



## Decision and Reasons for Decision

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Citation:	<i>McCrystal and Queensland Building and Construction Commission</i> [2022] QICmr 12 (14 March 2022)
Application Number:	316472
Applicant:	McCrystal
Respondent:	Queensland Building and Construction Commission
Decision Date:	14 March 2022
Catchwords:	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL TO DEAL - PREVIOUS APPLICATION FOR SAME DOCUMENTS</b> - application for access to file note subject of a previous application - where the agency's decision in respect of the previous application has been the subject of review - whether the later application, on its face, discloses any reasonable basis for again seeking access - section 43(3) of the <i>Right to Information Act 2009</i> (Qld)

## REASONS FOR DECISION

### Summary

1. By application dated 9 August 2021, the applicant applied to the Queensland Building and Construction Commission (**QBCC**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to 'original digital copy of document (including metadata) "File Note [...]" stored on "VOLUME DISK ID: 1263834-3 [...]" CASE/ INVESTIGATIONS DOCUMENTS'.
2. QBCC refused to deal with the application<sup>1</sup> insofar as it sought access to the 'File Note ...' (**File Note**), under section 43 of the RTI Act; that provision permits an agency to refuse to deal with an application in circumstances where documents the subject of that application have been the subject of a previous application by the same applicant.<sup>2</sup>
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of QBCC's internal review decision. Having reviewed that decision, I am satisfied that it was justified. I affirm QBCC's internal review decision.

### Background

4. Significant procedural steps are set out in the Appendix to this decision.

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<sup>1</sup> Internal review decision dated 16 November 2021.

<sup>2</sup> The applicant also applied for access to certain metadata; this was released to the applicant on internal review. The applicant did further agitate the metadata issue in his application for external review – his submissions on this issue were addressed in the Office of the Information Commissioner's letter dated 8 February 2022, which reasoning the applicant has not contested. It is therefore unnecessary to entertain this metadata issue any further in these reasons.

## Reviewable decision

5. The decision under review is QBCC's internal review decision dated 16 November 2021.

## Evidence considered

6. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and Appendix).
7. In making this decision I have had regard to the *Human Rights Act 2019* (Qld),<sup>3</sup> particularly the right to seek and receive information.<sup>4</sup> 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,<sup>5</sup> 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.*'<sup>6</sup>

## Issue for determination

8. The issue for determination is whether QBCC may refuse to deal with the applicant's access application dated 9 August 2021, under section 43 of the RTI Act.

## Relevant law

9. An agency may refuse to deal with an access application under section 43 of the RTI Act where, relevantly:
- an applicant has made a **First Application**,<sup>7</sup>
  - the agency's decision on the First Application has been the subject of a completed external review;<sup>8</sup> and
  - the applicant makes a **Later Application** to the same agency for access to the same documents sought under the First Application and the Later Application does not, ***on its face***, disclose any reasonable basis for again seeking access to the documents.<sup>9</sup>

## Findings

10. The criteria stated at paragraph 9 are satisfied in this case.
11. By application lodged on 5 August 2016 – the **First Application** – the applicant requested access to a broad range of documents concerning the '*building and construction activity*' of a nominated individual, and QBCC's enquiries into same.

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<sup>3</sup> HR Act.

<sup>4</sup> As embodied in section 21 of the HR Act.

<sup>5</sup> *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

<sup>6</sup> *XYZ*, [573].

<sup>7</sup> Section 43(1)(a) of the RTI Act.

<sup>8</sup> Sections 43(3)(d)(ii), (5)(b) and (6) of the RTI Act.

<sup>9</sup> Section 43(1)(b) of the RTI Act.

12. QBCC identified many documents, including the File Note.<sup>10</sup> QBCC refused access to this document (among others). QBCC's decision was affirmed by OIC, via decision following external review: *McCrystal and Queensland Building and Construction Commission (No. 2)*.<sup>11</sup>
13. QBCC's decision on the First Application was therefore the subject of a completed review within the meaning of section 43 of the RTI Act.
14. Subsequently, the applicant made a Later Application, for one of the same documents the subject of the First Application, ie the File Note. That Later Application was, as far as is relevant, made in terms set out in paragraph 1.<sup>12</sup>
15. The Later Application does not, 'on its face', disclose any reasonable basis for again seeking access to a document that has been the subject of a completed external review.
16. The criteria prescribed in section 43 of the RTI Act having been met, QBCC was entitled to refuse to deal with the Later Application.

### ***Applicant's submissions***

17. OIC conveyed the reasoning at paragraphs 10-16 to the applicant by letter dated 8 February 2022. In a reply dated 22 February 2022, the applicant resisted that reasoning, largely repeating matters raised in his application for external review.
18. In summary terms, the applicant's submissions in support of his case seem to be that:
  - the File Note as requested in the Later Application was not the subject of the First Application, and, in any event,
  - his Later Application does disclose on its face a reasonable basis for its making; and further and alternatively,
  - even if the foregoing is incorrect, OIC should exercise the discretion conferred by section 39(3) of the RTI Act, and deal with the Later Application.
19. The applicant also complained that QBCC did not consult with him during its processing of the Later Application, to solicit from him an explanation justifying the making of that application.
20. The first submission summarised in paragraph 18 cannot be accepted. As set out above, the File Note was plainly one of the many documents the subject of the First Application. That document was dealt with by QBCC in its decision on the First Application, which decision was affirmed by OIC on review.
21. Nor can the second. It is clear, as a simple matter of fact, that the Later Application<sup>13</sup> comprises no more than a bare request for information. The legislature's intention as expressed in the words 'on its face' is unambiguous, and an applicant making a later application cannot<sup>14</sup> require an agency to have regard to side matters, documents or information,<sup>15</sup> or assume special contextual or background knowledge on the part of decision makers dealing with that

<sup>10</sup> Identified as 'page 82' of '1263834 Disc Part 1', and the existence of which was disclosed to the applicant via release of page 1991 of '1263834 compliance EDRMS' pursuant to the same access application (a copy of which accompanied his 9 August 2021 access application to QBCC).

<sup>11</sup> [2018] QICmr 10 (*McCrystal*), this decision being to the effect the File Note comprised the personal information of someone other than the applicant, disclosure of which would, on balance, be contrary to the public interest: see *McCrystal*, at [83] and [238]-[263].

<sup>12</sup> Edited merely to remove the personal information of others.

<sup>13</sup> Set out in paragraph 1.

<sup>14</sup> As the applicant's submissions on this point appear to imply.

<sup>15</sup> Such as the extensive arguments as to why the applicant has a reasonable basis for making the Later Application, as stated in his application for external review (and which are thus not disclosed 'on the face' of the Later Application).

application.<sup>16</sup> The onus rests with the applicant to ensure any later application states, on its face, a justification for again seeking access to a document dealt with in, relevantly, a concluded external review. The Later Application fails this requirement.

22. As for the third submission outlined in paragraph 18, while I acknowledge the discretion to deal with applications otherwise meeting the requirements of section 43,<sup>17</sup> it is also the case that Parliament has presumed that to do so would be contrary to the public interest.<sup>18</sup> With this in mind, and the fact that the File Note was found to comprise 'personal information'<sup>19</sup> – a characterisation that would persist,<sup>20</sup> regardless of any other change in circumstances that might justify a re-application for the same document<sup>21</sup> – I do not consider it appropriate to 'look through' the Later Application's failure to meet the requirements of section 43, and nevertheless deal with that application.
23. There is nothing to preclude the applicant lodging a further application, setting out what he submits comprises 'a reasonable basis' for making such an application. Whether such a basis exists, however, is a matter best assessed by QBCC – the agency with control of requested documents and first-hand knowledge of the matters agitated by the applicant – in the first instance.
24. Turning to the submission stated in paragraph 19, this is answered by the language of section 43 itself, and the express requirement that any later application disclose the reasons for making same on the face of that application. Quite simply, Parliament has, as canvassed above, put the onus on an applicant to explain why they are again seeking access to a document previously dealt with, at the time of making and *on the face of* the later application.<sup>22</sup>
25. Finally, the applicant in his submissions makes various allegations against individuals. There is nothing of any probative value before me suggesting these assertions are possessed of any substance. By way of example, the applicant in his 22 February 2022 submissions seems to accuse QBCC's internal review decision maker of serious wrongdoing, that officer having made the decision under review despite, according to the applicant, being '*...specifically prohibited from involving herself in the Internal Review*'.
26. There exists no prohibition or bar of any legal force of which I am aware preventing the relevant officer from making decisions under the RTI Act.<sup>23</sup> That being the case, I can only assume the applicant's allegations here are premised on QBCC not agreeing to his requests that the internal review decision maker not deal with his application.
27. If the preceding analysis is correct, the relevant allegation can only be described as unreasonable.<sup>24</sup> It is obviously not a matter for any individual applicant to dictate the way a given application should be handled by an agency, nor the personnel who might so manage that application.

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<sup>16</sup> The applicant in his 22 February 2022 submissions contending that QBCC's internal review decision maker '*...has dealt with my RTI Requests previously, would be aware of the Information in Issue and the context in which it appears, would understand the "on its face, a reasonable basis" test is satisfied*'.

<sup>17</sup> Conferred by section 39(3) of the RTI Act.

<sup>18</sup> Section 39(2) of the RTI Act.

<sup>19</sup> See section 12 of the *Information Privacy Act 2009* (Qld) which defines 'personal information' and applies for the purposes of the RTI Act: schedule 5 of the latter.

<sup>20</sup> Giving rise to a presumption that disclosure of this document would cause a public interest harm: schedule 4, part 4, section 6 of the RTI Act.

<sup>21</sup> Noting that I am not, here, making any finding one way or another as to whether the balance of the public interest may have shifted in the several years since OIC's 2018 decision in *McCrystal* (see footnote 11).

<sup>22</sup> Agencies are required to consult with applicants in certain circumstances under the RTI Act, such as where an access application does not satisfy a 'relevant application requirement' as prescribed in sections 24(2) or (3) of the RTI Act: section 33 of the RTI Act. No such obligation attends section 43 of the RTI Act.

<sup>23</sup> And the applicant has not brought any to my attention.

<sup>24</sup> And if that analysis is incorrect, then the allegation is without substance, for reasons noted in the opening sentence of paragraph 26.

## **DECISION**

28. I affirm the decision under review. QBCC may refuse to deal with the applicant's access application dated 9 August 2021, under section 43 of the RTI Act.
29. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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**K Shepherd**  
**Acting Right to Information Commissioner**

**Date: 14 March 2022**

## APPENDIX

### Significant procedural steps

Date	Event
7 December 2021	OIC received the applicant's application for external review. OIC requested documents from QBCC.
10 December 2021	OIC received the requested documents from QBCC.
16 December 2021	OIC advised the applicant and QBCC that the application had been accepted.
8 February 2022	OIC conveyed a preliminary view to the applicant.
22 February 2022	OIC received submissions from the applicant contesting the preliminary view.