the Morris case and the operation of section 4.9(1) of the PSAA and part 18.2.4.4.9 of the HRM Manual, in circumstances where a Police Officer will be exposed to a risk of self-incrimination, I am of the view that it may be that a Police Officer's right to claim privilege against self-incrimination is abrogated by implication.

However, I make no specific finding on this issue as it is not necessary for the purpose of this review.

Conclusion regarding the application of section 42(1A) of the FOI Act

111. I do not consider that the third limb of section 42(1A) FOI Act has been satisfied in this case and accordingly the matter in issue is not exempt under section 42(1A) of the FOI Act.

Decision

112. I vary the decision under review (being the deemed decision of the QPS refusing access to documents sought in the applicant's FOI access application dated 13 May 2005), by deciding that:

- pursuant to section 77(1) of the FOI Act, that part of the applicant's application that revisits matters that have previously been addressed in decisions of this Office is vexatious and will not be dealt with in this review

- part of folio 11 and the whole of folio 13, being the typed summary of the interview with Sergeant McDonald, and the corresponding taped record of interview, are not exempt pursuant to section 42(1)(ca) or section 42(1A) of the FOI Act

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

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V Corby
Assistant Commissioner

Date: 29 June 2007