



Decision and Reasons for Decision

Citation:	<i>McMahon and Crime and Misconduct Commission</i> [2014] QICmr 16 (1 May 2014)
Application Number:	311914
Applicant:	McMahon
Respondent:	Crime and Misconduct Commission
Decision Date:	1 May 2014
Catchwords:	ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION – applicant seeks access to information concerning 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.

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 allegations raised by the applicant in a submission to the Queensland Floods Commission of Inquiry (**QFCI**). The submission had been forwarded by the QFCI to CMC.
2. CMC identified a number of relevant pages, however it failed to make a decision within the timeframe prescribed in the RTI Act, and was therefore deemed to have made a decision refusing access to all requested information. CMC nevertheless released¹ the bulk of the information. CMC subsequently proceeded² to release further relevant information to the applicant. Access was refused to a limited amount of information, on the basis it comprised exempt information.³
3. The decision CMC is deemed to have made refusing access to all relevant information is set aside. CMC is entitled to refuse access to the limited amount of information

¹ By way of a purported initial decision dated 3 December 2013.

² By way of a purported internal review decision dated 10 January 2014. A deemed decision is not a reviewable decision for the purpose of internal review – sections 46(1)(a) and 81(b) of the RTI Act. Accordingly, CMC did not have power to conduct an internal review in respect of its deemed decision. The practical consequence of both purported decisions, however, was to release to the applicant much of the information to which he had applied for access. OIC has treated each of CMC's purported decisions as submissions as to its position in this review.

³ A ground for refusing access to information – sections 47(3)(a) and 48 of the RTI Act, CMC in this case relying on the category of exempt information prescribed in schedule 3, section 10(4) of the RTI Act. See CMC's purported internal review decision dated 10 January 2014.

actually in issue, on the basis it comprises exempt information to which access may be refused, as information obtained, used or prepared for an investigation by CMC in performance of its prescribed functions.⁴

Procedural steps

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

Reviewable decision

5. The decision under review is the deemed decision CMC's principal officer is taken to have made under section 46(1)(a) of the RTI Act.

Evidence considered

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

Information in issue

7. The information in issue in this review comprises segments of information redacted from 12 pages,⁵ and the entirety of a 13th.

Relevant law

8. 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.
9. Relevantly, an agency may refuse access to information to the extent it comprises exempt information.⁶ Information will be exempt to the extent it falls within the CMC Exemption.

Findings

Bias/conflict of interest

10. The applicant has had external review applications dealt with by the Office of the Information Commissioner (**OIC**) in the past. In his application for external review and again in correspondence dated 2 March 2014 and submissions dated 13 April 2014, the applicant contends, as best as I can understand, that in view of these past dealings and alleged 'failures' by OIC to entertain or address various matters raised by him over the years, OIC has a conflict of interest in dealing with the application the subject of this decision.⁷

⁴ As above.

⁵ These part-released pages comprise a letter from the QFCI to CMC dated 1 April 2011 (page 1), 'CMC Report of Matter' (pages 2-10), letter CMC to QFCI dated 23 September 2011 (page 11) and a 'Case Management Plan' (page 12). Information in issue appearing on these pages consists of a name, email address, contact number, signature and position description on page 1, names, signatures and position descriptions appearing across pages 2-12, and two segments in rows 2 and 4 of page 12 comprising a CMC matter reference. A segment appearing on page 12 merely comprises the name of an officer who processed the applicant's RTI request; it postdates the application and as it is not information pertaining to the applicant or his submissions to the QFCI, it falls outside the scope of his application and is not in issue in this review.

⁶ Sections 47(3)(a) and 48 of the RTI Act.

⁷ And, in his application for external review and letter dated 2 March 2014, sets out an extensive list of demands he says must necessarily be implemented in order to progress this review – as OIC advised the applicant by letter dated 21 February 2014, the procedure to be determined on external review is entirely at the discretion of the Information Commissioner: section 95 of the RTI Act.

11. There is nothing before me suggesting the applicant's assertions concerning his previous dealings with OIC are possessed of any substance. In any event, I have not to my knowledge dealt with the applicant in any capacity prior to this review, and can see no basis on which it could be said I have any conflict of interest in dealing with an application for review of a decision to refuse access to a relatively marginal quantity of information. I am satisfied I am capable of determining his application with detachment and objectivity, and that there is no basis for finding that a fair-minded lay observer might reasonably apprehend that I might not bring an impartial and unprejudiced mind to the resolution of this matter.⁸ I am also satisfied that the applicant's external review application has been 'fairly, properly and thoroughly considered on its merits free from apprehended bias'.⁹

Application of the CMC Exemption – schedule 3, section 10(4) of the RTI Act

12. Schedule 3, section 10(4) of the RTI Act (**CMC Exemption**) has been analysed and applied in a number of OIC decisions.¹⁰ 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'¹¹ for an investigation¹² by CMC¹³ in the performance by it of its prescribed functions, where that information is not, relevantly, about the person the subject of the complaint.¹⁴
13. The information in issue comprises information obtained, used, or prepared by CMC in the course of its investigation into and assessment¹⁵ of misconduct allegations levelled by the applicant and referred to CMC by the QFCI. I am satisfied it meets the requirements of the CMC Exemption. Further, as none of this information – the names and identifying particulars of other individuals, and internal references to other CMC matters – is 'about'¹⁶ the applicant, the exception to the CMC Exemption does not apply. Relevant information therefore comprises exempt information, to which access may be refused.

'Investigation'

14. In reaching the above conclusion, I have considered the applicant's submissions that CMC did not 'investigate' the concerns raised in his submission to the QFCI. The applicant's submissions in this regard are relatively extensive, canvassing various matters outside my jurisdiction and/or not relevant to the issues I am required to assess

⁸ Paraphrasing the test for assessing apprehended bias: *Michael Wilson & Partners v Nicholls* [2011] HCA 48.

⁹ Quoting the applicant's concerns, as set out in his letter dated 2 March 2014.

¹⁰ 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).

¹¹ Undefined terms to be interpreted according to their ordinary meaning: *McKay*, paragraph [63].

¹² An expansive concept, defined as it is in the *Crime and Misconduct Act 2001* (Qld) (**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) of the RTI Act, the Assistant Information Commissioner there determining that it can encompass the process of assessing, examining or considering a complaint: paragraphs [55]-[59].

¹³ A 'prescribed crime body' – schedule 3, section 10(9) of the RTI Act.

¹⁴ 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. The investigation here is finalised, however as discussed below, the information is not 'about' the applicant. As to the potentially expansive scope of the CMC Exemption, 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].)

¹⁵ The performance of one of CMC's prescribed functions – section 35(1)(a) of the CM Act provides that CMC performs its misconduct functions by, among other things, 'expeditiously assessing complaints about...misconduct made to it'.

¹⁶ 'Of, concerning, in regard to': *Macquarie Dictionary Online*.

in this review. I understand the thrust of his case to be, however, that CMC did not conduct a 'bona fide'¹⁷ investigation of his concerns, as that term might be ordinarily understood.

15. Whatever the word may mean in ordinary usage, 'investigation' as deployed in the CMC Exemption has a particular meaning peculiar to its context. The concept of an 'investigation' as embodied in the CMC Exemption is:

...broadly defined to include the steps of merely examining or considering the relevant complaint.

...CMC on receiving a complaint, conducts an initial assessment of that complaint to determine whether jurisdiction exists for a fuller inquiry to be conducted, and, if so, the manner and nature of that inquiry. ...the definition of "investigate" clearly and logically anticipates a broad range of activity – "examining" or "considering" a complaint are both encompassed within the meaning of investigate, and are also basic steps fundamental to the process of assessment.¹⁸ (My emphasis.)

16. I am quite satisfied CMC 'examined' and 'considered' the applicant's complaints as raised in his submission to the QFCI.¹⁹ CMC's nine-page 'Report of Matter'²⁰ and its letter to the applicant dated 23 September 2011 each disclose that his allegations were, at the least, 'examined' and 'considered'. In accordance with the above reasoning, I am therefore satisfied CMC conducted an 'investigation' within the meaning of the CMC Exemption.
17. The requirements of the CMC Exemption are met. Access to the Information in Issue may be refused on the ground it comprises exempt information.

DECISION

18. I set aside the decision under review. In substitution, I find that the Information in Issue is exempt information to which access may be refused under sections 47(3)(a), 48 and schedule 3, section 10(4) of the RTI Act.
19. I have made this decision as a delegate of the Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

JS Mead
Right to Information Commissioner

Date: 1 May 2014

¹⁷ Submissions dated 13 April 2014.

¹⁸ *Springborg*, at paragraphs [55] and [58]. *Springborg* considered the material equivalent of schedule 3, section 10(4) of the RTI Act, as appeared in the repealed *Freedom of Information Act 1992* (Qld). As noted above (note 12), paragraphs [55] to [59] of that decision analyse in detail the concept of an 'investigation' as that term is used in the CMC Exemption.

¹⁹ I am also satisfied that in reaching this conclusion, I am – contrary to the applicant's contentions as contained in his submissions dated 13 April 2014 – properly interpreting and applying the principles enunciated in *Springborg*.

²⁰ On which most of the redacted segments in issue appear. CMC released the bulk of this document to the applicant pursuant to its purported initial decision dated 3 December 2013, despite considering that the entire document comprised exempt information under the CMC Exemption.

APPENDIX

Significant procedural steps

Date	Event
25 October 2013	The applicant applied to CMC for access to documents under the RTI Act.
29 November 2013	The timeframe for CMC to decide the applicant's application expired. CMC's principal officer was therefore taken to have made a decision refusing access to requested information, under section 46(1)(a) of the RTI Act.
3 December 2013	Apparently unaware it had exceeded the statutory timeframe for making its decision, CMC issued a purported decision to the applicant.
3 January 2014	The applicant sought to apply for internal review of CMC's purported initial decision.
10 January 2014	CMC issued a purported internal review decision to the applicant.
9 February 2014	OIC received the applicant's application for external review, which included allegations of conflict of interest and set out the applicant's requirements for the conduct of the review.
11 February 2014	OIC wrote to CMC requesting processing information.
18 February 2014	CMC provided processing information and background information concerning the processing of the applicant's application.
21 February 2014	OIC wrote to the applicant, explaining the procedure to be adopted on external review and advising OIC identified no basis for concluding any conflict of interest existed. The applicant was requested to confirm by 7 March 2014 he wished to proceed with external review on the basis outlined in OIC's letter.
2 March 2014	The applicant replied to OIC's 21 February 2014, confirming he wished to proceed with external review.
13 March 2014	OIC wrote to the participants accepting the application for external review.
25 March 2014	CMC forwarded copies of the Information in Issue.
3 April 2014	OIC wrote to the applicant conveying a preliminary view that CMC was entitled to refuse access to the Information in Issue. The applicant was invited to provide submissions by 17 April 2014 in the event he did not accept this preliminary view. The applicant was advised that if a reply to OIC's letter was not received by 17 April 2014, OIC would finalise the review.
24 April 2014	Absent any record of a response from the applicant to OIC's letter dated 3 April 2014, OIC wrote to the participants finalising the review.
24 April 2014	The applicant wrote to OIC advising he had forwarded a reply to OIC's 3 April 2014 letter within the required timeframe and offering to forward a further copy. OIC advised the applicant it had no record of receiving same, and requested the applicant resend his reply.
25 April 2014	The applicant forwarded a fresh copy of his reply and submissions, dated 13 April 2014, to OIC.
1 May 2014	OIC wrote to the participants re-opening the external review.