



Decision and Reasons for Decision

Citation:	<i>T84 and Minister for Energy, Renewables and Hydrogen and Minister for Public Works and Procurement [2022] QICmr 30 (16 June 2022)</i>
Application Number:	316279
Applicant:	T84
Respondent:	Minister for Energy, Renewables and Hydrogen and Minister for Public Works and Procurement
Decision Date:	16 June 2022
Catchwords:	<p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST INFORMATION - complaint and related information concerning the applicant and companies associated with the applicant - identifying information of complainants and third parties - personal information and privacy - prejudice to deliberative processes - prejudice to future supply of confidential information - whether disclosure of information 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)</p> <p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - whether agency has conducted reasonable searches - whether access to further documents may be refused on the basis they are nonexistent or unlocatable - sections 47(3)(e) and 52(1) of the <i>Right to Information Act 2009</i> (Qld)</p>

REASONS FOR DECISION

Summary

1. The applicant applied¹ under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to 'any and all internal and external communications' held by the respondent (**Minister's Office**) concerning, relating to, or making reference to, the applicant and a number of other named persons or entities associated with the applicant, including two building companies.

¹ On 7 May 2021.

2. The Department of Energy and Public Works (**Department**) dealt with the application under direction from the Minister.² After requesting a number of extensions of time from the applicant to process the application, the Department advised that searches of the records of the Minister's Office had located 419 responsive pages. The Department decided³ to give the applicant full access to 74 pages, partial access to 61 pages, and to refuse access to 284 pages. It refused access on the grounds that the information in question was exempt information under the RTI Act,⁴ or that its disclosure would, on balance, be contrary to the public interest.
3. The applicant applied⁵ to the Office of the Information Commissioner (**OIC**) for external review of the decision to refuse him access to information. He also raised concerns that further documents should have been located.
4. For the reasons explained below, I affirm the decision made by the Department on behalf of the Minister's Office. I also find that there are no reasonable grounds for believing that additional responsive documents exist in the possession or under the control of the Minister's Office and that access to any further documents may be refused under section 47(3)(e) of the RTI Act.

Background

5. The applicant was a director of, or otherwise associated with, a group of related building companies that went into administration and were subsequently liquidated between 2016 and 2018.
6. The applicant was involved in a legal dispute with the Queensland Building and Construction Commission (**QBCC**) regarding the removal of the building licence for one company, and an associated decision to exclude the company from certain government tender lists. The applicant contends that these actions led to the collapse of that company and others in the related group.⁶
7. Over the past several years, the applicant has made a series of RTI access applications to various agencies and other government entities seeking access to information about himself and his group of companies, including complaint information.

Reviewable decision

8. The decision under review is the decision dated 6 August 2021.

Evidence considered

9. Significant procedural steps relating to the external review are set out in the Appendix.
10. In reaching my decision, I have had regard to the submissions, evidence, legislation, and other material referred to throughout these reasons (including footnotes and Appendix).
11. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.⁷ I consider a decision-maker will be '*respecting, and acting compatibly with*' that right and others prescribed in the HR Act, when applying

² See section 31 of the RTI Act.

³ Decision dated 6 August 2021.

⁴ On the basis of Cabinet confidentiality, Parliamentary privilege and legal professional privilege.

⁵ On 26 August 2021.

⁶ Proceedings in the Federal Court followed.

⁷ Section 21 of the HR Act.

the law prescribed in the RTI Act.⁸ I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between equivalent pieces of Victorian legislation:⁹ *‘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.’*¹⁰

Information in issue

12. Some additional information from 28 pages¹¹ was released to the applicant during the external review. The applicant also accepted OIC’s view that certain information was exempt and some information was irrelevant. Accordingly, that information is no longer in issue and not considered in these reasons.
13. The information left in issue comprises information, the disclosure of which the Department decided would, on balance, be contrary to the public interest (**Information in Issue**).¹² The Information in Issue mainly appears in email communications and correspondence, and comprises identifying and other information relating to various third parties who interacted with the Minister’s Office, as well as with other Ministers and government agencies, about their dealings with the applicant and his group of companies, including complaints about those dealings.

Issues for determination

14. The issues for determination are:
 - whether access to the Information in Issue may be refused on the basis that its disclosure would, on balance, be contrary to the public interest;¹³ and
 - whether the Department has taken all reasonable steps to locate information responsive to the access application, such that access to further documents may be refused on the grounds that they are nonexistent or unlocatable (sufficiency of search).¹⁴

Relevant law - contrary to the public interest

15. The RTI Act gives a right of access to documents of government agencies.¹⁵ This right is subject to other provisions of the RTI Act, including grounds on which access may be refused. Access may be refused to information where its disclosure would, on balance, be contrary to the public interest.
16. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision maker must:¹⁶
 - identify factors irrelevant to the public interest and disregard them
 - identify factors in favour of disclosure of information
 - identify factors in favour of nondisclosure of information; and

⁸ *XYZ v Victoria Police (General)* [2010] VCAT 255 (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 at [111].

⁹ *Freedom of Information Act 1982 (Vic)* and the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*.

¹⁰ *XYZ* at [573].

¹¹ Pages 87, 88, 138, 140, 157-159, 211, 220, 221, 243-245, and 295-309.

¹² As identified in the schedule attached to the Department’s decision dated 6 August 2021: all or parts of pages 1-82, 84-89, 91-114, 136-149, 155-159, 168, 187, 189-201, 204-205, 207-208, 216-217, 222-234, 240-245, 251-259, 295-299, 307-308, 314, 319, 323, 329, 334, 336, 344, 349, 355, 360, 368, 372, 376-377, 382-383, 390 and 393.

¹³ Section 47(3)(b) and section 49 of the RTI Act.

¹⁴ Section 47(3)(e) and 52 of the RTI Act.

¹⁵ Section 23(1)(a) of the RTI Act.

¹⁶ Section 49(3) of the RTI Act.

- decide whether, on balance, disclosure of the information would be contrary to the public interest.
17. Schedule 4 of the RTI Act contains non-exhaustive lists of factors that may be relevant in determining where the balance of public interest lies in a particular case. I have considered these lists,¹⁷ together with all other relevant information, in reaching my decision. I have kept in mind the RTI Act's pro-disclosure bias¹⁸ and Parliament's requirement that grounds for refusing access to information be interpreted narrowly.¹⁹

Applicant's submissions

18. The applicant's submissions²⁰ in favour of disclosure of the Information in Issue can be summarised as follows:
- he is aware of the identities of the third parties referred to in the Information Issue
 - the third parties interacted with the media and '*actively and openly agitated against the applicant's companies*' in relation to their claims and complaints
 - the third parties chose to distribute their private, business, professional, commercial, and financial affairs and they therefore have no right to the protection of their personal information or privacy interests, and no claim that they communicated information in confidence
 - the fact that the third parties chose to distribute this information publicly also negates any argument that disclosure of the Information in Issue could reasonably be expected to prejudice the future supply of similar information in the future
 - the claims and complaints made by third parties against the applicant's companies were fraudulent and vexatious
 - these claims contributed to false media articles about the applicant and his companies
 - disclosure of the Information in Issue could reasonably be expected to show that it is incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant
 - these fraudulent and vexatious claims and complaints led to the decision to exclude one of the applicant's companies from some government tender lists between January 2017 and October 2018
 - disclosure of the Information in Issue could reasonably be expected to reveal the reason for this decision
 - the distribution of this false information contributed to the liquidation of the applicant's companies which was to the financial benefit of the third parties '*in lessening competition in their markets in the construction industry*'
 - nondisclosure of this information would protect these persons from '*any separate action relating to their conduct and would in effect be approval of their conduct thereby allowing them ... to continue and repeat that conduct in the future*'
 - recent QCAT proceedings found in favour of the applicant's company: access to the Information in Issue could reasonably be expected to contribute to the administration of justice generally, including procedural fairness
 - the Minister's Office and the Department did not properly investigate the legitimacy of the claims and complaints, demonstrating a deficiency in the conduct or administration of those entities

¹⁷ I have considered each of the public interest factors outlined in schedule 4 of the RTI Act, and any relevant factors are discussed below.

¹⁸ Section 44 of the RTI Act.

¹⁹ Section 47(2) of the RTI Act. In deciding whether disclosure of the Information in Issue would, on balance, be contrary to the public interest, I have taken no irrelevant factors into account in making my decision.

²⁰ Dated 5 April 2022 and 26 April 2022.

- OIC should ensure that a proper investigation into the claims and complaints was undertaken by the Department/Minister's Office; if no investigation took place, the public interest must weigh in favour of disclosure
- where information supplied to an agency is not founded in fact and has not been investigated, its disclosure could not reasonably be expected to prejudice the government's deliberative processes
- likewise, the flow of information to government '*must first be verified so as to assist the agency to perform its regulatory functions and not be vulnerable if the representations were not founded in fact and where the agency or the ... Minister automatically acted upon them*'
- it is erroneous for OIC to rely on media reports about the applicant's companies and information disclosed in the Federal Court proceedings as reducing the weight to be afforded to the public interest in disclosure of the Information in Issue because:
 - the media coverage should not be regarded as accurate or factual
 - only six adverse media articles were published about the first of the applicant's companies to be placed into voluntary administration in June 2016 (**Company A**)
 - the Federal Court proceedings did not examine the circumstances leading to the liquidation of Company A but focused only on the liquidation of another company (**Company B**) in October 2018
 - the Federal Court proceedings heard '*very little evidence*' regarding actions taken by the Minister's Office and/or the Department; and
- any assertion that access to the Information in Issue may cause embarrassment is an irrelevant consideration.

19. In conjunction with his submission dated 26 April 2022, the applicant provided a bundle of 340 pages comprising a variety of documents and newspaper articles which he relied upon as evidence that he was already aware of the identities of the third parties and the nature of the complaints they had made to the media and to various government entities about him and his companies. He submitted that:

The exhibits provide documentary evidence that various persons and entities actively and openly agitated against [the applicant's companies] and that such conduct was fraudulent, vexatious, false, misleading, gratuitous and unfairly subjective in the distribution of information and interaction with various recipients.

...

These exhibits prove that I, as applicant, know the identity of the persons and entities, that I have knowledge of their conduct and that I know the identity of recipients that they interacted with and distributed information to. That knowledge lessens the weight that the OIC is currently affording to the public interest in its preliminary view of nondisclosure and lessens any automatic harm arising from allowing access to the remainder of the information in issue. In light of this evidence, the OIC cannot now deem that information not be disclosed under an RTI application to protect the rights to privacy of these persons and entities, whereby their conduct, they have waived that privilege.

...

These persons and entities actively and openly engaged in potentially corrupt behaviour and their fraudulent and vexatious conduct was to the detriment of [the applicant's companies] and these exhibits provide evidence of that conduct. Given the nature of this conduct and these exhibits, the OIC must reconsider their preliminary view and decide to allow access to the remainder of the information in issue (in relation to all documents disclosed to date) and should not refuse access on the grounds that its disclosure would, balance, the contrary to the public interest.

20. Based on the applicant's submissions, the following public interest factors favouring disclosure contained in schedule 4, part 2 to the RTI Act appear to be relevant:

- a) disclosure could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability²¹
- b) disclosure could reasonably be expected to inform the community of the Government's operations²²
- c) disclosure could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official²³
- d) the information is the applicant's personal information²⁴
- e) disclosure could reasonably be expected to advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies²⁵
- f) disclosure could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision²⁶
- g) disclosure could reasonably be expected to reveal that the information is incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant;²⁷ and
- h) disclosure could reasonably be expected to contribute to the administration of justice generally, including procedural fairness.²⁸

21. At the outset, I note that, while the applicant contends that he is aware of the identifies of the third parties contained in the Information in Issue, and of the nature of the information they provided, I can neither confirm nor deny the applicant's assertions in that regard. The Minister's Office claims that the Information in Issue is contrary to the public interest information. As such, I am prohibited under the RTI Act from disclosing such information under section 108(3) of the RTI Act.

22. I have reviewed the bundle of documents that the applicant provided in support of his public interest arguments. It comprises a variety of documents, correspondence, media articles etc, concerning the applicant and his companies, including complaints made against them by various subcontractors, and correspondence between creditors and the liquidators. It would appear that the applicant has obtained access to some documents through the RTI process. Other documents may have been obtained through various legal proceedings involving the applicant and/or his companies, including the Federal Court proceedings.

23. I do not accept the applicant's assertion that this bundle of documents establishes that complaints made about the applicant's companies were false, fraudulent, vexatious, malicious, etc. I am not aware of any formal finding by a court or any other investigative body to that effect. OIC does not hold an investigative role under the RTI Act. It is not OIC's role to interrogate the documents provided by the applicant, or to somehow test the veracity of the complaints, and make a finding of that nature.

24. Nor is there any material before me, including in the Information in Issue, to support a finding that there were any deficiencies in the conduct or administration of the Minister's Office in its dealings with the applicant or his companies, and the concerns raised about them with the Minister's Office and other government entities.

²¹ Schedule 4, part 2, item 1 of the RTI Act.

²² Schedule 4, part 2, item 3 of the RTI Act.

²³ Schedule 4, part 2, item 5 of the RTI Act.

²⁴ Schedule 4, part 2, item 7 of the RTI Act. 'Personal information' is defined in section 12 of the *Information Privacy Act 2009* (Qld) 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'.

²⁵ Schedule 4, part 2, item 10 of the RTI Act.

²⁶ Schedule 4, part 2, item 11 of the RTI Act.

²⁷ Schedule 4, part 2, item 12 of the RTI Act.

²⁸ Schedule 4, part 2, item 16 of the RTI Act.

25. The applicant argues that a failure by the Minister's Office to investigate the veracity of complaints made to it by third parties would indicate such a deficiency. I do not agree. I do not consider that, given the role of a Minister, it is reasonable to expect that the Minister's Office would itself conduct an investigation into the complaints. The applicant appears to be under the misapprehension that the Minister's Office and the Department are, in effect, interchangeable. However, they are separate entities, with different roles. I accept that ultimate responsibility for departmental management rests with the responsible Minister. But I do not consider that that responsibility reasonably extends to an expectation that the Minister will conduct an investigation into the veracity of complaints made, or information provided, by constituents. As far as possible, the management of departments is the responsibility of the departmental Chief Executive Officer; they are responsible for managing the day to day operations of departments, ensuring the efficient and effective delivery of departmental services and providing effective advice to the Minister on policy matters requiring Ministerial attention.²⁹ Accordingly, while I accept that the Information in Issue does not indicate that the Minister's Office investigated the complaints that were made, I do not accept that that is a factor favouring disclosure of the Information in Issue in the circumstances of this case.
26. I am therefore not satisfied that factors c) or g) apply to the Information in Issue.
27. I acknowledge the general public interest in enhancing the accountability and transparency of the Minister's Office in its dealings with members of the community and other government entities (factors a) and b)). I afford these factors low to moderate weight in the public interest. In doing so, I have taken account of the nature of the Information in Issue, the information already disclosed to the applicant or otherwise in the public domain concerning the collapse of the applicant's companies, and the fact that the Information in Issue does not indicate decision-making by the Minister's Office in respect of complaint information.
28. The released information indicates that the Minister's Office requested briefs from the Department/QBCC about matters raised by complainants and other concerned entities. As I have noted above, the investigation of complaints and the taking of appropriate action in respect of them is the primary responsibility of the relevant department, rather than the Minister's Office.
29. Accordingly, I am not satisfied that disclosure of the Information in Issue would advance, to any significant extent, the public interest in the accountability or transparency of the Minister's Office in its dealings with the applicant or his companies, or contribute in any significant way to the community's understanding of the operations of the Minister's Office.
30. For similar reasons, I afford low to moderate weight to factors e) and f). Given the information which the applicant has already had access to concerning the general nature of the complaints made to government about him and his companies, the actions taken against his companies, as well as the fact that the Information in Issue does not reveal any decision-making by the Minister's Office based upon complaints received, I am not satisfied that disclosure would advance the fair treatment of the applicant and his companies by the Minister's Office in any significant way, nor reveal or contribute significantly to an understanding of decisions taken about the applicant's companies beyond what he already knows and that is in the public domain.

²⁹ [2.1 Ministers - Cabinet Handbook - Department of the Premier and Cabinet \(premiers.qld.gov.au\)](https://www.premiers.qld.gov.au/2.1-Ministers-Cabinet-Handbook-Department-of-the-Premier-and-Cabinet)

31. The applicant argues that the public examination by the liquidator in the Federal Court related only to Company B and that he requires access to the Information in Issue to scrutinise complaints made about Company A and associated government action. He also contends that media articles cannot be relied upon as accurate when assessing the weight to be applied to factors favouring disclosure.
32. Firstly, in respect of Company A, QCAT proceedings in 2018 brought by Company B and related companies seeking review of a decision of QBCC that those companies were excluded companies, indicates that Company A was liquidated as a result of a long-running dispute over a property development. Just prior to its liquidation, Company A's name was changed. To the extent that complaints were made about Company A and are in the public domain, these related to the failure by government to ensure that Deeds of Novation, by which government contracts with Company A were assigned to Company B following the liquidation of Company A, provided for the payment by Company B of debts owed to creditors by Company A and to otherwise take on the liabilities of Company A. The applicant is aware of this.
33. Secondly, I have not made any finding about the accuracy or otherwise of media articles. I have examined the Information in Issue and formed the view that disclosure of the Information in Issue would not significantly enhance the public interest in the accountability or transparency of the Minister's Office or contribute in any significant way to an understanding of decisions taken by government regarding the applicant's companies. The released information indicates that the Minister met with concerned third parties to receive their complaints, and that his Office was also referred similar complaints that had been made to other government officials. The Minister requested and received briefs from the Department/QBCC about the matters raised by complainants and the actions taken to date.
34. The applicant believes that the attempt by QBCC to cancel building licences, and the associated decision to exclude Company B from certain government tender lists, were unfair and ultimately led to the collapse of Company B. As I have noted, he considers that what he contends were vexatious and fraudulent complaints were relied upon by QBCC in making these decisions.
35. I reiterate my finding at paragraph 23 above that there is nothing before me to establish that any formal finding has been made to the effect that complaints made about the applicant and his companies were fraudulent or vexatious, etc.
36. In addition, the actions of QBCC and the information it relied upon in making its decisions were ventilated in relevant legal proceedings. I am not satisfied that disclosure of the Information in Issue could reasonably be expected to contribute in any significant way to an understanding of QBCC's actions.
37. I am not satisfied that factor h) has any application in the circumstances of this case. This factor favours disclosure when the applicant is pursuing a legal remedy because disclosure of the information could reasonably be expected to contribute to the administration of justice. I am not aware of any legal remedy that the applicant is currently pursuing or seeking to pursue. He simply claims in his submissions that nondisclosure of the Information in Issue would protect persons, whom he accuses of providing fraudulent and vexatious information to government, from '*any separate action relating to their conduct*'.

38. It was established in *Willsford and Brisbane City Council*³⁰ that this factor would arise where:
- loss or damage or some kind of wrong has been suffered in respect of which a remedy was, or might be, available under the law
 - the applicant had a reasonable basis for seeking to pursue the remedy; and
 - disclosure of the information held by the agency would assist the applicant to pursue the remedy, or to evaluate whether a remedy was available, or worth pursuing.
39. All three criteria must be met in order for the administration of justice factor to apply. The onus is on the applicant to establish they require the information to pursue, or assess the viability of pursuing, a legal remedy because they have suffered an actionable wrong. This requires more than just an assertion or statement.³¹ The decision-maker needs details and where necessary, evidence, of any potential legal remedy the applicant may be pursuing.
40. I am not satisfied that the applicant has discharged this onus. He has made a brief reference to requiring access to the information so that the third parties are not protected from action for their conduct. As I have noted above, apart from the applicant's assertions, there is no independent material before me to establish that complaints made against the applicant's companies have been found to be fraudulent or vexatious. I am not able to identify, from the applicant's submissions, what potential legal remedy the applicant may be seeking to pursue through release of the Information in Issue.
41. Lastly, in respect of the application of factor d), the bulk of the Information in Issue concerns the actions of the applicant's companies, rather than sensitive personal information about the applicant as an individual. However, I accept that references to the applicant contained in the Information in issue comprises his personal information. I note that, in the majority of instances, the applicant's personal information is inextricably intertwined with the personal information of others, including complainants. In response to my preliminary view³² that the public interest in protecting the personal information and privacy of third parties outweighed the public interest in disclosure, the applicant submitted that this view '*disappears when considered in the context of fraudulent and vexatious conduct* [of the complainants]'.³³ I reiterate my findings at paragraph 23 above. I do not consider that the applicant's assertions about the veracity of the complaints warrants the placing of stronger weight on the public interest in disclosure of his personal information. Given the nature of the Information in Issue, and the information already released to the applicant in this review, I would afford this factor moderate weight when balancing the public interest.
42. In summary, as regards to factors favouring disclosure of the Information in Issue, I afford low to moderate weight to factors a), b), e) and f). I afford moderate weight to factor d). I do not consider that factors c), g) and h) apply to the Information in Issue.

Factors favouring nondisclosure

43. The Department identified the following relevant factors favouring nondisclosure:

³⁰ (1996) 3 QAR 368.

³¹ *Lester and Queensland Police Service* [2017] QICmr 11 (27 March 2017).

³² Letter dated 10 March 2022.

³³ Submission dated 5 April 2022.

- a) disclosure of the information could reasonably be expected to prejudice the private, business, professional, commercial or financial affairs of entities³⁴
 - b) disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy³⁵
 - c) disclosure could reasonably be expected to cause a public interest harm by disclosing the personal information of another person³⁶
 - d) disclosure could reasonably be expected to cause a public interest harm by disclosing a consultation that has taken place in the course of the government's deliberative processes;³⁷ and
 - e) disclosure could reasonably be expected to prejudice the future supply of information that was communicated in confidence.³⁸
44. In respect of the application of factor a), some of the Information in Issue comprises information about the financial position of entities that had dealings with the applicant's companies. As regards factors b) and c), the bulk of the Information in Issue comprises personal information of persons that was communicated to the Minister's Office and other government entities in the course of those persons raising questions or complaints about the operation of the applicant's companies. A number of those parties were consulted by OIC to obtain their views on disclosure. One party did not respond, however, all others strongly objected to disclosure of the information that concerned them.
45. The applicant argues that factors a), b) and c) favouring nondisclosure should not be taken into account because he alleges that the third parties chose to distribute their personal and business information publicly, and so they should therefore not be afforded protection from disclosure of this information under the RTI Act. His submission in this regard is again predicated on the assumption that he knows the identities of the third parties who are referred to in the Information in Issue, and the details of the complaints they made.
46. As noted above, section 108(3) of the RTI Act prevents me from disclosing Information in Issue. I can therefore neither confirm nor deny the applicant's assertion. I have acknowledged that concerns and complaints raised by numerous parties in respect of their dealings with the applicant's companies are in the public domain through media articles or legal proceedings. The applicant has provided copies of documents in his possession that record and discuss such complaints. However, even if the applicant was correct in his assertion, the fact that an applicant is already aware of the personal information of others may, in some instances and depending on the information, reduce the weight to be afforded to the public interest in protecting the right to privacy of those persons. However, that interest is reduced rather than destroyed.³⁹ There exists a residual privacy interest that must be taken into account, and it weighs particularly heavily in relation to source complaint documents authored by third parties.
47. Once information is disclosed under the RTI Act, there is no limitation on its use or control over its further dissemination.⁴⁰ While information about the complaints and concerns raised about the applicant's companies by a variety of sources may be in the public domain, the Information in Issue discloses sensitive communications between members of the community and Ministers (and other politicians and government agencies) about matters falling within their respective spheres of portfolio or regulatory responsibility.

³⁴ Schedule 4, part 3, item 2 of the RTI Act.

³⁵ Schedule 4, part 3, item 3 of the RTI Act.

³⁶ Schedule 4, part 4, section 6 of the RTI Act

³⁷ Schedule 4, part 4, section 4 of the RTI Act.

³⁸ Schedule 4, part 4, section 8 of the RTI Act.

³⁹ *Queensland Newspapers and Department of Justice and Attorney-General: Carmody (Third Party)* [2016] QICmr 23 (27 June 2016).

⁴⁰ See *FLK v Information Commissioner* [2021] QCATA 46 at [17] per McGill J.

Taking into account the nature of the Information in Issue, as well as the important role in ensuring an accessible and accountable government that is played by the ability of constituents to consult directly with elected Members of Parliament about matters of concern, I afford moderate weight to the public interest in protecting the personal and business information of the third parties, and their right to privacy in respect of that information. In making that finding, I have also had regard to the fact that complaints made about the applicant's companies contained in the Information in Issue date back to between 2016 and 2018, with matters concerning the collapse of the applicant's group of companies now largely out of the public eye. I consider that fresh ventilation of this type of complaint information could reasonably be expected to cause prejudice to the residual privacy interests of the persons concerned.

48. For these reasons, I afford moderate to significant weight to factors a), b) and c).
49. I am satisfied that disclosure of the Information in Issue would disclose deliberative process information, namely, consultations that have taken place in the course of, or for, deliberations about responding to complaints concerning matters falling within the Minister's portfolio. A public interest harm therefore automatically arises.
50. In terms of the weight to be attributed to this harm factor, it would appear that the relevant deliberations are concluded. This, together with the elapse of time since the consultations took place, means that I afford factor d) low weight when balancing the public interest.
51. As to factor e), I consider that disclosure of this type of complaint information under the RTI Act could reasonably be expected to cause prejudice to its future supply to Ministers and agencies, thereby causing an associated prejudice to their ability to discharge their portfolio or regulatory responsibilities and obligations. I accept that it is reasonable to expect that members of the community may be reluctant to engage with Ministers and government entities with concerns and complaints of the nature that are in issue in this review where that information is liable to be disclosed to the subject of the complaint, and to the world at large, under the RTI Act.
52. The applicant argues that the fact that the complainants chose to ventilate their complaints publicly through the media means that the requisite prejudice identified in factor e) does not arise. I repeat the comments I have made above in paragraphs 46 and 47 concerning the applicant's contentions in this regard.
53. The prohibition on disclosing information that is in issue in a review, together with the specific terms of the applicant's access application, and the documents he has provided in support of his submissions, makes it difficult to discuss the application of this factor to the Information in Issue in any detail without confirming or denying the applicant's assertions about the Information in Issue. I can only state that I do not accept that the applicant has established that all of the Information in Issue, in connection with the identity of those persons who supplied it, is already known to him. To the extent that it is not, I afford significant weight to factor e).
54. In summary, I afford factors a), b) and c) moderate to significant weight in the public interest balancing test. I afford low weight to factor d), and significant weight to factor e).

Finding

55. I have taken no irrelevant public interest factors into account.

56. After balancing the public interest factors favouring disclosure and nondisclosure of the Information in Issue, I find that the factors favouring nondisclosure, particularly protecting the privacy of other individuals in their communications with Government in a sensitive complaint context, outweigh the factors favouring disclosure discussed at paragraphs 20 to 42 above. On balance, I find that disclosure of the Information in Issue would be contrary to the public interest and access to it may therefore be refused under the RTI Act.
57. Even if I were to accept the applicant's submission and find that nondisclosure factor e) does not apply to any of the Information in Issue, I am not satisfied that the balance of the public interest would favour disclosure of the Information in Issue.

Relevant law - sufficiency of search

58. Access to a document may be refused if the document is nonexistent or unlocatable.⁴¹
59. To be satisfied that documents are nonexistent, a decision-maker must rely on their particular knowledge and experience and have regard to a number of key factors, including:⁴²
- the administrative arrangements of government
 - the agency's structure
 - the agency's functions and responsibilities
 - the agency's practices and procedures (including but not exclusive to its information management approach); and
 - other factors reasonably inferred from information supplied by the applicant including the nature and age of the requested document/s and the nature of the government activity to which the request relates.
60. If searches are relied on to justify a decision that the documents do not exist, all reasonable steps must be taken to locate the documents. What constitutes reasonable steps will vary from case to case as the search and enquiry process an agency will be required to undertake will depend on the particular circumstances.
61. To determine whether a document exists, but is unlocatable, the RTI Act requires consideration of whether there are reasonable grounds for the agency to be satisfied that:
- the requested document has been or should be in the agency's possession; and
 - whether the agency has taken all reasonable steps to find the document.
62. In answering these questions, regard should again be had to the circumstances of the case and the key factors listed in paragraph 59.
63. The Information Commissioner's external review functions include investigating and reviewing whether agencies have taken reasonable steps to identify and locate documents applied for by applicants.⁴³ Generally, the agency that made the decision under review has the onus of establishing that the decision was justified or that the

⁴¹ Sections 47(3)(e) and 52 of the RTI Act. A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist - section 52(1)(a) of the RTI Act. A document is unlocatable if it has been or should be in the agency's possession and all reasonable steps have been taken to find the document but it cannot be found - section 52(1)(b) of the RTI Act.

⁴² *H76 and Brisbane City Council* [2022] QICmr 24 (27 April 2022).

⁴³ Section 130(2) of the RTI Act. The Information Commissioner also has power under section 102 to require additional searches to be conducted during an external review.

Information Commissioner should give a decision adverse to the applicant.⁴⁴ However, where an external review involves the issue of missing documents, the applicant has a practical onus to establish reasonable grounds to be satisfied that the agency has not discharged its obligation to locate all relevant documents. Suspicion and mere assertion will not satisfy this onus.

Submissions of the parties

64. In his external review application, the applicant asserted that the Department/Minister's Office had not located all responsive information, including '*documents (or earlier or later versions of those documents) previously disclosed pursuant to separate RTI Applications*' and '*communications that initiated or progressed the documents previously disclosed pursuant to separate RTI Applications*'.
65. The applicant was asked to provide further details about the documents he contended were missing, so as to assist in identifying them.⁴⁵
66. In a submission dated 21 September 2021, the applicant provided a 16 page schedule identifying 30 documents that he considered were responsive to his application and that ought reasonably to have been located by the Minister's Office. However, he also submitted that there were '*hundreds of other pages in existence that have not been disclosed*' and which he had been provided with as a result of '*previous, separate RTI applications*'. The applicant argued that there should be in existence '*early, draft, final and endorsed versions of those documents*'. He also submitted that:

There may be other documents in existence not disclosed in previous separate RTI applications that should have been captured in this [application]. I am unable to comment on those documents as I am unsure with certainty what they may contain. Those documents should have been captured in the disclosed documents relevant to [this RTI application], but due potentially to a lack of impartiality, independence, or competence they have not been disclosed.

Lastly, the disclosed documents in this [application] do not include document specifically identified and requested relating to meetings attended by the Minister on 6 September 2016 and 18 January 2017. To suggest that there is no agenda, minutes, actions or outcomes from these meetings, on the public record in the Ministerial diary for September 2016 and January 2017 is preposterous.

67. The applicant's submission was provided to the Department for response on 27 September 2021. The Department was also asked to provide a copy of any records of the searches that had been conducted for responsive documents held by the Minister's Office. After requesting several extensions of time, the Department responded on 25 January 2022. The Department provided a schedule containing a response to each of the 30 documents that the applicant had identified as missing. It also provided⁴⁶ a copy of relevant search records indicating that eight staff members of the Minister's Office had conducted searches of the records of the Minister's Office in order to locate any responsive documents.
68. In response to the applicant's assertions about the 30 missing documents, the Department advised that further extensive searches had been conducted of records of both the Minister's Office and the Department with the result that:
 - most of the missing documents had been located within the Department's records

⁴⁴ Section 87(1) of the RTI Act.

⁴⁵ Letter dated 8 September 2021.

⁴⁶ On 7 October 2021.

- a small number of documents had not been able to be located based on the applicant's description in his schedule; and
- a small number of documents in fact formed part of the Information in Issue.

69. In responding to the applicant's assertions generally, the Department stated:

- *the Minister's office has provided the Department's delegated decision-makers with a copy of all the documents located in the Minister's office that are relevant to [the applicant's] application under the RTI Act*
- *[the applicant's] contention that other documents previously released to him, and which should be in the Minister's office, is inaccurate as his previous RTI applications were made to the Department, including the former Department of Housing and Public Works, and therefore those documents were located within the Department's records*
- *draft documents, such as the briefing notes identified in [the applicant's] submission, are generated by Departmental staff, and are retained in the Department's records; and*
- *briefing notes identified in [the applicant's] submission as being signed by the Minister or a member of the Minister's staff are not retained in the Minister's office but are returned to the Department for recordkeeping purposes.*

... finally, we wish to provide a response to [the applicant's] contention that "due potentially to a lack of impartiality, independence, or incompetence, [documents] have not been disclosed..."

...

The Department's delegated officers are professional decision-makers, each with many years of experience in the field, and are aware of their responsibilities under the RTI Act, including providing applicants with the right to request access to information in the government's possession or under the government's control.

70. In response to the applicant's assertions regarding the existence of documents concerning meetings that he submitted the Minister had attended in September 2016 and January 2017, the Department located and provided copies of relevant extracts from the Minister's diary and calendar confirming those meetings. It objected to disclosure of the identities of those persons who had attended the meetings with the Minister. The remainder of the information was disclosed to the applicant. I am satisfied that disclosure of the identities of the participants would, on balance, be contrary to the public interest, for the reasons explained at paragraphs 21-57 above.

71. Lastly, in respect of missing emails identified by the applicant that involved previous staff of the Minister's Office, the Department advised that email accounts of former Ministerial staff members are not able to be accessed by the Minister's Office and are the responsibility of the Department of the Premier and Cabinet.

72. The Department did not consent to the disclosure to the applicant of all of the information contained in the schedule it had prepared. Accordingly, in communicating the Department's position to the applicant in my letter dated 10 March 2022, I summarised the response. I advised the applicant that the Department disputed that there was any indication that most of the documents he had identified had ever been provided to the Minister's Office and that most had been located after searching the Department's records. Based on a review of the contents of those documents, and the explanation provided by the Department concerning their creation/background, I advised the applicant that it was my preliminary view that there were no reasonable grounds for expecting that such documents would exist in the records of the Minister's Office.

73. The applicant did not accept my preliminary view. In his response,⁴⁷ he submitted:

⁴⁷ Dated 5 April 2022.

Notwithstanding the contents of your response, I continue to maintain that in respect of the sufficiency of search issue, there are reasonable grounds for believing that the Minister ... or the office of the Minister ... holds additional responsive information that has not yet been disclosed, and/or it can access those documents via the Department however at this time has chosen not to.

It is my view that the conduct of the Department and the ... Ministers office to date in respect of this matter has been unprofessional and contrary to its obligations.

It appears that neither the Department nor the Ministers office has been opened, transparent and accountable and has intentionally or incompetently failed to disclose all relevant documents in response to this RTI application.

It is a breach of Ministerial record-keeping standards, where these records should have been kept, or alternately the Department and/or the ... Ministers office in fact retains a copy of these records however are deliberately with-holding them.

74. On the basis that some briefing notes had been disclosed to him, the applicant disputed the Department's explanation that the Minister's Office does not ordinarily retain copies of briefing notes prepared by the Department for the Minister's signature/approval.
75. The applicant provided a further copy of his original schedule with additional comments. He also added a further seven documents that he contended were responsive to the terms of his application and that ought to exist in the records of the Minister's Office. He continued to argue that there were many other documents in addition to the ones he had identified that should have been located by the Minister's Office:

Regrettably, your response almost concentrates solely on the 30 documents listed in an Annexure 1 attached to my correspondence dated 21 September 2021. It is almost as if those 30 documents are now the focal point for the issues relevant to this particular external review, which they are not.

My correspondence was clear, the 30 documents identified were only of [sic] some of the documents that are in existence but not disclosed, and which should have been.

It is disappointing that, the RTI external review has seemingly narrowed down this RTI application to those 30 documents, yet not considered the many other documents in existence but not identified in my correspondence dated 21 September 2021 and which appeared to have not been considered by the OIC.

76. The applicant also complained that he had not been advised of the Department's response in relation to each of the 30 documents he had identified in his initial schedule, but instead had been provided with only a summary.

Discussion

77. As noted above, where a sufficiency of search issue is raised on external review, the issues for OIC to determine are:
- whether there are reasonable grounds for believing that additional responsive documents exist in the agency's possession or under its control; and, if so
 - whether the searches and inquiries conducted by the agency in an effort to locate the additional responsive documents have been reasonable in all the circumstances.

78. The applicant bears the practical onus of establishing reasonable grounds to be satisfied that the agency has not discharged its obligation to locate all relevant documents and that further searches and inquiries ought reasonably to be required.
79. In relation to the applicant's general assertion that the Minister's Office should hold 'hundreds' of other responsive documents, but that he has not identified and the contents of which he cannot be certain about, I do not consider that the applicant has discharged this practical onus. As noted, suspicion and mere assertion will not satisfy this onus.
80. I observed at paragraph 25 above that the applicant appears to be under a misapprehension regarding the relationship between the Minister's Office and the Department. He asserts, in effect, that even if documents are located within the records of the Department, they are under the control of the Minister's Office and the Minister's Office is required to produce them. That is incorrect. The Minister's Office and the Department are separate entities for the purposes of the RTI Act. The Minister's Office is required to search for, and produce, 'documents of a Minister' as defined in section 13 of the RTI Act, and not 'documents of an agency' as defined in section 12. I do not consider that, given the role of a Minister's Office, it is reasonable to expect that it would ordinarily hold documents of an operational nature that relate to the discharge by the relevant portfolio department of its regulatory or statutory functions.
81. The search records provided by the Minister's Office indicate that eight staff members of the Minister's Office conducted searches of office records and email accounts and located 419 responsive pages. A further detailed review of the records of both the Minister's Office and the Department was undertaken to try to locate the 30 documents identified by the applicant as missing. The Department also provided OIC with a submission regarding its searches and inquiries in relation to each of the 30 documents alleged to be missing.⁴⁸ In summary, the Department submitted:
- the majority of the documents were located within the Department's records
 - Departmental Liaison Officers are not staff members of the Minister's Office and any records relating to their interactions would not ordinarily be held by the Minister's Office
 - copies of Ministerial briefing notes are prepared by the Department and are not ordinarily retained by the Minister's Office once signed, but are returned to the Department
 - emails accounts of former Ministerial staff are under the control of the Department of the Premier and Cabinet, and not the Minister's Office
 - in relation to some documents that the applicant obtained as a result of making other RTI access applications, and which he contends the Minister's Office should also hold, there is no reference in the documents to the Minister, and no indication they were provided to the Minister; and
 - some documents were unable to be identified in the records of either the Minister's Office or the Department, based on the information/description provided by the applicant.
82. The applicant disputed the Department's advice that the Minister's Office is unable to access and search the email accounts of former Ministerial staff members, and that such accounts are under the control of the Department of the Premier and Cabinet. However,

⁴⁸ Section 108 of the RTI Act prevents me from quoting that submission in its entirety, and similarly, from providing the applicant with a copy. I acknowledge that an applicant raising sufficiency of search concerns is at a certain disadvantage when there are also documents to which access has been refused. However, given the specificity with which the applicant described missing documents and the information contained in the Department's responding submission, I am constrained in providing any further information in these reasons, other than the following summary.

he provided no grounds in support of his position. I note that the Ministerial Handbook⁴⁹ provides that the Premier decides the staffing of Ministerial offices and that no staff member's employment may be terminated without first advising the Premier's Office. Employment matters for Ministerial staff are handled by Ministerial Services. Relevant legislative provisions governing the employment of Ministerial staff are contained in the *Ministerial and Other Office Holder Staff Act 2010* (Qld).⁵⁰ Given the oversight exercised by the Office of the Premier, and Ministerial Services, over the employment of staff in Ministerial offices, I do not consider it is unreasonable to expect that responsibility for the email accounts of former Ministerial staff members would pass to the Department of the Premier and Cabinet following resignation or termination of employment.

83. The applicant also disputes the Department's contention that Briefs to the Minister prepared by Departmental staff are generally not retained by the Minister once they have been approved/signed but, instead, are returned to the Department. I accept that the Minister's Office located, and gave the applicant access to, some briefing documents in this review. However, I also accept the Department's position that, generally, it is not the case that Briefs, or drafts thereof, will be located within the records of a Minister's Office. But, in any event, even if that were not correct, I am satisfied that the searches that have been conducted of the records of the Minister's Office in an effort to locate any additional responsive documents have been reasonable in all the circumstances.
84. Based on the information provided by the Department both about the searches conducted by staff of the records of the Minister's Office, and the Department's response to the 30 documents identified by the applicant as missing, I am unable to identify any further searches or inquiries that it would be reasonable to ask the Minister's Office to undertake in an effort to locate any additional responsive documents. I am satisfied that the Department's response, a summary of which is set out in paragraph 81 above, provides a reasonable explanation as to why the bulk of the documents are held by the Department and not by the Minister's Office, or are otherwise unable to be located, based upon the description provided by the applicant.
85. As regards to the additional seven documents identified as missing by the applicant, I do not consider it is reasonable to ask the Minister's Office/Department to conduct further searches for those documents based on the description provided by the applicant. For example, two of the documents are described by the applicant as a letter or email from an '*undetermined author*' and an '*undetermined sender*'. In respect of other documents, the applicant describes the subject matter as '*undetermined*'. I am not satisfied that the applicant has discharged the onus upon him to establish that there are reasonable grounds for believing that these documents exist in the possession or under the control of the Minister's Office. Furthermore, given the searches that have already been conducted of the records of the Minister's Office, including the further detailed review of the records that was conducted in an effort to try to locate the first 30 documents identified by the applicant as missing, I am not able, on the information before me, to identify any further searches or inquiries that it would be reasonable to ask the Minister's Office to undertake.

Finding

86. In summary, the applicant's submissions have not satisfied me that there are reasonable grounds for believing that additional responsive documents exist in the possession or under the control of the Minister's Office that could reasonably be expected to be located

⁴⁹ [1.1 Office Staff - Ministerial Handbook - Department of the Premier and Cabinet \(premiers.qld.gov.au\)](#)

⁵⁰ The *Public Service Act 2008* (Qld) and Directives issued under the *Ministerial and Other Office Holder Staff Act 2010* (Qld) govern the employment of public servants in Ministerial offices.

through any additional search or inquiry by the Minister's Office. Taking into account the documents located in response to the application and the searches and inquiries that the Minister's Office and Department have conducted (including the summary of the Department's response set out in paragraph 81 above), I am satisfied that reasonable steps have been taken in this case and I am unable to identify any additional searches or inquiries that it would be reasonable to ask the Minister's Office to undertake.

87. I find that access to any additional documents may be refused on the basis that they are nonexistent or unlocatable under sections 47(3)(e) and 52(1) of the RTI Act.

DECISION

88. I affirm the decision of the Department, made on behalf of the Minister's Office, that access to the Information in Issue may be refused under section 47(3)(b) of the RTI Act because its disclosure would, on balance, be contrary to the public interest under section 49 of the RTI Act.
89. In addition, I find that the searches and inquiries conducted by the Minister's Office/Department in an effort to locate all responsive documents have been reasonable in all the circumstances, and that access to further documents may be refused on the basis they are nonexistent or unlocatable under sections 47(3)(e) and 52(1) of the RTI Act.
90. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

K Shepherd
Acting Right to Information Commissioner

Date: 16 June 2022

APPENDIX A

Significant procedural steps

Date	Event
26 August 2021	OIC received the application for external review. OIC requested the initial documents. The Department provided the initial documents.
8 September 2021	OIC accepted the application for external review.
21 September 2021	OIC received submissions on sufficiency of search from the applicant.
27 September 2021	OIC provided the Department with a copy of the applicant's submissions and requested a response, as well as provision of copies of the Information in Issue and search records.
7 October 2021	OIC received copies of the Information in Issue and search records.
12 October 2021	OIC communicated a preliminary view to the applicant.
2 November 2021	OIC communicated a preliminary view to the Department. OIC received submissions from the applicant.
8 November 2021	OIC expressed a further preliminary view to the applicant.
9 December 2021	OIC granted the Department further time to provide submissions.
20 December 2021	OIC received submissions from the Department concerning the Information in Issue.
21 December 2021 – 24 December 2021	OIC consulted with third parties.
25 January 2022	OIC received the Department's response to the applicant's sufficiency of search submissions.
27 January 2022	OIC requested further information from the Department.
9 March 2022	OIC received a response from the Department.
10 March 2022	OIC communicated a preliminary view to the applicant.
5 April 2022	OIC received submissions from the applicant.
8 April 2022	The Department released additional information to the applicant.
26 April 2022	OIC received submissions from the applicant.