



## Decision and Reasons for Decision

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**Application Number:** 311159

**Applicant:** Gapsa

**Respondent:** Department of Transport and Main Roads

**Decision Date:** 6 September 2013

**Catchwords:** ADMINISTRATIVE LAW - RIGHT TO INFORMATION - GROUNDS ON WHICH ACCESS MAY BE REFUSED – CONTRARY TO PUBLIC INTEREST INFORMATION – an agency may refuse access to a document to the extent the document comprises information the disclosure of which would, on balance, be contrary to the public interest – workplace investigation documents – whether disclosure would, on balance, be contrary to the public interest – sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

### REASONS FOR DECISION

#### Summary

1. The applicant applied<sup>1</sup> to the Department of Transport and Main Roads (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to a workplace investigation report, statements and documents provided by relevant people, the applicant's response to the allegations against him and the investigator's findings.
2. The Department located 398 pages and 22 audio recordings which responded to the application and decided to grant access to 5 pages in full and 5 pages in part and refuse access to 388 pages and the 22 audio recordings in full on the grounds that disclosure would be contrary to the public interest. On internal review, the Department made the same decision.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision to refuse access to 388 pages of the investigation report and its attachments.
4. On external review the Department agreed to release a further 225 pages either in full or in part to the applicant.
5. For the reasons set out below, I am satisfied that the public interest favouring open discussion of public affairs and enhancing the government's accountability, revealing

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<sup>1</sup> By access application dated 5 July 2012.

the reason for a government decision or any background or contextual information that informed that decision and the applicant having access to his personal information is outweighed by the public interest favouring nondisclosure because of individuals' right to privacy and the prejudice to the Department's management function. Therefore, access to the information under consideration in this review is refused on the basis that its disclosure would, on balance, be contrary to the public interest.

## **Background**

6. Significant procedural steps relating to the application and the external review are set out in the appendix to this decision.

## **Reviewable decision**

7. The decision under review is the Department's internal review decision dated 6 September 2012.

## **Evidence considered**

8. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and appendix).

## **Information in issue**

9. The information in issue in this review is information provided by complainants and other departmental officers throughout the course of the investigation into allegations made against the applicant,<sup>2</sup> including the evidence provided by those individuals, summaries of interviews, emails and other documents evidencing and/or documenting their complaints.

## **Issues for determination**

10. The issue for determination in this review is whether access to the Information in Issue can be refused on the basis that its disclosure would, on balance, be contrary to the public interest.<sup>3</sup>

## **Would disclosure of the Information in Issue, on balance, be contrary to the public interest?**

11. Yes, for the reasons that follow.

## **Relevant law**

12. Under section 23 of the RTI Act, a person has a right to be given access to documents of an agency, subject to a number of exclusions and limitations, including grounds for refusal of access. These grounds are contained in section 47 of the RTI Act. Relevantly, access may be refused to information the disclosure of which would, on balance, be contrary to the public interest under section 49 of the RTI Act.

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<sup>2</sup> The applicant did not contest OIC's view that it was contrary to the public interest to disclose information about allegations made against another subject officer. Therefore, I have not considered that information in this decision.

<sup>3</sup> Sections 47(3) (b) and 49 of the RTI Act.

13. The term *public interest* refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.
14. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest<sup>4</sup> and explains the steps that a decision-maker must take<sup>5</sup> in deciding the public interest as follows:
  - identify any irrelevant factors and disregard them
  - identify relevant public interest factors favouring disclosure and nondisclosure
  - balance the relevant factors favouring disclosure and nondisclosure; and
  - decide whether disclosure of the information in issue would, on balance, be contrary to the public interest.

### **Findings**

15. No irrelevant factors arise in the circumstances of this case.

#### **Enhance government accountability and reveal reasons for a decision**

16. If disclosing information could reasonably be expected to enhance the government's accountability<sup>6</sup> or reveal the reason for a government decision and any background or contextual information that informed the decision,<sup>7</sup> it is relevant to consider these public interest factors favouring disclosure. I am satisfied that there is a public interest in government agencies being accountable for properly investigating workplace disputes.<sup>8</sup>
17. In this case, disclosure of the Information in Issue would to some extent further these public interest factors as it would enable the applicant to assess the findings of the investigator against the evidence relied on. This would assist him to further understand the Department's decision. However, the applicant has now received a significant amount of information on external review which furthers these public interest factors, including:
  - background information
  - the allegations against the applicant
  - legislation, policy and procedures considered during the investigation
  - summary of findings made by the investigator
  - the investigator's analysis and conclusion
  - evidence relied on
  - summaries of the applicant's own evidence; and
  - the investigator's statement of systemic issues within the work unit and the investigator's recommendations.
18. Given the nature of the Information in Issue (ie that it is witness statements and personal information of complainants), I am satisfied that the information will not

<sup>4</sup> Schedule 4 of the RTI Act sets out the factors for deciding whether disclosing information would, on balance, be contrary to the public interest.

<sup>5</sup> Section 49(3) of the RTI Act.

<sup>6</sup> Schedule 4, part 2, item 1 of the RTI Act.

<sup>7</sup> Schedule 4, part 2, item 11 of the RTI Act.

<sup>8</sup> *I6XD0H and Department of Community Safety* (Unreported, Queensland Information Commissioner, 26 June 2012) at [31].

significantly further promote enhance the government's accountability or reveal the reasons for a decision. I am satisfied that the Department has now provided the applicant with a significant amount of information relevant to his access application and I consider that these public interest factors have been significantly advanced by the release of that information. I am also satisfied that disclosure of the Information in Issue would do little to further advance these public interest factors. Therefore, I give these factors little weight.

### **Administration of justice and fair treatment of individuals**

19. In the applicant's application for internal review<sup>9</sup> the applicant stated that:

*[he believes] that by ... being lawfully provided... with a copy of the [Information in Issue he] will be in a position to assess if [he has] received fair treatment.*

20. If disclosure of information could reasonably be expected to contribute to the administration of justice generally or to the administration of justice for a person, including procedural fairness, it is relevant to consider this public interest factor favouring disclosure.<sup>10</sup> In the context of workplace investigations, procedural fairness requires, amongst other things, that a person is adequately informed of the allegations against them and the outcome of those allegations, including where appropriate information about the evidence relied on. Similarly, if disclosing information could reasonably be expected to advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies, it is relevant to consider this public interest factor favouring disclosure. However, this public interest factor does not require a decision maker to ensure that an applicant is provided with sufficient information to enable that applicant to be *subjectively* satisfied that he or she received fair treatment.
21. I am satisfied, from reviewing the information that has been released to the applicant, including the information released to the applicant on external review, that the applicant has been afforded procedural fairness as he has been provided with the substance of the allegations, the summary of findings made by the investigator and the investigator's analysis and conclusion and the applicant participated in the investigation process which is now complete. Further, the allegations against the applicant were found to be unsubstantiated. Given the information already released to the applicant and the nature of the Information in Issue (ie witness statements and personal information of complainants, rather than information about the way in which the investigation was conducted), I am satisfied that disclosure of the Information in Issue will not further advance the fair treatment of the applicant in his dealings with the Department. Therefore, it is my view that these public interest factors do not arise for consideration.

### **Possible deficiencies, misconduct or negligent, improper or unlawful conduct and incorrect or misleading information**

22. In his application for internal review<sup>11</sup> the applicant stated:

*...[that he has] concerns in relation to the false allegations that [he] had faced and the complaint management process to which [he was] subjected.*

*...[he] believe[s] that the [Information in Issue is] likely to assist [him] to clarify and identify further concerns that [he has] in relation to maladministration in the Department...*

<sup>9</sup> Dated 13 August 2012.

<sup>10</sup> Schedule 4, part 2, item 16 of the RTI Act.

<sup>11</sup> Dated 13 August 2012.

23. On external review<sup>12</sup> the applicant also submitted that:

*...[The] Investigation Report demonstrates no compliance with any standards for the investigation of workplace issues...*

*... when the evidence provided is tested there will be most likely more evidence that [he] will be able to disprove as being false, malicious or vexatious.*

*...Throughout the whole investigation, which lasted approximately seven (7) months, management was largely unaccountable for its detrimental actions towards [him]...*

*[The Department] did not provide [him] with a head of power for the investigation...*

*...the multiple complaints from various staff did not even constitute an “employee complaint” as defined in Directive No.08/10 Managing employee complaints...*

*...the Legal and Prosecution Services Branch... failed to ensure proper compliance with any statutory regulations relating [to] proper employee complaints management.*

24. It is not my role to determine whether there has been any maladministration or wrongdoing on the part of an agency in conducting workplace investigations. The role of the OIC is limited to a merits review of government agencies’ decisions under the RTI Act. However, the RTI Act recognises that the following public interest factors favouring disclosure may arise in certain circumstances:

- disclosure of the information could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official<sup>13</sup>
- disclosure of the information could reasonably be expected to reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct;<sup>14</sup> and
- disclosure of the information could reasonably be expected to reveal that the information was—
  - incorrect
  - out of date
  - misleading
  - gratuitous
  - unfairly subjective; or
  - irrelevant.<sup>15</sup>

25. I have set out the information the Department agreed to release to the applicant on external review in paragraph 17 above. I am satisfied that the applicant has now been provided with sufficient information to allow or assist inquiry into possible deficiencies in the conduct or administration of the Department or an official in the conduct of the investigation of allegations made against him. I have carefully reviewed the Information in Issue and I am satisfied that disclosure of that information could not reasonably be expected to further any of the three public interest factors set out above. Therefore, I afford these factors no weight in the circumstances.

<sup>12</sup> By emails dated 2 September 2013 and 3 September 2013.

<sup>13</sup> Schedule 4, part 2, item 5 of the RTI Act.

<sup>14</sup> Schedule 4, part 2, item 6 of the RTI Act.

<sup>15</sup> Schedule 4, part 2, item 12 of the RTI Act.

### **Applicant's personal information**

26. If disclosing information could reasonably be expected to disclose the personal information of the individual applying for that information, a public interest factor favouring disclosure arises.<sup>16</sup> As some of the Information in Issue, including the applicant's name and references to events to which he was a party, is the applicant's personal information, this factor is relevant here.<sup>17</sup>
27. This factor warrants significant weight. However, the nature of this information is such that it is not possible to separate the applicant's personal information from the personal information of others. In other words, the relevant information cannot be disclosed to the applicant without disclosing personal information of other individuals. Therefore, the relevant privacy interests of other people (which I discuss below) must be balanced against the public interest in disclosing to the applicant his personal information.

### **Right to privacy and personal information**

28. If disclosing the information could reasonably be expected to prejudice the protection of an individual's right to privacy it will be relevant to consider this public interest factor favouring nondisclosure.<sup>18</sup> The RTI Act also provides that if disclosing information will disclose the personal information of another person, disclosure could reasonably be expected to cause a public interest harm.<sup>19</sup> The Information in Issue includes information about opinions, thoughts and feelings provided by complainants and other Departmental officers which has not been provided to the applicant and is not capable of being de-identified. This information is the personal information of people other than the applicant.
29. Since disclosure of the Information in Issue would disclose the personal information of other people, I am satisfied that disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy and cause a public interest harm. Given the nature of this information, significant weight should be afforded to these public interest factors favouring nondisclosure.

### **Management or assessment of agency staff**

30. If disclosing information could reasonably be expected to have a substantial effect on the management or assessment by an agency of the agency's staff or prejudice an agency's management function, a public interest factor favouring nondisclosure arises.<sup>20</sup> In the applicant's application for internal review the applicant stated that the allegations made against him were false.
31. I am not in a position to express an opinion about whether or not the statements made about the applicant are false. In any event, while I acknowledge that people can make false allegations to government agencies about public servants, there is a very strong public interest in protecting the free flow of information concerning the conduct and competency of public servants, even where this may result in an agency investigating false allegations. This is because the Department relies on information from public servants and/or members of the public in order to become aware of, and if necessary resolve, any issues concerning the conduct and competency of public servants.

<sup>16</sup> Schedule 4, part 2, item 7 of the RTI Act.

<sup>17</sup> Section 12 of the *Information Privacy Act 2009* (Qld) defines 'personal information' 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>18</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>19</sup> Schedule 4, part 4, section 6 of the RTI Act.

<sup>20</sup> Schedule 4, part 4, section 3(c) of the RTI Act.

32. The applicant also submitted on external review<sup>21</sup> that:

*...the Legal and Prosecution Services Branch... failed to ensure proper compliance with any statutory regulations relating [to] proper employee complaints management. Therefore, the argument to protect [the Department's] industrial relations and human resource management function is false as officers with those responsibilities did not comply with mandatory statutory obligations.*

33. I am not in a position to express an opinion about whether or not the Department properly conducted the investigation in light of its statutory obligations, nor is it my role to do so. However, I have carefully reviewed the Information in Issue and I am satisfied that it is not of a type to assist the applicant in determining whether or not the Department properly conducted the workplace investigation.

34. Further, in investigations such as this, information is usually provided by witnesses on the understanding that the information will be used for the purposes of the investigation and any subsequent disciplinary action only. Information received is ordinarily treated confidentially, except to the extent that procedural fairness and discipline processes require otherwise. In my view, disclosing the Information in Issue could reasonably be expected to have a detrimental effect on the Department's management function as disclosing information of this type would tend to discourage individuals from coming forward with relevant information in the future. I am also satisfied that disclosure of this information could reasonably be expected to cause staff to lose confidence in the finalisation of investigations, particularly where allegations are found to be unsubstantiated.<sup>22</sup> This in turn would significantly impact the effectiveness of future investigations. As noted by Assistant Information Commissioner Jefferies in *I6XD0H and Department of Community Safety*:<sup>23</sup>

*Although it is reasonable to expect staff to cooperate with investigation processes in the course of their employment, disclosing the transcripts of interviews of other witnesses when it is not required for the investigation and discipline process and after the matter has been finalised would also make staff reluctant to fully participate in future workplace investigations of this nature.*

35. This factor has significant weight against disclosure of the Information in Issue.

### **Balancing the relevant public interest factors**

36. For the reasons set out above, I afford little weight to the public interest factors in enhancing the government's accountability and revealing the reason for a government decision or any background or contextual information that informed that decision and I afford significant weight to the public interest factor in the applicant having access to his personal information.

37. Balanced against these factors favouring disclosure of the Information in Issue are the following factors favouring nondisclosure, to which I afford significant weight:

- the Information in Issue is the personal information of others and its disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy and cause a public interest harm; and

<sup>21</sup> By email dated 3 September 2013.

<sup>22</sup> *Daw and Queensland Rail* (Unreported, Queensland Information Commissioner, 24 November 2010) at [17].

<sup>23</sup> (Unreported, Queensland Information Commissioner, 26 June 2012) at [6].

- disclosure of the Information in Issue could reasonably be expected to prejudice the Department's management function.

38. Having balanced the relevant factors in this case, I consider the public interest in nondisclosure of the Information in Issue outweighs the public interest factors favouring disclosure.

## **DECISION**

39. For the reasons set out above, I vary the decision under review and find that disclosure of the Information in Issue is, on balance, contrary to the public interest.

40. I have made this decision as a delegate of the Acting Information Commissioner, under section 145 of the RTI Act.

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**Lisa Meagher**  
**Acting Assistant Information Commissioner**

**Date: 6 September 2013**



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

<b>Date</b>	<b>Event</b>
5 July 2012	The Department received the access application.
8 August 2012	The Department decided to refuse access to the Information in Issue.
13 August 2012	The Department received the applicant's application for internal review of its decision dated 8 August 2012.
6 September 2012	The Department again decided to refuse access to the Information in Issue.
7 September 2012	OIC received the applicant's application for external review of the Department's decision dated 6 September 2012.
18 September 2012	OIC notified the applicant in writing that the external review application had been accepted.  OIC notified the Department that the external review application had been accepted and asked the Department for a copy of the Information in Issue.  The Department provided OIC with a copy of the Information in Issue.
7 November 2012	OIC sought further information from the Department.
12 November 2012	The Department provided OIC with the requested information.
18 April 2013	OIC conveyed to the Department the view that disclosure of some of the investigation report and its attachments is not, on balance, contrary to the public interest and invited the Department to make submissions if it did not agree with the view.
8 May 2013	The Department advised OIC that it did not accept OIC's view and provided written submissions.
28 May 2013	OIC sought further information from the Department.
20 June 2013	The Department provided OIC with further written submissions and agreed to release some information to the applicant.
11 July 2013	OIC conveyed to the Department its view that further information could be released to the applicant as its disclosure is not, on balance, contrary to the public interest.
1 August 2013	The Department advised that it accepted OIC's view.
12 August 2013	OIC conveyed a view to the applicant on the refusal of access issue.
23 August 2013	The Department provided the applicant with a copy of the information it agreed to release on external review.
2 September 2013	The applicant advised OIC that he objected to OIC's view in part.