



Decision and Reasons for Decision

Citation:	<i>M83 and Queensland Police Service [2020] QICmr 49 (9 September 2020)</i>
Application Number:	315356
Applicant:	M83
Respondent:	Queensland Police Service
Decision Date:	9 September 2020
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL TO DEAL - EXEMPT INFORMATION - applicant seeking access to investigation file concerning their complaint - whether application is expressed to relate to all documents containing information of a stated kind or relating to a stated subject matter - whether all of the documents to which the application relates would comprise exempt information - whether section 59 of the <i>Information Privacy Act 2009 (Qld)</i> applies

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Queensland Police Service (**QPS**) under the *Information Privacy Act 2009 (Qld)* (**IP Act**) for the following documents containing their personal information:²
 - (i) the ESC investigation file concerning the applicant's complaint;³ and
 - (ii) entries about the applicant in a police officer's notebook.
2. Although QPS did not make a decision within the timeframe prescribed by the IP Act, QPS located and released some of the requested information to the applicant.⁴ QPS also notified the applicant that it had decided to refuse to deal with the part of the application seeking the investigation file (**Part One of the application**).⁵
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for an external review of QPS's deemed decision with respect to Part One of the application.⁶

¹ Application dated 15 November 2019.

² By email dated 10 December 2019 the applicant narrowed the scope of the application to these two categories.

³ 'ESC' is the Ethical Standards Command unit within QPS. The applicant identified the requested complaint file by reference to a specific file number.

⁴ QPS located 156 pages and refused access to 5 pages and portions of information on 113 pages on the ground that disclosure would, on balance, be contrary to the public interest under sections 47(3)(b) and 49 of the *Right to Information Act 2009 (Qld)* (**RTI Act**). QPS also deleted irrelevant information appearing within the released pages.

⁵ Decision dated 6 April 2020.

⁶ On 26 April 2020. Therefore, the full and partial refusal of information in response to Part 2 is not in issue in this review.

4. For the reasons set out below, I set aside the decision QPS is deemed to have made refusing access to the information remaining in issue and find that section 59 of the IP Act applies to Part One of the application, as all the requested documents appear to comprise exempt information under schedule 3, section 10(4) of the RTI Act.

Reviewable decision and evidence considered

5. The decision under review is the deemed decision QPS is taken to have made under section 66 of the IP Act.
6. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including the footnotes and Appendix).
7. I have also had regard to the *Human Rights Act 2019* (Qld),⁷ particularly the right to seek and receive information.⁸ 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 and the RTI Act.⁹ I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between equivalent pieces of Victorian legislation:¹⁰ '*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*'.¹¹
8. The significant procedural steps taken during the external review process are set out in the Appendix.

Issue for determination

9. The issue to be determined is whether Part One of the application may be the subject of a refusal to deal decision under section 59 of the IP Act.

Relevant law

10. 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.¹² Section 59 of the IP Act sets out one of the circumstances in which it would not be in the public interest to deal with an access application, namely where:
 - 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
 - it appears to the agency that all of the documents to which the application relates are comprised of exempt information.¹³
11. Relevantly, information will qualify as exempt if it consists of information obtained, used or prepared for an investigation by a prescribed crime body, or another agency, in the

⁷ Referred to in these reasons as the **HR Act**, and which came into force on 1 January 2020.

⁸ Section 21 of the HR Act.

⁹ *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].

¹⁰ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹¹ **XYZ** at [573].

¹² Section 58(1) of the IP Act.

¹³ Exempt information is information the disclosure of which Parliament has considered would, on balance, be contrary to the public interest. Schedule 3 to the RTI Act identifies the types of information which comprise exempt information.

performance of the prescribed functions of the prescribed crime body (**Prescribed Crime Body Exemption**).¹⁴

12. Schedule 3, section 10(6) of the RTI Act excludes the operation of the Prescribed Crime Body Exemption if the investigation has been finalised and the relevant information is about the applicant.
13. If an agency relies on section 59 of the IP Act, it is not required to identify any or all of the documents that would be relevant to the access application.¹⁵ However, in the circumstances of a specific case, it may be appropriate and necessary to consider the relevant documents to be satisfied that every relevant document comprises exempt information.¹⁶
14. External review by the Information Commissioner¹⁷ is merits review, which is an administrative reconsideration of a case.¹⁸ As such, the Information Commissioner has the power to decide any matter in relation to an application that could have been decided by the agency, under the IP Act.¹⁹ After conducting an external review of a decision, the Information Commissioner must make a decision affirming, varying, or setting aside and making a decision in substitution for, the decision under review.²⁰

Findings

Is Part One of the application 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?

15. Yes, for the reasons that follow.
16. Part One of the application seeks all documents in the ESC's file about its investigation of the applicant's complaint. I am satisfied that this part of the application relates to all documents that relate to a stated subject matter, that is, information relating to the investigation of a specific complaint. Accordingly, the first limb of section 59 of the IP Act is satisfied.

Does it appear that all of the documents to which Part One of the application relates comprise exempt information?

17. For the reasons set out below, it appears that all of the documents requested in Part One of the application comprise exempt information under the Prescribed Crime Body Exemption and therefore, the second limb of section 59 of the IP Act is satisfied.
18. As I have noted above, information will be subject to the Prescribed Crime Body Exemption if:
 - (i) the information was obtained, used or prepared for an investigation

¹⁴ Schedule 3, section 10(4) of the RTI Act.

¹⁵ Section 59(2) of the IP Act.

¹⁶ In this review, I have examined all of the documents located by QPS in response to Part One of the application (**Requested Documents**).

¹⁷ Or delegate.

¹⁸ This can be described as 'stepping into the shoes' of the primary decision-maker, to determine what is the correct and preferable decision.

¹⁹ Section 118(1)(b) of the IP Act. However, this does not apply to the discretion in section 64(4) of the IP Act to give access to a document to which access can be refused, as the Information Commissioner does not have power to direct that access be given to a document which is exempt or contrary to public interest to disclose: section 118(2) of the IP Act.

²⁰ Section 123(1) of the IP Act.

- (ii) the investigation was conducted by a prescribed crime body, or another agency, in the performance of a prescribed function of the prescribed crime body; and
- (iii) the exception to the exemption does not apply.
19. With respect to the first requirement, I note that the terms '*obtained, used and prepared*' are not defined in the IP Act, the RTI Act or *Acts Interpretation Act 1954* (Qld) so they must be given their ordinary meaning. I have carefully considered the Requested Documents and I am satisfied that they are all documents ESC obtained, used and/or prepared for the investigation of the applicant's complaint. The scope of the application is effectively limited to those documents that form the ESC investigation file into the applicant's complaint.
20. In considering the second requirement, I note that the RTI Act recognises that the Crime and Corruption Commission (**Commission**) is a '*prescribed crime body*'; and the Commission's corruption functions are '*prescribed functions*'.²¹ Chapter 2, Part 3 of the *Crime and Corruption Act 2001* (Qld) (**CC Act**) identifies the Commission's corruption functions and sets out the principles to be applied by the Commission when performing those functions.²² Relevantly:
- the principles to be applied by the Commission include 'devolution', which is where the Commission refers a complaint back to an agency to investigate, subject to the Commission's monitoring role; and
 - section 35(1)(c) of the CC Act confirms that the Commission may perform its corruption functions by undertaking a monitoring role for police misconduct.²³
21. The applicant submits that they did not complain about corruption²⁴ and the investigation found no official misconduct.²⁵ The Commission's corruption functions are not limited to corruption investigations and explicitly include its monitoring role of police misconduct.
22. Having carefully considered the Requested Documents²⁶ and seeking specific submissions from QPS to confirm that this particular ESC investigation was subject to the monitoring role of the Commission, I am satisfied that the requested documents comprise information obtained, used or prepared by QPS in the performance of the Commission's prescribed functions.
23. I have also considered where, under schedule 3, section 10(6) of the RTI Act, the exception to the Crime Body Exemption will apply if the investigation has been finalised and the information is about the applicant.²⁷
24. The applicant submits that the investigation is finalised and it consists of information about them.²⁸
25. I find that the investigation has been finalised, however I am not satisfied that the requested documents are *about* the applicant. The word '*about*' in schedule 3,

²¹ Schedule 3, section 10(9) of the RTI Act.

²² These principles are set out in section 34 of the CC Act.

²³ Details of the monitoring role for police misconduct are set out in section 47 of the CC Act and '*police misconduct*' is defined in schedule 2 of the CC Act.

²⁴ External review application.

²⁵ Submissions received 4 August 2020.

²⁶ As section 121 of the IP Act relevantly prevents the Information Commissioner from disclosing information that is claimed to be exempt information, I am unable to provide a detailed description of the Requested Documents in these reasons for decision.

²⁷ If the exception is found to apply, the requested documents cannot comprise exempt information under the Prescribed Crime Body Exemption, and therefore, section 59 of the IP Act cannot apply.

²⁸ External review application.

section 10(6) of the RTI Act, as a matter of law, is a *'non-technical term defined according to its natural and ordinary meaning.'*²⁹

26. In this matter, the applicant is the complainant and not the subject of the allegations or the investigation. I am satisfied that the documents on the ESC investigation file, while they may have been brought about by the applicant's complaint, are not about the applicant—they are about the individuals who were the subject of the complaint.³⁰ To the extent these documents contain information about the applicant, this information is intertwined with information about others in such a way that it cannot be practically separated and I do not consider such intertwined personal information to be 'about' the applicant in the circumstances.

Conclusion

27. For these above reasons, I find section 59 of the IP Act applies because Part One of the application is expressed to relate to all documents of a stated subject matter and all of the Requested Documents appear to comprise exempt information under the Prescribed Crime Body Exemption.

Public interest considerations

28. The applicant has put forward a number of public interest arguments favouring disclosure of the ESC investigation file.³¹ The applicant has explained that, as the complainant, they are seeking more information about how the complaint was handled and what information was considered by the investigators. I acknowledge that the IP Act is to be administered with a pro-disclosure bias and the grounds for refusal are to be interpreted narrowly.³² However, when information qualifies as exempt information, as is the case here, I am precluded from taking other considerations into account. Parliament has determined that disclosure of exempt information would, on balance, be contrary to the public interest in all instances.³³ Accordingly, while the applicant has raised compelling arguments for why further information should be provided to them, I am unable to consider these arguments in relation to the disclosure of exempt information.

DECISION

29. For the above reasons, I set aside the decision QPS is deemed to have made refusing access to the Requested Information and find that section 59 of the IP Act applies to Part One of the application.
30. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

S Martin
Assistant Information Commissioner

Date: 9 September 2020

²⁹ *Darlington v Office of The Information Commissioner & Queensland Police Service* [2015] QCATA 167 (**Darlington**) at [52].

³⁰ *Darlington* at [56]-[58].

³¹ External review application and submissions received 4 and 11 August 2020.

³² Sections 64(1) and 67(2)(a) of the IP Act.

³³ Section 48(2) of the RTI Act. As noted above, the information Commissioner also has no discretion to direct that access be given to exempt information (section 118(2) of the IP Act). Refer also to *Dawson-Wells v Office of the Information Commissioner & Anor* [2020] QCATA 60 at [17]-[18] and *BL v Office of the Information Commissioner & Anor* [2012] QCATA 149 at [13] and [15].

APPENDIX**Significant procedural steps**

Date	Event
26 April 2020	OIC received the application for external review.
18 May 2020	OIC advised the applicant and QPS that the external review application had been accepted and asked QPS to provide further information.
27 May 2020	OIC received the requested information from QPS.
22 July 2020	OIC requested, and received, further information from QPS.
29 July 2020	OIC conveyed a preliminary view to the applicant and invited the applicant to provide submissions if they did not accept the preliminary view.
4 August 2020	OIC received the applicant's written submissions.
11 August 2020	OIC received the applicant's further submissions, in a conversation with the applicant.