



Decision and Reasons for Decision

Citation:	<i>Magin and Department of Environment and Heritage Protection</i> [2016] QICmr 26 (30 June 2016)
Application Number:	312772
Applicant:	Magin
Respondent:	Department of Environment and Heritage Protection
Decision Date:	30 June 2016
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - INVESTIGATION BY PRESCRIBED CRIME BODY - report about conduct of public service officers - whether 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 exempt - sections 47(3)(a), 48 and schedule 3, section 10(4) of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Environment and Heritage Protection (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to an investigative report regarding the Main Beach Bathing Pavilion authored by a Mr Marjason.
2. The Department located 147 pages in response to the access application and refused access to the entirety of this information on the ground that it was exempt information—namely, information obtained, used or prepared for an investigation by the Department in the performance of the prescribed functions of a prescribed crime body.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision.
4. For the reasons set out below, I affirm the Department's decision.

Background

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

Reviewable decision

6. The decision under review is the Department's decision dated 24 February 2016.

Information in issue

7. The information in issue is a 147 page report on an investigation relating to the Main Beach Bathing Pavilion authored by Mr Marjason (**Report**).¹

Issue for determination

8. The issue for determination is whether access to the Report can be refused on the ground that it comprises exempt information—in particular, information 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.

Evidence considered

9. Evidence, submissions, legislation and other material that I have considered in reaching this decision are disclosed in these reasons (including footnotes and Appendix).
10. Submissions were provided to OIC by the applicant² on a number of occasions.³ I have summarised and addressed the applicant's submissions below, to the extent they are relevant to the issue for determination. In respect of the submissions that are not relevant to the issue for determination, these generally relate to the applicant's concerns about the conduct and outcome of the investigation relating to the Main Beach Bathing Pavilion, the qualifications of the investigator, and the handling of his complaints by the then Crime and Misconduct Commission. OIC's jurisdiction under the RTI Act relates only to decisions about access to documents held by agencies and does not extend to any consideration of these matters.

Relevant law

11. Under the RTI Act, a person has a right to be given access to documents of an agency.⁴ However, this right of access is subject to other provisions of the RTI Act, including the grounds on which an agency may refuse access to documents.⁵
12. One ground for refusing access is if the information sought comprises exempt information.⁶ Exempt information is information, the disclosure of which the Queensland Parliament has considered would, on balance, be contrary to the public interest. Schedule 3 of the RTI Act sets out the various types of exempt information.⁷
13. Relevantly, schedule 3, section 10(4) provides that information is exempt information if it was obtained, used or prepared for an investigation by a prescribed crime body, or

¹ In submissions dated 27 April 2016, 18 May 2016 and 24 May 2016, the applicant contended that the Department's decision-maker located and considered information beyond the scope of his access application. Also, the applicant raised a number of queries about the content of 147 pages. OIC addressed the applicant's concerns by confirming that the 147 pages located by the Department comprised the Report. OIC was unable to provide a more detailed response to the applicant's concerns, as doing so would disclose information claimed to be exempt information, contrary to the requirement set out in section 108(1) of the RTI Act.

² These include submissions made by the applicant's legal representative. For sake of brevity, these reasons refer to all submissions as having been made by the applicant.

³ As set out in the Appendix.

⁴ Section 23 of the RTI Act.

⁵ Set out in section 47 of the RTI Act.

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

⁷ Section 48(2) of the RTI Act.

another agency, in the performance of the prescribed functions of the prescribed crime body.

14. An exception to this exemption applies where the information consists of information about the applicant and the investigation has been finalised.⁸

Findings

15. The applicant accepts that the Report was obtained, used or prepared for the purpose of an investigation by the Department. However, he contends that the Department's investigation was an internal investigation only and, on this basis, that the exemption cannot apply.⁹ Consequently, the issue requiring consideration is whether the investigation was conducted by a prescribed crime body, or another agency, in the performance of a prescribed function of the prescribed crime body.

Was the investigation conducted by a prescribed crime body, or another agency, in the performance of a prescribed function of the prescribed crime body?

16. Under the RTI Act, the Crime and Corruption Commission (**Commission**)¹⁰ is a prescribed body.¹¹ The Commission's prescribed functions¹² include a corruption function.¹³ This function involves dealing with complaints about corrupt conduct.¹⁴

17. Based on my review of the parties' submissions (including the attachments to the applicant's submissions), as well as the Report, I make the following findings regarding the investigation:

- the applicant made a number of complaints to the Department about the conduct of two Departmental officers in relation to works carried out at the Main Beach Bathing Pavilion
- the Department notified the Commission about the complaints
- the Commission referred the complaints to the Department to deal with, subject to monitoring by the Commission
- the Department then engaged Marjason Consulting to undertake an investigation of the complaints; and
- finally, the Department advised the Commission of the outcome of the investigation.

18. The applicant contends that the Department was not required to notify the Commission of his complaints. Rather, he submits that:

- his complaints to the Department did not involve misconduct or corrupt conduct

⁸ Schedule 3, section 10(6) of the RTI Act.

⁹ Submission dated 13 June 2016.

¹⁰ The Commission was, at the time of the investigation, called the Crime and Misconduct Commission. The *Crime and Misconduct Act 2001*, which established this Commission, was amended by the *Crime and Misconduct and Other Legislation Amendments Act 2014* (Qld) (**CMOLA Act**). Among other things, the amendments changed the name of the Act to the *Crime and Corruption Act 2001* (Qld) (**CC Act**) and the name of the Commission to the Crime and Corruption Commission. For ease of reference, these reasons refer to the CC Act and Commission.

¹¹ See definition of *prescribed crime body* in schedule 3, section 10(9) of the RTI Act.

¹² See definition of *prescribed functions* in schedule 3, section 10(9) of the RTI Act.

¹³ See definition of *corruption function* in schedule 3, section 10(9) of the RTI Act, which refers to the definition in section 33 of the CC Act. The amendments effected by the CMOLA Act replaced the Commission's misconduct function, as set out in section 33 of the CC Act, with the corruption function.

¹⁴ See definition of *corrupt conduct* in section 15 of the CC Act. The amendments effected by the CMOLA Act also replaced what was, at the time of the Department's investigation, referred to as official misconduct with the concept of corrupt conduct (see section 15(1) and section 400(c) of the CC Act). A similar definition at section 8 of the *Independent Commission Against Corruption Act 1988* (NSW) was considered in *Independent Commission Against Corruption v Cunneen* [2015] HCA 14.

- therefore his complaints could not give rise to or support the reasonable suspicion of official misconduct or corrupt conduct required to trigger a duty by the Department to notify the Commission;¹⁵ and
- instead, the Department commissioned an internal investigation on the strength of his complaint, absent of any suggestion of official misconduct or corrupt conduct or involvement of the Commission.¹⁶

19. However, on the information before me, I am satisfied that that:

- the Department considered that the conduct alleged by the applicant in his complaints would, if proved, amount to what was, at the time, referred to as official misconduct—and therefore notified the Commission in accordance with its obligation to do so under the CC Act;¹⁷ and
- the Commission then assessed the complaints as raising allegations that would, if proved, amount to conduct of this nature—and, on this basis, referred the complaints back to the Department to deal with.

20. Given these circumstances, I do not accept the applicant's submissions insofar as they contend that the Department did *not* notify the Commissioner; nor do I accept them to the extent they alleged that such notification *did* occur, but was unreasonable, and therefore unable to form the basis for an investigation by the Commission.

21. The applicant also submits that:

- the investigation was initiated by the applicant's complaints to the Department, and was not initiated by the Commission¹⁸
- the Commission did not appoint Marjason Consulting¹⁹
- he was not advised that the report was being used or prepared for an investigation by a prescribed crime body in the performance of the prescribed functions of the prescribed crime body, nor that the investigation was being conducted subject to the Commission's monitoring role²⁰
- the terms of reference did not record that the investigation had been devolved by the Commission²¹
- the letter of engagement of Mr Marjason did not mention the matter being referred by the Commission to the Department or the monitoring role of the Commission²²
- the investigation was initiated, funded and conducted by the Department in pursuit of a routine law enforcement investigation²³
- an obligation to notify the Commission would only arise regarding any adverse outcomes emanating from the Report;²⁴ and
- reports by the Department to the Commission about his complaints or its internal investigation did not result in the application of the devolution principle and could

¹⁵ Submissions dated 18 May 2016 and 13 June 2016. On the other hand, the applicant also submits that '*[t]he legal opinion supports my view that the [Main Beach Bathing Pavilion] matter does involve unlawful misconduct*' (submission dated 5 May 2016) and '*[i]t is clear DEHP had a responsibility to notify the CMC under s.38 of the Crime and Corruption Act that complaints containing a suspicion of misconduct existed*' (submission dated 18 May 2016). I also note that a letter from the Commission to the Gold Coast City Council provided by the applicant to OIC states '*Mr Magin has previously raised the concerns directly to the CMC. Mr Magin's concerns have been assessed and referred to the chief executive officer (CEO) of the council and the Director-General of the department, respectively, to deal with pursuant to the Crime and Misconduct Act 2001*' (letter dated 20 March 2013 attached to submission dated 18 May 2016).

¹⁶ Submission dated 13 June 2016.

¹⁷ Section 38(2) of the CC Act.

¹⁸ Submission dated 18 April 2016.

¹⁹ Submission dated 18 May 2016.

²⁰ Submission dated 18 May 2016.

²¹ Submission dated 18 May 2016.

²² Submissions dated 18 and 26 April 2016 and 18 May 2016.

²³ Submission dated 18 May 2016.

²⁴ Submissions dated 18 April 2016 and 18 May 2016.

not change the character of the report which, prior to such reporting, was an internal law enforcement investigation.²⁵

22. The RTI Act states that information is exempt information if it is obtained, used or prepared for an investigation by a prescribed crime body or *an agency other than a prescribed crime body*, if that agency is performing the prescribed functions of the prescribed crime body.²⁶ Accordingly, in the present circumstances, the Department will be *an agency other than a prescribed crime body* for the purpose of the exemption, if the Department was performing the Commission's corruption function.²⁷
23. The Commission's corruption function involves dealing with complaints about corruption in an appropriate way, having regard to principles set out in its Act.²⁸ These principles include the principle of *devolution*—which specifies that action to deal with corruption in a unit of public administration should generally happen within the unit.²⁹
24. The principle of devolution is enabled by some of the provisions that specify how the Commission may perform this function—namely, provisions enabling the Commission to refer a complaint to a relevant public official or unit of public administration to be dealt with by them, or dealt with by them in cooperation with the Commission, subject to the Commission's monitoring role.³⁰ Similarly, provisions addressing how a public official is to deal with a complaint about corrupt conduct also enable devolution, by providing that the public official has a responsibility to deal with a complaint that is referred to it by the Commission,³¹ subject to the Commission's monitoring role.³²
25. On careful consideration of the information before me, I am satisfied that, in accordance with the provisions outlined above, the Department was performing the Commission's corruption function, by dealing with complaints about alleged corrupt conduct devolved to it by the Commission in accordance with the requirements of its Act and, when doing so, it was subject to the Commission's monitoring.
26. The applicant submits³³ that the Marjason Report was commissioned in response to his complaints *prior* to the Department's referral of the matter to the Commission, and it was therefore prepared as part of an internal law enforcement investigation by the Department, not an investigation devolved by the Commission. However, this submission is not supported by the information before me, which indicates the engagement of Marjason Consulting occurred *after* the Commission devolved the complaints to the Department to deal with, subject to the Commission's monitoring role.
27. In these circumstances, I am satisfied that the Department's investigation of the applicant's complaints was carried out in the performance of the Commission's corruption function, and therefore in the performance of a prescribed function of a prescribed crime body as defined in the RTI Act. Accordingly, I am satisfied that the exemption applies to the Report.

²⁵ Submission dated 13 June 2016.

²⁶ Schedule 3, section 10(4) of the RTI Act.

²⁷ Being the relevant function following the CMOLA Act amendments—see footnote 13 above.

²⁸ Specifically, in section 34 of the CC Act—see section 33 of the CC Act.

²⁹ Section 34(c) of the CC Act.

³⁰ Sections 35(1)(b),(d) and (e) and 46(2)(b) of the CC Act. The nature of the Commission's monitoring role is set out at section 48 of the CC Act.

³¹ Section 43 of CC Act.

³² Section 44(2) of CC Act.

³³ Submission dated 13 June 2016.

Does the exception apply?

28. The exception to the exemption is set out in schedule 3, section 10(6). It applies if the investigation is finalised and the Report is about the applicant.
29. While the applicant submits³⁴ that he does not rely on this exception, he also submits '[a]lthough my complaints are not about me my complaints have standing at law'. In these circumstances, for the sake of clarity, I will address the exception to the exemption.
30. In *G8KPL2 and Department of Health*,³⁵ the Right to Information Commissioner considered the meaning of 'about' in schedule 3, section 10(6) of the RTI Act and found that an investigation report, while created as a result of the applicant's complaint, was not about the applicant—rather, it was about the persons who were the subject of the allegations and related investigation. On this basis, the Right to Information Commissioner concluded that the exception in schedule 3, section 10(6) of the RTI Act did not apply.
31. The applicant's submissions indicate that he considers that he has an interest in the matters under investigation. However, the applicant was not the subject of the investigation and therefore the Report is not *about him*. Therefore, in accordance with the reasoning in *G8KPL2*, I find that the exception cannot apply.

Other matters raised by the applicant

The exception in schedule 3, section 10(2)(d) of the RTI Act

32. The applicant submits³⁶ a finding that the Report is exempt information under schedule 3, section 10(4) of the RTI Act is abrogated by the exception in schedule 3, section 10(2)(d) of the RTI Act. The applicant further submits³⁷ that, even if the Report was the product of an investigation initiated *after* referral from the Commission, the investigation was a routine law enforcement investigation by an agency, and the exception in schedule 3, section 10(2)(d) therefore applies.
33. The exception in schedule 3, section 10(2)(d) of the RTI Act relates to a report prepared in the course of a routine law enforcement inspection or investigation by an agency whose functions include that of enforcing the law (other than criminal law or the law relating to corruption under the CC Act). While it is an exception to the exemptions in schedule 3, section 10(1) of the RTI Act, it is *not* an exception to the exemption in schedule 3, section 10(4) of the RTI Act. As I am satisfied that the Report is subject to the exemption in schedule 3, section 10(4) of the RTI Act, this exception does not arise for consideration.

Public interest considerations

34. In its decision, the Department nominated an alternative ground for refusing access to the Report—namely, that its disclosure would, on balance, be contrary to the public interest.³⁸ In response to this ground of refusal, the applicant made submissions to OIC regarding public interest factors favouring disclosure of the Report.

³⁴ Submission dated 18 May 2016.

³⁵ (Unreported, Queensland Information Commissioner, 31 January 2011) (*G8KPL2*). In considering the appeal of *G8KPL2*, the Queensland Civil and Administrative Tribunal did not disagree with the Information Commissioner's interpretation of 'about' in schedule 3, section 10(6) of the RTI Act. See *Minogue v Office of the Information Commissioner Queensland and Anor* [2012] QCATA 191.

³⁶ Submission dated 18 May 2016.

³⁷ Submission dated 18 May 2016.

³⁸ Section 47(3)(b) and 49 of the RTI Act.

35. As I am satisfied that the Report is exempt information, it is unnecessary for me to also consider the separate ground for refusal involving application of the public interest balancing test.³⁹ Further, I cannot take public interest considerations such as those raised by the applicant into account to alter or override my finding that the Report qualifies as exempt information. Parliament determined that disclosure of exempt information would, on balance, be contrary to the public interest in all instances,⁴⁰ and I have no discretion to release such information.⁴¹

The Department's processing of the access application

36. The applicant's submissions raise concerns about the conduct of the Department's decision-maker in processing his access application.⁴² These submissions are not strictly relevant to the issue for determination, given that I am conducting a merits review and considering matters afresh. However, in terms of the Information Commissioner's obligations relating to disciplinary action, I confirm there is no evidence which would give the Information Commissioner reason to consider the decision-maker's actions were as alleged.⁴³

Conclusion

37. For the reasons outlined above, I find that the Report:
- was obtained, used or prepared for an investigation by the Department in the performance of a prescribed function of a prescribed crime body
 - is not subject to the exception in schedule 3, section 10(6) of the RTI Act; and
 - is therefore exempt information under schedule 3, section 10(4) of the RTI Act.

DECISION

38. I affirm the Department's decision to refuse access to the Report under sections 47(3)(a) and 48 of the RTI Act.
39. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

A Rickard
Acting Assistant Information Commissioner

Date: 30 June 2016

³⁹ In section 49(3) of the RTI Act. See *BL v Office of the Information Commissioner and Department of Communities* [2012] QCATA 149 at [15]-[16].

⁴⁰ Section 48(2) of the RTI Act.

⁴¹ Section 105(2) of the RTI Act.

⁴² Specifically, that the Department's decision-maker acted outside the scope of the access application, breached their jurisdiction and statutory obligations and served as a biased investigator rather than an administrator—submissions dated 27 April 2016 and 18 May 2016.

⁴³ If OIC considered there was such evidence, the Information Commissioner would take the actions specified in section 113 of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
5 January 2016	The Department received the access application.
24 February 2016	The Department issued a decision on the access application.
2 March 2016	OIC received the applicant's application for external review. OIC asked the Department to provide information relevant to the application.
9 and 10 March 2016	OIC received the requested information from the Department.
14 March 2016	OIC notified the applicant and the Department that the external review had been accepted. OIC asked the Department to provide a copy of the information in issue.
30 March 2016	OIC received a copy of the Report from the Department.
14 April 2016	OIC conveyed a preliminary view to the applicant and invited the applicant to provide submissions by 29 April 2016 if he did not accept the preliminary view.
15 April 2016	The applicant spoke with an OIC staff member about OIC's preliminary view and requested an extension of time to provide submissions.
18 April 2016	OIC received the applicant's submissions.
19 April 2016	OIC granted an extension to 13 May 2016 for the applicant to provide further submissions.
27 April 2016	OIC received the applicant's further submissions.
5 May 2016	OIC received further submissions from the applicant. The applicant spoke with an OIC staff member and confirmed he wished to make further submissions.
13 May 2016	OIC granted the applicant's requested extension to 16 May 2016 to provide further submissions. The applicant requested a further extension of time to 18 May 2016 to provide submissions.
16 May 2016	The applicant again requested a further extension of time to provide submissions. OIC granted the requested extension to 18 May 2016 for the applicant to provide further submissions.
18 May 2016	OIC received the applicant's further submissions.
23 May 2016	OIC reiterated its preliminary view to the applicant and invited the applicant to provide submissions by 6 June 2016 if he did not accept the preliminary view.
24 May 2016	OIC received the applicant's further submissions and a request for a further extension of up to two months.
25 May 2016	OIC advised the applicant that the requested further extension was not granted and submissions were due to be provided by 6 June 2016. The applicant provided further submissions and OIC confirmed to the applicant that the 147 pages of information in issue comprised the Report.
6 June 2016	The applicant's legal representative spoke with an OIC staff member and requested a further extension to 13 June 2016 to provide submissions. OIC granted the requested extension.
13 June 2016	OIC received further submissions from the applicant's legal representative, which included a request that OIC refer specified questions to the Queensland Civil and Administrative Tribunal (QCAT) under section 118 of the RTI Act.
15 June 2016	OIC advised the applicant that it did not intend to exercise its discretion to refer any questions of law to QCAT under section 118 of the RTI Act.