



Decision and Reasons for Decision

Citation: *Isles and Queensland Police Service* [2017] QICmr 1 (12 January 2017)

Application Numbers: 312927 and 312942

Applicant: Isles

Respondent: Queensland Police Service

Decision Date: 12 January 2017

Catchwords: ADMINISTRATIVE LAW - INFORMATION PRIVACY ACT - REFUSAL TO DEAL - applicant seeking access to his personal information appearing in police incident database - whether applications are expressed to relate to all documents that contain information of a stated kind - whether all of the documents to which the applications relate would comprise exempt information - whether the applications may be the subject of a refusal to deal decision under section 59 of the *Information Privacy Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION ACT - EXEMPT INFORMATION - whether disclosing information could reasonably be expected to prejudice the effectiveness of lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law - schedule 3, section 10(1)(f) of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the Queensland Police Service (**QPS**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) broadly seeking access to his personal information in the QPRIME database¹, including information showing how many times his personal information had been accessed through the database.
2. QPS decided to neither confirm nor deny the existence of the requested information under section 69 of the IP Act.² On external review, I have decided to vary the QPS decisions, for the reasons set out below. In summary, I have found that all of the documents to which the applications relate comprise exempt information³ and that therefore, section 59 of the IP Act applies to refuse to deal with the applications.

¹ Queensland Police Records and Information Management Exchange. This is the database used by QPS to capture and maintain records for all police incidents in Queensland.

² One decision was issued outside the statutory timeframe and therefore, under the *Information Privacy Act 2009* (**IP Act**), it is a deemed decision— refer paragraph 6 below.

³ Schedule 3, section 10(1)(f) of the *Right to Information Act 2009* (Qld) (**RTI Act**).

Background

3. Significant procedural steps relating to the applications and external review process are set out in the Appendix.
4. In both applications, the applicant requested access to QPRIME records showing how many times his personal information had been accessed, in a specified time period. On external review, QPS confirmed to OIC⁴ that such information would be contained in a document known as a QPRIME Activity Report.⁵ For the purpose of considering the issues in these reviews, QPS provided OIC with a copy of the Activity Reports containing information pertaining to the applicant.
5. As set out above, QPS decided to neither confirm nor deny the existence of documents responding to these applications.⁶ Generally, that provision will only apply where confirming the very existence of documents is likely to cause the harm that an agency would otherwise seek to avoid by refusing access to the relevant information.⁷ The facts relating to these applications are such that the applicant is aware that his QPRIME record has been accessed by QPS as he has had direct contact with QPS officers on a number of occasions during the timeframes relevant to the applications.⁸ On this basis, I conveyed a view to QPS during the review, that any harm associated with disclosing the fact of QPRIME access, had already occurred and that therefore, section 69 of the IP Act could not apply to these applications.⁹ QPS accepted this view.¹⁰

Reviewable decisions

6. The decisions under review are:
 - (i) the decision deemed to have been made by QPS to refuse access to all information requested in the access application dated 23 June 2016¹¹; and
 - (ii) QPS's decision dated 31 August 2016 to neither confirm nor deny the existence of the information requested in the access application dated 28 July 2016.

Evidence considered

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

Issue to be determined

8. External review by the Information Commissioner¹² is merits review, i.e., an administrative reconsideration of a case which can be described as 'stepping into the shoes' of the primary decision-maker to determine what is the correct and preferable decision. As such, the Information Commissioner has the power to decide any matter in relation to an application that could have been decided by the agency, under the IP Act.¹³ After conducting an external review of a decision, the Information Commissioner must make a

⁴ Oral submissions made to OIC on 16 September 2016.

⁵ As noted in *Wolfe and Queensland Police Service* [2016] QICmr 27 (30 June 2016) (*Wolfe*) at [57], QPS has previously released this type of information under the IP Act. Since the decision was issued in *Wolfe*, QPS has reconsidered its approach to releasing QPRIME Activity Reports under the IP Act, as discussed at paragraph 24 below.

⁶ Section 69 of the IP Act.

⁷ *EST and Department of Family Services and Aboriginal Affairs* (1995) 2 QAR 645 at [11] cited with approval in *Tolone v Department of Police* (Unreported Queensland Information Commissioner, 9 October 2009) at [25].

⁸ For example, in relation to the QPS investigation into the disappearance of the applicant's father.

⁹ Letter to QPS dated 29 September 2016.

¹⁰ Letter to OIC dated 7 October 2016.

¹¹ Section 66(1) of the IP Act. The date of the purported decision notice was 15 August 2016, however QPS was deemed to have refused access to the information requested in the access application on 14 August 2016.

¹² Or delegate.

¹³ Section 118(1)(b) of the IP Act.

decision affirming, varying, or setting aside and making a decision in substitution for, the decision under review.¹⁴

9. As set out in paragraph 5 above, QPS is no longer advancing the argument that section 69 of the IP Act applies to neither confirm nor deny the existence of documents requested in the access applications. Therefore, that provision is not examined in these reasons for decision. Rather, I consider the issue for determination to be whether the applications may be the subject of a refusal to deal decision under section 59 of the IP Act.¹⁵ To enliven that provision, the following issues must be considered:

- (a) whether the applications are expressed to relate to all documents of a stated kind or relate to a stated subject matter; and
- (b) whether all of the documents to which the applications relate comprise exempt information.

Relevant law

10. If an access application is made to an agency under the IP Act, the agency should deal with the application unless this would not be in the public interest.¹⁶ Section 59 of the IP Act states that one of the only circumstances in which it would not be in the public interest to deal with an access application, is as follows:

59 Exempt Information

- (1) *This section applies if—*
 - (a) *an access application is expressed to relate to all documents, or to all documents of a stated class, that contain information of a stated kind or relate to a stated subject matter; and*
 - (b) *it appears to the agency or Minister that all of the documents to which the application relates are comprised of exempt information.*
- (2) *The agency or Minister may refuse to deal with the application without having identified any or all of the documents.*

11. Exempt information is information the disclosure of which Parliament has considered would, on balance, be contrary to the public interest.¹⁷ The RTI Act provides that certain law enforcement information is exempt, as follows:

10 Law enforcement or public safety information

- (1) *Information is exempt information if its disclosure could reasonably be expected to—*
 - ...
 - (f) *prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law;*
 - ...
- (2) *However, information is not exempt under subsection (1) if it consists of—*
 - (a) *matter revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law; ...*

¹⁴ Section 123(1) of the IP Act.

¹⁵ QPS does not contest the application of section 59 of the IP Act. The applicant however, maintains that he is entitled to access any QPRIME Activity Reports containing information about him.

¹⁶ Section 58(1) of the IP Act.

¹⁷ The Dictionary in schedule 5 of the IP Act provides that 'exempt information' means information that is exempt information under the RTI Act. See section 48 and schedule 3 of the RTI Act.

Findings

12. For section 59 of the IP Act to apply I must firstly be satisfied that both access applications are expressed to relate to all documents, or to all documents of a stated class, that contain information of a stated kind, or relate to a stated subject matter. To determine this issue, the terms of each access application must be closely examined.

13. The applicant requested access to the following information about himself:

Comprehensive personal QPS QPRIME file, including all past and present, dating back to 2006, advices, cautions and warnings ... encompassing all peripheral information pertaining to the personal QPS QPRIME profile of [the applicant].¹⁸

Details of how many times in total that [my] personal information had been accessed through Queensland Police database QPRIME since January 1, 2008.¹⁹

14. I am satisfied that the applications are framed as requests for access to *all* records, or all data, appearing in the QPRIME database relating to the applicant. I am further satisfied that the applications are expressed to relate to all documents that contain information of a *stated kind*, i.e., the applicant's personal information appearing in the QPRIME database. Accordingly, I find that the first limb of section 59 of the IP Act is satisfied.

15. Secondly, I must be satisfied that all of the documents to which the applications relate are comprised of exempt information. The relevant exemption relied on by QPS is that set out in schedule 3, section 10(1)(f) of the RTI Act, which will apply if the following are established:

- there exists a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law; and
- disclosure *could reasonably be expected to* prejudice that method or procedure.

16. QPS has submitted that disclosure of QPRIME Activity Reports would generally reveal the number of occasions on which QPS officers have accessed QPRIME in relation to a particular individual, and would disclose the badge number of the inquiring officer and the reasons for access. QPS has submitted that it has serious concerns that the disclosure of such information would enable an individual to deduce the level of QPS surveillance/investigation they are under, and/or identify any particular QPS units which may/may not be monitoring an individual's behaviour/involvement in activities.

17. Having considered the evidence provided by QPS on external review,²⁰ I am satisfied that the process of QPS officers accessing the QPRIME database forms an integral part of QPS's lawful methods and procedures for preventing, detecting or investigating contraventions, or possible contraventions of the law, specifically in terms of intelligence and surveillance operations.

18. I am also satisfied that revealing the extent of information in QPRIME Activity Reports and the specific circumstances of each instance of access, for any individual, could reasonably be expected to prejudice these lawful methods and procedures. QPRIME Activity Reports show when, how often and why QPS officers have accessed the QPRIME database in relation to an individual and I find that the disclosure of such information could reasonably be expected to prejudice QPS's ability to gather intelligence. As to whether this

¹⁸ Access application dated 23 June 2016.

¹⁹ Access application dated 28 July 2016.

²⁰ Particularly the oral submissions made by QPS to OIC on 16 September 2016.

- expectation of prejudice is reasonable,²¹ I am satisfied that QPS has demonstrated to OIC that there are particular circumstances in which disclosing information could reasonably be expected to prejudice QPS's lawful methods and procedures, even though the information may appear innocuous, on its face, or when read in isolation.²²
19. For the reasons set out in paragraphs 16 to 18 above, I am satisfied that QPRIME Activity Reports comprise exempt information under schedule 3, section 10(1)(f) of the RTI Act.
 20. The applicant's submissions on external review²³ indicate that he believes QPS officers have inappropriately entered and accessed information in QPRIME in relation to him. On the basis of this submission, I have considered the exception to this exemption which provides that information will not be exempt under schedule 3, section 10(1) of the RTI Act if it consists of matter revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law.²⁴
 21. In my view, for this exception to apply, a decision-maker would generally need to have available to them some form of objective and authoritative finding that the scope of a law enforcement investigation has exceeded the limits imposed by law.²⁵ I do not consider the RTI Act intends for a decision-maker to draw a conclusion of this nature by assessing untested evidence or unsubstantiated allegations.
 22. In this review, aside from the applicant's assertions about suspected actions of QPS officers, I do not have any objective evidence to support a finding that the scope of a law enforcement investigation has exceeded the limits imposed by law. Accordingly, I am satisfied that the evidence available to me in this review does not establish that the exception to the exemption in schedule 3, section 10(2) applies.²⁶
 23. The applicant's submissions also focus on the need for transparency in the performance of QPS's functions.²⁷ I acknowledge that the IP Act is to be administered with a pro-disclosure bias.²⁸ However, the exemptions in schedule 3 of the RTI Act set out the types of information which Parliament has decided, would, on balance, be contrary to the public interest to disclose. Once the requirements of an exemption have been established, I am precluded from considering any public interest factors, no matter how compelling.²⁹
 24. The applicant has also argued that there is a '*precedent for the release*' of QPRIME Activity Reports.³⁰ As noted above, QPS has, in the past, decided to disclose this type of information to an applicant under the IP Act.³¹ In recent months, a series of access applications have been made to QPS under the IP Act, by various individuals seeking access to their personal information in QPRIME Activity Reports. In processing these applications, QPS has identified a number of issues associated with disclosure of QPRIME Activity Reports, which has led QPS to make submissions to OIC regarding the expectation of prejudice to its methods and procedures.³²

²¹ The requirements of the phrase '*could reasonably be expected to*' in the particular context of this exemption were discussed by the Right to Information Commissioner in *Gold Coast Bulletin and Queensland Police Service* (Unreported, Queensland Information Commissioner, 23 December 2010) at [20]-[21].

²² Under section 121(3) of the IP Act, I must not disclose information claimed to be exempt or contrary to the public interest in reasons for decision. I am therefore, constrained in the extent to which I can explain the particular circumstances put forward by QPS in support of the application of this exemption.

²³ Applicant's submissions dated 31 October 2016.

²⁴ Schedule 3, section 10(2)(a) of the RTI Act.

²⁵ Previous decisions of the Information Commissioner have not considered, in any detail, the nature or extent of evidence required for this exception to apply.

²⁶ There is no evidence available to OIC to indicate that any other exceptions in schedule 3, section 10(2) of the RTI Act apply.

²⁷ Applicant's submissions dated 31 October 2016.

²⁸ Section 58 of the IP Act.

²⁹ Also, under section 118 of the IP Act, the Information Commissioner does not have the power to direct that access to an exempt document be granted.

³⁰ Applicant's submissions dated 31 October 2016.

³¹ See footnote 5 and the decision cited therein, *Wolfe* at [57].

³² See paragraphs 16 to 18 above.

25. As a decision-maker conducting merits review, I am required to determine each matter on its own facts and on the basis of available evidence at the time of making my decision—there is no requirement for me to follow the approach taken by an agency in a previous external review. Similarly, there is nothing in the IP Act which prevents an agency from, over time, reconsidering its approach to the disclosure of particular information. In any event, an agency retains the discretion to disclose exempt information, whereas the Information Commissioner does not.³³
26. On the basis of the above, I am satisfied that the position previously taken by QPS in relation to disclosure of QPRIME Activity Reports under the IP Act does not have any impact on my finding that this information meets the requirements for exemption under schedule 3, section 10(1)(f) of the RTI Act.
27. Accordingly, I find that the second limb of section 59 of the IP Act is satisfied as all of the information to which the access applications relate comprises exempt information under schedule 3, section 10(1)(f) of the RTI Act.

DECISION

28. I vary the decisions of QPS and find that section 59 of the IP Act applies on the basis that both applications are expressed to relate to all documents containing information of a stated kind, and all of the documents to which the applications relate comprise exempt information under schedule 3, section 10(1)(f) of the RTI Act.
29. I have made this decision under section 123 of the IP Act, as a delegate of the Information Commissioner under section 139 of the IP Act.

K Shepherd
Assistant Information Commissioner

Date: 12 January 2017

³³ Sections 64(4) and 118(2) of the IP Act.

APPENDIX

Significant procedural steps

Date	Event
23 June 2016	QPS received the first access application.
28 July 2016	QPS received the second access application.
15 August 2016	QPS issued a purported decision notice to neither confirm nor deny the existence of any documents for the first application. OIC received the first external review application. OIC notified the applicant that his application for external review had been received.
16 August 2016	OIC asked QPS to provide relevant procedural documents.
17 August 2016	The applicant contacted OIC and provided oral submissions.
24 August 2016	The applicant made further oral submissions to OIC. QPS provided OIC with relevant procedural documents.
25 August 2016	OIC notified the applicant and QPS that the first external review application had been accepted and asked QPS to provide further information.
29 August 2016	The applicant provided oral submissions to OIC.
31 August 2016	QPS issued a decision to neither confirm nor deny the existence of any documents in response to the second application. OIC received the second external review application. OIC requested documents from QPS for the second application and notified the applicant that his application had been received. The applicant provided additional oral submissions to OIC.
2 September 2016	OIC received the requested information from QPS for the second application.
16 September 2016	OIC staff met with QPS and obtained oral submissions. OIC received a copy of QPRIME Activity Reports from QPS.
22 September 2016	OIC wrote to the applicant to clarify external review timeframes.
27 September 2016	OIC notified the applicant that his second external review application had been accepted.
29 September 2016	OIC sent a written preliminary view to QPS in relation to both applications.
7 October 2016	QPS wrote to OIC to confirm acceptance of OIC's preliminary view.
18 October 2016	OIC conveyed a preliminary view to the applicant on both applications and invited him to provide final submissions.
1 November 2016	The applicant provided final submissions to OIC. OIC notified the applicant that his submissions had been received.
15 November 2016	OIC responded to the applicant's submissions and provided an indication as to the timeframes for final decisions to be issued in both matters.
7 December 2016	OIC emailed the applicant to update him on the progress of the external reviews.
21 December 2016	OIC emailed the applicant to provide an indication as to the expected timeframe for completion of both external reviews.