



Decision and Reasons for Decision

Citation: *H22 and Queensland Building and Construction Commission [2022] QICmr 52 (18 November 2022)*

Application Number: 316369

Applicant: H22

Respondent: Queensland Building and Construction Commission

Decision Date: 18 November 2022

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - documents concerning alleged misconduct investigation - whether information was obtained, used or prepared for an investigation by a prescribed crime body or another agency in performance of the prescribed functions of the prescribed crime body - sections 47(3)(a), 48 and schedule 3, section 10(4) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - LEGAL PROFESSIONAL PRIVILEGE - communications between agency and legal advisers - whether information would be privileged from production in a legal proceeding on the ground of legal professional privilege - whether information exempt under section 48 and schedule 3, section 7 of the *Right to Information Act 2009* (Qld) - whether access may be refused under section 47(3)(a) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - public interest disclosure information - whether disclosure of information is prohibited by section 65(1) of the *Public Interest Disclosure Act 2010* (Qld) - whether information is exempt information under sections 47(3)(a) and 48 and schedule 3, section 12(1) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST - personnel information - personal information - prejudice agency management function - unsubstantiated allegations - accountability and transparency - 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 applied¹ to the Queensland Building and Construction Commission (**QBCC**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to documents concerning an investigation conducted by an external consultant on behalf of QBCC in late 2020 into allegations of misconduct.
2. QBCC identified a number of documents, and decided² to give access to some of them. It refused access to other documents (in full or part), on the grounds they comprised:
 - exempt information;³ and/or
 - information, disclosure of which would, on balance, be contrary to the public interest.⁴
3. The applicant applied⁵ to the Office of the Information Commissioner (**OIC**) for external review of QBCC's decision to refuse him access to information. The applicant also submitted that QBCC had failed to locate all relevant documents.
4. Negotiations during the external review significantly narrowed the range of matters in dispute.
5. In terms of the remaining information in issue, I am satisfied that QBCC's decision to refuse access to information on the grounds it comprises exempt or contrary to the public interest information should be affirmed. I am also satisfied that access to some of the information located by QBCC during the external review attracts legal professional privilege and is thus also exempt information. QBCC may therefore refuse access to all of this information.

Background

6. Significant procedural steps taken during the external review are set out in the Appendix.

Reviewable decision

7. The decision under review is QBCC's internal review decision dated 20 September 2021.

Evidence considered

8. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and Appendix).
9. In making this decision I have had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.⁶ I consider that in observing and applying the law prescribed in the RTI Act, an RTI decision-maker will be '*respecting and acting compatibly with*' this right and others prescribed in the HR Act,⁷ and that I have done so in making this decision, as required under section 58(1) of the HR Act. In this regard, I note Bell J's observations on the interaction between the Victorian analogues of Queensland's RTI Act and HR Act: '*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.*'⁸

¹ Application dated 10 March 2021.

² Internal review decision dated 20 September 2021.

³ Sections 47(3)(a) and 48, and schedule 3, sections 7, 10(4) and 12(1) of the RTI Act.

⁴ Sections 47(3)(b) and 49 of the RTI Act.

⁵ External review application dated 18 October 2021.

⁶ As embodied in section 21 of the HR Act.

⁷ *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].

⁸ *XYZ* at [573]. OIC's approach to the HR Act set out in this paragraph has recently been considered and endorsed by QCAT, Judicial Member McGill in *Lawrence v Queensland Police Service* [2022] QCATA 134 noting that he saw '*no reason to differ*' from our position ([23]).

Information in issue

10. The information in issue comprises the following:⁹
- information (primarily correspondence and file notes) contained in case file FOL2026864: pages 1-60, 65 -70, 81-108
 - information (primarily correspondence, file notes and a report) contained in case file MISF20 129: pages 3 (part), 5-52, 57-58 (part), 60-69, 110, 113-114, 126-127, 140,¹⁰ 147-269
 - three copies of a draft version of the report at MISF20 129 pages 147-269, located by QBCC during this review; and
 - communications between QBCC and a private law firm contained in a 47-page bundle of documents also located by QBCC during the review (**Law Firm Documents**).¹¹

Issues for determination

11. QBCC agreed to disclose some further information and, at OIC's request, conducted additional searches and located further documents, parts of which were also released to the applicant. The applicant, meanwhile, has not contested my 16 September 2022 preliminary view that QBCC had discharged its search obligations.¹²
12. Therefore, the issues remaining for determination are whether QBCC may refuse access to information on the grounds that that information comprises:
- exempt information to which access may be refused under sections 47(3)(a) and 48 of the RTI Act, as information qualifying for exemption under one or more of schedule 3, sections 7, 10(4) and/or 12(1) of the RTI Act; or
 - information to which access may be refused under section 47(3)(b) of the RTI Act, as information the disclosure of which would, on balance, be contrary to the public interest.

Relevant law

Exempt information

13. The RTI Act confers a right of access to documents of government agencies such as the Department.¹³ This right is subject to other provisions of the RTI Act, including grounds on which access may be refused.¹⁴
14. Agencies such as QBCC may refuse access to information requested under the RTI Act to the extent the information comprises 'exempt information'.¹⁵ 'Exempt information'¹⁶ includes information:

⁹ In whole or part, and adopting QBCC's file name and numbering. Parts of certain of the following pages comprise duplicate information, which duplicated information has been excluded from the ambit of the review and is not in issue – see my letter to the applicant dated 13 July 2022, especially footnote 11 identifying relevant part pages. These part pages are also marked with distinct boxes, copies of which will accompany the copy of these reasons to be given to QBCC.

¹⁰ In my letter to the applicant I noted that page 142 of this file was also in issue; in preparing these reasons I have identified that that page – page 5 of an 8 page bundle entitled 'Pages from MISF20 129 138-145' – was in fact released to the applicant during the review, and is not in issue.

¹¹ Being all of pages 1-9, 20, 22-24 of this bundle, together with various parts of other pages: the numbering of this bundle is explained in my letter to the applicant dated 16 September 2022, at footnote 9. A copy of relevant pages, with legally privileged information the subject of this decision clearly marked, was supplied to QBCC on 3 August 2022 (other information redacted from this bundle comprises mobile telephone numbers, discussed below).

¹² Applicant's submissions dated 7 October 2022.

¹³ Section 23 of the RTI Act.

¹⁴ Section 47 of the RTI Act. These grounds are to be interpreted narrowly: section 47(2)(a) of the RTI Act, a requirement I have borne in mind in making my decision, together with Parliament's intention that the Act be administered with a pro-disclosure bias (section 44 of the RTI Act).

¹⁵ Section 47(3)(a) of the RTI Act.

¹⁶ Section 48(4) of the RTI Act.

- that would be privileged from production in a legal proceeding on the ground of legal professional privilege (**LPP**)¹⁷
- 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;¹⁸ and
- disclosure of which is prohibited by, relevantly, section 65(1) of the *Public Interest Disclosure Act 2010* (Qld) (**PID Act**).¹⁹

15. I have addressed each exemption in turn.

Discussion and findings

Legal professional privilege

16. Information will qualify as exempt information if it would be privileged from production in a legal proceeding on the ground of LPP.²⁰ LPP attaches to confidential ‘...communications between a client and his or her lawyer made for the dominant purpose of seeking or giving professional legal assistance, including representation in legal proceedings.’²¹ Such assistance may be given by external or in-house employed legal professionals.²² LPP extends to internal circulations or repetitions of privileged communications,²³ and copies of non-privileged documents, where made for a privileged purpose.²⁴
17. Having examined the relevant pages (or parts),²⁵ I am satisfied that subject information meets the above requirements. These documents comprise confidential communications or copies of documents, all brought into existence for a privileged purpose – requesting or conveying²⁶ legal assistance, from or by professional legal advisors. Subject to any exception applying,²⁷ they thus attract LPP.
18. The applicant resists any finding that relevant information attracts LPP, on the basis, as best as I understand his submissions, that the relevant information was created in furtherance of an illegal or improper purpose, and therefore the improper purpose exception to LPP applies.
19. For this exception to apply there must be some prima facie evidence that relevant information was made in preparation for, or furtherance of, some illegal or improper purpose:²⁸

This exception operates to displace legal professional privilege where evidence exists that the ... client has embarked on a deliberate course of action knowing that the proposed actions were contrary to law, and has made the relevant communications in furtherance of that illegal or improper purpose.

.... In establishing improper purpose, the standard of proof is high. The High Court has observed that it “is a serious thing to override legal professional privilege where it would otherwise be applicable” and as a result “vague or generalised contentions of crimes or improper purposes will not suffice.”

¹⁷ Schedule 3, section 7 of the RTI Act.

¹⁸ Schedule 3, section 10(4) of the RTI Act.

¹⁹ Schedule 3, section 12(1) of the RTI Act.

²⁰ Schedule 3, section 7 of the RTI Act. This exemption reflects LPP at common law: *Ozcare and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 13 May 2011) at [12].

²¹ *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at [9], per Gleeson CJ, Gaudron, Gummow and Hayne JJ and following *Esso Australia Resources Ltd v Commission of Taxation* (1999) 201 CLR 49.

²² *Waterford v Commonwealth of Australia* (1987) 163 CLR 54.

²³ *Komacha v Orange City Council* (Supreme Court of New South Wales, Rath J, 30 August 1979, unreported).

²⁴ *Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.

²⁵ MISF20 129: pages 110, 113-114; FOL2026864: pages 49-50 (which two pages, for completeness, I note are also exempt under the Prescribed Crime Body Exemption, for reasons explained below – see footnote 39); and relevant pages and segments of the Law Firm Documents (as noted at footnote 11 above).

²⁶ Or repeating.

²⁷ I.e., waiver or improper purpose.

²⁸ *Secher and James Cook University* (Unreported, Queensland Information Commissioner, 6 June 2012) at [20], summarising relevant case law. See also *R v Bell; Ex parte Lees* (1980) 146 CLR 141.

20. The applicant requested that this aspect of his review be placed in abeyance,²⁹ while he solicited the views of the Chair of the CCC about various matters.³⁰ In terms of the relevant information, the applicant stated:³¹

I await further advice from Mr Barbour and the CCC. It may be prudent of him to commence an assessment on his own initiative in relation to the information in issue and determine that it falls under, and satisfies, s15 of the Crime and Corruption Commission Act 2001 ; and therefore attracts an exception to LPP.

21. The applicant considers that I should wait on a response from an agency which is not a participant in this review, and not at any stage requested by me – the delegate empowered to determine the procedure in this review under section 95 of the RTI Act – to provide comment or submissions. He has given no indication as to when any reply will be forthcoming, if at all. Even if a reply were received, I do not anticipate any real likelihood that it would contain the advice the applicant envisages and render the improper purpose exception applicable. In this regard, I note that the applicant's assertions about the improper purpose to LPP are unsupported by any objective or probative material, and do not come close to meeting the high standard of proof required to establish the improper purpose exception. Further, I note that relevant information appears to have been brought into existence for the entirely proper and uncontroversial purpose of seeking or obtaining professional legal assistance. In these circumstances, and noting both that the procedure in this review is a matter for my determination³² and the procedural fairness afforded to the applicant to date, I have declined to wait on any response from the CCC's Chair and am content to conclude that the improper purpose exception has no application.
22. Otherwise, I note that the applicant's submissions also appear to take issue with the accuracy of legal advice. To the extent this is so, I observe that this has no bearing on whether or not that advice attracts LPP.
23. The information identified in footnote 25 attracts LPP and thus comprises exempt information, to which access may be refused.

Prescribed Crime Body exemption

24. Schedule 3, section 10(4) of the RTI Act – the '**Prescribed Crime Body Exemption**' – provides that information will be exempt information³³ if it consists of 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.
25. The Crime and Corruption Commission (**CCC**) is a prescribed crime body³⁴ and its prescribed functions³⁵ are broad in relation to suspected corrupt conduct.³⁶ Where CCC refers a complaint alleging corruption back to an agency such as QBCC, to investigate,³⁷ all information obtained used or prepared by the agency as part of that investigation will also be exempt information under the Prescribed Crime Body Exemption.

²⁹ Letter from the applicant to OIC dated 7 October 2022.

³⁰ At paragraph 2.a.-i. of a 49-page, 324-paragraph letter from the applicant to CCC dated 7 October 2022, a copy of which he gave OIC access along with his letter to OIC dated 7 October 2022.

³¹ Paragraph 7 of letter from the applicant to OIC dated 7 October 2022.

³² Section 95(1)(a) of the RTI Act.

³³ To which access may be refused under section 47(3)(a) and 48 of the RTI Act.

³⁴ Schedule 3, section 10(9) of the RTI Act.

³⁵ The CCC's prescribed functions are defined in schedule 3, section 10(9) of the RTI Act as its crime, intelligence and corruption functions. These functions are specified in Chapter 2 of the CC Act.

³⁶ As defined in section 15 of the CC Act. Section 22 of the CC Act provides that a reference to corruption includes, in the context of a complaint or corruption investigation, suspected corruption.

³⁷ CCC's corruption function involves dealing with complaints about corruption in an appropriate way, having regard to principles set out in section 34 of the CC Act (see section 33 of the CC Act). 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 (see section 34(c) of the CC Act). The principle of devolution is enabled by some of the provisions that specify how CCC may perform this function—namely, provisions enabling CCC 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 CCC, subject to CCC's monitoring role (sections 35(1)(b), (d) and (e) and 46(2)(b) of the CC Act). The nature of CCC's monitoring role is set out at section 48 of the CC Act. 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 CCC (section 43 of the CC Act) subject to CCC's monitoring role (section 44(2) of the CC Act).

26. In this case, CCC fielded a complaint as to the actions of a particular officer.³⁸ CCC referred that complaint to QBCC – who by the time of CCC’s referral was employing the officer – for investigation. QBCC ultimately commissioned an external consultant to undertake that investigation, which investigation led to, among other things, the production of several drafts and a final report.
27. I am satisfied that the information on the relevant pages (or parts)³⁹ meets the requirements of the Prescribed Crime Body Exemption, having been obtained, used or prepared by one of CCC⁴⁰ or QBCC⁴¹ for an investigation by QBCC on devolution from CCC, in the performance by CCC of its prescribed functions.⁴² This information is ‘about’⁴³ the officer the subject of the complaint, not the applicant, and therefore the exception prescribed in schedule 3, section 10(6) has no application.
28. The information identified in footnote 39 is therefore exempt information under the Prescribed Crime Body Exemption and access to that information may be refused.
29. The applicant resists the above finding.⁴⁴ His principal contention is that CCC referred the matter to a specific QBCC officer, and that only information obtained, used or prepared by that individual officer (and not, for example, the external consultant retained by QBCC) can be eligible for exemption under the Prescribed Crime Body Exemption. In his 7 October 2022 submissions, he further argues that:

*[the external consultant] was not engaged for the purpose of responding **directly** to the referral that was given **directly** by the CCC to... [the specific QBCC officer]; even though the QBCC appears to have later made the claim that the ...[consultant’s] investigation satisfied that referral. A later or parallel investigation which is not being carried out under devolution or direction of the CCC will not attract the exemption and therefore must be disclosed.*

[applicant’s emphasis]

30. As a further or alternative submission, he contends that as the CCC referred the matter to QBCC with no outcome required, it was not ‘monitoring’ the devolved investigation, and therefore there was no ‘performance’ of CCC’s ‘prescribed functions’ by CCC or QBCC.
31. These submissions are, as I advised the applicant in my letter dated 13 July 2022, misconceived.
32. Possibly, noting the applicant’s emphasis of the word ‘directly’ in his above submissions, the applicant may have construed the provisions in the *Crime and Corruption Act 2001* (Qld) (**CC Act**) about public officials dealing with corrupt conduct complaints⁴⁵ as referring solely and personally to those officials, and therefore precluding delegation to other officers within the relevant agency or engagement of consultants. However, there is nothing in the language of these provisions to indicate that this was Parliament’s intention. I am unaware of any such practice among agencies, and observe that an expectation that the particular public official to whom a complaint was devolved would be the only individual able to deal with that complaint would, in most instances, be unworkable, given that public official’s workload and competing priorities. I also note that the Prescribed Crime Body Exemption is expressed to relate to and fix upon the actions of bodies and agencies, not individual officers. There is nothing within the language of this provision precluding its application to information obtained, used or prepared

³⁸ Relevant facts are apparent from the documents located in response to the applicant’s access application, and further canvassed in his submissions – see, for example, his application for internal review, paragraph 17, and documents referred to therein.

³⁹ MISF20 129: pages 3, 5-52, 57-58, 140,142, 147-269; and FOL2026864: pages 1-48, 51, 52-60, 65-70, 81-108. As I explained to the applicant during the review (see my letter dated 13 July 2022) and have noted elsewhere in these reasons, it is my view that certain other pages attracting legal professional privilege (FOL2026864: pages 49-50), or exemption under schedule 3, section 12(1) of the RTI Act (MISF20 pages 60-69), are also exempt under the Prescribed Crime Body Exemption, for reasons explained in this and following paragraphs: see footnotes 25 and 55.

⁴⁰ Which is, as noted at paragraph 25, a prescribed crime body.

⁴¹ Including via its agent, the external consultant.

⁴² Relevantly, its corruption function.

⁴³ The meaning of which is explained in *Darlington v Office of the Information Commissioner & Queensland Police Service* [2015] QCATA 167 at [52] and *G8KPL2 and Department of Health* (Unreported, Queensland Information Commissioner, 31 January 2011) at [32] (*G8KPL2*); *Darlington and Queensland Police Service* [2014] QICmr 14 (11 April 2014).

⁴⁴ See particularly paragraphs 18-21 of his application for internal review, and submissions dated 7 October 2022.

⁴⁵ Such as sections 43, 44, 46 and 48 along with the definitions of ‘public official’ and ‘deal with’ in schedule 2 of the CC Act.

by a consultant retained by an agency for the purposes of discharging a qualifying 'prescribed function'.⁴⁶ Further, the documents themselves⁴⁷ disclose that all relevant information in this case was 'obtained, used or prepared' for an investigation arising from the complaint or matter referred by CCC to QBCC.

33. As for the applicant's alternative submission, the mere fact that a matter or complaint is, as here, referred or devolved by CCC to an agency for an investigation is in my view sufficient to meet the requirements of the Prescribed Crime Body Exemption. Apart from anything else, such referral appears necessarily subject to ongoing CCC monitoring – referral occurs pursuant to section 46(2)(b) of the CC Act, which provides that it takes place '*...subject to the commission's monitoring role*'.⁴⁸ Section 48 of the CC Act then confers on CCC a broad discretion as to how its monitoring role might be discharged, which discretion is not subject to any temporal limit. As QBCC pointed out in the decision under review, the way that an agency dealt with the relevant complaint was and remains subject to CCC monitoring, which might occur at any time.⁴⁹
34. As he did in relation to the LPP exemption,⁵⁰ the applicant requested that this aspect of his review be placed in abeyance, while he solicited the views of the Chair of the CCC about matters including the application of the Prescribed Crime Body Exemption.⁵¹ I have declined to do so. Being the officer charged with the statutory duty of determining whether QBCC's application of the exemption is justified, I am required to consider whether the information in issue meets the requirements of the Prescribed Crime Body Exemption. Having considered the relatively straightforward questions of fact discussed above, I am in this case satisfied that this exemption applies, which conclusion I am quite able to reach by reference to the information itself. I cannot see how the post hoc view of the CCC's Chair sought by the applicant could alter my assessment in this regard; and further, the Chair's response regarding the other matters is immaterial. Given these circumstances, and noting the procedural fairness afforded to the applicant to date, I – being the delegate empowered to determine the procedure in this review⁵² – consider it unnecessary to wait on any response from the CCC's Chair in order to reach my abovementioned conclusion that the Prescribed Crime Body Exemption applies.
35. The applicant is, of course, entitled to approach the CCC and/or QBCC, and request that they exercise their discretion to disclose exempt information;⁵³ that is not, however, a discretion that I enjoy on external review.⁵⁴

Information disclosure of which is prohibited by an Act

36. QBCC refused access to some information⁵⁵ under schedule 3, section 12(1) of the RTI Act, which provides that information is exempt information if its disclosure is prohibited by, relevantly, section 65(1) of the PID Act.
37. Section 65(1) of the PID Act provides:
- (1) *If a person gains confidential information because of the person's involvement in this Act's administration, the person must not make a record of the information, or intentionally or recklessly disclose the information to anyone, other than under subsection (3).*
38. 'Confidential information' as referred to in the above provision is defined⁵⁶ to include:

⁴⁶ *Magin and Department of Environment and Heritage Protection* [2016] QICmr 26 (30 June 2016) at [22]-[27].

⁴⁷ Including, for example, the executive summary at MISF20 129: page 150.

⁴⁸ This overarching monitoring role is reinforced by sections 43 and 44(2) of the CC Act, which together oblige officials fielding complaints on referral from the CCC to deal with same '*...subject to the commission's monitoring role*' (section 44(2)).

⁴⁹ Such as, for example, by review or audit (section 48(1)(b) of the CC Act), or a report to be given '*in the way and at the times the commission directs*' (section 48(1)(c)(i) of the CC Act).

⁵⁰ See paragraph 20 above.

⁵¹ See paragraph 3 of his letter to OIC dated 7 October 2022 and his letter to CCC noted at footnote 30 above.

⁵² Section 95(1)(a) of the RTI Act.

⁵³ Noting that during the review I did ask QBCC to consider discretionary release of some of the information subject to the Prescribed Crime Body Exemption; it declined to do so (letter OIC to QBCC dated 30 May 2022; QBCC email reply dated 1 July 2022).

⁵⁴ Section 105(2) of the RTI Act.

⁵⁵ Relevantly, MISF20 129 pages 60-69 (which pages would, as noted above (footnote 39), also appear to me to attract exemption under the Prescribed Crime Body Exemption).

⁵⁶ Section 65(7) of the PID Act.

- information about a discloser or the person who is the subject of a disclosure (information about their identity, occupation, address or whereabouts)
 - information disclosed as part of the public interest disclosure
 - information about an individual's personal affairs; and
 - information that, if disclosed, could cause detriment to a person.
39. For the purposes of section 65(1) of the PID Act, a person '*gains information because of the person's involvement in this Act's administration if the person gains the information because of being involved, or an opportunity given by being involved, in the administration*'.⁵⁷
40. These are stringent provisions, and QBCC's reliance on them is, in my view, justified. Unconditional release of relevant information under the RTI Act⁵⁸ would comprise an intentional disclosure of information about a discloser or the subject of a disclosure, and/or disclosed as part of a public interest disclosure; information that was, in turn, 'gained' by QBCC officers due to obligations imposed on them by – ie, their involvement in the administration of – the PID Act.
41. This information is not '*only personal information about*' the applicant. Accordingly, the exception stated in schedule 3, section 12(2) of the RTI Act has no application.
42. The applicant submits that relevant information is subject to one or both of sections 65(3) and (4) of the PID Act. The former confers a discretion to disclose confidential information subject to the prohibition imposed section 65(1); the latter provides that that prohibition does not override natural justice requirements to disclose information 'to a person whose rights would otherwise be detrimentally affected'.
43. My view is that neither of these provisions is open to be considered by a decision-maker under the RTI Act, who is charged only with assessing whether information falls within the prohibition stated in section 65(1) of the PID Act.⁵⁹ In any event, none of the circumstances stated in section 65(3) appear relevant in this case (including the applicant's purported attempt to consent to the release of this information to him).⁶⁰
44. Nor can I see that matters the subject of this information concerned the applicant in a fashion that may have required him to be afforded natural justice, as that concept is legally defined and understood.⁶¹ The person or persons standing to have rights '*detrimentally affected*' as stated by section 65(4) – and thus who may be entitled to be apprised of and given the opportunity to engage with 'confidential information' otherwise subject to section 65(1) – would in the present context seem likely to me to be the subject of any PID. That was not the applicant in this case.
45. The applicant also made relatively extensive submissions premised on the assumption that he is the 'discloser', and that accordingly, the provisions above could not sensibly apply.⁶² Section 108 of the RTI Act constrains me in the detail I can give as to this information; it is sufficient to note that the applicant's assumption is misplaced.
46. Again, the applicant requested that this aspect of his review be placed in abeyance⁶³ while he

⁵⁷ Section 65(2) of the PID Act.

⁵⁸ As Judicial Member McGill SC has observed '*... the effect of the... [Information Privacy Act 2009 (Qld)] is that, once information has been disclosed, it comes under the control of the person to whom it has been disclosed. There is no provision of that Act which contemplates any restriction or limitation on the use which that person can make of that information, including by way of further dissemination.*': *FLK v Information Commissioner* [2021] QCATA 46 at [17]. These comments are equally applicable to access obtained via the cognate mechanisms of the RTI Act.

⁵⁹ Being the section specified in schedule 3, section 12(1) of the RTI Act. Section 65(3) of the PID Act does not alter the characterisation of information as 'confidential information'; it merely confers, as noted, a discretion allowing disclosure of that confidential information if certain requirements are met.

⁶⁰ At face value, the likeliest to apply might be section 65(3)(g); which enlivens the discretion to consider disclosure where disclosure is '*authorised...under another Act*' – in this case, the RTI Act. Disclosure would, however, only be authorised under RTI Act were there to exist a determination granting access – a determination I have no power to make or direct, where it is established that information is exempt information: section 105(2) of the RTI Act.

⁶¹ In this context, the right to be made aware of, and respond to, information which will be used in the course of a decision that will negatively affect a person: *Kioa v West* (1985) 159 CLR 550 at 629 (Brennan J).

⁶² See particularly his submissions dated 7 October 2022.

⁶³ See paragraph 14 of his letter to OIC dated 7 October 2022 and his letter to CCC noted at footnote 30 above.

solicited the views of the Chair of the CCC. However, consistent with my reasoning at paragraphs 21 and 34 above, I have declined to do so. I am satisfied that the CCC's Chair response to the applicant – should any be received – could not reasonably be expected to alter my assessment of these requirements.

47. The information identified in footnote 55 comprises exempt information, the disclosure of which is prohibited, and access to it may therefore be refused.

Contrary to the public interest

48. Another ground on which access to information may be refused under the RTI Act is where its disclosure would, on balance, be contrary to the public interest.⁶⁴ For the reasons explained below, I consider the following information may be refused on this basis:

- segments of information redacted from MISF20 129 pages 126-127; and
- mobile telephone numbers.

Segments of information redacted from MISF20 129 pages 126-127

49. The segments of information redacted from MISF20 129 pages 126-127 comprise parts of a letter to a QBCC officer, conveying the outcome of the external consultant's investigation (the balance of which letter was released to the applicant during the review). Relevant parts comprise the officer's personal information,⁶⁵ and disclosure could reasonably be expected to prejudice protection of that individual's right to privacy.⁶⁶ Given the nature of this information, these two factors warrant, in my view, substantial weight. Each is alone sufficient to displace transparency and accountability factors favouring disclosure.⁶⁷
50. The nature of this information is, however, such that its disclosure could also reasonably be expected to prejudice fair treatment,⁶⁸ and undermine staff confidence in QBCC's capacity to manage sensitive personnel information confidentially, thereby prejudicing its management function.⁶⁹ These, too, are factors warranting considerable weight, and taken together, I am satisfied all factors favouring nondisclosure conclusively outweigh those favouring release.
51. I conveyed the substance of the above reasoning to the applicant in my letter dated 13 July 2022. He does not accept that reasoning and insists on being given access to relevant information. His submissions in support,⁷⁰ however, amount to little more than bare rejection of my public interest reasoning, and contain nothing to dissuade me from the conclusions expressed above.

⁶⁴ Section 47(3)(b) of the RTI Act. Steps to be undertaken in balancing the public interest are prescribed in section 49 of the RTI Act, which steps - including disregarding irrelevant factors - I have adhered to in making this decision. I have also had regard to the totality of the applicant's submissions, and the non-exhaustive lists of public interest factors stated in schedule 4 of the RTI Act. As for what the concept of the 'public interest' embodies, it '*...is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members. The interest is therefore the interest of the public as distinct from the interests of an individual or individuals*': *Director of Public Prosecutions v Smith* (1991) 1 VR 63. The concept 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, although there are some recognised public interest considerations that may apply for the benefit of an individual: Chris Wheeler, 'The Public Interest: We Know It's Important, But Do We Know What It Means' (2006) 48 *AIAL Forum* 12, 14.

⁶⁵ Being information about identifiable persons: see the definition of personal information in section 12 of the *Information Privacy Act 2009* (Qld).

⁶⁶ Schedule 4, part 3, item 3 of the RTI Act. The concept of 'privacy' is not defined in the RTI Act. OIC has adopted the Australian Law Reform Commission's definition of the concept: the right of an individual to preserve their personal sphere free from interference from others ("For your information: Australian Privacy Law and Practice" *Australian Law Reform Commission Report No. 108* released 11 August 2008, at paragraph 1.56). Information of this kind - the results of an investigation into serious allegations of misconduct against an individual - are such that although arising from that individual's occupation of public office, they nevertheless come within their personal sphere, which the affected individual is entitled to preserve free from interference from others - in this case, unrestricted disclosure under the RTI Act.

⁶⁷ Including the general public interest in promoting access to government information, and schedule 4, part 2, items 1, 3 and 11 of the RTI Act, all of which considerations, while important, in the context of this case - including information already released to the applicant, and nature of the information in question - warrant only moderate weight.

⁶⁸ By disclosing unsubstantiated allegations: schedule 4, part 3, item 6 of the RTI Act.

⁶⁹ Schedule 4, part 3, item 19 of the RTI Act.

⁷⁰ Submissions dated 7 October 2022.

52. Stating that he is '*suspicious*' that relevant information may have been created for an '*improper purpose*', he further asserts his view that '*QBCC staff confidence and management of sensitive personal information is in fact enhanced by the release of this information*'.
53. Public interest factors favouring disclosure of information will be engaged where disclosure of that information could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official,⁷¹ and/or reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct.⁷² In this case, however, the very information itself makes clear that the matters which it canvasses were neither 'deficient conduct' nor conduct of a kind specified in schedule 4, part 2, item 6 of the RTI Act, let alone substantiated conduct of this latter kind. As a matter of fact, I am satisfied neither factor thus falls to be considered in balancing the public interest.⁷³
54. As for the applicant's case for accessing personal information, how staff confidence in an agency's ability to manage sensitive information of the kind in issue might be enhanced by unconditional release of same under the RTI Act is not explained by the applicant, nor in any way apparent to me. Such disclosure would, I think, have quite the opposite effect.
55. I can identify no other factors of considerations favouring release of relevant segments of information. Balancing the competing factors which I have noted above against one another, I am satisfied that disclosure of those segments would, on balance, be contrary to the public interest, and access to them may be refused.

Mobile telephone numbers

56. For the sake of completeness, I should note that mobile phone numbers were redacted from various documents otherwise released to the applicant,⁷⁴ on the basis their disclosure would, on balance, be contrary to the public interest. The applicant has made no specific case for access to these numbers, however in view of his general 7 October 2022 submission requesting '*disclosure of the information in issue*' it is prudent that I briefly deal with same.
57. It is well-established that disclosure of mobile telephone numbers would, on balance, be contrary to the public interest,⁷⁵ OIC having found to this effect on numerous occasions.⁷⁶ There is nothing at all before me to cause me to depart from this usual position, and, adopting the reasoning stated in our earlier decisions, I find that disclosure of any mobile telephone numbers would, on balance, be contrary to the public interest. Access to mobile telephone numbers may therefore be refused.
58. Again, the applicant requested that this aspect of his review be placed in abeyance⁷⁷ while he solicited the views of the Chair of the CCC. Having carefully considered the applicant's submissions, the segments of information and mobile telephone numbers in issue, and the contexts in which they appear, I am satisfied that the Chair's response – should any be received – could not reasonably be expected to alter the relevance or weight of any public interest factors. Therefore, consistent with my reasoning outlined above, I have again declined to put this aspect of the review on hold pending a response from the CCC's Chair as anticipated by the applicant.

⁷¹ Schedule 4, part 2, item 5 of the RTI Act.

⁷² Schedule 4, part 2, item 6 of the RTI Act.

⁷³ And if one or both did, then I am satisfied the nature of the matters canvassed is too insubstantial to warrant affording either factor anything but moderate weight (a weight insufficient to displace the nondisclosure considerations discussed above).

⁷⁴ See, for example, the Law Firm Documents.

⁷⁵ Largely on privacy and personal information grounds.

⁷⁶ See, for example, *Kiepe and the University of Queensland* (Unreported, Queensland Information Commissioner, 1 August 2012), [18]-[21], *Underwood and Minister for Housing and Public Works* [2015] QICmr 27 (29 September 2015), *Underwood and Department of Housing and Public Works (No. 1)* [2016] QICmr 11, [43]-[55], *Underwood and Department of Housing and Public Works (No. 2)* [2016] QICmr 36, [56]-[66], *Smith and Sunshine Coast Regional Council; Diamond Energy Pty Ltd (Third Party)* [2017] QICmr 42, [12]-[17].

⁷⁷ See the penultimate paragraph of his letter to OIC dated 7 October 2022 and his letter to CCC noted at footnote 30 above.

DECISION

59. I affirm QBCC's decision to refuse access to information on the grounds it comprises exempt information under sections 47(3)(a) and 48⁷⁸ of the RTI Act, and information disclosure of which would, on balance, be contrary to the public interest under sections 47(3)(b) and 49 of the RTI Act.
60. I further vary that decision, to the extent necessary, to find that access may be refused to information located during this review⁷⁹ on the same grounds.
61. I have made this decision under section 110 of the RTI Act, as a delegate of the Information Commissioner under section 145 of the RTI Act.

A Rickard
Acting Right to Information Commissioner

Date: 18 November 2022

⁷⁸ And schedule 3, section 7, 10(4) and/or 12(1) of the RTI Act.

⁷⁹ Being information redacted from the Law Firm Documents – see footnote 11.

APPENDIX**Significant procedural steps**

Date	Event
18 October 2021	OIC received the application for external review.
19 October 2021	OIC requested the preliminary documents from QBCC.
28 October 2021	OIC received the requested preliminary documents from QBCC.
5 November 2021	OIC advised the applicant and QBCC that the external review application had been accepted. OIC requested the information in issue from QBCC.
19 November 2021	OIC received the information in issue from QBCC.
24 November 2021	QBCC provided the information in issue to OIC with redactions.
1 December 2021	OIC provided the applicant with an update.
19 January 2022	OIC requested QBCC provided a copy of the information in issue with proposed markups only.
24 January 2022	QBCC provided the information in issue to OIC with proposed markups.
25 January 2022	OIC provided the applicant with an update.
23 February 2022	OIC conveyed a preliminary view to QBCC. OIC provided the applicant with an update.
8 March 2022	QBCC requested an extension of time to respond to OIC's preliminary view. OIC granted the extension of time.
15 March 2022	QBCC provided submissions in response to OIC's preliminary view.
28 March 2022	OIC issued correspondence to a third party for consultation. OIC requested QBCC release some documents to the applicant and provide submissions in relation to releasing further information. OIC provided the applicant with an update.
8 April 2022	QBCC requested an extension of time to provide the documents to the applicant and reply to OIC's letter dated 28 March 2022. OIC granted the extension of time and advised the applicant of the extension.
14 April 2022	QBCC advised OIC that the documents had been released to the applicant and agreed to release further information.
20 April 2022	Third party advised OIC that documents to review had not been received.
21 April 2022	QBCC advised they would resend the documents to third party. OIC extended third party's time to respond to third party consultation. The third party provided a submission in response to OIC's third party consultation. QBCC provided documents to the third party with proposed markups for third party's review. The applicant provided submissions.
28 April 2022	The third party confirmed agreeance to the release of documents with proposed redactions.

Date	Event
10 May 2022	The applicant requested an update.
12 May 2022	OIC provided the applicant with an update.
30 May 2022	OIC issued correspondence to QBCC requesting clarification on several matters.
13 June 2022	QBCC requested an extension of time to respond to OIC's letter dated 30 May 2022. OIC granted QBCC the extension of time.
30 June 2022	OIC followed up QBCC on overdue response. OIC provided the applicant with an update.
1 July 2022	OIC received submissions from QBCC in response to letter dated 30 May 2022.
13 July 2022	OIC requested QBCC release additional information and provide further submissions. OIC conveyed a preliminary view to the applicant.
20 July 2022	QBCC confirmed the release of additional information to the applicant.
27 July 2022	QBCC provided OIC with an update.
29 July 2022	OIC received additional information in issue from QBCC.
1 August 2022	The applicant requested an extension of time to respond to OIC's preliminary view.
3 August 2022	OIC advised the applicant that no response was required to the preliminary view. OIC requested QBCC review proposed markups and advise OIC of its position.
4 August 2022	QBCC advised OIC it agreed with OIC's proposed markups.
17 August 2022	OIC issued correspondence to a third party for consultation.
31 August 2022	The third party requested an extension of time to respond to OIC's third party consultation correspondence. OIC granted the extension of time.
1 September 2022	The third party responded to OIC's request for consultation and confirmed no objection to disclosure.
16 September 2022	OIC provided the third party with an update. OIC requested QBCC release additional information to the applicant. OIC conveyed a final preliminary view to the applicant.
7 October 2022	The applicant provided submissions contesting OIC's preliminary view.