



## Decision and Reasons for Decision

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<b>Citation:</b>	<b><i>M39 and Queensland Police Service [2023] QICmr 66 (8 December 2023)</i></b>
<b>Application Number:</b>	<b>317306</b>
<b>Applicant:</b>	<b>M39</b>
<b>Respondent:</b>	<b>Queensland Police Service</b>
<b>Decision Date:</b>	<b>8 December 2023</b>
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - INFORMATION AS TO EXISTENCE OF PARTICULAR DOCUMENTS - application for information pertaining to the Queensland Fixated Threat Assessment Centre - whether section 55 of the <i>Right to Information Act 2009</i> (Qld) applies to neither confirm nor deny the existence of requested documents</b>

### REASONS FOR DECISION

#### Summary

1. The applicant applied to the Department of Health under the *Right to Information Act 2009* (Qld) (**RTI Act**) to access certain information pertaining to the Fixated Persons Unit. This application was partially transferred to the Queensland Police Service (**QPS**) on 17 February 2023.<sup>1</sup>
2. QPS did not make a decision within the timeframe prescribed in the RTI Act and was therefore taken to have made a decision refusing access to the requested information.<sup>2</sup>
3. The applicant applied<sup>3</sup> to the Office of the Information Commissioner (**OIC**) for review of the decision QPS was deemed to have made.
4. On external review, QPS submitted that it was entitled to neither confirm nor deny the existence of the requested documents.<sup>4</sup> The applicant does not accept this.
5. For the reasons set out below, I vary the decision QPS was deemed to have made and find that the existence of the requested documents may be neither confirmed nor denied under section 55 of the RTI Act.
6. Nothing in this decision should be taken as confirming the existence or non-existence of the requested documents.

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<sup>1</sup> Under section 38 of the RTI Act.

<sup>2</sup> Under section 46 of the RTI Act. QPS confirmed this deemed decision by letter dated 8 May 2023.

<sup>3</sup> External review application received by OIC on 15 May 2023.

<sup>4</sup> Under section 55 of the RTI Act.

## Background

7. The information sought by the applicant falls into two broad categories, namely:
- information about whether he is on the 'Fixated Persons Unit list'; and
  - 'Statutes, rules of conduct, information on supervisory organs, and methods of appealing' his listing on the Fixated Unit's list.
- (the 'Requested Documents').
8. The Requested Documents concern the Queensland Fixated Threat Assessment Centre (QFTAC) which is a joint initiative between QPS and the Queensland Forensic Mental Health Service. QFTAC:
- identifies fixated individuals through their irregular communications with public office holders; and
  - seeks to mitigate the risk posed by these individuals by linking them with mental health interventions and addressing other identified risk factors.

## Reviewable decision

9. The decision under review is the decision QPS is deemed to have made under section 46 of the RTI Act, refusing access to the requested information.

## Evidence considered

10. The evidence, submissions, legislation and other material I have considered in reaching my decision are set out in these reasons (including footnotes and the Appendix). The significant procedural steps taken during the external review are set out in the Appendix.
11. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.<sup>5</sup> I consider a decision-maker will be '*respecting and acting compatibly with*' this right and others prescribed in the HR Act, when applying the law prescribed in the RTI Act.<sup>6</sup> I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act.<sup>7</sup>

## Issue for determination

12. External review by the Information Commissioner<sup>8</sup> is merits review.<sup>9</sup> 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 RTI Act.<sup>10</sup>

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<sup>5</sup> Section 21 of the HR Act.

<sup>6</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]. I note that OIC's approach to the HR Act set out in this paragraph was considered and endorsed by the Queensland Civil and Administrative Tribunal in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23] (where Judicial Member McGill saw '*no reason to differ*' from our position).

<sup>7</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>8</sup> Or delegate.

<sup>9</sup> That is, an administrative reconsideration of a case which can be described as 'stepping into the shoes' of the primary decision-maker to determine what is the correct and preferable decision.

<sup>10</sup> Section 105(1)(b) of the RTI Act.

13. The issue for determination in this review is whether QPS may neither confirm nor deny the existence of the requested documents under section 55 of the RTI Act.

### Relevant law

13. Section 23 of the RTI Act relevantly provides that a person has a right to be given access to documents of an agency such as QPS. This right is *subject to* other provisions in the RTI Act, including section 55 of the RTI Act.
14. Section 55 of the RTI Act is intended to apply in circumstances where revealing that the agency does or does not have documents in response to an access application, due to the wording of the request, would reveal information to which an agency would normally be entitled to refuse access.<sup>11</sup>
15. A decision-maker can neither confirm nor deny the existence of a document which, if it existed, would contain prescribed information.<sup>12</sup> 'Prescribed information' is defined as:
  - exempt information mentioned in schedule 3, section 1, 2, 3, 4, 5, 9 or 10 of the RTI Act; or
  - personal information the disclosure of which would, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act.<sup>13</sup>
16. Relevant to this matter, information will comprise exempt information under schedule 3, section 10(1)(i) of the RTI Act if its disclosure could reasonably be expected to prejudice a system or procedure for the protection of persons, property or the environment.

### Findings

17. The QFTAC system is designed to ensure the safety and security of subject individuals and the broader community within the meaning of the exemption in schedule 3, section 10(1)(i) of the RTI Act.<sup>14</sup>
18. The scope of this access application has been worded such that confirming whether the Requested Documents exist would reveal to the applicant whether he has or is currently on the Fixated Persons List. This could reasonably be expected to result in prejudice to the QFTAC system because it would reveal to the applicant whether QPS is monitoring or had previously monitored him and this knowledge may result in the applicant modifying his behaviour in such a way so as to avoid detection by the QFTAC system. In turn, I consider this could reasonably be expected to result in vulnerable individuals in need of mental health intervention and support going undetected by the QFTAC system, thereby compromising its effectiveness.
19. In his submissions on external review, the applicant referred to the Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights,<sup>15</sup> in support

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<sup>11</sup> Section 55(4) of the IP Act also confirms that a decision to neither confirm nor deny the existence of a document is a decision refusing access to the document.

<sup>12</sup> Section 55 of the RTI Act.

<sup>13</sup> Pursuant to section 10 and schedule 5 of the RTI Act and section 12 of the *Information Privacy Act 2009* (Qld), 'Personal information' is defined as 'information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion'.

<sup>14</sup> *V29 and Metro North Hospital and Health Service* [2020] QICmr 10 (21 February 2020) at [15], *H30 and Queensland Police Service* [2019] QICmr 44 (14 October 2019) at [13], *E70 and Hon Dr Steven Miles MP, Minister for Health and Minister for Ambulance Services* [2019] QICmr 58 (11 December 2019) at [23] and *A87 and Queensland Police Service* [2019] QICmr 37 (3 September 2019) at [15].

<sup>15</sup> Submission dated 5 July 2023.

of his view that the Requested Documents be released. It was also submitted, amongst other matters, that:

- the Fixated Persons Unit is carrying out a public function and is funded by the public and information about its existence and the rules of operation should be available to those meant to be protected by it; and
  - the absence of rules regarding operations, statutes and charters, indicates a serious omission on the part of QPS and the Queensland Government to regulate an entity that can easily abuse its powers if not properly regulated.
20. This information is clearly very important to the applicant, however, in this matter, the entitlement to access information is regulated by the provisions of the RTI Act, and, as explained at paragraph 13, is subject to limitations, including grounds upon which access to information may be refused.<sup>16</sup>
21. The applicant's submissions<sup>17</sup> discuss the public interest in disclosure of the Requested Documents. However, under the RTI Act, there is no scope for me to consider public interest arguments in circumstances where the requirements of an exemption have been established. This is because Parliament has decided that it would be contrary to the public interest to disclose this information<sup>18</sup> and the Information Commissioner does not have the power to direct that access be given to exempt information.<sup>19</sup>
22. In view of the applicant's submission in relation to abuse of power, I have considered whether the exception to the exemption, in schedule 3, section 10(2)(a) of the RTI Act applies. That exception provides that information will not be exempt if it consists of a matter revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law. I am limited in the extent to which I can explain the reasons for my finding, for the reasons explained above. However, on the information before me, I am satisfied that the exception to the exemption in schedule 3, section 10(2)(a) does not apply.
23. For the reasons explained at paragraphs 17 to 22, I am satisfied that, if the Requested Documents existed, they would comprise exempt information under schedule 3, section 10(1)(i) of the RTI Act. Accordingly, I am satisfied that Requested Documents satisfy the definition of *prescribed information* under section 55 of the RTI Act.

## DECISION

24. For the reasons set out above, I vary QPS' decision and find that it is entitled to neither confirm nor deny the existence of the Requested Documents pursuant to section 55 of the RTI Act.
25. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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**S Martin**  
**Acting Right to Information Commissioner**

**Date: 8 December 2023**

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<sup>16</sup> These are set out in section 47 of the RTI Act.

<sup>17</sup> Submissions dated 5 July and 26 July 2023.

<sup>18</sup> Section 48(2) of the RTI Act.

<sup>19</sup> Section 105(2) of the RTI Act.

**APPENDIX****Significant procedural steps**

<b>Date</b>	<b>Event</b>
15 May 2023	OIC received the external review application.
29 May 2023	OIC notified the applicant and QPS that the application for external review had been accepted and requested information from QPS.
31 May 2023	OIC received the requested information from QPS.
23 June 2023	OIC conveyed a preliminary view to the applicant and invited the applicant to provide a submission by 7 July 2023 if he did not accept the preliminary view.
5 July 2023	OIC received the applicant's submissions.
12 July 2023	OIC conveyed a further preliminary view to the applicant and invited the applicant to provide further submissions by 26 July 2023 if he maintained his disagreement with the preliminary view
26 July 2023	OIC received the applicant's further submissions.