



## Decision and Reasons for Decision

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<b>Citation:</b>	<b><i>Q53 and Queensland Building and Construction Commission [2021] QICmr 45 (2 September 2021)</i></b>
<b>Application Number:</b>	<b>315792</b>
<b>Applicant:</b>	<b>Q53</b>
<b>Respondent:</b>	<b>Queensland Building and Construction Commission</b>
<b>Decision Date:</b>	<b>2 September 2021</b>
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST - personal information of other individuals - safeguarding personal information and the right to privacy of other individuals - whether disclosure would, on balance, be contrary to the public interest - whether access may be refused under section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and section 47(3)(b) of the <i>Right to Information Act 2009</i> (Qld)</b>

### REASONS FOR DECISION

#### Summary

1. The applicant applied<sup>1</sup> to the Queensland Building and Construction Commission (**QBCC**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to communications<sup>2</sup> between a Builder, QBCC, and an external building consultant acting as QBCC's Claims Manager relating to a contract for construction works at the applicant's residence covered by the Queensland Home Warranty Scheme.<sup>3</sup>
2. QBCC located '18 files containing 947 folios of documents'<sup>4</sup> responding to the application and decided<sup>5</sup> to refuse access to 74 entire folios and 71 part folios on the grounds that this information was exempt information or contrary to the public interest information.
3. The applicant applied<sup>6</sup> to the Office of the Information Commissioner (**OIC**) for external review of QBCC's decision to refuse access to this information.
4. For the reasons set out below, I find that access to the information may be refused on the ground that its disclosure would, on balance, be contrary to the public interest.

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<sup>1</sup> Access application dated 19 August 2020.

<sup>2</sup> Occurring from 1 March 2020 to 17 August 2020.

<sup>3</sup> A compulsory statutory insurance scheme for residential construction work carried out in Queensland.

<sup>4</sup> Comprising written documents (including, for example, emails, contracts and reports) and audio and video files.

<sup>5</sup> Decision dated 26 November 2020.

<sup>6</sup> On 14 December 2020.

## Reviewable decision

5. The decision under review is QBCC's decision dated 26 November 2020.

## Evidence considered

6. 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).
7. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), which provides that it is unlawful for a public entity to make a decision in a way that is not compatible with human rights, or to fail to give proper consideration to a human right relevant to the decision.<sup>7</sup> Here, the right to seek and receive information<sup>8</sup> is particularly apposite. I note the observations made by Bell J on the interaction between equivalent pieces of Victorian legislation<sup>9</sup>: '*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>10</sup> I also note that a decision-maker will be '*respecting, and acting compatibly with*' the right to seek and receive information and other rights prescribed in the HR Act when applying the law prescribed in the IP Act and *Right to Information Act 2009* (Qld) (**RTI Act**).<sup>11</sup> I have, in accordance with section 58(1) of the HR Act, done so in making this decision.

## Information in issue

8. In response to the applicant's application, QBCC located one voicemail, 14 video files and 932 pages of documents.<sup>12</sup> Of these, QBCC gave the applicant access to the voicemail, 801 pages and 71 part pages and decided to refuse access to:
  - 14 video files, 60 pages<sup>13</sup> and 41 part pages<sup>14</sup> on the ground they are exempt information; and
  - 31 part pages,<sup>15</sup> on the ground they are contrary to public interest information.
9. Accordingly, the **Information in Issue** considered in this review consists of 14 video files,<sup>16</sup> 60 pages<sup>17</sup> and 71 part pages.<sup>18</sup> It includes multiple duplicates,<sup>19</sup> as the applicant has not excluded duplicates from consideration.

<sup>7</sup> Section 58(1) of the HR Act.

<sup>8</sup> Section 21(2) of the HR Act.

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

<sup>10</sup> *XYZ v Victoria Police (General)* [2010] VCAT 255 (**XYZ**) at [573].

<sup>11</sup> *XYZ* at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 at [111].

<sup>12</sup> QBCC's decision refers to the voicemail, each of the 14 video files and each page of the 932 pages as a folio – and therefore refers to 947 folios in total.

<sup>13</sup> Collectively, the 14 video files and 60 pages are referred to as '*74 entire folios*' in QBCC's decision.

<sup>14</sup> Referred to as '*41 part folios*' in QBCC's decision.

<sup>15</sup> Referred to as '*31 part folios*' in QBCC's decision.

<sup>16</sup> Referred to in Attachment B to QBCC's decision as 600078 Claims 16714798 Attach\_09 (duplicated at 600078 Claims 16730046 Attach\_008, 810066 Claims 17380845 Attach\_003, 810066 Claims 17381256 Attach\_003, 810066 Claims 17381260 Attach\_002, 810066 Claims 17381263 Attach\_003, 810066 Claims 17481738 Attach\_003, and 810066 extra doc 18276577 Attach\_003); and 810066 Claims 17380845 Attach\_002 (duplicated at 810066 Claims 17381256 Attach\_002, 810066 Claims 17381260 Attach\_001, 810066 Claims 17381263 Attach\_002, 810066 Claims 17481738 Attach\_002 and 810066 extra doc 18276577 Attach\_002).

<sup>17</sup> Referred to in Attachment B to QBCC's decision as pages 26-29, 31, 34-38, 44-47, 49, 52-56, 63-66, 68, 71-75, 84-87, 89, 92-96, 106-109, 111, 114-118, 155-158, 160, and 163-167 of file 810066 Claims ECM.

<sup>18</sup> Referred to in Attachment B to QBCC's decision as parts of pages 3, 5, 6, 65, 67, 128, 134, 139, 149, 232, 236, 322, 326, 329, 335, 341, 347, 356, 366, 376, 386, 399, 411, 426, 441, 458, 475, 494, 514, 535, 556, 580, 603, 626 and 630 of file 600078 Claims ECM; 2, 7, 11, 15, 19, 24, 30, 31, 37, 38, 64, 72, 89 and 112 of file 600078 Claims ECM Extra docs; and 24, 25, 43, 61, 62, 80, 82, 83, 103, 104, 123, 126, 129, 131, 134, 136, 138, 140, 141, 142, 144 and 154 of file 810066 Claims ECM. As noted at page 6 of Attachment B to QBCC's decision, the total is 71 part pages, not 72 part pages, as QBCC found that one page contained portions of both exempt information and contrary to public interest information.

<sup>19</sup> For example, as set out at footnote 16, there are 2 video recordings, but 7 duplicates of one recording and 5 duplicates of the other recording with different file names.

## Issue for determination

10. On external review, OIC stands in the shoes of the decision maker and considers matters afresh. On 14 May 2021, I wrote to QBCC and advised that I did not consider that there was sufficient evidence to meet the requirements to establish that 14 video files, 60 pages and 41 part pages were exempt information, as claimed by QBCC.<sup>20</sup> QBCC did not seek to maintain its reliance on this exemption.
11. Therefore, the issue for determination in this review is whether access to the Information in Issue can be refused on the ground that its disclosure would, on balance, be contrary to the public interest.

## Relevant law

12. Under the IP Act, an agency may refuse access to information in the same way and to the same extent the agency could refuse access to that information under the RTI Act.<sup>21</sup> One ground for refusing access to information under the RTI Act is where disclosure of the information would, on balance, be contrary to the public interest.<sup>22</sup> The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest<sup>23</sup> and explains the steps that the decision-maker must take<sup>24</sup> in deciding the public interest as follows:
  - identify any irrelevant factors and disregard them
  - identify relevant public interest factors favouring disclosure and nondisclosure
  - balance the relevant factors favouring disclosure and nondisclosure; and
  - decide whether disclosure of the information would, on balance, be contrary to the public interest.

## Findings

### *Irrelevant factors*

13. I am satisfied that no irrelevant factors arise in the circumstances of this case.

### *Factors favouring disclosure*

14. The Information in Issue consists of:
  - i) names and signatures of individuals other than the applicant
  - ii) statements made by individuals other than the applicant; and
  - iii) comments and other information (including video footage) provided to QBCC by individuals other than the applicant.

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<sup>20</sup> In the decision, QBCC had refused access to some information under section 47(3)(a) and schedule 3, section 10(1)(d) of the RTI Act.

<sup>21</sup> Section 67(1) of the IP Act.

<sup>22</sup> Sections 47(3)(b) and 49 of the RTI Act. The term *public interest* refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.

<sup>23</sup> Schedule 4 of the RTI Act sets out the factors for deciding whether disclosing information would, on balance, be contrary to the public interest. However, this list of factors is not exhaustive. In other words, factors that are not listed may also be relevant.

<sup>24</sup> Section 49(3) of the RTI Act.

15. Factors favouring disclosure will arise if disclosure could reasonably be expected to enhance the accountability and transparency of QBCC regarding its management of matters arising from the applicant's contract for construction works – for example, by informing the community of the government's operations or revealing background or contextual information to decisions.<sup>25</sup>
16. As noted at paragraph 14 above, the information at i) comprises the names and signatures of third parties. I do not consider that disclosure of this information would advance QBCC's accountability and transparency in any way. Accordingly, I consider that these factors do not apply in relation to the information at i).
17. On the other hand, the information at ii) and iii) comprises information provided to QBCC by third parties about incidents arising in relation to the contract for construction works. I accept that disclosing this information would advance the public interest factors identified in paragraph 15 above. However, a significant amount of information about QBCC's management of matters arising from the contract has been released to the applicant, and the information at ii) and iii) comprises third party information which does not contain any details about QBCC's actions. Therefore, I consider that these public interest factors have already been advanced to a considerable degree by the information that has already been released. In terms of the information at ii) and iii), given the limited nature of this information, I consider that these factors warrant low to moderate weight.
18. During the external review, the applicant submitted:<sup>26</sup>

*Please explain this, as why am being denied documents that relate to my name, my address and contracts containing my name.*

19. A factor favouring disclosure arises regarding information that is the applicant's personal information.<sup>27</sup> Clearly, this factor cannot apply to the information at i). It does, however, apply to some of the information at ii) and iii) – namely, the parts of the information at ii) and iii) which constitute the applicant's personal information<sup>28</sup> and relate to incidents arising in relation to construction works undertaken at the applicant's home under the contract. I acknowledge that information about these construction works and the incidents in question are matters at the core of the applicant's personal sphere. Accordingly, to the extent the information at ii) and iii) comprises the applicant's personal information, I afford this factor favouring disclosure significant weight. However, I also note that the information at ii) and iii) which comprises the applicant's personal information relates to incidents involving other parties, and therefore also gives rise to factors favouring nondisclosure regarding those parties' personal information and privacy.<sup>29</sup>
20. In seeking an external review, the applicant submitted:<sup>30</sup>

*I strongly believe an external review from the office of information commissioner is warranted due to the belief that my rights to information have not been properly considered based on what has been received has raised questions on pursuant to any legal proceedings I wish to take.*

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<sup>25</sup> Schedule 4, part 2, items 1, 3 and 11 of the RTI Act.

<sup>26</sup> Email dated 16 May 2021.

<sup>27</sup> Schedule 4, part 2, item 7 of the RTI Act.

<sup>28</sup> Personal information is defined in section 12 of the IP Act as *information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.*

<sup>29</sup> This is addressed at paragraphs 28 and 29.

<sup>30</sup> Submission to OIC dated 14 December 2020.

*I have strong beliefs, from what I have read, the QBCC have allowed the involved parties to use potential defamation and criminality as an argument to deny myself and the public of my rights to information.*

21. Given these submissions, I have considered whether disclosing the Information in Issue could reasonably be expected to contribute to the administration of justice for the applicant.<sup>31</sup> In some circumstances, information can be accessed under the RTI Act for litigation purposes,<sup>32</sup> but only if the administration of justice factor is sufficient to outweigh other considerations, such as privacy. This is generally limited to circumstances where disclosure of the information sought *'would assist [the applicant] to pursue [a] remedy, or to evaluate whether a remedy is available, or worth pursuing'*.<sup>33</sup> The applicant has indicated that she may consider pursuing legal proceedings. However, apart from brief mention of *'potential defamation and criminality'*, she has not provided any information regarding the nature of the legal proceedings she wishes to pursue, nor specified who those proceedings would be against. In these circumstances – having carefully considered the content of the Information in Issue, and also taking into account the amount and nature of the information which has already been released to the applicant – I am unable to identify how disclosing the Information in Issue could provide the applicant with any further assistance in terms of identifying and evaluating legal options, or commencing proceedings in pursuit of a remedy. Accordingly, based on the material before me, I do not consider that the factor favouring disclosure relating to the administration of justice for the applicant applies in these circumstances.

22. Noting the applicant's brief mention of *'criminality'*, I have also considered whether disclosing the Information in Issue could reasonably be expected to contribute to the enforcement of the criminal law.<sup>34</sup> However, there is nothing before me (either in the Information in Issue or in the information already released to the applicant) which supports the applicant's contention regarding criminality. Accordingly, I am satisfied that there is no basis on which this factor favouring disclosure could apply.

23. The applicant has also submitted:<sup>35</sup>

*Information that has been requested is for myself and to further benefit the public disclosure of the QBCC home warranty scheme colluding with [the Claims Manager] and [the Builder] in potentially defrauding the home warranty scheme. From the minimal documents received, it has been clear the QBCC home warranty scheme worked with [the Claims Manager] to assist [the Builder] in successfully terminating an independent building contract and avoiding a non completion claim ( this was read in a portion of the documents provided)*

...  
*In my view, I am being denied my human and legal rights to documents and information that have been denied to protect those whom could have perpetrated a lie.*

24. To the extent these submissions raise the HR Act, I refer to paragraph 7 above. Otherwise, in light of these submissions, I have considered whether disclosing the Information in Issue could reasonably be expected to:

- allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official;<sup>36</sup> or

<sup>31</sup> Schedule 4, part 2, item 17 of the RTI Act.

<sup>32</sup> A public interest factor favoring disclosure arises where disclosure could contribute to the administration of justice for you (schedule 4, part 2, item 17). A relevant public interest consideration was also identified and analysed by the Information Commissioner in *Willsford and Brisbane City Council* (1996) 3 QAR 368 (**Willsford**), at [17].

<sup>33</sup> *Willsford* at [17](c).

<sup>34</sup> Schedule 4, part 2, item 18 of the RTI Act.

<sup>35</sup> Submission to OIC dated 16 May 2021.

<sup>36</sup> Schedule 4, part 2, item 5 of the RTI Act.

- reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct.<sup>37</sup>
25. As noted at paragraph 17, a significant amount of information about the management of matters arising from the applicant's contract for construction works has been released to the applicant. There is no evidence in the information before me (either in the Information in Issue or in the information already released to the applicant) which supports the applicant's contention that QBCC officers or the Claims Manager have acted inappropriately in their management of matters arising from the applicant's contract for construction works. Moreover, as most of the Information in Issue comprises information provided by third parties, I do not consider it is reasonable to expect that its disclosure could assist in revealing possible deficiencies in the conduct of an *agency* or *official*. Accordingly, I find these factors favouring disclosure do not apply in the circumstances of this review.
26. I have also considered whether disclosing the Information in Issue could reasonably be expected to contribute to procedural fairness<sup>38</sup> or advance the fair treatment of individuals in accordance with the law in their dealings with agencies.<sup>39</sup> Here, it is again relevant to note that most of the Information in Issue comprises information provided by third parties. I also note that the actions taken by QBCC and its Claims Manager, and incidents and issues considered by them prior to taking those actions, were matters which the applicant was generally appraised of and given the opportunity to address at the time. I further note that these matters are generally apparent in the information already released to the applicant. Consequently, I am satisfied that the factors favouring disclosure regarding contribution to procedural fairness and fair treatment do not apply in the circumstances of this review.
27. I have carefully considered all factors listed in schedule 4, part 2 of the RTI Act, and can identify no other public interest considerations telling in favour of disclosure of the Information in Issue.

### **Factors favouring nondisclosure**

28. The RTI Act recognises that disclosing an individual's personal information to someone else can reasonably be expected to cause a public interest harm.<sup>40</sup> I am satisfied that the information at i), being names and signature of other individuals, comprises the personal information of those other individuals. While the information at ii) and iii) relates to incidents arising in relation to the contract for construction works, it cannot, in my view, be characterised as relating to any parties' business affairs.<sup>41</sup> Rather, it comprises the personal information of third parties. Noting the relatively sensitive nature of the information and the circumstances of its provision, I afford this factor favouring nondisclosure significant weight.
29. A further factor favouring nondisclosure arises if disclosing information could reasonably be expected to prejudice the protection of an individual's right to privacy.<sup>42</sup> The concept of 'privacy' is not defined in the RTI Act. It can, however, essentially be viewed as the right of an individual to preserve their '*personal sphere*' free from interference from

<sup>37</sup> Schedule 4, part 2, item 6 of the RTI Act.

<sup>38</sup> Schedule 4, part 2, item 16 of the RTI Act.

<sup>39</sup> Schedule 4, part 2, item 10 of the RTI Act.

<sup>40</sup> Schedule 4, part 4, section 6(1) of the RTI Act.

<sup>41</sup> Accordingly, I do not consider that any of the business affairs factors (at schedule 4, part 3, items 2 and 15 and part 4, section 7 of the RTI Act) apply in the circumstances of this review.

<sup>42</sup> Schedule 4, part 3, item 3 of the RTI Act.

others.<sup>43</sup> For the reasons stated in paragraph 28 above, I am satisfied that disclosure of the Information in Issue would interfere with the personal sphere of the third parties. Accordingly, I afford this factor favouring nondisclosure significant weight.

30. I have also considered whether disclosure of the Information in Issue could prejudice the future supply of confidential information to an agency.<sup>44</sup> However, noting the requirement for builders to enter into contracts covered by the Queensland Home Warranty Scheme, and noting that it is in the interests of builders to engage with QBCC and its Claims Manager regarding any claims that arise in relation to that scheme, I am satisfied such factors do not apply.

### ***Balancing the public interest***

31. I have considered the pro-disclosure bias in deciding access to information.<sup>45</sup> On balance, I consider the significant weight of the nondisclosure factors regarding personal information and privacy of third parties outweighs the low to moderate weight of the accountability and transparency disclosure factors in relation to the information at i). Despite the additional weight of the personal information disclosure factor, which arises regarding some of information at ii) and iii), I have reached the same conclusion, that is the privacy and personal information harm factors carry determinative weight, regarding the entirety of the information at ii) and iii). Accordingly, access to the Information in Issue may be refused on the basis that its disclosure would, on balance, be contrary to the public interest.

### **DECISION**

32. I vary QBCC's decision by finding that access to the Information in Issue may be refused under section 67(1) of the IP Act and section 47(3)(b) of the RTI Act on the ground that its disclosure would, on balance, be contrary to the public interest.
33. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

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**A Rickard**  
**Assistant Information Commissioner**

**Date: 2 September 2021**

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<sup>43</sup> Paraphrasing the Australian Law Reform Commission's definition of the concept in *'For your information: Australian Privacy Law and Practice'* Australian Law Reform Commission Report No. 108 released 12 August 2008, at paragraph 1.56. Cited in *Balzary and Redland City Council; Tidbold (Third Party)* [2017] QICmr 41 (1 September 2017) at [28].

<sup>44</sup> Schedule 4, part 3, item 16 and part 4, section 8(1) of the RTI Act.

<sup>45</sup> Section 64 of the IP Act.

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

<b>Date</b>	<b>Event</b>
14 December 2020	OIC received the applicant's application for external review.
17 December 2020	OIC advised QBCC and the applicant that the application for external review had been received and requested procedural documents from QBCC.
22 December 2020	OIC received the requested procedural documents from QBCC.
18 February 2021	OIC advised QBCC and the applicant that the application for external review had been accepted and requested a copy of the documents located in response to the access application from QBCC.
25 March 2021	OIC received a copy of the requested documents from QBCC.
14 May 2021	OIC conveyed a preliminary view to the applicant.
14 May 2021	OIC wrote to QBCC about the preliminary view.
16 May 2021	OIC received submissions from the applicant.