



Decision and Reasons for Decision

Citation:	<i>P80 and Queensland Building and Construction Commission; F80 (Third Party) [2021] QICmr 17 (23 April 2021)</i>
Application Number:	315427
Applicant:	P80
Respondent:	Queensland Building and Construction Commission
Third Party:	F80
Decision Date:	23 April 2021
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION CONTRARY TO PUBLIC INTEREST INFORMATION - property information obtained during complaint investigation by regulatory authority - accountability and transparency, administration of justice, procedural fairness and fair treatment - right to privacy concerning individual's private residence - unsubstantiated allegations - third party personal information - whether disclosure would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Queensland Building and Construction Commission (QBCC) under the *Right to Information Act 2009* (Qld) (RTI Act) for access to seven documents obtained by QBCC during its investigation of a complaint, previously made by the applicant to QBCC, about a building certifier.²
2. QBCC located 24 pages in response to the application, and after consulting with relevant third parties, decided³ to disclose a copy of certifier's response to the QBCC complaint (Certifier's Response),⁴ but refused access to the remaining information⁵ on the basis that disclosure would, on balance, be contrary to the public interest.⁶

¹ On 10 March 2020.

² In February 2020, QBCC decided that the certifier had not engaged in unsatisfactory conduct or professional misconduct and provided the applicant with a copy of its reasons for this decision under the *Building Act 1975* (Qld) (Decision Notice).

³ On 8 May 2020. The decision upheld objections raised by the third parties and was therefore, only adverse to the interests of the access applicant.

⁴ Four full pages and one part page.

⁵ 19 pages and one part page.

⁶ Section 47(3)(b) and 49 of the RTI Act.

3. The applicant applied⁷ to the Office of the Information Commissioner (**OIC**) for external review of QBCC's decision submitting that it would be in the public interest to disclose the refused documents, particularly because he required them to pursue a legal remedy.
4. During the review, OIC also consulted with relevant third parties. One of those parties accepted OIC's view that two Department of Housing and Public Works inspection and compliance certificates (**Forms 15 and 16**) could be partially disclosed.⁸ QBCC also agreed to disclosure of this information.
5. For the reasons set out below, I affirm QBCC's decision to refuse access to the information remaining in issue under section 47(3)(b) of the RTI Act.

Background and evidence considered

6. The decision under review is QBCC's decision dated 8 May 2020.
7. Significant procedural steps taken in the review are set out in the Appendix. 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).
8. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.⁹ 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 RTI Act.¹⁰ I have acted in this way in making this decision.¹¹ I also note the observations made by Bell J on the interaction between equivalent pieces of Victorian legislation:¹² '*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*'.¹³

Information in issue

9. The information in issue comprises:
 - documents obtained by QBCC in the course of investigating the complaint including house plans/drawings, photos and correspondence prepared for the property owner by private consultants (**Property Information**); and
 - signatures, mobile telephone numbers and an email address of other individuals appearing in Forms 15 and 16, and part of page 1 of the Certifier's Response (**Third Party Information**).

Issue for determination

10. The issue for determination is whether disclosure of the Property Information and Third Party Information would, on balance, be contrary to the public interest.
11. The applicant has raised concerns about unauthorised disclosure of his personal information by QBCC, the conduct of QBCC and alleges that the third party has

⁷ External review application received 21 May 2020.

⁸ The other third parties did not respond to OIC's consultation correspondence and therefore, were taken to raise no objections to the proposed disclosure of information in Forms 15 and 16.

⁹ Section 21 of the HR Act.

¹⁰ *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].

¹¹ In accordance with section 58(1) of the HR Act.

¹² *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹³ *XYZ* at [573].

exercised his legal rights *'in retaliation'* against the applicant which OIC has *'completely failed to address'*.¹⁴

12. The powers of the Information Commissioner on external review are set out in the RTI Act,¹⁵ and OIC's jurisdiction on external review is confined to reviewing a decision on access to information held by a government agency.¹⁶ To the extent that the applicant's submissions are relevant to the assessment of public interest factors for and against disclosure, I have considered them below.

Relevant law

13. The RTI Act provides for a right of access to information held by Queensland government agencies. However, this right is subject to certain limitations, including grounds for refusing access to information.¹⁷ One ground is where disclosure would, on balance, be contrary to the public interest.¹⁸ In deciding where the balance of the public interest lies, the RTI Act requires a decision maker to identify factors for and against disclosure, disregard irrelevant factors and decide, on balance, whether disclosure would be contrary to the public interest.¹⁹
14. In balancing the public interest, a decision maker must disregard any irrelevant factors.²⁰

Findings

Property Information

Irrelevant factors

15. During the review, one of the consulted third parties raised concerns about the applicant's motivation for seeking access to the Property Information, and the actions he would likely take if he obtained it. A concern that the release of information may result in mischievous conduct by the applicant is an irrelevant consideration under the RTI Act²¹ and I have not taken this submission into account. No other irrelevant factors arise in the circumstances of this matter.

Factors favouring disclosure

16. The applicant made submissions about the need for transparency in relation to the development on the adjoining property that was the subject of his certification complaint to the QBCC. He submitted that he had encountered difficulty in obtaining development documents from the local council and referred to legislative requirements for such documents to be available for inspection and purchase.²²
17. I accept that disclosure of the Property Information would, to an extent, enhance the accountability of QBCC in terms of revealing the information QBCC obtained to investigate the complaint²³ and reveal background information that was available to QBCC in making its decision on the complaint.²⁴ However, none of the Property

¹⁴ Applicant submission to OIC received on 25 February 2021 and 28 February 2021.

¹⁵ Sections 84-110 and 130 of the RTI Act.

¹⁶ Section 85 of the RTI Act. See also *'reviewable decision'* schedule 5, RTI Act.

¹⁷ Which are intended to be interpreted narrowly: section 47(2)(a) of the RTI Act.

¹⁸ Section 47(3)(b) of the RTI Act.

¹⁹ Section 49(3) of the RTI Act.

²⁰ Including those at schedule 4, part 1 of the RTI Act.

²¹ Third party submission to OIC received on 31 January 2021.

²² Applicant's submission to OIC received on 25 February 2021.

²³ Schedule 4, part 2, item 1 of the RTI Act.

²⁴ Schedule 4, part 2, item 11 of the RTI Act.

Information reveals anything about QBCC's deliberations, investigation processes or provides further reasons for QBCC's decision. That type of information, is however, contained in the comprehensive Decision Notice that was provided to the applicant by QBCC at conclusion of the investigation. The Certifier's Response also describes the information that was relied on by the certifier in relation to planning requirements and design compliance. While I acknowledge the applicant's interest in gaining further insight into the local council's assessment of the property, because the development application approval was given by the private building certifier, the Property Information does not reveal anything about the local council's involvement in the matter.

18. Given the information that has been released to the applicant under the RTI Act, and conveyed in the Decision Notice, I am satisfied that the transparency and accountability factors²⁵ have already been significantly discharged. Accordingly, I afford these public interest factors low weight in favour of disclosure.
19. The applicant also argued that he requires the Property Information to defend his case in future complaint processes and anticipated legal proceedings.²⁶ Therefore, I have considered whether disclosure of the Property Information could reasonably be expected to contribute to the administration of justice for the applicant.²⁷ The Information Commissioner has previously held that this public interest factor will be established where:²⁸
 - loss or damage or some kind of wrong has been suffered, in respect of which a remedy is, or may be, available under the law
 - the applicant has a reasonable basis for seeking to pursue the remedy; and
 - disclosure of the information in issue would assist the applicant to pursue the remedy, or to evaluate whether a remedy is available, or worth pursuing.
20. However, in *Willsford*, the Information Commissioner also recognised that the '*mere assertion by an applicant that information is required to enable pursuit of a legal remedy will not be sufficient to give rise to a public interest consideration*'.²⁹
21. I am satisfied that the applicant's entitlement to seek review of the QBCC investigation outcome, or commence/defend a legal proceeding, is not contingent on obtaining access to the Property Information. The applicant is aware of the identity of involved parties and has received access to a significant volume of information in the Decision Notice, Certifier's Response and Forms 15 and 16 through this review. Accordingly, I am not satisfied that disclosure of the Property Information would assist the applicant to pursue the remedy. It may, to some limited extent, assist the applicant in evaluating whether a remedy worth pursuing, or the strength of his defence against potential legal action threatened against him. However, the applicant's legal options in relation to the QBCC complaint were outlined in the Decision Notice and if materials are required in any appeal (or in any other proceedings, including defending proceedings), the Court or Tribunal's own disclosure processes will be the appropriate mechanism to obtain such information. Accordingly, I afford this factor low weight.

²⁵ Schedule 4, part 2, items 1 and 11 of the RTI Act.

²⁶ External review application dated 16 May 2020 and applicant's submission to OIC received on 18 August 2020 and 25 February 2021.

²⁷ Schedule 4, part 2, item 17 of the RTI Act.

²⁸ *Willsford and Brisbane City Council* (1996) 3 QAR 368 (*Willsford*), noting the *Willsford* criteria set out at [17]; see also *10S3KF and Department of Community Safety* (Unreported, Queensland Information Commissioner, 16 December 2011) at [15] - [22], *Beale and Department of Community Safety* (Unreported, Queensland Information Commissioner, 11 May 2012) at [20] - [24] and *Bruce Dulle Family Lawyers and Workcover Queensland* (Unreported, Queensland Information Commissioner, 26 July 2012) at [25] - [32].

²⁹ *Willsford* at [17].

22. The applicant also contends that disclosure could reasonably be expected to contribute to the administration of justice generally (including procedural fairness) and to advance his fair treatment in his dealings with agencies.³⁰ In this case, the agency process is complete, and the applicant has been provided with the Decision Notice and Certifier's Response. I do not consider that disclosure of the Property Information would advance his fair treatment or afford him any significant level of procedural fairness. I note that despite QBCC making no adverse findings against the certifier, the applicant contends that the Property Information will support his complaint. While I do not consider the Property Information lends support to the applicant's case, I accept that, to a limited extent, it would apprise the applicant of all the evidence considered by QBCC, thus furthering procedural fairness and his fair treatment to a limited extent. Accordingly, I afford these factors some, albeit low weight.
23. The applicant also submits that QBCC's conduct has been deficient and that their actions are a '*cover up of their own negligence and or numerous indiscretions*'.³¹ The public interest will favour disclosure of information where it could reasonably be expected to:
- allow or assist inquiry into possible deficiencies of conduct or administration by an agency or official³²
 - reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct³³; and/or
 - reveal that the information was incorrect, out of date, misleading, unfairly subjective and irrelevant.³⁴
24. I am satisfied that there is no evidence in the Property Information to indicate possible deficiencies in QBCC's conduct or administration of the investigation. Similarly, the material does not reveal evidence of misconduct or otherwise negligent conduct³⁵ or incorrect or misleading information. I afford no weight to these factors.
25. The applicant also submitted that disclosure of the Property Information could reasonably be expected to contribute to the protection of the environment,³⁶ reveal environmental or health risks or measures relating to public health and safety,³⁷ contribute to the maintenance of peace and order³⁸ and the enforcement of criminal law.³⁹ I understand that broadly, planning and development matters may give rise to environmental or safety issues, and that the applicant has broadly raised issues of harassment that may be peace and order matters. However, for these factors to arise, the disclosure of the Property Information itself must *reasonably be expected*⁴⁰ to contribute to the outcome anticipated by the particular public interest factor. In the absence of any evidence

³⁰ Schedule 4, part 2, item 10 and item 16 of the RTI Act.

³¹ Applicant's submission to OIC received on 25 February 2021.

³² Schedule 4, part 2, items 5 of the RTI Act.

³³ Schedule 4, part 2, items 6 of the RTI Act.

³⁴ Schedule 4, part 2, items 12(a)(b)(c)(e) and (f) of the RTI Act.

³⁵ *McCrystal and Queensland Building and Construction Commission* [2017] QICmr 32 (10 August 2017) at [86] to [92].

³⁶ Schedule 4, part 2, item 13 of the RTI Act.

³⁷ Schedule 4, part 2, item 14 of the RTI Act.

³⁸ Schedule 4, part 2, item 15 of the RTI Act.

³⁹ Schedule 4, part 2, item 18 of the RTI Act. The applicant identified this public interest factor in his external review application to OIC received on 21 May 2020.

⁴⁰ The term '*could reasonably be expected to*' requires an expectation that is reasonably based, that is, neither absurd, irrational or ridiculous (*Attorney-General v Cockcroft* (1986) 64 ALR 97 at 106) nor merely a possibility (*Murphy and Treasury Department* (1995) 2 QAR 744 (*Murphy*)). Whether the expected consequence is reasonable requires an objective examination of the relevant evidence (*Murphy* at [45] - [47]). It is not necessary for a decision-maker to be satisfied upon the balance of probabilities that disclosing the document will produce the anticipated harm (*Sheridan and South Burnett Regional Council (and Others)* (Unreported, Queensland Information Commissioner, 9 April 2009 at [189] - [192]). The expectation must arise as a result of the disclosure, rather than from other circumstances (*Murphy* at [54]).

reasonably connecting disclosure of the Property Information to these public interest factors, I find they do not apply.⁴¹

Factors favouring nondisclosure

26. The Property Information consists of house plans/drawings, photos and correspondence between the homeowner and private consultants in relation to the development at the property. The Property Information relates to an individual's private residence giving rise to the public interest factor intended to protect an individual's right to privacy. The concept of 'privacy' is not defined in the RTI Act. It can, however, essentially be viewed as the right of an individual to preserve their '*personal sphere free from interference by others*'.⁴² I am satisfied that a person's activities associated with their residential home, including privately certified building work, form part of that personal sphere.⁴³ There is a public interest in private citizens being free to enjoy their private residence without undue interference from others. The house plans/drawings and photos provide an insight into the layout of the home, which is inherently private. Likewise, the communications between the homeowner and private consultants (certifier and engineer) were generated in the course of a private business relationship.
27. The applicant strenuously rejects that the Property Information attracts any level of privacy and cites legislation - including the *Building Act 1975 (Qld)* - that requires certain development information to be available for inspection and purchase.⁴⁴ I accept that certain property information can be available for inspection and purchase from local governments under the *Building Act 1975 (Qld)*, the *Planning Act 2016 (Qld)* and the *Planning Regulation 2017 (Qld)*.⁴⁵ However, access under these alternative regimes is not absolute.⁴⁶ Here, the applicant has not sought information from the local council, but from QBCC which holds the Property Information as a result of an investigation of a complaint about a private certifier. I consider this gives the Property Information a higher level of sensitivity as it forms part of the evidence used in a complaint process. Accordingly, I am satisfied that the privacy factor carries significant weight in favour of nondisclosure.
28. The applicant submits that his own privacy was prejudiced during the complaint process⁴⁷ and argues that the development has impacted his family's own privacy and use and enjoyment of their land. I understand the applicant remains dissatisfied with the development, however, I do not consider this reduces the weight of the public interest in protecting the right to privacy of another individual. To the extent that these submissions give rise to arguments in favour of accountability and transparency, these have been

⁴¹ Schedule 4, part 2, items 13, 14, 15 and 18 of the RTI Act. In reaching this decision, in addition to these factors raised by the applicant, I have considered each of the non-exhaustive lists of factors set out in Schedule 4. Some clearly have no relevance, such as for example, schedule 4, part 2, item 19 (relating to innovation and facilitation of research).

⁴² Paraphrasing the Australian Law Reform Commission's definition of the concept in 'For your information: Australian Privacy Law and Practice', *Australian Law Reform Commission Report No. 108 (Volume 1)*, released 30 May 2008, at [1.56]. Cited in *Balzary and Redland City Council; Tidbold (Third Party)* [2017] QICmr 41 (1 September 2017) at [28].

⁴³ I accept that local authorities (eg. councils) impose certain planning requirements on homeowners making changes to their property and in some cases, that information is publicly available under a council scheme. However, as the documents in this review are held by QBCC and within the context of a complaint about private certification, I do not consider the fact that the same or similar information is published online in different circumstances reduces the privacy interest in this matter to any significant degree.

⁴⁴ Applicant's submission to OIC received on 18 August 2020, 22 and 24 September 2020, 25 and 28 February 2021.

⁴⁵ Section 264(1) of the *Planning Act 2016 (Qld)*, and section 70(1) and schedule 22 of the *Planning Regulation 2017 (Qld)* sets out requirements for specific types of documents, and how local government (and others) may or must make these documents available. Section 54 of the *Building Act 1975 (Qld)* refers to these public access requirements in the context of information provided by private certifiers, and provides that a local government may rely on documents provided by private certifiers for the purpose of making these documents publicly available.

⁴⁶ See section 264(6) of the *Planning Act 2016 (Qld)* and section 70(2) and schedule 22, part 5, section 14 of the *Planning Regulation 2017 (Qld)*, which provide that for certain categories of documents (including development information held under the *Building Act 1975 (Qld)*), the public access requirements do not apply to '*sensitive security information*' and '*information of a purely private nature about an individual*'.

⁴⁷ Applicant's submission to OIC received on 24 September 2020, 25 and 28 February 2021.

addressed above. However, I am unable to consider any complaints by the applicant about his own privacy being infringed as this is beyond my jurisdiction on external review.⁴⁸

29. Finally, the RTI Act also recognises that disclosing information about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct, could reasonably be expected to prejudice the fair treatment of individuals.⁴⁹ QBCC did not make any adverse findings against the certifier in response to the applicant's complaint. The Property Information does not detail the allegations made by the applicant but forms part of the evidence relied on by QBCC in its investigation. Given that none of the complaint items were substantiated, I consider disclosure could reasonably be expected to prejudice the fair treatment of the certifier, but to a limited degree given the particular nature of the Property Information, and I afford this low weight against disclosure.

Balancing the public interest

30. In addition to the pro-disclosure bias, as set out above, there are a number of public interest factors that favour disclosure of the Property Information. However, taking into account the circumstances of the matter, the nature of the Property Information, and the information already available to the applicant (ie. the Certifier's Response and QBCC's Decision Notice), I find that the weight to be attributed to these factors is low. I am satisfied that these factors are outweighed by the significant weight of the public interest in protecting an individual's right to privacy in the context of a residential home and communications with private consultants. I have also afforded low weight to limiting prejudice to the fair treatment of the certifier, who was the subject of unsubstantiated allegations.
31. I am satisfied that the nondisclosure factors outweigh the factors in favour of disclosure, and that disclosure of the Property Information would, on balance, be contrary to the public interest. Accordingly, I find that access to the Property Information may be refused under section 47(3)(b) of the RTI Act.

Third Party Information

32. I am satisfied that the signatures, mobile numbers and email address in Forms 15 and 16 and the redacted part of the Certifier's Response comprises the personal information⁵⁰ of other, private individuals. The Third Party Information is about those individuals, including opinion, and identifies those individuals.
33. There is a general public interest in promoting public access to government-held information.⁵¹ Disclosure of the Third Party Information would provide a greater level of insight into the material considered by QBCC in investigating the applicant's complaint, thereby affording transparency in the process and enhancing QBCC's accountability in terms of complaint handling.⁵² However, given the Third Party Information is of the limited nature described at paragraph 9 above, the weight of these pro-disclosure factors is low.

⁴⁸ OIC explained this by email to the applicant on 27 November 2020 and referred him to the OIC website for the process of making a privacy complaint.

⁴⁹ Schedule 4, part 3, item 6 of the RTI Act.

⁵⁰ The term '*personal information*' is defined in section 12 of the *Information Privacy Act 2009* (Qld) and schedule 5 of the RTI Act as '*information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion*'.

⁵¹ Pro-disclosure bias as set out in section 44(1) of the RTI Act.

⁵² Schedule 4, part 2, items 1, 3, and 11 of the RTI Act.

34. I acknowledge that the redacted part of the Certifier's Response also comprises personal information of the applicant, giving rise to a factor favouring disclosure.⁵³ However, the information forms part of an opinion expressed by a private individual, not a public service officer, and accordingly, the weight to be attributed to this factor is also low.
35. In contrast, release of this information would disclose personal information of other individuals, including private contact details and expressions of opinion. I am satisfied that this could reasonably be expected to intrude into the other individuals' *'private sphere'* and cause a public interest harm.⁵⁴ I afford significant weight to these factors with respect to redacted part of the Certifier's Response given the sensitive complaint context in which it was provided and moderate weight to the information in Forms 15 and 16 as the information is of a less sensitive nature, but still comprises personal information and contact details of private individuals.
36. On balance, I find that safeguarding the personal information and privacy of other individuals outweighs the low weight of enhancing QBCC's accountability and transparency, and providing the applicant with access to mutual personal information. Accordingly, I find that disclosure of the Third Party Information would, on balance, be contrary to the public interest, and access to it may be refused under section 47(3)(b) of the RTI Act.

DECISION

37. I affirm QBCC's decision and find that access to the Property Information and Third Party Information may be refused under section 47(3)(b) of the RTI Act.
38. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

K Shepherd
Assistant Information Commissioner

Date: 23 April 2021

⁵³ Under schedule 4, part 2, item 7 of the RTI Act.

⁵⁴ Giving rise to factors favouring nondisclosure under schedule 4, part 3, item 3 and part 4, section 6 of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
21 May 2020	OIC received the external review application.
25 May 2020	OIC requested procedural documents from QBCC.
1 and 8 June 2020	QBCC provided a copy of relevant procedural documents.
7 July 2020	OIC notified the applicant and QBCC that it had accepted the application for external review and requested the Information in Issue from QBCC.
22 July 2020	OIC received the information in issue from QBCC.
18 August 2020	OIC received submissions from the applicant.
3 September 2020	OIC requested and obtained further information from QBCC.
22 and 24 September 2020	OIC received submissions from the applicant.
27 November 2020	OIC issued a preliminary view to QBCC.
4 December 2020	QBCC requested an extension of time to respond to the preliminary view.
7 January 2021	QBCC accepted OIC's preliminary view, subject to OIC consulting with third parties.
22 January 2021	OIC consulted with third parties and sought their views on disclosure of certain information.
23 January 2021	OIC received submissions from a third party.
25 January 2021	QBCC sent the consultation documents to the third parties.
31 January 2021	OIC received further submissions from a third party.
19 February 2021	OIC issued a preliminary view to the applicant, QBCC and the third party.
25 and 28 February 2021	OIC received further submissions from the applicant.
19 March 2021	QBCC provided OIC with a copy of the Decision Notice.