



## Decision and Reasons for Decision

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| Citation:           | <i>JA14YM and Crime and Misconduct Commission</i> [2014] QICmr 13 (10 April 2014)  |
| Application Number: | 311748   |
| Applicant:          | JA14YM   |
| Respondent:         | Crime and Misconduct Commission  |
| Decision Date:      | 10 April 2014  |
| Catchwords:         | <p><b>ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION –</b> applicant seeks access to information concerning identity of complainant and assessment of complaint by respondent – whether disclosure would reveal information that could reasonably be expected to identify a confidential source of information in relation to the enforcement or administration of the law – whether information is exempt from disclosure under sections 47(3)(a) and 48 and schedule 3, section 10(1)(b) of the RTI Act.</p> <p><b>ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION –</b> applicant seeks access to information concerning identity of complainant and assessment of complaint by respondent – 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 exempt from disclosure under sections 47(3)(a) and 48 and schedule 3, section 10(4) of the RTI Act.</p> <p><b>ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – CONTRARY TO PUBLIC INTEREST –</b> information concerning assessment by respondent of allegations against third party – whether disclosure would, on balance, be contrary to the public interest – section 47(3)(b) and 49 of the <i>Right to Information Act 2009 (Qld)</i></p> |

## REASONS FOR DECISION

### Summary

1. The applicant applied to the Crime and Misconduct Commission (**CMC**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to documents concerning a complaint lodged with CMC about the applicant, containing allegations of misconduct.
2. CMC released<sup>1</sup> some information to the applicant, and refused access to other information,<sup>2</sup> on various grounds.<sup>3</sup> The applicant applied to OIC for external review of CMC's decision.
3. During the course of the external review, CMC agreed to release some information to which it had initially refused access.<sup>4</sup> CMC also located additional relevant documents,<sup>5</sup> significant parts of which it released, while the applicant withdrew his application as it concerned certain types of information.
4. CMC's decision is set aside. Information remaining in issue is:
  - exempt information to which access may be refused,<sup>6</sup> as
    - information disclosure of which could reasonably be expected to identify a confidential source of information (**Confidential Source Exemption**),<sup>7</sup> and/or
    - information obtained, used or prepared for an investigation by CMC in performance of its prescribed functions (**CMC Exemption**),<sup>8</sup> or
  - information disclosure of which would, on balance, be contrary to the public interest,<sup>9</sup> as personal information of an individual other than the applicant.

### Procedural Steps

5. Significant procedural steps relating to the access application and external review are set out in the appendix.

### Reviewable decision

6. The decision under review is the deemed decision taken to have been made by CMC under section 83(2) of the RTI Act, affirming CMC's initial decision dated 27 June 2013.

<sup>1</sup> Pursuant to a purported internal review decision dated 21 August 2013; this decision was made outside the statutory timeframe for making internal review decisions as prescribed in section 83(2) of the RTI Act. In accordance with that provision, CMC was therefore taken to have made a decision affirming CMC's initial decision dated 27 June 2013. The practical consequence of CMC's out of time internal review decision was, however, that a deal of information was released to the applicant additional to that disclosed pursuant to the initial decision. Accordingly, OIC has in the course of this external review only considered information to which access was refused in the purported internal review decision (together with additional information located during the external review). OIC has treated CMC's purported internal review decision as a submission in this review.

<sup>2</sup> 52 pages of an initial 73 identified by CMC (excluding duplicates, access to which the applicant did not pursue) were released to the applicant in full. Nine (numbered 'pages 1-9' for the purposes of this review) were released in part, and access to the remaining 12 ('10-21') refused in full.

<sup>3</sup> CMC refused access to parts of pages 1-9 and all of 10-21 on the grounds some of this information comprised exempt information under sections 47(3)(a) and 48, and schedule 3, section 10(1)(b), and other information on the grounds the information comprised information the disclosure of which would, on balance, be contrary to the public interest under sections 47(3)(b) and 49 of the RTI Act, relying on various of the public interest harm and nondisclosure factors prescribed in schedule 4 to the RTI Act.

<sup>4</sup> Being parts of pages 10-21, ie, the documents to which access had initially been refused in full.

<sup>5</sup> 'Pages 22-81'.

<sup>6</sup> Under sections 47(3)(a) and 48 of the RTI Act.

<sup>7</sup> Schedule 3, section 10(1)(b) of the RTI Act.

<sup>8</sup> Schedule 3, section 10(4) of the RTI Act.

<sup>9</sup> Sections 47(3)(b) and 49 of the RTI Act.

## Evidence considered

7. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and appendix).

## Information in issue

8. The information in issue in this review comprises segments of information appearing on the following pages:<sup>10</sup>
  - pages 1-5, 7, 8,
  - pages 10-14, 16, 18, 20, and
  - pages 23-26, 29-31,<sup>11</sup> 33,<sup>12</sup> 35, 36-38, 42-43, 51, 53, 55, 72-3.

## Relevant law

9. Section 23 of the RTI Act confers a general right to access documents of an agency. This right, however, is subject to a number of exclusions and limitations, including grounds for refusal of access prescribed in section 47 of the RTI Act.
10. Relevantly, an agency may refuse access to information to the extent it comprises exempt information,<sup>13</sup> or where its disclosure would, on balance, be contrary to the public interest.<sup>14</sup>

## Findings

### ***Application of the Confidential Source Exemption***

11. Exempt information includes information the disclosure of which could reasonably be expected to enable the existence or identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained.<sup>15</sup> Information will be exempt on this basis if:
  - there exists a confidential source of information,
  - the information which the confidential source has supplied is in relation to the enforcement or administration of the law, and
  - disclosure of the information in issue could reasonably be expected<sup>16</sup> to enable the existence or identity of the confidential source of information to be ascertained.<sup>17</sup>
12. Relevant segments of information appear on pages 1-5, 7-8, 10-14, 16, 18, 23, 25, 29, 30, 31, 35-8, 51, 53, 55 and 72-3. These segments generally comprise identifying particulars, contact details and other background information linked with the identity of the complainant. Having carefully reviewed this information, I consider CMC is entitled to refuse access to it on the basis that:

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<sup>10</sup> Not all of the information redacted from relevant pages remains in issue - some segments comprise information (such as officer names and contact telephone numbers) to which the applicant does not seek access.

<sup>11</sup> Page 31 substantially duplicating page 18.

<sup>12</sup> Substantially duplicating page 20.

<sup>13</sup> Sections 47(3)(a) and 48 of the RTI Act.

<sup>14</sup> Sections 47(3)(b) and 49 of the RTI Act.

<sup>15</sup> Schedule 3, section 10(1)(b) of the RTI Act.

<sup>16</sup> The phrase *could reasonably be expected to* requires an objective consideration of all the relevant evidence and consideration of whether the expectation is reasonably based. A reasonable expectation is not irrational, absurd or ridiculous. *Sheridan and South Burnett Regional Council and Others* [2009] QICmr 26 (9 April 2009) at paragraphs [189] – [193] referring to *Attorney-General v Cockcroft* (1986) 64 ALR 97.

<sup>17</sup> *McEniery and Medical Board of Queensland* (1994) 1 QAR 349 at paragraph [16]. *McEniery* considered the application of section 42(1)(b) of the *Freedom of Information Act 1992* (Qld), identical in terms to schedule 3, section 10(1)(b) of the RTI Act.

- the source supplying relevant information – the complainant – did so on the implied mutual understanding that their identity would remain confidential,<sup>18</sup> **and** their identity continues to remain confidential,
  - the information relates to the enforcement or administration of the law, namely the *Crime and Misconduct Act 2001* (Qld) (**CM Act**) and *Integrity Act 2009* (Qld);<sup>19</sup> and
  - disclosure of this information would reveal information that could reasonably be expected to enable the source's identity to be ascertained.
13. The applicant contends the Confidential Source Exemption cannot apply, submitting that:
- the function giving rise to the complaint was public, and contemporary press coverage of the allegations made by the complainant means that the required element of confidentiality cannot be satisfied,
  - the applicant was not subject to the CM Act nor the Integrity Act, therefore the complaint did not relate to the enforcement/administration of the law, and
  - the name used by the complainant was 'fake', and therefore the complainant *'does not exist, not at least in the name given in the complaint'*.<sup>20</sup>

### Confidential source of information

14. The applicant submits that the function at which events giving rise to the complaint occurred was a public occasion. He further notes that the complaint and its substance were the subject of press coverage. The applicant argues that in view of these facts, the complainant was *'...not relaying anything confidential'*,<sup>21</sup> further querying how the matter can *'...be confidential when it has been released to the newspapers?'*<sup>22</sup>
15. The key issue in this regard, however, is not whether events giving rise to the supply of information were secret, nor whether the information a source supplies is confidential, but whether, relevantly, the identity of the source of that information is confidential. This is because the exemption set out in schedule 3, section 10(1)(b) of the RTI Act operates in relation to a confidential source of information, rather than a source of confidential information.
16. In other words, it is the existence or identity of the source of information that must be confidential for this exemption to apply, not the actual information supplied. A complaint about events transpiring at a public function may nevertheless be made confidentially. Equally, a complainant's identity may be confidential, even if the information they supply is in or enters the public domain.<sup>23</sup>
17. There is no evidence before me to suggest the identity of the complainant in this case was published in the media, or otherwise publicised. I am satisfied the complainant is a confidential source of information.

<sup>18</sup> As evidenced, among other things, by the terms of the source's communications with CMC (see for example page 14, an email from the complainant to CMC dated 4 March 2013), and CMC's subsequent treatment of the source's identity.

<sup>19</sup> The legislation CMC considered may have been breached in the event the allegations contained in the complaint were substantiated. The complaint actually identifies the *Integrity Act 2009* (Qld), *Public Sector Ethics Act 1994* (Qld) and the *Auditor General Act 2009* (Qld) as potentially relevant legislation.

<sup>20</sup> Letter dated 6 March 2014.

<sup>21</sup> Letter dated 19 November 2013.

<sup>22</sup> Letter dated 6 March 2014.

<sup>23</sup> Such as by way of newspaper publication: see *McEniery*, at paragraph [14], considering a similar situation in which information supplied by a confidential source was itself in the public domain.

## Relate to the enforcement or administration of the law

18. In his 19 November 2013 submissions, the applicant noted that he was not a person subject to the operation of the CM Act, and that relevant conduct could not have amounted to 'official misconduct' as defined in that Act in any event. He reiterated these submissions in his letter dated 6 March 2014, stating:

*This complaint did not fall within the [CM] Act. Even if it had, it did not amount to misconduct...I hold no position in Queensland. I have no responsibility for administering anything, and in fact never did.*

19. The Confidential Source Exemption only requires that the relevant information 'relates' – is connected<sup>24</sup> – to enforcement or administration of the law; not that it results in a substantiated breach of same. The provision does not require a confidential source to accurately particularise a specific law, nor that the information they supply comprise conclusive evidence of a breach of that law. It operates simply to protect the identity of sources supplying information relating to or connected with either the enforcement or administration of the law.
20. In this case, information supplied related to the interpretation and potential application and enforcement of the CM Act and/or the *Integrity Act 2009*. At the time the complaint was made, the applicant occupied a role in Queensland that could at the least be described as quasi-public, and while the complaint was ultimately assessed as being without basis, this outcome occurred only after CMC received the complaint, initiated investigative inquiries, conducted research, and completed its assessment process – activities at the least comprising administration<sup>25</sup> of the law (the CM Act), and flowing directly from the making of the complaint.
21. As noted in paragraph 12, I am satisfied the relevant information relates to the enforcement or administration of the law.

## 'Fake' name - anonymous/pseudonymous complaints

22. The applicant's submissions<sup>26</sup> note that the complainant gave no address or telephone number, and also refer to CMC investigators' suspicions that identifying particulars used by the complainant may be 'fake'.
23. As to the first of these points, an informant may be identified by information other than contact particulars such as an address or telephone number, and the mere failure to supply same does not preclude the operation of the Confidential Source Exemption.<sup>27</sup>
24. As to the second point, I acknowledge that CMC investigators queried the authenticity of the name used by the complainant. Ultimately, there is no evidence conclusively determining the issue.
25. I do note, however, that OIC's inquiries<sup>28</sup> have disclosed that individuals using the same name as the complainant live and work in the region in which the relevant function was held. While the applicant contends that just because the name 'is a name

<sup>24</sup> Paraphrasing the *Macquarie Dictionary Online* definition (accessed 11 March 2014).

<sup>25</sup> A broad concept – see the judgment of Jones J in *Re Croom and Accident Compensation Commission* (1989) 3 VAR 441, discussed and cited with approval in *McEnery* (at paragraphs [36]-[43]).

<sup>26</sup> Especially the submissions contained in his letters dated 11 February and 6 March 2014.

<sup>27</sup> And, indeed, point to an informant's desire to keep their identity confidential: *Re Sinclair and Secretary, Department of Social Security* (1985) 9 ALN N127; *McKenzie v Secretary, Department of Social Security* (1986) 65 ALR 645, considering the equivalent exemption provision as contained in the *Freedom of Information Act 1982* (Cth).

<sup>28</sup> Open source internet searches conducted through the course of the review, most recently on 12 March 2014.

used in [name of city] does not prove that it is the real name of the complainant,' equally it does not prove that it is not.

26. In this regard, it is important to bear in mind that the test imposed by the Confidential Source Exemption is not one requiring absolute proof, but reasonable expectation. The provision reflects the important public interest in ensuring the free flow of information to law enforcement authorities. While I do not wish to overstate the likelihood of identification, given:
- the fact that, as noted above, actual individuals exist using the name,
  - the information contains other potentially identifying information, including references to the complainant's age, geographic locations at given points in time and work and business interests, and
  - the relatively small pool of potential complainants,<sup>29</sup>

I consider it reasonable – and not 'irrational, absurd or ridiculous'<sup>30</sup> – to conclude that disclosure of relevant information could enable identification of the complainant.<sup>31</sup> Accordingly, I consider the third requirement identified in paragraph 11 above is satisfied in this case.

### Malicious complaint

27. The applicant has consistently stressed his view through the course of this review that the complaint was an exercise in malice. In his application for external review, for example, he submits that in refusing access to information, CMC became '*...party to a scheme which was designed to use the Agency to damage the applicant*'. Further, in his letter dated 6 March 2014 the applicant states that the complainant '*...is a source of malevolent media coverage which was the sole object of this exercise*'.
28. I acknowledge the frustration and concern that must be felt by an individual in the applicant's position, having to endure allegations subsequently assessed as without basis. A complainant's motives, however, are irrelevant in considering the application of schedule 3, section 10(1)(b) of the RTI Act; the provision is '*...clearly designed to protect the identity of informers and does not differentiate between the good, the bad or the indifferent*'.<sup>32</sup> An informant can be regarded as a confidential source of information, notwithstanding that person may have been prompted by an improper motive.<sup>33</sup>

### Application of the CMC Exemption

29. Even if I were wrong in my findings as to the application of the Confidential Source Exemption, I consider CMC may nevertheless refuse access to the bulk of the information identified in paragraph 12.<sup>34</sup> This is because I consider this information comprises exempt information, pursuant to the CMC Exemption.<sup>35</sup>

<sup>29</sup> The applicant advised in his letter dated 19 November 2013 that attendance at the relevant function was 'at least 15 people'.

<sup>30</sup> See note 16.

<sup>31</sup> Further bearing in mind that the risk of identification actually occurring need not be substantial: *Re Maskell and Centrelink* [2004] AATA 522, at [15].

<sup>32</sup> *Re Richardson and Commissioner for Corporate Affairs* (1987) 2 VAR 51, as cited with approval in the Information Commissioner's decision in *Bayliss and Medical Board of Queensland* (1997) 4 QAR 1, at paragraph [33].

<sup>33</sup> *McKenzie*. In making this observation, I am recording no finding as to the complainant's motives in this case.

<sup>34</sup> That is, all information identified in paragraph 12, other than redacted segments in issue appearing on pages 2, 3 and 16, which in my view ought properly be characterised as information 'about' the applicant and concerning a finalised investigation, and thus fall within the exception to the CMC Exemption set out in schedule 3, section 10(9) of the RTI Act. It is also arguable as to whether the segments in issue on page 38 could be said to comprise information 'obtained, used or prepared' for CMC's investigation, given they post-date CMC's assessment process. CMC, however, contends otherwise (submissions dated 7 April 2014). This issue has arisen relatively late in the review process, and is probably better explored in a case in which it may have a material effect on the outcome. In the circumstances, I have refrained from making a finding on the application of the CMC Exemption to this limited quantity of information (though it remains exempt from disclosure, in accordance with my findings at paragraphs 11-28).

<sup>35</sup> The purported internal review decision did not rely on the CMC Exemption; its possible application was raised by CMC in its letter to OIC dated 28 November 2013. In any event, an external review under the RTI Act is a full merits review and I have

30. The CMC Exemption – schedule 3, section 10(4) of the RTI Act – has been analysed and applied in a number of OIC decisions.<sup>36</sup> For the purposes of these reasons, it is sufficient to note that it is a broad provision, operating to exempt from disclosure information ‘obtained, used or prepared’<sup>37</sup> for an investigation<sup>38</sup> by CMC<sup>39</sup> in the performance by it of its ‘prescribed functions’,<sup>40</sup> where that information is not, relevantly, about the access applicant.<sup>41</sup>
31. CMC received the complaint, which it characterised and assessed as a complaint of suspected official misconduct.<sup>42</sup> As I explained to the applicant in my letter dated 20 February 2014, relevant information comprises information obtained,<sup>43</sup> used,<sup>44</sup> or prepared<sup>45</sup> by CMC in the course of its investigation into and assessment of the complaint. Assessing and dealing with complaints about misconduct are part of CMC’s misconduct functions,<sup>46</sup> which in turn comprise one of CMC’s prescribed functions.
32. Further, as this specific information comprises:
- particulars concerning the complainant (including the name and email address used by the complainant),<sup>47</sup> and
  - information regarding the making of the complaint<sup>48</sup> (rather than its substance),
- it is not, by its very nature, ‘about’<sup>49</sup> the applicant. The exception to the CMC Exemption does not, therefore, apply.
33. Accordingly, I am satisfied that the requirements of the CMC Exemption are met. I am further satisfied that the exception to the CMC Exemption does not apply. Relevant information therefore comprises exempt information, to which access may be refused.

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jurisdiction to consider the information in issue in light of any exemption provisions under the RTI Act that I consider are relevant to the facts of a case.

<sup>36</sup> See, for example, *Springborg and Crime and Misconduct Commission; RZ (Third Party), BX (Fourth Party), Director-General of the Department of Justice and Attorney General (Fifth Party)* (2006) 7 QAR 77 and *McKay and Department of Justice and Attorney General* (Unreported, Queensland Information Commissioner, 25 May 2010) (each considering section 42(3A) of the former *Freedom of Information Act 1992* (Qld), the equivalent of schedule 3, section 10(4) of the RTI Act), *G8KPL2 and Department of Health* (Unreported, Queensland Information Commissioner, 31 January 2011) and *Together Queensland, Industrial Union of Employees and Department of Transport and Main Roads* (Unreported, Queensland Information Commissioner, 1 February 2013).

<sup>37</sup> Undefined terms to be interpreted according to their ordinary meaning: *McKay*, paragraph [63].

<sup>38</sup> An expansive concept, defined as it is in the CM Act to include the mere ‘examination or consideration’ of information (paraphrasing the definition of ‘investigate’ contained in schedule 2 to the CM Act). *Springborg* contains a detailed analysis of the concept of an ‘investigation’ as used in schedule 3, section 10(4), the Information Commissioner there determining that it can encompass the process of assessing, examining or considering a complaint: paragraphs [55]–[59].

<sup>39</sup> A ‘prescribed crime body’ – schedule 3, section 10(9) of the RTI Act.

<sup>40</sup> Defined in schedule 3, section 10(9) of the RTI Act.

<sup>41</sup> Schedule 3, section 10(6) of the RTI Act provides for an exception to schedule 3, section 10(4), but only where an investigation is finalised and information is about an applicant. While the investigation in this case has been finalised, specific segments of information are, as noted, not ‘about’ the applicant. As to the potentially expansive scope of the provision, see *Together Queensland*, where Assistant Information Commissioner Jefferies observed that the CMC Exemption ‘...operates to provide that information falling within a defined class or category will comprise exempt information to which access may be refused, irrespective of whether disclosure of specific information in issue would have any prejudicial consequences...’ (at [34]), the Assistant Commissioner going on to note the provision may conceivably apply to exempt from disclosure information ‘...otherwise in the public domain.’ (At [36].)

<sup>42</sup> As defined and regulated by the CM Act – see CMC’s letter to the complainant dated 18 March 2013, the bulk of which has been released to the applicant but for identifying particulars on the first page (page 8 in this review).

<sup>43</sup> That is, information CMC has ‘come into possession of’: *Macquarie Dictionary Online* (accessed 10 March 2014).

<sup>44</sup> The ordinary definition of ‘use’ being ‘...to employ for some purpose, put into service’: as above.

<sup>45</sup> To, relevantly, ‘compose’: note 43.

<sup>46</sup> Section 33(b) of the CM Act provides that CMC’s misconduct functions include ensuring ‘...a complaint about, or information or matter involving, misconduct is dealt with in an appropriate way...’. Section 35(1)(a) further provides that CMC performs its misconduct functions by, among other things, ‘expeditiously assessing complaints about, or information or matters...involving, misconduct made or notified to it’.

<sup>47</sup> Which was both ‘obtained’ by CMC and subsequently ‘used’ by it during the investigation process to, by way of one example, further communicate with the complainant.

<sup>48</sup> The latter including information as to the place from and time at which the complaint was made.

<sup>49</sup> ‘Of, concerning, in regard to’: *Macquarie Dictionary Online* (accessed 10 March 2014).

## Exempt information and external review process – applicant’s submissions

34. The applicant’s submissions were, in the main, directed toward the operation of the Confidential Source Exemption, which I have addressed above as relevant. In his letter dated 6 March 2014, however, he made several submissions concerning the concept of ‘exempt information’ generally, and the external review process:

*Some of the material that has been redacted plainly does not fall into the category of being exempt from disclosure. For example, the lodgement form IYW2VPO asks questions about sex, whether the person identifies as Indigenous, or is of a non-English speaking background.... These statistics are not collected to identify a complainant. As you well know, they are collected to ascertain whether there is a balance in complaints and to alert to gender inequality or racial discrimination.*

*I am surprised that you have not looked carefully at this document. For example, the answer to the question “Do you speak a language other than English at home?” is redacted. The next line begins “If yes” and is left completely blank. It is obvious what is redacted and it serves no purpose to do it.*

*These are not important details of themselves. But they reveal the culture of secrecy by the CMC. How accountable it is depends entirely on how robust the external review that is undertaken.*

35. The applicant’s assertion that information cited in his submissions does not ‘fall into the category of being exempt from disclosure’ is not correct. On a strictly technical level, this is because the information falls, for the reasons given above, within one or more of the categories of exempt information prescribed in schedule 3 of the RTI Act. In accordance with section 48 of the RTI Act, it therefore comprises exempt information, which is, in turn, information to which access may be refused under section 47(3)(a) of the RTI Act.
36. More substantively, the type of information the applicant cites in the submission extracted above is information that by its very nature could tend to identify a source, particularly where, as in this case, the field of potential sources is so narrow. In this regard, it is not relevant whether such information is collected to ‘identify a complainant’ or otherwise – the key issue is whether disclosure of that information could reasonably be expected to enable identification. Noting again that I am only required to be satisfied of a reasonable expectation – not substantial risk – of identification, I consider that, for the reasons set out above, relevant information comprises exempt information under the Confidential Source Exemption.<sup>50</sup>
37. I should also note that I do not accept the above submissions insofar as they might be seen to call into question the rigour of the external review process in this case. I have examined and appropriately scrutinised the information in issue,<sup>51</sup> explained to the applicant the operation of all refusal of access grounds arising in this review and their application to relevant information, and afforded him several opportunities to provide submissions. I am satisfied that the external review process has been conducted impartially and ‘robustly’.
38. As to the applicant’s assertions of a ‘culture of secrecy,’ it is not my role to adjudicate on the conduct of another agency such as CMC. I would note, however, that the vast

<sup>50</sup> And would, in any event, comprise exempt information under the CMC Exemption, as information ‘obtained’ by CMC via solicitation on its complaint form, for the purposes of enabling collection of as much information concerning incoming complaints and complainants as may assist it in ‘expeditiously assessing’ those complaints.

<sup>51</sup> And note that while I am not liberty to disclose exempt information, insofar as the applicant speculates as to the nature of a segment of information, it is of course possible that the complainant’s response to the particular question is not that which the applicant postulates – the person completing the form may either have neglected or chosen not to supply the personal information that would complete the next question, the absence of a response to which is the basis of the applicant’s deduction.



bulk of the information identified by CMC has been released to the applicant by that agency (much of it during the course of this review), including substantive and relatively detailed information revealing the manner in which CMC assessed the complaint as it related to him.

39. I accept that the applicant may find it frustrating that some information has been withheld from him. The statutory right of access prescribed in the RTI Act is not, however, absolute. Where information satisfies the requirements for a particular ground for refusing access, I am bound to decide accordingly.
40. Access to the information identified in paragraph 12 may be refused, on the grounds it comprises exempt information.

### Contrary to public interest information

41. The balance of the information in issue consists of segments of information appearing on pages 20, 24-26, 29-30, 33, 42-43 and 53. CMC may refuse access to these segments, on the grounds their disclosure would, on balance, be contrary to the public interest.<sup>52</sup>
42. The information supplied by the complainant was, in general terms, directed toward the applicant. In assessing that information, however, CMC considered whether it might also suggest possible misconduct on the part of another individual (**Third Party**). The segments noted above comprise CMC's assessment of this possibility.
43. I am satisfied that information linking an identifiable individual to unfounded allegations of wrongdoing comprises that individual's personal information,<sup>53</sup> and that therefore relevant segments comprise the personal information of the Third Party.
44. I am also satisfied that disclosure of these segments would, on balance, be contrary to the public interest.<sup>54</sup>
45. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest<sup>55</sup> and explains the steps that a decision-maker must take<sup>56</sup> in deciding the public interest, as follows:
  - identify any irrelevant factors and disregard them
  - identify any relevant public interest factors favouring disclosure and nondisclosure
  - balance the relevant factors favouring disclosure and nondisclosure; and
  - decide whether disclosure of the information would, on balance, be contrary to the public interest.<sup>57</sup>

<sup>52</sup> The term *public interest* refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that, in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests.

<sup>53</sup> 'Personal information' is defined in section 12 of the *Information Privacy Act 2009* (Qld) as: 'information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.' This definition applies for the purposes of the RTI Act: schedule 6 of the RTI Act.

<sup>54</sup> For the sake of completeness, I should also note that some of segments of Third Party personal information (eg, those appearing on pages 24-26, 29, 30 and 53 would also appear to comprise exempt information subject to the CMC Exemption, being information 'prepared' for the purposes of CMC's investigation, none of which – as information concerning the Third Party – is 'about' the applicant.

<sup>55</sup> Schedule 4 of the RTI Act sets out the factors for deciding whether disclosing information would, on balance, be contrary to the public interest. However, this list of factors is not exhaustive. In other words, factors that are not listed may also be relevant in a particular case.

<sup>56</sup> Section 49(3) of the RTI Act.

<sup>57</sup> As to the correctness of this approach, see *Gordon Resources Pty Ltd v State of Queensland* [2012] QCATA 135.

46. Following those steps, I have not taken irrelevant factors into account.
47. As to factors favouring disclosure, the only factors arguably arising in this case are the general public interest in furthering access to government held information, and the fact that certain of the relevant segments of information contain some limited references to the applicant, which comprise his personal information.<sup>58</sup>
48. Telling against disclosure, however, is the public interest harm presumed to arise on disclosure of personal information,<sup>59</sup> and the public interest in avoiding prejudice to an individual's right to privacy,<sup>60</sup> a prejudice I consider could reasonably be expected to occur were information linking an individual with allegations of wrongdoing (subsequently, as noted, dismissed) to be disclosed.
49. Balancing these factors, I am in this case satisfied the factors favouring disclosure are outweighed by the public interest in protection of third party personal information and avoiding prejudice to individual privacy. Disclosure of the information identified in paragraph 41 would reveal that CMC had at the least contemplated the possibility that an individual other than the applicant (ie, the Third Party) may have committed wrongdoing, which would in my view comprise an unjustifiable incursion into the Third Party's 'personal sphere'. These are considerations deserving of considerable weight.
50. While I recognise the importance of furthering access to government information, and in releasing to an individual their personal information, the applicant's personal information (where it appears) is here intertwined with the personal information of the Third Party.<sup>61</sup> Accordingly, it is not possible to disclose the applicant's information without disclosing the personal information of the Third Party, which would result in the release of relatively sensitive personal information and thus occasion the adverse public interest consequences discussed above. Taking into account the fact that the references to the applicant as they appear in these segments are incidental – and noting that he has during the course of this external review obtained access to a considerable amount of information showing how CMC managed the complaint as against him – I consider that disclosure of segments concerning the Third Party would, on balance, be contrary to the public interest.
51. In making this finding, I acknowledge that the applicant has as a result of his application had disclosed to him some information concerning allegations against persons and entities other than him. I am precluded under the RTI Act from revealing in these reasons information claimed to be contrary to the public interest. However, even assuming that one of those persons is the same person as the subject of the Third Party segments, this would arguably only diminish relevant privacy interests. It does not, however, negate them, and given the nature of the information contained in the Third Party segments – contemplation and analysis of alleged wrongdoing ultimately found to be without substance – I consider relevant privacy interests and the public interest in avoiding release<sup>62</sup> of personal information remain sufficiently substantial so as to attract a weight sufficient to tilt the balance of the public interest in favour of nondisclosure in this case.

<sup>58</sup> Schedule 4, part 2, item 7 of the RTI Act.

<sup>59</sup> Schedule 4, part 4, section 6 of the RTI Act.

<sup>60</sup> Schedule 4, part 3, item 3 of the RTI Act. The concept of 'privacy' is not defined in the RTI Act. It can, however, be viewed as the right of an individual to preserve their personal sphere free from interference from others: *Marshall and Department of Police* (Unreported, Queensland Information Commissioner, 25 February 2011) at [27], 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.

<sup>61</sup> And, as regards the segments on pages 25 and 30, the complainant, including as they do the complainant's name and email address (information I have found comprises exempt information, for the reasons given at paragraphs 11-33).

<sup>62</sup> Or repeated or further release.

52. In this regard, I also note the question posed by the applicant in his letter dated 6 March 2014 as to whether the Third Party '*would...object to the material being released to me as part of this application?*', and whether that question had been asked of the Third Party. The obligation imposed on OIC to consult third parties under the RTI Act only arises where disclosure of information is contemplated; given the nature and relative sensitivity of the Third Party personal information in question, I have not done so in this case. The obligation to seek the views of the Third Party has not, therefore, been enlivened.

## DECISION

53. CMC's purported internal review decision varied considerably from the actual decision taken to have been made under section 83(2) of the RTI Act,<sup>63</sup> and neither decision dealt with all relevant information (much of which was identified in the course of this external review). In the circumstances, I consider the appropriate course of action is to set aside the decision under review. In substitution, I find that:
- i. the information referred to in paragraph 12 is exempt information to which access may be refused under section 47(3)(a) and 48 of the RTI Act, and
  - ii. disclosure of the information referred to in paragraph 41 would, on balance, be contrary to the public interest under section 49 of the RTI Act, and access to this information may therefore be refused under section 47(3)(b) of the RTI Act.
54. I have made this decision as a delegate of the Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

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**Jenny Mead**  
**Right to Information Commissioner**

**Date: 10 April 2014**

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<sup>63</sup> The decision under review: see paragraph 6.

## APPENDIX

### Significant procedural steps

| Date              | Event   |
|-------------------|---|
| 13 May 2013       | CMC received the application for access under the RTI Act.  |
| 27 June 2013      | CMC issued an initial decision to the applicant.  |
| 22 July 2013      | The applicant applied for internal review.  |
| 20 August 2013    | The timeframe for CMC to decide the applicant's internal review application expired. CMC was therefore taken to have made an internal review decision affirming the initial decision, under section 83(2) of the RTI Act.   |
| 21 August 2013    | CMC issued a purported internal review decision to the applicant.   |
| 12 September 2013 | OIC received the applicant's application for external review. OIC wrote to CMC requesting processing information.   |
| 24 September 2013 | OIC wrote to the participants accepting the application for external review.  |
| 7 November 2013   | OIC wrote to the applicant conveying a preliminary view that CMC was entitled to refuse access to some information. OIC further wrote to CMC, conveying a preliminary view that there were no grounds for refusing access to other information to which access had been refused. Both participants were invited to provide submissions in the event they did not accept this preliminary view.                                  |
| 19 November 2013  | The applicant wrote to OIC. The applicant advised he did not wish to pursue access to some information the subject of OIC's 7 November 2013 preliminary view, but otherwise did not accept OIC's preliminary view. The applicant set out submissions in support of his case for access.   |
| 28 November 2013  | CMC replied to OIC's 7 November 2013 preliminary view. CMC agreed to release additional information to the applicant. CMC maintained access should be refused to parts of the information in issue discussed in OIC's preliminary view, and identified additional information, access to which it submitted should be refused.  |
| 11 December 2014  | OIC wrote to the applicant and CMC, advising of the status of the review and, as regards CMC, confirming CMC's preparedness to release further information.   |
| 11 February 2014  | The applicant wrote to OIC. The applicant further narrowed the scope of the information to which he sought access, and set out additional submissions in support of his case for access to the information remaining in issue.  |
| 20 February 2014  | OIC wrote to the applicant, clarifying the information remaining in issue, addressing submissions made in both the applicant's 19 November 2013 and 11 February 2014 letters, reiterating the preliminary view conveyed in OIC's letter dated 7 November 2013 and conveying a further preliminary view that CMC was entitled to refuse access to information on certain grounds including, relevantly, under the CMC Exemption. |
| 6 March 2014      | The applicant wrote to OIC. The applicant advised he did not wish to pursue access to some information, but otherwise stated he did not accept OIC's preliminary view and maintained his case for access to the information in issue, setting out submissions in support.   |
| 26 March 2014     | OIC wrote to the applicant and CMC, clarifying the information remaining in issue in anticipation of formal decision.   |
| 7 April 2014      | CMC wrote to OIC, confirming information in issue and commenting on the application of the CMC Exemption.   |