



Decision and Reasons for Decision

Application Number: 310180

Applicant: Latemore

Respondent: Department of Police

Decision Date: 25 February 2011

Catchwords: **ADMINISTRATIVE LAW – INFORMATION PRIVACY ACT – section 67(1) of the *Information Privacy Act 2009* (Qld) - application by former police officer for access to documents about him**

ADMINISTRATIVE LAW – RIGHT TO INFORMATION ACT– section 47(3)(a) and section 48 of the *Right to Information Act 2009* (Qld) – exempt information – schedule 3 section 10(1)(a) – whether disclosure of the information in issue could reasonably be expected to prejudice the investigation of a contravention or possible contravention of the law in a particular case

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REASONS FOR DECISION

Summary

1. The applicant is a former employee of the Queensland Police Service (**QPS**) who seeks access to a range of documents about him from QPS under the *Information Privacy Act 2009* (Qld) (**IP Act**).
2. QPS refused access to the documents under section 67 of the IP Act and section 47(3)(a) of the *Right to Information Act 2009* (Qld) (**RTI Act**)¹ on the basis that:
 - the documents relate to matters that are still under investigation
 - disclosure of the documents could reasonably be expected to prejudice the investigation of a contravention or possible contravention of the law in a particular case; and
 - the documents comprise exempt information under section 48 and schedule 3 section 10(1)(a) and section 10(1)(e) of the RTI Act.
3. The applicant explains that disclosure of the documents will help him clear his name and that, in his view, there is no ongoing investigation as the matter has been finalised. He also believes that QPS does not have the power to compel his attendance at a disciplinary hearing as he is no longer a serving member of QPS and he is unable to attend a hearing due to his health.
4. For the reasons set out below, I find that access to the relevant documents can be refused under section 47(3)(a) of the RTI Act on the basis that the documents comprise exempt information under section 48 and schedule 3 section 10(1)(a) of the RTI Act.

Background

5. Significant procedural steps relating to the application are set out in the Appendix.

Reviewable decision

6. The decision under review is QPS' decision to refuse access to the relevant documents under section 47(3)(a) of the RTI Act on the basis that they comprise exempt information under section 48 of the RTI Act.

Information in issue

7. The information in issue in this review (**Information in Issue**) comprises diary notes and emails of certain QPS officers and the Sunshine Coast District Education and Training Office relating to the applicant.

Evidence considered

8. In making this decision, I have taken the following into account:
 - the access application to QPS and the application for external review to the Office of the Information Commissioner (**OIC**)
 - QPS' decision
 - submissions provided to OIC by QPS dated 28 July 2010, 8 September 2010 and 21 December 2010

¹ Section 67 of the IP Act allows an agency to refuse access to a document in the same way and to the same extent as section 47 of the RTI Act.

- submissions provided to OIC by the applicant dated 23 August 2010, 2 December 2010, 21 January 2011 and 27 January 2011
- the Information in Issue
- relevant provisions of the RTI Act, IP Act and other legislation as referred to below
- previous decisions of the Information Commissioner as identified in this decision.

Relevant law

9. Access must be given to a document unless it contains exempt information or its disclosure would, on balance, be contrary to the public interest.²
10. Schedule 3 section 10(1)(a) of the RTI Act provides that information is exempt information if its disclosure could reasonably be expected to prejudice the investigation of a contravention or possible contravention of the law (including revenue law) in a particular case.
11. In *Sheridan and South Burnett Regional Council (and Others)*³ the Information Commissioner considered the use of the phrase 'could reasonably be expected to' in the context of section 42(1)(ca) of the now repealed *Freedom of Information Act 1992* (Qld) and found it required a consideration of whether the expectation is reasonably based. I consider that interpretation is also relevant in the context of schedule 3 section 10(1)(a) of the RTI Act.
12. Therefore schedule 3 section 10(1)(a) of the RTI Act will apply where the following requirements are met:
 - there is an investigation of a contravention or possible contravention of the law (including revenue law) in a particular case; and
 - there is a reasonable expectation of prejudice to that investigation.

QPS' submissions

13. During the course of the external review, QPS conveyed to OIC general information about the nature of the investigations relating to the applicant and provided the following reasons in support of its decision to refuse access to the Information in Issue:
 - The applicant is the subject of several internal QPS investigations relating to activities undertaken during his employment as a police officer at QPS. The requested documents relate to matters that are still under investigation and QPS have not yet made a determination on whether to hold a post separation disciplinary hearing in accordance with Part 7A of the *Police Service Administration Act 1990* (Qld) (**PSA Act**).
 - In these circumstances it is reasonable to expect that prejudice could be caused to the investigation, and any possible subsequent hearing, if the documents were released prior to the completion of the investigation and eventual findings.
 - Police investigators must be able to explore theories, discuss the strengths and weaknesses of the investigation, gather and review evidence, and discuss the direction and progress of the investigation without the spectre that such information could be released prior to its finalisation.

² Section 44(1) of the RTI Act.

³ (Unreported, Queensland Information Commissioner, 9 April 2009) at paragraphs 189 - 191.

- Investigations in relation to disciplinary matters are dynamic in nature, in that the responses given by an officer whilst being interviewed will dictate what further investigations and enquiries will be undertaken by the investigating officer. Consequently, when determining if disclosure is reasonably expected to prejudice a disciplinary matter, it should be recognised that material gathered for the interview process, although seemingly innocuous, may be the starting point from which more significant information is obtained.
- Emails between senior officers, and their own individual diary notes, concerning the behaviour of the applicant are potentially pivotal to the QPS investigation. Premature release of these types of information has the very real propensity to severely jeopardise the integrity of the entire investigation. Such disclosure may enable persons subject to the investigation to construct defences, create alibis, tamper with evidence and interfere with witnesses.

Applicant's submissions

14. The applicant provided the following submissions in support of his case:

- The decision to refuse access to the Information in Issue is a breach of natural justice, procedural fairness and his civil right to obtain the information.
- Disclosure of the Information in Issue will assist the applicant in his defence and to clear his name as he believes he is being treated unfairly by QPS.
- There is no ongoing investigation as the investigation findings have already been made and given to the applicant. The finding was that a disciplinary hearing was to be held but the applicant is no longer a serving QPS officer.
- As the applicant is no longer a serving member of QPS, he cannot be compelled to attend a disciplinary hearing. In any event, the applicant would be unable to attend a hearing due to his health.

Findings

15. I will now consider whether the Information in Issue comprises exempt information with reference to the requirements set out above at paragraph 12.

Is there an investigation of a contravention or possible contravention of the law?

16. Schedule 3 section 10(8) of the RTI Act provides that a reference in that section to a contravention or possible contravention of the law includes a reference to misconduct or possible misconduct under the *Crime and Misconduct Act 2001* (Qld) (**CM Act**). Misconduct is defined in schedule 2 of the CM Act as official misconduct⁴ or police misconduct.⁵
17. Generally, if an investigation has been finalised, it is unlikely that disclosure of information relating to the investigation could reasonably be expected to prejudice that

⁴ Section 15 of the CM Act defines official misconduct as conduct that could, if proved, be a criminal offence; or a disciplinary breach providing reasonable grounds for terminating the person's services, if the person is or was the holder of an appointment.

⁵ Police misconduct is defined in schedule 2 of the CM Act as conduct, other than official misconduct, of a police officer that is disgraceful, improper or unbecoming a police officer; or shows unfitness to be or continue as a police officer; or does not meet the standard of conduct the community reasonably expects of a police officer.

investigation.⁶

18. QPS submits that:

- the applicant is the subject of several internal QPS investigations relating to activities undertaken during his employment as a police officer
- the requested documents relate to matters that are still under investigation and QPS have not yet made a determination on whether to hold a post separation disciplinary hearing in accordance with Part 7A of the PSA Act.

19. The applicant submits that:

- there is no ongoing investigation as the investigation findings have already been made and given to him
- as he is no longer a serving member of QPS, he cannot be compelled to attend a disciplinary hearing and, in any event, he would be unable to attend a hearing due to his health.

20. Where there is a complaint of official misconduct or police misconduct against a police officer, disciplinary action is conducted under the PSA Act.⁷ Part 7A of the PSA Act deals with disciplinary declarations against former officers. Section 7A.1 of the PSA Act applies where a disciplinary ground arises in relation to a police officer and, after the disciplinary ground arises, the employment of the person as a police officer ends for any reason.

21. The relevant provisions of Part 7A of the PSA Act provide:

- the commissioner may continue or start an investigation to decide whether a former officer is liable to disciplinary action in relation to the former officer's conduct at any time when he or she was a police officer⁸
- the commissioner may make a disciplinary finding and take disciplinary action against the former officer⁹
- after giving the former officer notice in relation to the disciplinary ground and/or holding a disciplinary hearing in relation to the disciplinary ground,¹⁰ the commissioner may take disciplinary action against the former officer, whether or not the former officer responds to the commissioner's notice or attends the disciplinary hearing.¹¹

22. I have carefully considered the information provided by QPS and the applicant and the relevant sections of the PSA Act as referred to above. Based on that information, I am not satisfied that the investigations into the applicant have been finalised or will be discontinued due to the applicant no longer being a QPS officer and/or being unable to attend a disciplinary hearing. I am satisfied that:

- the applicant is the subject of several internal QPS investigations relating to activities undertaken during his employment as a police officer
- the investigations relate to matters which, if proven, could amount to misconduct as that term is defined by the CM Act and result in formal disciplinary hearings
- there is an investigation of a contravention or possible contravention of the law

⁶ *Gill and Brisbane City Council* (2001) 6 QAR 45.

⁷ The PSA Act defines misconduct in the same way as police misconduct is defined in the CM Act.

⁸ Section 7A.1(3) of the PSA Act.

⁹ Section 7A.2(1) of the PSA Act.

¹⁰ Section 7A.3(1) of the PSA Act.

¹¹ Section 7A.3(4) of the PSA Act.

and requirement a) is satisfied in this case.

Is there a reasonable expectation of prejudice to the investigation?

23. I have carefully considered QPS' submissions as set out above at paragraph 13 and specifically note QPS' view that:
- the Information in Issue is potentially pivotal to the investigation
 - its premature release has the very real propensity to severely jeopardise the integrity of the entire investigation by enabling persons subject to the investigation to construct defences, create alibis, tamper with evidence and interfere with witnesses.
24. I have also carefully considered the contents of the Information in Issue with reference to the general information QPS provided about the nature of the investigations.
25. Based on QPS' submissions and my consideration of the Information in Issue, I am satisfied that:
- release of the Information in Issue before the investigations are finalised could prejudice the investigations
 - in the circumstances, the expectation is reasonably based and requirement b) is satisfied.

Conclusion

26. For the reasons set out above, I am satisfied in the circumstances of this review that:
- there is an investigation of a contravention or possible contravention of the law in this particular case; and
 - there is a reasonable expectation of prejudice to those investigations if the Information in Issue is disclosed.

DECISION

27. I affirm QPS' decision to refuse access to the Information in Issue under section 47(3)(a) of the RTI Act on the basis that it comprises exempt information under section 48 and schedule 3 section 10(1)(a) of the RTI Act.
28. I have made this decision as a delegate of the Information Commissioner under section 139 of the IP Act.

Jenny Mead
Right to Information Commissioner
Date: 25 February 2011

APPENDIX**Significant procedural steps**

Date	Event
2 March 2010	The applicant applies to QPS under the IP Act for certain documents about him.
6 April 2010	QPS decides to refuse access to the Information in Issue under section 47(3)(a) and section 48 of the RTI Act on the basis that it comprises exempt information under schedule 3 section 10(1)(a) and 10(1)(e) of the RTI Act.
18 April 2010	The applicant applies to OIC for external review.
30 April 2010	OIC informs QPS and the applicant that the external review application has been accepted for review.
22 June 2010	QPS provides OIC with a copy of the Information in Issue.
22 July 2010	OIC requests QPS provide information on the nature and status of the relevant investigations.
28 July 2010	QPS provides OIC with the requested information.
23 August 2010	The applicant confirms he only seeks access to diary notes and emails of certain QPS officers and the Sunshine Coast DETO office which relate to him.
30 August 2010	OIC seeks further submissions from QPS.
8 September 2010	QPS provides OIC with further submissions.
13 September 2010	OIC provides the applicant with a copy of QPS' submissions and invites him to provide any further submissions in support of his case.
2 December 2010	The applicant provides OIC with submissions in support of his case.
14 December 2010	OIC asks QPS to confirm the status of the investigations.
21 December 2010	QPS confirms the investigations are not finalised.
22 December 2010	OIC telephones the applicant to convey the preliminary view that the Information in Issue comprises exempt information under section 48 and schedule 3 section 10(1)(a) of the RTI Act.
23 December 2010	OIC confirms the preliminary view in writing and invites the applicant to provide final submissions in support of his case if he does not accept the preliminary view.
21 January 2011 27 January 2011	The applicant advises OIC he does not accept the preliminary view and provides submissions in support of his case.