



## Decision and Reasons for Decision

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Citation:	<b><i>Nadel and Queensland Police Service [2020] QICmr 19 (6 April 2020)</i></b>
Application Number:	<b>314849</b>
Applicant:	<b>Nadel</b>
Respondent:	<b>Queensland Police Service</b>
Decision Date:	<b>6 April 2020</b>
Catchwords:	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - INFORMATION AS TO EXISTENCE OF PARTICULAR DOCUMENTS - request for complaint documents about a named individual - whether existence of requested documents may be neither confirmed nor denied under section 55 of the <i>Right to Information Act 2009</i> (Qld).</b>

### REASONS FOR DECISION

#### Summary

1. The applicant applied<sup>1</sup> to Queensland Police Service (**QPS**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to:

*Documents that contain any of the following: Complaints, allegations, investigations, reviews, concerns of misconduct &/or inappropriate behaviour either alleged to have been, suspected to have been, or found to have been committed by [a named individual] during [the individual's] time (1990-1999) in Queensland Police. ...*

2. QPS decided<sup>2</sup> to neither confirm nor deny the existence of requested documents, under section 55 of the RTI Act.
3. I affirm QPS' decision: I find that QPS may neither confirm nor deny the existence of documents the subject of the applicant's RTI access application.

#### Background

4. Early in the review, the Office of the Information Commissioner (**OIC**) communicated a preliminary view to the applicant,<sup>3</sup> explaining that disclosure (or even confirmation of the existence) of information including unsubstantiated allegations could be damaging to an individual, and contrary to the public interest.

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<sup>1</sup> Application dated 22 June 2019.

<sup>2</sup> Decision dated 29 August 2019.

<sup>3</sup> Letter dated 2 October 2019.

5. In reply, the applicant refined his application to 'substantiated' allegations/complaints only.<sup>4</sup> I wrote again to the applicant,<sup>5</sup> explaining my preliminary view that QPS may neither confirm nor deny the existence of documents of this latter kind. The applicant further narrowed his request to documents that may record '*misconduct of the most serious nature*'.<sup>6</sup>
6. For the reasons explained below, I am satisfied that QPS may neither confirm nor deny whether documents exist, either as originally requested, or in narrower terms as proposed by the applicant during the review.
7. Significant procedural steps relating to the external review are otherwise as set out in the appendix to this decision.

### Reviewable decision

8. The decision under review is QPS' decision dated 29 August 2019.

### Evidence considered

9. Evidence, submissions, legislation and other material I have considered in reaching this decision are set out in these reasons (including footnotes and appendix).
10. I have also had regard to the *Human Rights Act 2019* (Qld),<sup>7</sup> particularly the right to seek and receive information as embodied in section 21 of that Act. I consider that in observing and applying the law prescribed in the RTI Act, an RTI decision-maker will be '*respecting and acting compatibly with*' this right and others prescribed in the HR Act,<sup>8</sup> and that I have done so in making this decision, as required under section 58(1) of the HR Act. In this regard, I note Bell J's observations on the interaction between the Victorian analogues of Queensland's RTI Act and HR Act: '*it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act.*'<sup>9</sup>

### Issue for determination

11. The issue I must determine is whether QPS may neither confirm nor deny the existence of documents the subject of the applicant's access application dated 22 June 2019, under section 55 of the RTI Act.

### Relevant law

12. Section 23 of the RTI Act relevantly provides that a person has a right to be given access to documents of an agency, such as QPS. This right is subject to other provisions of the RTI Act, including section 55.
13. Section 55 of the RTI Act allows a decision-maker to neither confirm nor deny the existence of a document which, assuming its existence, would be a document to which access would be

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<sup>4</sup> Submissions dated 11 October 2019 – see also applicant's email dated 25 October 2019.

<sup>5</sup> Letter dated 31 October 2019, reiterated in my letter dated 28 January 2020 in reply to submissions received from the applicant dated 21 November 2019.

<sup>6</sup> Submissions dated 6 March 2020.

<sup>7</sup> **HR Act** – which came into force on 1 January 2020.

<sup>8</sup> *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [11].

<sup>9</sup> **XYZ**, [573].

refused under section 47(3) of the RTI Act,<sup>10</sup> to the extent it contained 'prescribed information'.<sup>11</sup>

14. 'Prescribed information'<sup>12</sup> includes personal information<sup>13</sup> the disclosure of which would, on balance, be contrary to the public interest.
15. Determining this issue essentially requires a decision-maker to conduct a hypothetical public interest<sup>14</sup> balancing exercise, making a judgment as to where the balance of the public interest would lie, were requested documents to exist. This involves a notional application of the public interest balancing test, as prescribed in section 49 of the RTI Act,<sup>15</sup> including identifying public interest factors that would operate to favour disclosure and nondisclosure, assuming the existence of requested documents.<sup>16</sup>

## Consideration

16. In this case, there are strong public interest considerations that would favour nondisclosure of requested documents (if they existed). The very fact information comprises personal information gives rise to a presumed public interest harm, telling in favour of nondisclosure.<sup>17</sup> Additionally, information of the kind requested would, if it existed, reveal details about an individual's personal history, unconditional disclosure of which could (if it existed), reasonably be expected to intrude upon an individual's privacy.<sup>18</sup>
17. Finally, to the extent any documents might concern mere complaints or allegations against an individual (as originally requested by the applicant), disclosure could reasonably be expected to prejudice the public interest in treating persons fairly by avoiding disclosure of unsubstantiated allegations.<sup>19</sup>

<sup>10</sup> Grounds on which access may be refused.

<sup>11</sup> Section 55 of the RTI Act is appropriately used where there is something about the way in which, whether by accident or design, an access application is framed which will mean that the agency acknowledging the existence or non-existence of the particular kind of information is liable to cause the very kinds of detriment that key grounds for refusal prescribed in the RTI Act are intended to avoid – in this case, revealing personal information, by impliedly confirming whether or not complaints or allegations of misconduct etc have been made about a particular person. The procedure to be followed in cases of this kind – and the limitation on what information can be conveyed to an applicant – was explained by the Information Commissioner in *EST and Department of Family Services and Aboriginal and Islander Affairs* (1995) 2 QAR 645 at [20], the Commissioner noting that such a review '...must largely proceed in private...'. See also *Phylant and Queensland Police Service* (Unreported, Queensland Information Commissioner, 31 August 2011), [11], citing *Tolone and Department of Police* (Unreported, Queensland Information Commissioner, 9 October 2009), [28].

<sup>12</sup> Defined in schedule 5 of the RTI Act.

<sup>13</sup> Personal information comprises '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': section 12 of the *Information Privacy Act 2009* (Qld) (**IP Act**) and schedule 6 of the RTI Act.

<sup>14</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, although there are some recognised public interest considerations that may apply for the benefit of an individual: Chris Wheeler, 'The Public Interest: We Know It's Important, But Do We Know What It Means' (2006) 48 AIAL Forum 12, 14.

<sup>15</sup> In summary terms, section 49 of the RTI Act requires a decision maker to identify any irrelevant factors and disregard them; identify relevant public interest factors favouring disclosure and nondisclosure of subject information; balance relevant factors favouring disclosure and nondisclosure; and decide whether disclosure of subject information would, on balance, be contrary to the public interest. I have taken no irrelevant factors into account.

<sup>16</sup> I note that nothing in these reasons should be taken to either confirm or deny the existence of the type of documents requested by the applicant.

<sup>17</sup> Schedule 4, part 4, section 6 of the RTI Act.

<sup>18</sup> Thereby prejudicing protection of the individual's right to privacy, a factor favouring nondisclosure: schedule 4, part 3, item 3 of the RTI Act. The concept of privacy as used in this factor 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: 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. I am satisfied that historical conduct or performance information of the kind requested by the applicant comes within an individual's 'personal sphere' – i.e. that it comprises information over which an individual might reasonably expect to exert control. The phrase 'could reasonably be expected to' calls for a decision-maker to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely speculative/conjectural 'expectations') and expectations which are reasonably based, ie, expectations for the occurrence of which real and substantial grounds exist: *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at [155] to [160]. A reasonable expectation is one that is reasonably based, and not irrational, absurd or ridiculous: *Sheridan and South Burnett Regional Council and Others* (Unreported, Queensland Information Commissioner, 9 April 2009) at [189]-[193], referring to *Attorney-General v Cockcroft* (1986) 64 ALR 97.

<sup>19</sup> A factor favouring nondisclosure of information: schedule 4, part 3, item 6 of the RTI Act.

18. Individuals — including public servants, current and former — are entitled to expect that government will respect their personal information and privacy.<sup>20</sup> These factors favouring nondisclosure would, in my view, warrant substantial weight.
19. As for pro-disclosure considerations, the applicant submits several would apply to favour disclosure of requested documents<sup>21</sup> so as to justify release, i.e. that disclosure of requested documents could (assuming their existence), reasonably be expected to:
  - promote open discussion of public affairs,<sup>22</sup>
  - contribute to positive and informed debate on matters of serious interest,<sup>23</sup>
  - reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct,<sup>24</sup>
  - contribute to the facilitation of research;<sup>25</sup> and
  - foster fair treatment of the subject individual, by '*terminating the dissemination of harmful unsubstantiated speculation*'.<sup>26</sup>
20. I am not persuaded that there would exist any considerations favouring disclosure of complaints or unsubstantiated allegations of the type originally applied for by the applicant,<sup>27</sup> other than the general public interest in promoting access to government-held information<sup>28</sup> and, to some extent, the public interest in ensuring QPS transparency and accountability for the manner in which it deals with complaints. While not unimportant considerations worthy of some weight, I am satisfied each<sup>29</sup> would be comfortably displaced by the strong public interest ensuring government respects personal information and privacy, and avoiding dissemination of unsubstantiated allegations. The balance of the public interest would therefore favour nondisclosure of this type of information, if it were to exist.
21. Regarding information concerning substantiated matters, while I again acknowledge the general public interest in promoting access to government-held information, I consider that consideration would be insufficient to displace the strong and particular public interest considerations favouring nondisclosure discussed above.
22. As for the factors cited by the applicant and summarised at paragraph 19, whether all of these would arise to be considered in balancing the public interest would turn, in my view, on the nature and gravity of any substantiated conduct that might be recorded in requested documentation (should it exist).
23. Many of the applicant's submissions appear to be premised on the assumption that if documents recording substantiated complaints or misconduct exist, that material would relate to issues of considerable gravity and have a direct bearing on the subject individual's suitability for the latter's current role.

<sup>20</sup> This is particularly so where, as here, unconditional disclosure of that personal information could, if it existed, reasonably be expected to prejudice fair treatment and result in dissemination of unsubstantiated allegations.

<sup>21</sup> The applicant's public interest submissions as made during my review focussed on documents that may exist recording substantiated complaints, rather than unsubstantiated complaints, reflecting the progressive narrowing by him of his access application on review. See particularly his submissions dated 21 November 2019.

<sup>22</sup> Schedule 4, part 2, item 1 of the RTI Act.

<sup>23</sup> Schedule 4, part 2, item 2 of the RTI Act.

<sup>24</sup> Schedule 4, part 3, item 6 of the RTI Act.

<sup>25</sup> Schedule 4, part 2, item 19 of the RTI Act.

<sup>26</sup> The applicant also argues that there are two additional considerations not enumerated in schedule 4, part 2 of the RTI Act that would apply in this case – disclosure could reasonably be expected to permit scrutiny of suitability for public office and inform members of the public in voting decisions. As I advised the applicant by letter dated 28 January 2020, I do not accept this submission. These two matters are comfortably accommodated by one or more of the several factors favouring disclosure enumerated in schedule 4, part 2 of the RTI Act cited by the applicant; principally, schedule 4, part 2 item 1 (promoting open discussion of public affairs) and item 2 (contribute to positive and informed debate on important issues or matters of serious interest).

<sup>27</sup> Noting again the thrust of his submissions was not addressed to information of this kind – see footnote 21.

<sup>28</sup> Implicit, for example, in the object of the RTI Act (section 3).

<sup>29</sup> And, in the event I am mistaken in my identification of relevant factors relied on by the applicant, any other factors that might arguably arise to favour disclosure of personal information of this type.

24. Matters concerning workplace conduct fall on a broad spectrum, from minor indiscretions to serious misconduct/criminal offending. Determining whether historical disciplinary information could reasonably be expected to promote open discussion of contemporary public affairs, and/or contribute to positive and informed debate would depend on where that information (assuming it existed) fell on this spectrum.
25. By way of **hypothetical example only**, disclosure now of information concerning a reprimand made many years ago for lack of courtesy, inattention to detail, administrative tardiness or other '*inappropriate behaviour*' of similar minor nature would not, in my view, promote open discussion of public affairs, nor contribute to positive and informed debate about any roles that may be occupied many years later. In such a case, these factors would not arise for consideration in balancing the public interest.
26. Alternatively, if the above factors did apply to favour disclosure of historical disciplinary information,<sup>30</sup> I consider that, given the necessary age of that information, each factor would warrant a modest weighting.
27. I accept that disclosure of substantiated complaint information may, if it existed, by the very fact of that existence, meet the requirements for enlivening schedule 4, part 2, item 6 of the RTI Act,<sup>31</sup> and enhance the transparency and accountability of QPS for the manner in which it handles complaints and undertakes investigations against officers.<sup>32</sup> Once again, however, given any information<sup>33</sup> would be very dated – and, as noted, quite possibly relate to only minor indiscretions – I would afford these factors limited weight.
28. Disclosure may also contribute to a fuller biographical picture of the subject individual's working life,<sup>34</sup> albeit, in view of the age of any information, somewhat marginally.<sup>35</sup>
29. Promoting these several considerations<sup>36</sup> would, however, come at the expense of the significant public interest in safeguarding personal information, and protecting individual privacy. Release of the type of information requested by the applicant would (if it existed) represent an unjustifiable and unfair<sup>37</sup> disclosure of personal information, and an intrusion into individual privacy.
30. Of course, as I have noted above, the balance for and against disclosure may shift in a given case, depending where any documented disciplinary matters fell on the spectrum of severity.<sup>38</sup> When it comes, however, to balancing the public interest, displacing the substantial public interests in protecting individual privacy and safeguarding personal information is not readily achieved. This is even more so where, if information did exist, its disclosure would result in the release of personal information concerning matters more than two decades in the past. In these circumstances, I am not satisfied that there would exist a pro-disclosure case of sufficient weight to displace the significant public interests favouring nondisclosure of requested

<sup>30</sup> Such as, for example, information documenting '*misconduct of the most serious nature*', to which the applicant further, as noted, narrowed his access application in his submissions dated 6 March 2020.

<sup>31</sup> Reveal or substantiate misconduct. In my letter to the applicant dated 31 October 2019, I also alluded to the possible application of schedule 4, part 3, item 5 of the RTI Act, allowing or assisting inquiry into possible deficiencies in agency/official administration/conduct. Substantiated complaint information, however, would be the product of any such investigation – the investigation must, as a matter of logic, have already occurred, for any complaint to have been substantiated. It would not, therefore, be possible for disclosure now to assist such process in any fashion.

<sup>32</sup> Schedule 4, part 2, items 1 and 3-4.

<sup>33</sup> If any existed.

<sup>34</sup> Giving rise to the research factor in schedule 4, part 2, item 19 of the RTI Act.

<sup>35</sup> Meaning this factor, too, would warrant only minor weight.

<sup>36</sup> And any other applicable factors.

<sup>37</sup> Noting that I do not accept that unrestricted disclosure of an individual's work record to an unrelated third party could reasonably be expected to ensure fair treatment of that individual – see further my comments at paragraph 31 below.

<sup>38</sup> Factors favouring disclosure would be more likely I to attract greater weight in a serious case – although so too would personal information/privacy considerations favouring nondisclosure discussed in paragraph 16. The more serious the material the greater its sensitivity as personal information and the greater the attendant privacy interest, there being some public interest in allowing persons to 'move on' from past indiscretions (an observation not in any way intended to suggest the existence or otherwise of documents containing information of such a type in this case).

documents (if they existed), irrespective of the manner in which the applicant's access application is framed.

31. As for the applicant's submission at paragraph 19 that disclosure would promote fair treatment of the subject individual, by '*terminating the dissemination of harmful unsubstantiated speculation*', I do not consider this would give rise to a public interest consideration favouring disclosure to him of dated personal information concerning another individual. I do not accept that unrestricted disclosure of an individual's workplace record to an unrelated third party could reasonably be expected to ensure fair treatment of that individual. My view is that personal information of the kind requested is, by its very nature, information the dissemination or circulation of which the individual to whom it relates should ordinarily be entitled to control.
32. Finally, in his submissions dated 6 March 2020, the applicant referred to a decision to release information concerning another individual's prior employment in a public agency. That decision was made under a distinct information access regime, and concerned a request for more recent information that was possessed (from what I can gather) of less inherent sensitivity than disciplinary information of the kind requested in this case. While I acknowledge the applicant's submissions as to the decision's pertinence, I am not persuaded that it is of especial relevance to the matters I am required to determine in this case: a matter that must, in the end, be determined on its own facts.

## Conclusion

33. Having given the applicant's submissions and all relevant circumstances careful consideration, I consider that requested documents would, in the event they existed, comprise prescribed information, as personal information, disclosure of which would, on balance be contrary to the public interest.
34. Accordingly, I am satisfied that the documents the subject of the applicant's 22 June 2019 access application would, assuming their existence, comprise documents to which access could be refused under section 47(3) of the RTI Act, as prescribed information. QPS may therefore neither confirm nor deny the existence of such documents, under section 55 of the RTI Act.

## DECISION

35. I affirm the decision under review.
36. I have made this decision under section 110 of the RTI Act, as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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**Louisa Lynch**  
**Right to Information Commissioner**

**Date: 6 April 2020**

## APPENDIX

### Significant procedural steps

Date	Event
19 September 2019	OIC received the applicant's application for external review.
23 September 2019	OIC requested procedural documents from QPS.
24 September 2019	QPS provided OIC with the requested documents.
2 October 2019	OIC notified the applicant and QPS that the external review had been accepted. OIC conveyed to the applicant the preliminary view that QPS was entitled to neither confirm nor deny the existence of the requested documents under section 55 of the RTI Act.
11 October 2019	The applicant provided OIC with written submissions in reply to OIC's preliminary view.
25 October 2019	The applicant wrote to OIC refining the scope of his request.
31 October 2019	OIC conveyed a second preliminary view to the applicant, reiterating that QPS was entitled to neither confirm nor deny the existence of requested documents under section 55 of the RTI Act.
21 November 2019	The applicant provided OIC with written submissions.
26 November 2019	OIC updated QPS on the status of the external review.
28 January 2020	OIC conveyed a further preliminary view to the applicant, reiterating that QPS was entitled to neither confirm nor deny the existence of the requested documents under section 55 of the RTI Act.
6 March 2020	The applicant provided OIC with written submissions.