



## Decision and Reasons for Decision

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**Citation:** *X59 and Queensland Police Service [2021] QICmr 55 (27 October 2021)*

**Application Number:** 315643

**Applicant:** X59

**Respondent:** Queensland Police Service

**Decision Date:** 27 October 2021

**Catchwords:** ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL TO DEAL - applicant seeking access to information about access to his personal information within the QPRIME system - whether application is expressed to relate to all documents containing information of a stated kind - whether all of the documents to which the application relates would comprise exempt information - whether section 59 of the *Information Privacy Act 2009 (Qld)* applies  
ADMINISTRATIVE LAW - RIGHT TO INFORMATION ACT - EXEMPT INFORMATION - LAW ENFORCEMENT AND PUBLIC SAFETY INFORMATION - whether disclosure of information about access to applicant's personal information within the QPRIME system could reasonably be expected to prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law - whether information consists of matter revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law - whether information is exempt under 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**) to access certain information about himself.<sup>1</sup>
2. QPS did not make a decision within the required statutory timeframe and was therefore taken to have made a deemed decision refusing access to the requested information.<sup>2</sup>

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<sup>1</sup> The application is dated 27 April 2020 and became compliant on 13 May 2020.

<sup>2</sup> Under section 66(1) of the IP Act.

3. The applicant applied to the Office of the Information Commissioner (**OIC**) for an external review of the deemed decision<sup>3</sup> and, in that review, QPS was granted further time to make a decision in respect of the application.<sup>4</sup>
4. QPS then decided<sup>5</sup> to disclose some of the requested information to the applicant and refuse access to information appearing on 272 pages. QPS also refused to deal with two parts of the application, on various grounds.
5. The applicant applied again to OIC for external review of QPS' decision.<sup>6</sup> During the review, the applicant confirmed<sup>7</sup> that he was only seeking external review of QPS' refusal to deal with the part of his application which sought information about access to his personal information within the QPRIME system<sup>8</sup> for the period from 18 July 2015 to 1 May 2020 (**Part B of the application**).<sup>9</sup>
6. For the reasons set out below, I vary QPS' decision and find that QPS may refuse to deal with Part B of the application under section 59 of the IP Act.

## Background

7. The background to this matter is that the applicant was convicted of certain offences relating to an incident that occurred in 2015. Subsequently, these convictions were quashed and the applicant was acquitted on all counts. The applicant's original access application requested a broad range of information about him, including in relation to his prosecution and release,<sup>10</sup> his complaints about certain QPS officers, and access to his information on QPRIME.<sup>11</sup>
8. During the review, the applicant confirmed that he is primarily concerned that two police officers may have misused his personal information within QPRIME as part of an '*unlawful attempt to hurt him by means other than bona fide law enforcement*'.<sup>12</sup> This is relevant to Part B of the application, and as noted in paragraph 5 above, this is the only part of the application in issue in this review.
9. During the review, OIC took certain steps to identify opportunities and processes for early resolution and to promote settlement of the external review.<sup>13</sup> This included conveying a preliminary view<sup>14</sup> to the applicant, and then exploring opportunities<sup>15</sup> to narrow the scope of Part B of the application by confining the request to information about access

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<sup>3</sup> On 31 July 2020.

<sup>4</sup> This was notified to the applicant on 4 August 2020, in external review 315546.

<sup>5</sup> On 14 September 2021.

<sup>6</sup> By email dated 24 September 2020 (**external review application**).

<sup>7</sup> By email dated 1 February 2021.

<sup>8</sup> 'QPRIME' refers to the 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.

<sup>9</sup> This was how QPS defined the information in its decision. I also note that, although the access application was made under the IP Act, QPS referred to section 40 of the *Right to Information Act 2009* (Qld) (**RTI Act**) when deciding to refuse to deal with Part B of the application.

<sup>10</sup> And up until the date of the application.

<sup>11</sup> The scope of the application was subsequently clarified with QPS in a series of emails in May 2020

<sup>12</sup> Submissions dated 11 July 2021.

<sup>13</sup> As required under section 103(1) of the IP Act.

<sup>14</sup> It is the practice of OIC to convey a preliminary view, based on an assessment of the material before the Information Commissioner or her delegate at that time, to an adversely affected participant. This is to explain the issues under consideration to the participant and affords them the opportunity to put forward any further information they consider relevant to those issues. It also forms part of the Information Commissioner's processes for early resolution of external reviews.

<sup>15</sup> On 31 May 2021, after completing a preliminary assessment of the issues in this review, OIC wrote to the applicant to explain our preliminary view that QPS was entitled to refuse to deal with Part B of the application under section 59 of the IP Act. The applicant's representative provided submissions in response on 12 July 2021 and also proposed (in the alternative) a narrowed scope. On 13 August 2021, OIC provided the applicant with the option of proceeding with a narrowed scope. On 27 August 2021, the applicant then confirmed he continued to seek Part B of the application in full.

to the QPRIME system by specific individuals within a narrower date range.<sup>16</sup> The applicant declined this proposal, and accordingly, Part B of the application (in full) remains in issue in this review.

10. These procedural steps, as well as other significant procedural steps relating to this review, are set out in the Appendix.

### Reviewable decision and evidence considered

11. The decision under review is QPS' decision dated 14 September 2020.
12. The evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and the Appendix).
13. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.<sup>17</sup> I consider a decision-maker will be '*respecting, and acting compatibly with*' that right and others prescribed in the HR Act, when applying the law prescribed in the IP Act.<sup>18</sup> I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act.<sup>19</sup>

### Issue for determination

14. The only issue for determination in this review is whether QPS is entitled refuse to deal with Part B of the application under section 59 of the IP Act.

### Relevant law

15. 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.<sup>20</sup> This is known as the pro-disclosure bias in deciding to deal with applications. One of the few circumstances where it is not in the public interest to deal with an access application is set out in section 59 of the IP Act 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.*

16. Schedule 3 to the RTI Act identifies the types of information which will comprise exempt information for the purposes of the IP Act.<sup>21</sup> Relevantly, under schedule 3, section 10(1)(f) of the RTI Act, information will comprise exempt information if its

<sup>16</sup> Between 12 February 2020 and 1 May 2020.

<sup>17</sup> Section 21 of the HR Act.

<sup>18</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 [111].

<sup>19</sup> I also note the following observations made by Bell J in *XYZ* at [573], on the interaction between equivalent pieces of Victorian legislation (namely, the *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic)): '*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>20</sup> Section 58(1) of the IP Act. Section 58(2) of the IP Act identifies the only circumstances in which Parliament considers it would not be in the public interest to deal with an access application.

<sup>21</sup> Refer to the definition of 'exempt information' in schedule 5 to the IP Act and section 48(4) of the RTI Act.

disclosure could reasonably be expected to prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law (**Method or Procedure Exemption**). However, schedule 3, section 10(2) sets out certain circumstances where the exemption will not apply. Relevantly, information will not be exempt if it consists of matter revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law.<sup>22</sup>

17. On an external review, the agency or Minister who made the decision under review has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant.<sup>23</sup>

## Findings

### **Documents containing information of a stated kind or subject matter**

18. To determine whether the first limb of section 59 of the IP Act is met, it is necessary to examine the terms of the access application.
19. On an objective reading of Part B of the application, I am satisfied that it is framed as a request which relates to all documents that contain information of a stated kind, that is, information about access to the applicant's personal information within the QPRIME database.<sup>24</sup> Accordingly, I find that this limb of section 59 of the IP Act is satisfied.

### **Exempt information**

20. QPS' position is that all of the documents to which Part B of the application relates are comprised of exempt information under the Method or Procedure Exemption.
21. In order to assess whether the exemption applies, I have considered a copy of the documents responding to Part B of the application. This is necessary in the circumstances, as was observed by the Court of Appeal in *Commissioner of the Police Service v Shelton & Anor*<sup>25</sup> (**Shelton**):<sup>26</sup>

*... although s59(2) extends the discretion to refuse to deal with the application by enabling its exercise without any requirement to identify the relevant documents, the latter dispensation will have no practical content where a provision such as sch3 s10(2) makes the actual consideration of those documents a necessary earlier step, in deciding the exemption issue. However, that will not necessarily be the case for other categories of exempt information under sch3, which may permit the forming of an opinion in relation to the documents subject to a particular application by reference to the kind of information sought, without more.*

22. As noted above, Part B of the application seeks QPRIME access information for a period of approximately 5 years.<sup>27</sup> I can confirm that the document that responds to this part of the application is a QPRIME Activity Report (**Report**). I am constrained in describing the document in any detail, but as noted in previous decisions of the Information Commissioner,<sup>28</sup> QPRIME activity reports generally reveal the amount of activity and the

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<sup>22</sup> Schedule 3, section 10(2)(a) of the RTI Act. Although schedule 3, section 10(2) of the RTI Act lists other circumstances where the exemption provisions in schedule 3, section 10(1) will not apply, those circumstances do not arise in this matter and are not addressed in this decision.

<sup>23</sup> Section 100 of the IP Act.

<sup>24</sup> Consistent with the finding in *Shelton* at [14].

<sup>25</sup> [2020] QCA 96.

<sup>26</sup> Per Chief Justice Holmes at [48].

<sup>27</sup> I note that both the applicant's convictions, and the quashing of those convictions, occurred within this timeframe.

<sup>28</sup> *Kyriakou and Queensland Police Service* [2017] QICmr 30 (9 August 2017) at [30].

number of occasions on which QPS officers have accessed QPRIME in relation to an individual, the badge number of the inquiring officer, and includes a technical log of interactions within the database.

23. I acknowledge the applicant's position that the Report is not comprised of exempt information and his submission that *'the statute does not protect police who use QPrime corruptly or for purposes not associated with the enforcement of the law'*.<sup>29</sup>
24. The applicant argues that, if there is no *'extant allegation by police'* against him and all access entries are not directed to such extant allegations, then QPRIME is not, in those circumstances, being used as a method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law and the exemption is not available.<sup>30</sup>
25. I do not accept this line of reasoning. Even in circumstances where the QPRIME database has—on various prior occasions in unrelated matters (as identified by the applicant)—been accessed without authority, I remain satisfied that it is an integral part of QPS' lawful methods and procedures for preventing, detecting or investigating contraventions, or possible contraventions, of the law.<sup>31</sup> As QPS noted in the decision under review:

*When dealing with contraventions, or possible contraventions, of the law, QPS officers record information about individuals on QPRIME, and such information may relate to intelligence or surveillance operations, or other investigations. Further, QPS officers also access information recorded in QPRIME both during and after such activities, for example, to obtain background information and inform decisions.*

26. I accept this submission as to the purpose of QPRIME, and find that the database is a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law. I am also satisfied that disclosing a QPRIME activity report (including the Report responsive to Part B of the application), which shows when and how often QPS officers have accessed the QPRIME database in relation to an individual, could reasonably be expected to prejudice these QPS methods and procedures because it would enable an individual (in this case, the applicant) to deduce the level of surveillance or investigation they may, or may not, be under.
27. Turning then to schedule 3, section 10(2) of the RTI Act, the applicant has expressed concern that a particular police officer *'has the capacity to access, create or use QPrime information as part of a personal vendetta'* against the applicant and another officer has been investigated for misusing police information.<sup>32</sup> The applicant submits that the Report will *'reveal communications which, when correlated with other information already obtained by [him], amount to breaches of law'* and that, when read as a whole, the Report will indicate that the activities of police have exceeded the boundaries set by law.<sup>33</sup> More specifically, the applicant submits that any prejudice that could be expected to arise from disclosure.<sup>34</sup>

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<sup>29</sup> Submissions dated 11 July 2021.

<sup>30</sup> Submissions dated 11 July 2021.

<sup>31</sup> As noted in *Shelton* at [5], the Queensland Civil and Administrative Tribunal has also previously described QPRIME as a database of information obtained by QPS in its law enforcement functions, which is a dynamic and constantly updated central record for QPS.

<sup>32</sup> Submissions dated 11 July 2021. To avoid identifying the applicant and these officers, I am unable to further detail the applicant's submissions in this regard.

<sup>33</sup> Submissions dated 1 February 2021.

<sup>34</sup> Submissions dated 7 September 2021.

*... is only a prima facie reason for not disclosing a QPrime report. It could only have the status of a factor you would weigh along with other relevant considerations, otherwise it would amount to reading into the legislation a provision that was not there. In the circumstances of this case the person seeking the information is trying to establish whether he is under unlawful surveillance either by one of two officers ... in circumstances in which it is possible that the interface with QPrime might have been by another police officer being used as a conduit by one of these officers. A refusal to disclose runs the risk of covering up (possibly unobvious) unlawful conduct by persons who have a record for precisely such conduct.*

28. On the other hand, QPS submits that the information in the Report does not contain matter that would reveal that the scope of a law enforcement investigation has exceeded the limits imposed by law.<sup>35</sup>

29. While I have considered the applicant's submissions that raise concerns about particular officers, and the misuse of information by specific officers in unrelated matters,<sup>36</sup> I have carefully considered the Report, and I do not consider that it consists of matter revealing that the scope of a law enforcement investigation has exceeded imposed legal limits. The Court of Appeal observed in *Shelton*:<sup>37</sup>

*... it may well be apparent to the Queensland Police Service on the face of an activity report, from the identities of those who have been obtaining access or the frequency of access, that legitimate investigatory bounds have been exceeded. (I would note, however, that it does not follow that every instance of unauthorised access will be evidence that a law enforcement investigation has gone beyond legal limits, as opposed to being the improper conduct of an individual.)*

30. I have considered the Report, and it is not apparent that legitimate investigatory bounds have been exceeded in this case. The Report itself does not consist of matter revealing this. I understand the applicant considers the Report may be comprised of a piece of evidence – when correlated with other evidence – that will show wrongdoing, but this is not the test I am required to apply under the RTI Act.<sup>38</sup>

31. I note also, the applicant's concerns about our Office's interpretation of the legislation:<sup>39</sup>

*We very respectfully indeed submit that you are not asking yourself the correct statutory question. We very respectfully submit that the pro disclosure bias with which your Act (in the provisions we have previously cited) requires you to read an application, necessitates a different question: namely whether there is any evidence before you that reveals that an investigation has not exceeded imposed legal limits. And we submit that you are statutorily obliged to ask yourself that question, and to do so in the context of the very unusual circumstances of this case.*

I do not accept this construction. The pro-disclosure bias, and the onus on QPS in this matter, does not require QPS to prove that an investigation involving the applicant has not exceeded legal limits. Rather, schedule 3, section 10(2) of the RTI Act requires that I consider whether the Report itself consists of matter revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law. This is a question

<sup>35</sup> Submission dated 10 May 2021.

<sup>36</sup> Including supporting material provided with those submissions.

<sup>37</sup> Per Chief Justice Holmes at [46]-[47].

<sup>38</sup> I note the applicant's submissions dated 12 July 2021 that contend I should address whether '*the information is evidence relevant to a debate as to whether an investigation has exceeded the limits imposed by law*'. This expands the wording of the legislation beyond its ordinary meaning, and I do not consider it is the correct test.

<sup>39</sup> Submissions dated 7 September 2021. On 12 July 2021, the applicant also made extensive submissions concerning statutory construction, which I have carefully considered.

fact,<sup>40</sup> which I have determined by independently considering the content of the Report (which was provided to OIC by QPS),<sup>41</sup> together with QPS' decision, and submissions received from the parties. After considering this information, I consider QPS has met the onus, and I am satisfied that the Report does not consist of matter that reveals that the scope of a law enforcement investigation has exceeded the limits imposed by law.

### **Conclusion**

32. In summary, I find that section 59 of the IP Act applies to Part B of the application, as it is expressed to relate to all documents that contain information of a stated kind and all of the documents to which Part B of the application relates are comprised of exempt information under the Method or Procedure Exemption.

### **DECISION**

33. I vary the decision of QPS and find<sup>42</sup> that QPS may refuse to deal with Part B of the application under section 59 of the IP Act.

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**C Jones**  
**A/Assistant Information Commissioner**

**Date: 27 October 2021**

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<sup>40</sup> I do not accept that this finding of fact is an ultra vires 'judicial decision' as the applicant contends in submissions dated 12 July 2021.

<sup>41</sup> Consistent with the observations of Chief Justice Holmes in *Shelton* at [47]: *On my view, then, an agency cannot reach the view necessary under s59(1)(b) in relation to information which may be exempt under sch3 s10 without a consideration of the documents the subject of the application to ascertain whether they fall within s10(2). ... If the information meets any of the descriptions in s10(2), it is not exempt and it cannot appear to be.*

<sup>42</sup> As a delegate of the Information Commissioner, under section 139 of the IP Act.

## APPENDIX

### Significant procedural steps

Date	Event
24 September 2020	OIC received the external review application.
9 October 2020	OIC notified the applicant and QPS that the external review application had been accepted and asked QPS to provide further information.
10 November 2020	OIC received the requested information from QPS and confirmation that QPS had released information to the applicant in accordance with its decision.
19 November 2020	The applicant confirmed in a conversation with an OIC officer that he had received the information QPS identified for disclosure in its decision.
16 December 2020	OIC asked the applicant to identify the refusal grounds he wished OIC to consider in the review.
13 January 2021	OIC received the applicant's indication that he wished the review to consider QPS' decision refusing to deal with Part B of the application and his request for further time to confirm that this was the only refusal ground he wished OIC to consider in the review.
15 January 2021	OIC granted the applicant's requested extension.
1 February 2021	OIC received the applicant's submissions and confirmation that he wished OIC to only consider QPS' decision refusing to deal with Part B of the application.
23 February 2021	OIC requested information from QPS and provided an update to the applicant.
2 March 2021	OIC received the applicant's submissions.
10 May 2021	OIC received information from QPS.
31 May 2021	OIC conveyed a preliminary view to the applicant and invited the applicant to provide submission to OIC by 14 June 2021 if he wished to contest that view.
8 June 2021	OIC received the applicant's request for an extension to 12 July 2021 for his response to the preliminary view.
9 June 2021	OIC granted the requested extension.
12 July 2021	OIC received submissions from the applicant's legal representative contesting the preliminary view and proposing a narrowed application.
14 July 2021	OIC confirmed receipt of the application narrowing proposal to the applicant's legal representative and QPS.
20 July 2021	OIC received information from the applicant.
13 August 2021	OIC wrote to the applicant's legal representative asking whether the applicant wished to proceed with the review based on Part B of the application or seek to informally resolve the review based on the application narrowing proposal.
27 August 2021	OIC received submissions from the applicant's legal representative confirming that the applicant wished to proceed with the review based on Part B of the application.
30 August 2021	OIC conveyed a further preliminary view to the applicant's legal advisers and advised that if the applicant wished to proceed with the review, OIC would issue a formal decision to finalise the review.
7 September 2021	OIC received further submissions from the applicant's legal representative.