



Decision and Reasons for Decision

Citation: *Taylor and Department of Education* [2021] QICmr 64
(2 December 2021)

Application Number: 315150

Applicant: Taylor

Respondent: Department of Education

Decision Date: 2 December 2021

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - BREACH OF CONFIDENCE - School Opinion Survey response data - staff responses to questions about leadership, bullying and sexual harassment - whether disclosure would found an action for breach of confidence - whether information is exempt under sections 47(3)(a) and 48 and schedule 3, section 8(1) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST - School Opinion Survey response data - staff responses to questions about leadership, bullying and sexual harassment - accountability - important issue or matter of serious interest - Government's operations - deficiencies in conduct - personal information and privacy - agency's ability to obtain confidential information - management of staff - whether disclosure would, on balance, be contrary to the public interest - whether access may be refused under sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Education (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to the complete data set for School Opinion Surveys in 2018 and 2019.¹
2. As the Department did not reach a decision within the relevant timeframe, the Department is taken to have made a decision refusing access to all relevant documents.

¹ Application dated 22 December 2019.

3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review.² During the external review process, the information sought by the applicant was released, except for data gathered on seven questions. This data is the subject of this decision.³
4. For the reasons set out below, I find that access to the data regarding the seven questions may be refused on the ground that:
 - it comprises exempt information, namely information the disclosure of which would found an action for breach of confidence; and in the alternative
 - its disclosure would, on balance, be contrary to the public interest.

Background

5. The School Opinion Survey is an annual survey conducted by the Department to ‘...obtain the views of parents/caregivers, students and school staff from each school on what they do well and how they can improve’.⁴
6. The data from the School Opinion Survey was previously published in a disaggregated form.⁵ This means that it revealed the responses for specific schools, rather than grouping results by region or State. In recent years, however, the Department changed its processes and now publishes the data in aggregated form – that is, grouped together at a State level and reported in relation to various categories, eg. school types (primary and secondary), staff type (teaching/non-teaching) and student year level.⁶
7. The Department explained that:⁷

In previous years, a School Opinion Survey (SOS) data report covering all schools surveyed was made publicly available on the Department’s website each year. In 2017, seven questions were taken from the ‘Working for Queensland’ survey and placed into the SOS.

These seven questions consist of:

- *four questions relating to staff opinion of the performance of the leadership team; and*
- *three questions relating to staff bullying and sexual harassment.*

...

The Queensland Teacher’s Union (QTU) raised concerns about these seven questions being made publicly available. One of the reasons for this was because the questions will often relate to an individual where ‘the leadership team’ is just one person, the principal. Consequently, the Department came to an in-principle agreement with QTU whereby it would not publicly release the data for these seven questions.

The Department now only provides the data to relevant regional offices, with a direction that regions are not to publicly or internally release this data. The data for these questions has now been removed from the SOS reports that are provided to individual schools, although schools may request their individual data for these questions from their regional office if required.

² External review application dated 2 February 2020.

³ Except for data to which the Department had applied its pre-existing deidentification policy. In a letter from the applicant to OIC dated 27 May 2021, the applicant confirmed that she did not wish to pursue access to such data. Under the policy in question, results were shown as ‘DW’ (data withheld) when there were fewer than five respondents or all respondents had the same answer to a question.

⁴ < <https://qed.qld.gov.au/publications/reports/statistics/schooling/schools/schoolopinionsurvey> >.

⁵ Department’s submissions dated 25 March 2020 and 3 November 2021.

⁶ < <https://qed.qld.gov.au/publications/reports/statistics/schooling/schools/schoolopinionsurvey> >.

⁷ Letter from the Department to OIC dated 25 March 2020.

8. The applicant began making enquiries with the Department about access to the 2018 School Opinion Survey in March 2018 when she noticed that a School Opinion Survey results link had been removed from the Department's website.⁸ The applicant was unable to access the information she sought through administrative processes, despite extensive correspondence with the Department.

9. In an email to the applicant on 18 December 2019, the Department advised:⁹

As you note, you are able to make a Right To [sic] Information application for the School Opinion Survey (SOS) data you are seeking and any application will be assessed and responded to in accordance with the legislation.

As background though, I can advise that the SOS data now being released aligns with the Principles and Protocols for Reporting on Schooling in Australia, which was agreed to by Education Ministers from all jurisdictions. Specifically, these principles aim to ensure that the reporting of education data strikes a balance between the community's right to access information, with the need to avoid the misinterpretation or misuse of information. In the context of SOS data, it is important to note that the SOS is designed to enable individual schools to examine their school's results and trends in their data. It is not valid to compare the SOS data of different schools.

On this basis, individual school reports are now provided directly to schools for planning purposes, while a state-wide report is published on the department's website. Schools are however, required to make SOS information available through their school annual reports. 2018 data will be available on each schools [sic] website. 2019 data will be released at the end of this financial year.

10. On 22 December 2019, the applicant submitted her access application under the RTI Act for:¹⁰

... the complete data set of dis-aggregated school opinion surveys from every group surveyed, for each individual school, for each question asked for the year 2018 & 2019 in excel format (as provided in previous years).

11. The applicant has understandably expressed frustration at the length of time it has taken to reach a resolution of this issue since she first began her enquiries with the Department in March 2018. I have explained to the applicant¹¹ that OIC has attended to her matter consistently since February 2020; however, the external review process has been time consuming as it required a large amount of correspondence back and forth between OIC and the Department so that OIC could interrogate and understand, and the Department could explain:

- the type of data that is collected in the School Opinion Survey
- how the surveys have changed in recent years
- the terms on which the surveys are conducted
- the way in which the data is collected
- what standard reports are created from the data
- whether there is capacity for other types of reports to be generated
- how much time and what resources would be involved in generating other reports
- whether the Department is entitled to charge fees for the work involved in preparing other reports

⁸ Email from the applicant to the Department dated 12 March 2018.

⁹ Email from the Executive Director of Performance Monitoring and Reporting to the applicant dated 18 December 2019.

¹⁰ Access application dated 22 December 2019.

¹¹ Letter from OIC to the applicant dated 30 April 2021.

- privacy concerns in relation to disaggregated data and the seven questions added to the survey in recent years
- whether or not estimated work would substantially and unreasonably divert the Department's resources at different times during the global pandemic as business units assisted with COVID-related duties; and
- whether the applicant's suggestions for filtering the data would make the application more manageable, and therefore not a substantial and unreasonable diversion of resources.

12. Significant procedural steps in this review are set out in the Appendix.

Reviewable decision

13. The decision under review is the deemed decision refusing access to all documents requested by the applicant that the Department is taken to have made¹² on 30 January 2020.

Evidence considered

14. 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). I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.¹³ I consider a decision-maker will be '*respecting and acting compatibly with*' that right and others prescribed in the HR Act, when applying the law prescribed in the RTI Act.¹⁴ 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:¹⁵ '*it is perfectly compatible with the scope of that positive right in the Charter of Human Rights and Responsibilities Act for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act.*'¹⁶

Information in issue

15. As set out above, the majority of the information sought by the applicant was released during the external review. The information remaining in issue is the disaggregated data (ie. school-by-school data) regarding staff responses to the following questions (**Seven Questions**) from the School Opinion Surveys for the years 2018 and 2019 (**Data**):¹⁷

In general, thinking back over this school year, to what extent do you agree or disagree with the following statements:

- *The school leadership team operates with a high level of integrity*
- *The school leadership team are willing to act on suggestions to improve how things are done*
- *In my school, the leadership team is of high quality*
- *The school leadership team model the behaviours expected of all employees*

In relation to staff interactions during the past 12 months:

¹² Under section 46(1)(a) of the RTI Act.

¹³ Section 21 of the HR Act.

¹⁴ *XYZ v Victoria Police (General)* (2010) 33 VAR 1 (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 at [111].

¹⁵ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹⁶ **XYZ** at [573].

¹⁷ 2018 and 2019 School Opinion Survey forms attached to the Department's submissions to OIC dated 11 December 2020 and 5 November 2021.

- Have you witnessed bullying or sexual harassment in the workplace?
- Have you been subjected to bullying in the workplace?
- Have you been subjected to sexual harassment in the workplace?

16. The applicant agreed to exclude data to which the Department had applied its pre-existing deidentification policy¹⁸ (under which results are shown as 'DW' (data withheld) in circumstances when there were fewer than five respondents or all respondents had the same answer to a question). Therefore the Data does not include this data. The Data is stored in an Excel spreadsheet in three sheets named 'SchoolReport_Staff_All', 'SchoolReport_Staff_Teaching' and 'SchoolReport_Staff_Interactions'. The Data is categorised by Survey Type, School Name, Survey Year, Centre Code, Item Code, Question, n number, and results.

Issue for determination

17. The issue for determination is whether there is any ground on which access to the Data may be refused under the RTI Act. Specifically, I consider below:

- whether the Data is exempt information, namely information the disclosure of which would found an action for breach of confidence;¹⁹ and in the alternative
- whether disclosure of the Data would, on balance, be contrary to the public interest.²⁰

Breach of confidence exemption

Relevant law

18. The RTI Act gives a right of access to documents of government agencies.²¹ This right is subject to other provisions of the RTI Act, including grounds on which access may be refused. Access to a document may be refused to the extent the document comprises 'exempt information'.²² Schedule 3, section 8(1) of the RTI provides that information is exempt information if its disclosure would found an action for breach of confidence. This exemption encompasses both actions for breach of equitable obligations of confidence and actions for breach of contractual obligations of confidence.²³

19. The test for the exemption must be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff with appropriate standing to bring an action to enforce an obligation of confidence said to be owed to that plaintiff by an agency such as the Department.²⁴

20. In order to establish an equitable obligation of confidence, the following four cumulative requirements must be established:²⁵

- (a) the information must be identifiable with specificity
- (b) it must have the necessary quality of confidence

¹⁸ Letter from the applicant to OIC dated 27 May 2021.

¹⁹ Sections 47(3)(a) and 48 and schedule 3, section 8(1) of the RTI Act.

²⁰ Sections 47(3)(b) and 49 and schedule 4 of the RTI Act.

²¹ Section 23(1)(a) of the RTI Act.

²² Sections 47(3)(a) and 48 of the RTI Act.

²³ *Ramsay Health Care Ltd v Information Commissioner & Anor* [2019] QCATA 66 (**Ramsay**) at [66].

²⁴ *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (**B and BNRHA**) at [44].

²⁵ *Ramsay* at [94]-[95] adopting *Optus Networks Pty Ltd v Telstra Corporation Ltd* (2010) 265 ALR 281 at 39 and *Smith Kline & French Laboratories (Aust) Ltd v Secretary to the Department of Community Services & Health* (1990) 22 FCR 73 (**Smith Kline**) at 87. See also *Screen Queensland Pty Ltd v Information Commissioner & Ors* [2019] QCATA 122 (**Screen Qld**) at [26], and *NBN Co Ltd v Information Commissioner & Ors* [2021] QCATA 40 (**NBN Co**) at [27].

- (c) it must have been received in circumstances importing an obligation of confidence; and
- (d) there must be an actual or threatened misuse of it.

Findings

21. The hypothetical plaintiffs in this scenario are the school staff who provided responses that comprise the Data to the Department.

Requirement (a): specifically identifiable

22. In relation to this requirement, the applicant submitted that:²⁶

*The QLD Dept. Ed. has previously detailed their routine practise of ensuring confidentiality [Footnote: Results where there were fewer than five respondents and results where total agreement is reported and there were fewer than three respondents are withheld]. As in OIC decision regarding **Star News** [Footnote: Application of the breach of confidence exemption to workplace survey documents was discussed in Star News Group Pty Ltd and Southern Downs Regional Council [2019] QICmr 39 (12 September 2019)], individual employees cannot be identified from the school level summaries of the SOS, nor can information be attributed to any specific employee. Ass. Inf Comm Rickard refers to the questions as being specific, and not to the individual plaintiff being able to identify (& prove) their specific response.*

23. More recently, in response to requirement (a), the applicant submitted:²⁷

Officer Rickard hypothesized if one respondent out of a cohort of $n \geq 5$ recalled their own response with certainty then they may be able to infer the responses of the other >4 respondents if the data is subsequently withheld via the rule as above. However, n refers to voluntary anonymous respondents (not to all staff) i.e. it is not possible for the hypothetical plaintiff to know with certainty the identity of all of the other anonymous respondents as this survey was not compulsory. Even if the hypothetical plaintiff could achieve the impossible and know with certainty exactly which staff members had or had not filled in a voluntary anonymous survey, a basic excel function on the requested data (currently with the OIC) will reveal if there are indeed any questions to which 100% of responses are identical (and not merely the aggregated 'mostly yes', 'mostly no' or N/A).

24. In terms of the applicant's reliance on *Star News Group Pty Ltd and Southern Downs Regional Council [2019] QICmr 39 (12 September 2019) (**Star News**)* to dispute the application of requirement (a), I note that that decision did not consider requirement (a), as the decision-maker was satisfied that other requirements (namely (b), (c) and (d)) were not established.²⁸

25. The Department does, as the applicant notes, have a policy regarding data collected in the School Opinion Survey, so that certain types of data are withheld from reporting in certain circumstances where the person responding to the survey could be identified.²⁹ I discuss whether this is effective in relation to the Seven Questions at paragraphs 79 to 91 below – however, this is not relevant to the consideration of requirement (a).

²⁶ Letter from the applicant to OIC dated 14 June 2021. Underlined and bold text is applicant's emphasis.

²⁷ Letter from the applicant to OIC 20 October 2021. Underlined text is applicant's emphasis.

²⁸ *Star News* at [31]. In any event, the circumstances of this review are distinguishable from the *Star News* decision because:

- the survey was conducted by a third party in that decision, whereas it was conducted by the Department in this matter
- the information in issue in that decision was a report to Council by the third party about the results of the survey, which did not include the records of its interviews and meetings with Council's employees (*Star News* at [28]), whereas the information in issue in this matter is the raw data; and
- that decision concerned general assurances of confidentiality (again, *Star News* at [28]), whereas the Data with which this decision is concerned relates to Seven Questions about sensitive matters for which specific assurances were given by the Department, and the vast majority of the other survey data has been released to the applicant.

²⁹ As noted at footnote 3 and paragraph 16 above.

26. The applicant's submissions suggest that, in order to establish requirement (a), *certain individuals* should be specifically identifiable. However, case law concerning equitable obligations of confidence provides that it is the *information* that is said to be the subject of the obligation that must be capable of being specifically identified.³⁰
27. The Data has been provided to OIC in the form of an Excel spreadsheet. It is clearly identifiable as it comprises the responses to seven specific questions over two specified years (2018-2019). While there is information on the Department's website summarising the results of the 2018 and 2019 surveys, it does not provide the level of detail in the spreadsheet that was provided to OIC – ie. answers to the Seven Questions on a school-by-school basis. Therefore, I consider that the Data is specifically identifiable as information that is secret, rather than generally available, and requirement (a) is satisfied.

Requirement (b): quality of confidence

28. Information will not have the necessary quality of confidence if it is generally available³¹ or trivial information.³²
29. In relation to this requirement, the applicant submitted that:³³

While not trivial, the information requested does not involve commercial secrets, private secrets or Aboriginal and Torres Strait Islander cultural secrets. This information is in the "public domain" having been published on the QLD Ed Dept. website in 2017, is provided to the relevant regional offices, and to the individual schools [Footnote: From letter received 8th June 2021 Ass. Inf Comm Rickard wrote that the data is "provided to the relevant regional office for each of the schools, and ...to the relevant school".].

30. As noted by the applicant, the Department has confirmed that the Data 'is only provided to the relevant regional office for each of the schools, and is not publicly or internally released, except to the relevant school if required'.³⁴ I do not consider that the provision of the Data to individual schools on request, or to the regions under the condition they are prevented from publicly or internally releasing the data,³⁵ equates to it being 'generally available'. I am not aware of any public access to the answers to the Seven Questions across the State, except for the aggregated data that is available on the Department's website, which is entirely different to the level of detail disclosed in the Data.
31. I agree with the applicant that the Data does not involve commercial secrets, private secrets or Aboriginal and Torres Strait Islander cultural secrets, however, it is not necessary that the Data comprise such information in order to satisfy requirement (b). The nature of the Seven Questions demonstrates that the Data is sensitive; it is the personal opinions of staff members on the conduct and integrity of their superiors and their personal experiences of bullying and sexual harassment. This is important information concerning serious issues and is not of a trivial nature. In these circumstances, I consider that the Data has the necessary quality of confidence and requirement (b) is met.

³⁰ *Smith Kline* at 87: '... the plaintiff must be able to identify with specificity, and not merely in global terms, that which is said to be the **information in question**' [my emphasis]; *Corrs Pavey Whiting & Byrne v Collector of Customs* (1987) 14 FCR 434 per Gummow J at [443]; *Retractable Technologies Inc v Occupational & Medical Innovations Ltd* (2007) 72 IPR 58 at 90.

³¹ *TSO08G and Department of Health* (Unreported, Queensland Information Commissioner, 13 December 2011) at [20], adopting the reasoning of *B and BNRHA* at [43].

³² *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 48.

³³ Letter from the applicant to OIC dated 14 June 2021.

³⁴ Letter from the Department to OIC dated 9 October 2020.

³⁵ Letter from the Department to OIC dated 25 March 2020.

Requirement (c): circumstances importing obligation of confidence

32. Assessing whether requirement (c) is satisfied requires an evaluation of all relevant circumstances surrounding the communication of the Data, so as to determine whether the Department *'should be fixed with an enforceable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it'*.³⁶
33. In *B and BNRHA*, the Information Commissioner stated that, when considering this requirement:³⁷
- ...the fundamental inquiry is aimed at determining, on an evaluation of the whole of the relevant circumstances in which confidential information was imparted to the defendant, whether the defendant's conscience ought to be bound with an equitable obligation of confidence. The relevant circumstances will include (but are not limited to) the nature of the relationship between the parties, the nature and sensitivity of the information, and circumstances relating to its communication...*
34. Therefore, the relevant question is whether, when considering all of the circumstances under which the Data was collected, the Department is bound in conscience by an obligation to the staff to treat the Data confidentially.
35. The nature of the relationship between the Department and school staff is one of employer and employee, in which there is a natural power imbalance. Asking school staff to disclose sensitive information about the conduct and integrity of their colleagues and superiors requires the trust and confidence of the staff about the way in which the information will be used.
36. I have viewed the information that was provided to staff when completing the 2018 and 2019 surveys. For the 2018 survey, each of the Seven Questions is marked with an asterisk stating that they will be *'publicly reported at a state level only'*.³⁸ Similarly, for the 2019 survey, five of the Seven Questions are so marked.³⁹ In both surveys, there is also a general statement that *'Participation in the survey is anonymous and all the information that you provide will be treated confidentially.'*⁴⁰
37. Further, the Department's website provides that:⁴¹

Will feedback remain confidential?

Your responses will be strictly confidential and the information is used in ways which protect individual responses. All responses are protected by the Information Privacy Act 2009 (Qld). The department is legally bound to ensure that no identifying information is published or released. ...

Why does the survey ask for personal information?

³⁶ *B and BNRHA* at [76] and *Ramsay* at [82].

³⁷ At [84], citing the Full Court of the Federal Court of Australia in *Smith Kline and French Laboratories (Aust) Limited & Ors v Secretary, Department of Community Services and Health* (1991) 28 FCR 291 at pp 302-4. See also *Ramsay* at [79].

³⁸ 2018 and 2019 School Opinion Survey forms attached to the Department's submissions to OIC dated 11 December 2020 and 5 November 2021.

³⁹ The following questions were not marked with an asterisk in 2019: *'In my school, the leadership team is of high quality.'* and *'The school leadership team model the behaviours expected of all employees.'*

⁴⁰ 2018 and 2019 School Opinion Survey forms attached to the Department's submissions to OIC dated 11 December 2020 and 5 November 2021.

⁴¹ < <https://qed.qld.gov.au/publications/reports/statistics/schooling/schools/schoolopinionsurvey/faqs> >. The entirety of quoted information was on the Department's website in 2018 and 2019, according to a check of the 'Wayback Machine' website (involving entering the aforementioned URL at < <http://web.archive.org/> > and clicking on all calendar dates on which the URL was 'crawled' throughout those years. It is noted that admissibility of archived webpages recorded by the 'Wayback Machine' to provide evidence as to the state of a webpage at a particular point in time will depend on the circumstances (see *Dyno Nobel Inc v Orica Explosives Technology Pty Ltd (No 2)* [2019] FCA 1552 at [17] cf. *Harcourts WA Pty Ltd v Roy Weston Nominees Pty Ltd (No 4)* [2016] FCA 138 at [171]). It is considered that section 95(1)(c) of the RTI Act enables my reference to the archived webpages in the present circumstances.

The survey collects general background information to analyse the survey results in different ways, such as differences in responses between groups, like teaching and non-teaching school staff or students in different year levels. Strict confidentiality rules are applied to any reporting of these groups, so that even in very small schools, confidentiality is maintained. Data is not reported if an individual's responses can be identified.

...

Where is the survey data stored?

All survey responses are treated confidentially and stored securely. As part of the department's adherence to record keeping requirements:

- **paper forms** are archived and stored for a period of five years before they are securely destroyed
- **online responses** are stored securely on departmental servers with access restricted to a small number of central office staff.

38. The Department also provided OIC with evidence of an agreement with Queensland Teachers' Union (QTU) which states in relation to the SOS responses:⁴²

- State-level summary published to DoE website; **no school-level data is published...**
- Regions will not publicly or internally make available data relating to the seven SOS questions (unless that school-specific data is requested by the school).

39. In relation to requirement (c), the applicant submitted that:⁴³

Agreements between QLD Dept Ed. & QLD Teacher's Union do not factor into consideration. The QLD Ed Dept allege assurances were provided stating the SOS will be 'publicly reported at a state level only'. This requires consideration of to whom the obligation of confidentiality applies, what information it applies to; and whether it has exceptions or permits any use, disclosure, or publication of material derived from the workplace surveys. [Footnote: <https://www.oic.qld.gov.au/guidelines/for-government/access-and-amendment/decisionmaking/access-applications-for-workplace-surveys>]

40. QTU is the union which represents 'more than 47,000 teachers in the Queensland Government's primary schools, secondary schools, special schools, colleges, TAFE institutes and other educational facilities' and represents more than 90% of all teachers, principals and administrators.⁴⁴ The hypothetical plaintiffs in this matter are the Department's school staff, therefore the views of QTU are representative of a large proportion of the hypothetical plaintiffs. On this basis, I do not accept the applicant's submission that an agreement between the Department and QTU is irrelevant; rather, it is a key consideration in determining whether an obligation of confidence arises.

41. In relation to the applicant's concerns about the specificity of the commitment that the Data would be 'publicly reported at a state level only', I have outlined above⁴⁵ that this was a term connected by asterisk specifically to the Seven Questions, and the Seven Questions only, in the surveys completed by staff.

42. Public interest considerations also form part of the circumstances relevant to whether the Department ought to be bound by an equitable obligation of confidence.⁴⁶ Having considered the public interest arguments for and against disclosure in detail below,⁴⁷ I reach the conclusion that, on balance, disclosure of the Data would be contrary to the public interest. Similarly, insofar as the public interest is relevant to my considerations

⁴² Department's submission dated 11 December 2020, which attached an email from QTU to the Department dated 18 December 2018. Bold is my emphasis.

⁴³ Letter from the applicant to OIC dated 14 June 2021.

⁴⁴ < <https://www.qtu.asn.au/about-us> >.

⁴⁵ At paragraph 36.

⁴⁶ Ramsay at [82].

⁴⁷ Beginning at paragraph 65.

regarding requirement (c), I am satisfied that the public interest does not weigh against an equitable obligation of confidence arising.

43. Both the Department and the staff would have been generally aware of the possibility of information release under the RTI Act, and I have taken this into consideration in determining whether the Department is bound in conscience to keep the Data confidential. If there were fewer, or no, assurances given to keep the information confidential, the existence of the possibility of release under the RTI Act would factor more heavily in my consideration of the Department's equitable obligation. However, I do not consider that a general understanding about possible release of information under the RTI Act outweighs the multiple specific express assurances were made as to the restricted publication of the Data.
44. Taking into consideration all of the above circumstances, I consider that the multiple specific express assurances given by the Department outweigh the other circumstances in which the Data was collected so that the Department received the Data in circumstances which import an obligation of confidence that answers to the Seven Questions would not be publicly released in disaggregated form. Therefore, requirement (c) is met.

Requirement (d): actual or threatened misuse

45. In relation to this requirement, the applicant submitted that:⁴⁸

Disclosure of summaries of workplace satisfaction surveys should be used to draw attention to (and improve upon) the working conditions of teachers at the school level.

46. I agree with the applicant's statement, and I have outlined the significant public interest in releasing this type of information at paragraph 73 below. However, this is not relevant to my assessment of whether disclosure of the Data to the applicant would constitute an actual or threatened misuse of the confidential information. In circumstances where the staff were given multiple specific express assurances that the information would only be publicly released at a State level, release to the applicant under the RTI Act would be inconsistent and therefore, a misuse of the Data.⁴⁹ Accordingly, I consider that the fourth requirement of an action for breach of confidence is satisfied.

Detriment

47. Historically, the Information Commissioner has identified a fifth cumulative element – (e) disclosure must cause detriment to the plaintiff.⁵⁰ Members of the Queensland Civil and Administrative Tribunal have indicated that they favour the position that this fifth element should *not* be included in considerations regarding equitable obligations of confidence.⁵¹ Their comments have, to date, comprised *obiter*, and are therefore highly persuasive, but not strictly binding on OIC. Further, their comments were made in the context of non-government entities, whereas in this decision, the hypothetical plaintiffs are staff of the Department. In these circumstances, and also noting that the decisions in question cite with approval a High Court decision often quoted in the context of considering detriment to the plaintiff,⁵² I have, for sake of completeness, included below brief consideration of

⁴⁸ Letter from the applicant to OIC dated 14 June 2021.

⁴⁹ *Seager v Copydex Ltd* [1967] 1 WLR 923.

⁵⁰ *B and BNRHA* at [57]-[58].

⁵¹ *Ramsay* at [94]-[96], *Screen Qld* at [37]-[39], *Adani Mining Pty Ltd v Office of the Information Commissioner & Ors* [2020] QCATA 52 at [12], and *NBN Co* at [28] and [35]-[36].

⁵² That is, *The Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 51, cited in *Ramsay* at [75], *Screen Qld* at [40] and *NBN Co* at [37] and [45]-[51].

the element of detriment to the hypothetical plaintiffs in the circumstances of this review – that is certain staff of the Department.

48. The applicant submitted that:⁵³

There is no evidence that the disclosure of the school level summaries of SOS caused (in 2017 when previously published) or can cause detriment to an individual respondent.

49. While I do not have specific evidence that the release of this information in 2017 caused detriment, I consider this may be inferred from the submission made by the Department that QTU raised concerns about the 2017 iterations of the Seven Questions being made publicly available⁵⁴ and evidence of discussions between QTU and the Department in 2018 about terms under which the responses to the Seven Questions would be provided by staff in future. I also observe that it was after the publishing of this information that the Department made the changes to its website to remove disaggregated information and provide State level reporting only.
50. The staff provided information to their employer about sensitive issues relating to their colleagues and superiors on the understanding that it would not be publicly disclosed, except at a State level. I consider that releasing the Data despite multiple express assurances that it would not be publicly released would result in a loss of trust and cause staff stress. I am therefore satisfied that disclosure of the Data would cause detriment to the hypothetical plaintiffs in this matter.

Deliberative process exception

51. Schedule 3, section 8(2) of the RTI Act provides that *deliberative process information* is not exempt information under section 8(1) unless it consists of information communicated by an entity other than *a person in the capacity of* (amongst others) *an officer of an agency*. The effect of this exception is that intra-agency and inter-agency communications of deliberative process matter cannot qualify for exemption under section 8 of schedule 3.⁵⁵

- ***‘a person in the capacity of an officer of an agency’***

52. The definition of ‘officer’ includes ‘*a person employed by or for the agency*’.⁵⁶ Therefore, I consider that the school staff who provided the Data are officers of the Department.
53. However, I am not satisfied that these staff were necessarily *acting in their capacity as officers of the Department* when voluntarily answering the Seven Questions. In this regard, I note that in *Pemberton and The University of Queensland*,⁵⁷ the Information Commissioner observed in relation to the equivalent provision in the now repealed FOI Act:⁵⁸

The words of s.46(2)(a)(iii) raise an issue of some importance in this case. The phrase "a person in the capacity of ... an officer of an agency" was clearly, in my opinion, intended to distinguish acts done by a person who is an officer of an agency (as that word is defined in s.8 of the FOI Act), in his or her capacity as such an officer (i.e. acts done for and on behalf of the

⁵³ Letter from the applicant to OIC dated 14 June 2021.

⁵⁴ Letter from the Department to OIC dated 25 March 2020.

⁵⁵ *Sandy and Brisbane City Council* (Unreported, Queensland Information Commissioner, 18 September 2009) at [33] and *Cairns Port Authority and Department of Lands; Cairns Shelf Co No. 16 Pty Ltd (Third Party)* (1994) 1 QAR 663 at [41] which considered the equivalent provision of the *Freedom of Information Act 1992* (Qld) (**FOI Act**).

⁵⁶ Subsection (d) in the definition of ‘officer’ in schedule 5 of the RTI Act.

⁵⁷ (1994) 2 QAR 293 (*Pemberton*).

⁵⁸ At [71].

person's employing agency, in the course of performing his or her duties of office) from acts done by the person in other capacities, e.g. in a purely private or personal capacity.

54. In *Pemberton*, the Information Commissioner found that staff members who were required to provide referee reports as part of their duties did so in their capacity as officers of the university:⁵⁹

... for certain kinds of promotional procedures in place at the University, Heads of Department, Deans and Pro-Vice-Chancellors are required, as part of their duties of office, to provide reports or comments on the suitability for promotion of aspiring members of academic staff of the organisational units for which they have responsibility.

55. However, other staff members who provided referee reports on a voluntary basis were found *not* to be acting in their capacity as officers of the university:⁶⁰

*... the evidence makes it clear that an officer of the University approached to act as referee in respect of the teaching experience, ability and performance of a candidate for promotion is not obliged to so act. The relevant guidelines state that the willingness of the nominated person to act as referee must be ascertained in advance. Certainly it does not appear to have been part of the duties of office of staff of the University (other than Heads of Department), to provide referee reports of this nature. **While the issue is not free from doubt, I think the better view is that documents 2 and 14 were provided on a voluntary basis by individuals considered to be of sufficient eminence in the academic community to act as referee of the teaching experience, ability and performance of a colleague, rather than in their capacity as officers of the University.***

56. I also note that, when considering the balance of the public interest – a separate ground for refusal under the RTI Act⁶¹ – there is a distinction made between ‘routine personal work information’ and ‘non-routine personal information’. These terms are not defined in the RTI Act, but have been used to explain the difference between information that is related to the routine day-to-day work duties and responsibilities of public sector employees, and information of a more sensitive nature that encroaches on, or entirely relates to, an employee’s personal sphere.⁶² Routine personal work information is more likely to be released, whereas non-routine personal information requires more careful consideration. This distinction is in my view helpful in determining whether the Data was provided by staff in their official capacity.

57. Clearly, the Department should not have the benefit of an equitable protection of confidence for internal deliberations among its own staff regarding routine day-to-day work duties and responsibilities. However school staff have voluntarily responded to the School Opinion Survey. The voluntary provision of personal opinions – particularly those about the integrity and behaviour of superiors, as well as personal experiences of bullying and sexual harassment in the workplace – is not, in my view, part of the staff members’ duties, or their ‘routine personal work information’. Accordingly, consistent with the abovementioned reasoning in *Pemberton* and distinction between routine personal work information and non-routine personal information, I do not consider that the Data was provided by these staff acting ‘*in the capacity of ... an officer of an agency*’.

⁵⁹ At [72]. In contrast, in *ALE & RBA and Central Queensland University; W (Third Party)* (Unreported, Queensland Information Commissioner, 20 January 1997) the Information Commissioner found that memoranda written by two staff members criticising another staff member were written in their capacities as officers of the university, and therefore the deliberative process exception applied.

⁶⁰ At [83]. Bold is my emphasis.

⁶¹ Sections 47(3)(b) and 49 of the RTI Act.

⁶² *Kiepe and The University of Queensland* (Information Commissioner of Queensland, 1 August 2012) at [19]; *Tol and The University of Queensland* [2015] QICmr 4 (18 February 2015) at [23]; *G46 and Queensland Police Service (No. 2)* [2020] QICmr 73 (7 December 2020) at [44].

- **‘deliberative process information’**

58. ‘Deliberative process information’ is information disclosing:⁶³

- (a) *an opinion, advice or recommendation that has been obtained, prepared or recorded; or*
- (b) *a consultation or deliberation that has taken place;*

in the course of, or for the purposes of, the deliberative processes involved in the functions of government.

59. Deliberative processes are the government’s ‘*thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.*’⁶⁴

60. The applicant submitted that:⁶⁵

Clarification may be sought by reviewing previous rulings on this matter, Eccleston [Footnote: Eccleston and Department of Family Services and Aboriginal and Islander Affairs (1993) 1 QAR 60 (Eccleston) at [28]-[30], citing with approval the definition given in Re Waterford and Department of Treasury (No.2) (1984) 5 ALD 588 at 606. While Eccleston concerns section 41(1)(a) of the repealed FOI Act, it remains relevant to the public interest test under section 49 and provides useful analysis of the wording still used in schedule 4, part 4, item 4 of the RTI Act.] “while the term “deliberative processes” encompasses the policy forming processes of an agency, it extends to cover deliberation for the purposes of any decision-making function of an agency. It does not, however, cover the purely procedural or administrative functions of an agency.” “The s.41 exemption is not intended to protect the “raw data” or evidentiary material upon which decisions are made.” “Staff responses to workplace surveys will rarely, if ever, be routine personal work information, as they fall outside staff members’ day to day routine duties”, [Footnote: www.oic.qld.gov.au/guidelines/for-government/access-and-amendment/decision-making/accessapplications-for-workplace-surveys] hence do not merely record the procedural or administrative functions of an agency.

61. I have considered previous decisions addressing the interpretation of deliberative process information defined in almost exactly the same words in schedule 4, part 4, section 4 of the RTI Act. As the applicant has mentioned, raw data does not generally fall within the kinds of documents that have previously been found to constitute deliberative process information, such as:⁶⁶

- evaluations of competing tender submissions⁶⁷
- information prepared during consultations undertaken by the Treasurer in deliberating on, and evaluating matters in relation to, proposed mining projections,⁶⁸ and
- advice from an external party in relation to the possible development of public land.⁶⁹

62. While I am satisfied that the Data is comprised of opinions, I am not satisfied that these opinions were obtained in the course of, or for the purposes of, the government’s deliberate processes. The Data generated by the SOS process is simply raw data; it is

⁶³ Schedule 3, section 8(3) of the RTI Act.

⁶⁴ *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at [28]-[30] citing with approval the definition given in *Re Waterford and Department of Treasury (No.2)* (1984) 5 ALD 588 at [606].

⁶⁵ Letter from the applicant to OIC dated 14 June 2021.

⁶⁶ In *Swiatek and The University of Southern Queensland* [2017] QICmr 57 (8 December 2017) ‘individual marks awarded to 121 students in two assignments in a particular subject’ was not considered to be deliberative process information at [41].

⁶⁷ *Rylsey Enterprises Pty Ltd and Cassowary Coast Regional Council* [2015] QICmr 13 (12 May 2015) at [39].

⁶⁸ *North Queensland Conservation Council Incorporated and Queensland Treasury* [2016] QICmr 9 (29 February 2016) at [51].

⁶⁹ *Frecklington, MP and Department of Transport and Main Roads* [2020] QICmr 54 (22 September 2020) at [23].

not, of itself, deliberative process material. While the Data may feed into the government's deliberative processes if it raises concerns in a specific year, the SOS process is a broad monitoring exercise that is several steps removed from the deliberative processes of government. Therefore, I do not consider that the Data is deliberative process information.

Conclusion

63. On the basis of the above, I am satisfied that:

- all requirements necessary to establish an equitable obligation of confidence are satisfied and therefore disclosure of the Data would found an action for breach of confidence
- the Data was not provided by school staff in their capacity as officers of the Department and is not deliberative process information, and therefore the deliberative process exception in schedule 3, section 8(2) does not apply; and
- accordingly, access to the Data may be refused on the ground that it is exempt information.⁷⁰

64. As noted in *Pemberton*,⁷¹ however, a finding that the Data was *not* provided by school staff in their capacity as officers of the Department is not free from doubt. Given this, and in the event my conclusion that the Data is *not* deliberative process information is incorrect – in which case the deliberative process exception in schedule 3, section 8(2) would apply and the Data could not be refused under the breach of confidence exemption – I have alternatively considered below whether disclosure of the Data would, on balance, be contrary to the public interest.

Public interest balancing test

Relevant law

65. Access to a document may be refused to the extent the document comprises information the disclosure of which would, on balance, be contrary to the public interest.⁷² The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest and explains that a decision maker must take the following steps in deciding the public interest:⁷³

- identify any irrelevant factors and disregard them
- identify any relevant public interest factors favouring disclosure and nondisclosure
- balance the relevant factors favouring disclosure and nondisclosure; and
- decide whether disclosure would, on balance, be contrary to the public interest.

Findings

66. The applicant has indicated that she considers the Department has been attempting to refuse access to the information without just cause.⁷⁴ The applicant submits that all four of the following irrelevant factors should be disregarded.⁷⁵

⁷⁰ Section 47(3)(a) and schedule 3, section 8(1) of the RTI Act.

⁷¹ As quoted at paragraph 55 above.

⁷² Section 47(3)(b) of the RTI Act.

⁷³ Section 49(3) of the RTI Act.

⁷⁴ Applicant's submissions to OIC dated 23 April 2020 and 2 November 2020.

⁷⁵ Letter from the applicant to OIC dated 14 June 2021.

- 1 *Disclosure of the information could reasonably be expected to cause embarrassment to the Government or to cause a loss of confidence in the Government.*
 - 2 *Disclosure of the information could reasonably be expected to result in the applicant misinterpreting or misunderstanding the document.*
 - 3 *Disclosure of the information could reasonably be expected to result in mischievous conduct by the applicant.*
 - 4 *The person who created the document containing the information was or is of high seniority within the agency.*
67. The public interest balancing test provides that the decision maker must disregard any irrelevant factors.⁷⁶
68. In terms of the first irrelevant factor, I do not consider that releasing the Data could reasonably be expected to cause a loss of confidence in the Government as most reasonable people would expect any workplace as large as Queensland's entire State schooling to have some staff record experiences of bullying / sexual harassment or criticism of leadership. To the extent that disclosing any information about these issues could reasonably be expected to cause embarrassment to the Government, I have disregarded this as irrelevant.
69. In terms of the second and third irrelevant factors, the applicant's communications throughout the review have displayed a sophisticated and comprehensive understanding of the School Opinion Survey, statistical considerations and ways in which the Data may be sensibly be used. On this basis, I hold no concerns about the applicant misunderstanding or misusing the Data and do not consider that these irrelevant factors arise in this review. Further, the document does not appear to have been created by a person of high seniority within the Department. Given this, I do not consider that the fourth irrelevant factor arises either. Even if these factors had arisen in the circumstances of this review, I would be obliged to disregard them.⁷⁷
70. For sake of completeness, I confirm that I have not taken into account any irrelevant factors⁷⁸ in making this decision.

Factors favouring disclosure

Accountability and transparency

71. The applicant raised the public interest favouring disclosure of information where it could reasonably be expected to:⁷⁹
- enhance the Government's accountability⁸⁰
 - contribute to positive and informed debate on important issues or matters of serious interest⁸¹
 - inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by the Government in its dealings with members of the community⁸²

⁷⁶ Section 49(3)(d) of the RTI Act.

⁷⁷ Section 49(3)(d) of the RTI Act.

⁷⁸ Noting that, given the wording of section 49(3)(a) of the RTI Act, the irrelevant factors listed in schedule 4, part 1 of the RTI Act are non-exhaustive.

⁷⁹ Letter from the applicant to OIC dated 14 June 2021.

⁸⁰ Schedule 4, part 2, item 1 of the RTI Act.

⁸¹ Schedule 4, part 2, item 2 of the RTI Act.

⁸² Schedule 4, part 2, item 3 of the RTI Act.

- allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official⁸³
- reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct;⁸⁴ and
- advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies.⁸⁵

72. The applicant contends that *'there are generally strong and compelling public interest arguments favouring disclosure.'*⁸⁶ She also submits that in the last year of publicly released disaggregated data, *'in some locations 1 in 4 respondents answered that they had witnessed or been subjected to bullying or harassment... The inference that the [Department] or indeed any government agency is cognisant of how victims feel about their abuse and thus evidence or material which could be used to prevent future abuse should be concealed, is quite shocking'*.⁸⁷
73. A comprehensive snapshot of the views of staff about the integrity of their leadership teams and issues of bullying and sexual harassment in the workplace responsible for educating the State's children is important information and this weighs heavily in favour of release. These are serious issues that would have a significant impact on the functioning of the schools and the workplace health and safety of staff. Releasing the Data would further the public interest in relation to all of the above outlined factors specified in the RTI Act. The Department has discharged its obligation of accountability to an extent by releasing the data for the Seven Questions aggregated at a State level, as noted at paragraph 6 above, and releasing analysis of the data by school type⁸⁸ and demographic.⁸⁹
74. Despite this publicly available information, I would still attribute significant weight to the factors listed at paragraph 71, as the Data reveals a level of detail which would allow the public to analyse the issues at a school-by-school level.
75. I have considered whether any other public interest factors favouring disclosure apply, including those listed in schedule 4, part 2 of the RTI Act. I cannot identify any other public interest consideration favouring disclosure of the Data that would carry weight in these circumstances.

Factors favouring nondisclosure

Personal information and privacy of other individuals

76. There is a public interest favouring nondisclosure of information where it could reasonably be expected to prejudice the protection of an individual's right to privacy.⁹⁰ The RTI Act also recognises that a public interest harm will occur where personal information is disclosed.⁹¹
77. 'Personal information' is:⁹²

⁸³ Schedule 4, part 2, item 5 of the RTI Act.

⁸⁴ Schedule 4, part 2, item 6 of the RTI Act.

⁸⁵ Schedule 4, part 2, item 10 of the RTI Act.

⁸⁶ Letter from the applicant to OIC dated 14 June 2021.

⁸⁷ Letter from the applicant to OIC dated 20 October 2021. Underlined text is applicant's own.

⁸⁸ Namely, Primary, Secondary, P-10/P-12, SDE/EU/SP and Special.

⁸⁹ Namely, Male, Female, Other Gender, Indigenous and Non-Indigenous.

⁹⁰ Schedule 4, part 3, item 3 of the RTI Act, raised in the Department's submissions dated 25 March, 9 October and 11 December 2020.

⁹¹ Schedule 4, part 4, section 6(1) of the RTI Act, raised in the Department's submissions dated 25 March, 9 October and 11 December 2020.

⁹² Schedule 5 of the RTI Act and section 12 of the *Information Privacy Act 2009* (Qld).

... 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.

78. The Department submitted:⁹³

The Queensland Teacher's Union (QTU) raised concerns about the sensitive nature of these questions and communicated a view that this data should not be made publicly available. Consequently, the Department came to an in-principle agreement with QTU whereby it agreed that it would not publicly release the data for these seven questions. The data is only provided to the relevant regional office for each of the schools, and is not publicly or internally released, except to the relevant school if required.

As advised in my previous letter of 25 March 2020, the four questions relating to the leadership team will most often be about one person, the Principal, or a very small group of identifiable staff members in schools with 'leadership teams.' Disclosure of the responses to these four questions could reasonably be expected to prejudice the protection of an individual's right to privacy as it would disclose staff opinions about the performance of either their Principal or a small group of people.

Similarly, the three questions relating to bullying and sexual harassment could in some cases also identify staff members who have been victim to bullying and/or sexual harassment. This is due to rarity of such incidences resulting in small sample pools of persons indicating they have been subjected to bullying or sexual harassment.

It is well established that often victims of bullying and sexual abuse wish to remain anonymous, whether this be out of embarrassment, fear of retribution or for other personal reasons. Similarly, staff members who have provided negative information about their superior's leadership abilities will likely also not wish to be identified. If the Department were to release the data in issue, staff members may be hesitant to respond honestly, or at all, to the seven questions, if they knew that the Department's position regarding confidentiality had changed, and that the data could be released to members of the public.

79. The assessment of whether the Data comprises personal information depends on the wording of the question being asked in the survey. The four leadership questions are framed in a way that identifies a specific group of people – the leadership team:

In general, thinking back over this school year, to what extent do you agree or disagree with the following statements:

- *The school leadership team operates with a high level of integrity*
- *The school leadership team are willing to act on suggestions to improve how things are done*
- *In my school, the leadership team is of high quality*
- *The school leadership team model the behaviours expected of all employees*

80. The applicant submitted:⁹⁴

The [Department's] claim that 'leadership teams' are 'most often about one person' is grossly inaccurate. In fact, most schools where the respondents were >=5 have more than one member of the leadership team, information found by simple search on the QLD Government website.

81. Despite the submissions of both the Department and the applicant, the size of the leadership team is not relevant to the question of whether the Data is personal

⁹³ Letter from Department to OIC dated 9 October 2020.

⁹⁴ Letter from the applicant to OIC dated 20 October 2021.

information. Regardless of whether the answers to the first four questions are negative or positive, they are opinions about every person in the leadership team of a specific school. I expect that the leadership team would always include the Principal of the school. Therefore, at the very least, the answers to the first four questions are the personal information of the Principal, whose identity is a matter of public knowledge through the Queensland Government's School Directory.⁹⁵ Other members of the leadership team are also likely to be able to be reasonably identifiable from their positions as Deputy Principal, Heads of Department, Heads of Curriculum, Heads of Special Needs, Business Services Manager, etc.⁹⁶

82. If the four questions were worded differently, then the size of the leadership team could possibly be a relevant consideration in determining whether specific individuals are identifiable. However, in this case, given the four questions relate to the leadership team as a whole, the responses relate to every person in that team, and comprise information or opinions about members of leadership teams whose identities can reasonably be ascertained. Accordingly, I am satisfied that the Data relating to the four questions can be categorised as 'personal information'.
83. However, the three remaining bullying/harassment questions are framed more generally than the four leadership questions:

In relation to staff interactions during the past 12 months:

- *Have you witnessed bullying or sexual harassment in the workplace?*
- *Have you been subjected to bullying in the workplace?*
- *Have you been subjected to sexual harassment in the workplace?*

84. These three questions are not framed in a way that results in all responses comprising personal information. However, there are two ways in which the data about the three remaining questions may comprise personal information.

- Firstly, it may be that information known outside of the survey could be combined with the Data for these questions to result in specific answers being reasonably attributable to a specific person. For example, if it was known that a certain staff member had been subject to a complaint, in some circumstances it may be reasonably inferred from the survey data that this complaint concerned bullying or harassment.
- Secondly, staff who completed the survey would know what responses they gave, which may allow for them to work out the answers of other staff members in certain circumstances. For example, if there were five respondents and the Data showed that 20% (ie. one respondent) answered in a certain way, the staff member who answered this way would, when looking at the Data, know that all of the other staff answered differently.

85. In terms of the first way, I have no way to know whether there is other information available that can be joined with the data for the three bullying / harassment questions to result in a person's identity reasonably being ascertained, and therefore cannot determine the extent to which responses to the three questions would enable personal information to be deduced in this manner.

86. In terms of the second way, the applicant submitted:⁹⁷

⁹⁵ < <https://schoolsdirectory.eq.edu.au/> >.

⁹⁶ < <https://alt-qed.qed.qld.gov.au/working-with-us/induction/queensland-state-schools/leadership-team> >.

⁹⁷ Letter from the applicant to OIC dated 20 October 2021. Underlined text is applicant's emphasis.

... it is not possible for the hypothetical plaintiff to know with certainty the identity of all of the other anonymous respondents as this survey was not compulsory. Even if the hypothetical plaintiff could achieve the impossible and know with certainty exactly which staff members had or had not filled in a voluntary anonymous survey, a basic excel function on the requested data (currently with the OIC) will reveal if there are indeed any questions to which 100% of responses are identical (and not merely the aggregated 'mostly yes', 'mostly no' or N/A).

...

The identities and personal information of respondents cannot be discerned from the voluntary anonymous replies of the survey (as explained above) thus privacy factors do not apply.

87. On review, the applicant agreed to rule out any data where all of the respondents gave the same answer to the question, so I am not considering this information.⁹⁸ However, as set out above, I am considering the scenario in which one member of staff gave an answer different to the other members of staff.
88. I accept the applicant's submission that the voluntary nature of the survey is a relevant consideration. The question I am required to consider is whether an individual's identity can *reasonably* be ascertained. While I can well imagine circumstances in which staff would share the fact that they have completed the survey, and that in some limited circumstances this would allow a person's response to reasonably be ascertained, I have no way of knowing with any certainty whether this occurred, and therefore cannot determine the extent to which data regarding the three questions would enable personal information to be deduced as contemplated by the second way noted at paragraph 84 above.
89. Given my conclusions at paragraphs 85 and 88, I cannot make a definitive finding about whether the answers to the last three questions comprise personal information, as doing so would require information to which I do not have access.
90. I have carefully considered the applicant's suggestion that entries identifying specific people be removed.⁹⁹ As discussed in the immediately preceding paragraphs, in relation to the last three questions, while it is possible that the data for the three questions may be personal information, there is no way for me to know where this may be the case. Accordingly, there is no way for me to pinpoint information identifying specific people for removal.
91. In contrast, in relation to the first four questions, *all* of the responses comprise personal information of the people in the leadership team.¹⁰⁰ Here, it is possible to pinpoint information identifying specific people for removal – however, the removal of this information (that is, all responses) would not be an outcome the applicant intends. The sensitivity of this information varies significantly, as there are both positive and negative responses. It is not possible to remove the negative responses, as it would be evident that the schools that were removed had negative responses, and thus the same harm would occur.
92. In conclusion, I consider the factors favouring non-disclosure set out in paragraph 76 are established in relation to the data for the four leadership questions. These factors are of significant weight as they relate to sensitive matters (ie. the integrity, quality and behaviour of identifiable individuals within a leadership team) and disclosure of the data would be in circumstances where express assurances of confidentiality had otherwise

⁹⁸ Letter from the applicant to OIC dated 27 May 2021.

⁹⁹ Applicant's submissions to OIC dated 23 April 2020 and 29 July 2020.

¹⁰⁰ As noted at paragraphs 81 and 82 above.

been given. I am unable to reach a finding about whether the factors are established in relation to the data for the three bullying/harassment questions.

Prejudice deliberative processes

93. The public interest favours nondisclosure of deliberative process information¹⁰¹ in some circumstances. In this regard, the applicant made the submissions noted at paragraph 60 above. She also submitted that:¹⁰²

*Once established as Deliberative Process Information, the school level summaries requested can be assessed (as above) by a **Public Interest Test**.*

Deliberative Process Information that consists of factual and/or statistical material, expert opinion or analysis is excluded from the Public Interest harm factor. When considering whether the deliberative process prejudice factor applies, decision makers should first determine if the deliberative process has concluded and if there is no decision left to be made, the factor will not apply.

94. I do not consider that the deliberative process factors weighing against disclosure arise in the circumstances of this review. In this regard, I refer to my reasons at paragraphs 51 to 62 above and repeat my finding that the Data is not deliberative process information, nor could its release be reasonably expected to prejudice the Department's deliberative processes.

Prejudice the ability to obtain confidential information

95. There is a public interest favouring nondisclosure of information where it could reasonably be expected to prejudice an agency's ability to obtain confidential information (**CI Prejudice Factor**).¹⁰³ The RTI Act also recognises that a public interest harm will occur where information of a confidential nature that was communicated in confidence is disclosed and this disclosure could reasonably be expected to prejudice the future supply of information of this type (**CI Harm Factor**).¹⁰⁴ The same deliberative process exception as set out in paragraph 51 above regarding breach of confidence may apply to the CI Harm Factor.¹⁰⁵

96. The applicant submitted that:¹⁰⁶

Confidential prejudice factor and confidential harm factor both require the information to be of a confidential nature, i.e., "the information is attributable to specific people, have the necessary quality of confidence, and, for the Confidential Harm Factor, an understanding of confidence must attach to it. [Footnote: <https://www.oic.qld.gov.au/guidelines/for-government/access-and-amendment/decisionmaking/access-applications-for-workplace-surveys>]" "Even if the information's confidential nature can be established, both factors have an additional requirement—that its disclosure could reasonably be expected to prejudice the future supply of either confidential information or information of the kind in question. [Footnote: <https://www.oic.qld.gov.au/guidelines/for-government/access-and-amendment/decisionmaking/access-applications-for-workplace-surveys>]"

¹⁰¹ Schedule 4, part 3, item 20 and part 4, section 5 of the RTI Act.

¹⁰² Letter from the applicant to OIC dated 14 June 2021. Footnotes omitted; bold text is applicant's own.

¹⁰³ Schedule 4, part 3, item 16 of the RTI Act, raised in the Department's submissions dated 25 March, 9 October and 11 December 2020.

¹⁰⁴ Schedule 4, part 4, section 8(1) of the RTI Act.

¹⁰⁵ Schedule 4, part 4, section 8(2) of the RTI Act

¹⁰⁶ Letter from the applicant to OIC dated 14 June 2021.

97. The Department submitted that ‘staff members may be hesitant to respond honestly to survey questions if the results of these particular questions were to be released’¹⁰⁷ and:¹⁰⁸

As a consequence of staff members not responding (or not responding honestly) to the seven questions of concern, the integrity of the survey would be compromised, and in turn this would prejudice the research of the Department. The Department submits that to act in any way that could reasonably discourage the provision of information concerning leadership, bullying and sexual harassment would cause significant public interest harm.

98. While the CI Prejudice Factor simply requires consideration of whether disclosure could reasonably be expected to prejudice the agency’s ability to obtain confidential information, the CI Harm Factor will only arise if:

- the information consists of information of a confidential nature
- the information was communicated in confidence; and
- its disclosure could reasonably be expected to prejudice the future supply of such information.

99. I am satisfied that the Data consists of information of a confidential nature and was communicated in confidence for the reasons set out at paragraphs 28 to 44 above. If the Data was released despite multiple specific express assurances given by the Department that it would not, in circumstances where the content of the questions is sensitive, where concerns about release had already been raised by QTU, and where participation in the survey is voluntary, I consider that this would prejudice the willingness of staff to participate in the survey in future because the staff would not trust the information to be treated in the way that was promised. In terms of the deliberative process exception to the CI Harm Factor, I repeat and rely on my reasons at paragraphs 51 to 62 above.

100. Therefore, I find that both the CI Prejudice Factor and the CI Harm Factor apply in favour of nondisclosure of the Data and I attribute these factors significant weight for the same reason I attribute the factors favouring disclosure significant weight, ie. the Data concerns serious issues that would have a significant impact on the functioning of the workplace responsible for educating the State’s children and the workplace health and safety of staff, and therefore any prejudice to the collection or accuracy of this Data would be detrimental.

Management function

101. There is a public interest favouring nondisclosure of information where disclosure could reasonably be expected to prejudice the management function of an agency or the conduct of industrial relations by an agency.¹⁰⁹

102. The applicant submitted that:¹¹⁰

“Where information cannot be linked to identifiable staff members it will be harder to satisfy these factors; even if satisfied, they will likely attract only a low weight. [Footnote: <https://www.oic.qld.gov.au/guidelines/for-government/access-and-amendment/decisionmaking/access-applications-for-workplace-surveys>]”

¹⁰⁷ Department’s submission dated 25 March 2020.

¹⁰⁸ Letter from Department to OIC dated 9 October 2020.

¹⁰⁹ Schedule 4, part 3, item 19 of the RTI Act.

¹¹⁰ Letter from the applicant to OIC dated 14 June 2021.

For example, in the case of Star News [Footnote omitted], the “Commissioner:

• noted that, although agency staff may have expressed concerns about disclosure, the workplace survey information in question could not be attributed to any specific staff member; and

• found that any impact on the agency’s employment relationship would not be significant, nor adversely impact Council’s service delivery [Footnote omitted]”

“The Commissioner considered that, although these factors did apply to the information, little weight could be afforded to them” [Footnote omitted].

103. As set out in paragraph 99, releasing the responses to sensitive questions where the Department has expressly promised otherwise, is likely to result in staff mistrust.¹¹¹ I consider mistrust will arise even if specific people are not identified from the staff answers because of the assurances that were given specifically in relation to the Seven Questions. If the staff do not trust what they are being told by their superiors, this will prejudice the employee-employer relationship and make management of the staff, and industrial relations, more difficult. Also, if the staff do not provide accurate data for concerns about leadership, bullying and harassment, it will make it more difficult for the Department to identify and deal with these issues as part of its management function, and this will lead to a deterioration in workplace conditions which will prejudice the employee-employer relationship. Therefore, this factor favouring non-disclosure is established and should be afforded significant weight because of the serious content of the responses to the Seven Questions and the importance of safe and productive working relationships in the system responsible for educating the State’s children.

Balancing the public interest

104. I have taken into account the pro-disclosure bias in deciding access to documents under the RTI Act and note that this is the starting point when considering the balance of the public interest.¹¹² The Data is very important information concerning the quality and integrity of leadership in the State school system and experiences of bullying and sexual harassment in the workplace. This remains of significant public interest even though the data has been released in aggregated form categorised by school type and demographic.
105. The circumstances of collection of the Data are a key consideration in my assessment of the potential outcome of disclosure. Once the Data was collected under those conditions, they have a lasting effect on the way in which the Data should be treated. If the Data was collected in different circumstances, it may have been in the public interest to release. However, the Data was collected in conditions where multiple specific express assurances were given by the Department to staff that no school level data would be published and answers to the Seven Questions would be publicly reported at a State level only.
106. On this basis, I am satisfied that disclosure would cause significant detriment to:
- employee-employer relationships
 - staff management
 - information gathering; and
 - identifying and resolving leadership, bullying and harassment concerns that affect the workplace health and safety of staff responsible for caring for, and educating, the State’s children, and in turn, affect the proper functioning of the State’s schools.

¹¹¹ The circumstances of this review are distinguishable from the *Star News* decision for the reasons noted at footnote 28 above.

¹¹² Section 44(1) of the RTI Act.

107. Even if the answers to the three questions concerning bullying and harassment do not comprise personal information, I remain satisfied that the harms listed above weigh heavily against disclosure. Where the Data comprises personal information of the leadership team, the balance weighs even more heavily against disclosure.
108. There are six factors favouring disclosure and five factors favouring nondisclosure in this review. As set out above, I consider all of the factors favouring disclosure and nondisclosure deserve significant weight. However, the balancing process is not a strictly mathematical exercise. The public interests served by the six pro-disclosure factors in this review overlap to a large extent. They largely address considerations of Government accountability including, importantly, identification of deficiencies in conduct and treatment. The factors favouring nondisclosure are more varied and serve the public interest in protecting privacy, ensuring the flow of important information to Government and preventing damage to employer-employee relationships. I consider that these factors favouring non-disclosure have a broader impact and are of more concern in the context of this review. For this reason, even taking into consideration the pro-disclosure bias, I consider that the factors favouring nondisclosure slightly outweigh the factors favouring disclosure. In other words, I am satisfied that there is more public interest harm that will occur by way of disclosure of the Data than public interest that would be served by disclosure. Accordingly, I find that access to the Data may be refused on the ground that its disclosure would, on balance, be contrary to the public interest.¹¹³

DECISION

109. I vary¹¹⁴ the Department's decision and find that:

- the Data is exempt information under schedule 3, section 8(1) of the RTI Act and therefore, access to it may be refused under section 47(3)(a) of the RTI Act;
- in the alternative, disclosure of the Data would, on balance, be contrary to the public interest and access to it may be refused under section 47(3)(b) of the RTI Act.

110. I have made this decision under section 110 of the RTI Act as a delegate of the Information Commissioner, under section 145 of the RTI Act.

A Rickard
Acting Right to Information Commissioner

Date: 2 December 2021

¹¹³ Sections 47(3)(b) and 49 of the RTI Act.

¹¹⁴ Noting that, as Council did not make a decision within the timeframe set out in the RTI Act, Council is deemed to have made a decision refusing access to all relevant documents.

APPENDIX

Significant procedural steps

Date	Event
2 February 2020	OIC received the application for external review.
6 February 2020	OIC wrote to the applicant acknowledging receipt of her external review application.
7 February 2020	OIC wrote to the Department requesting preliminary information.
14 February 2020	The Department provided the preliminary information.
11 March 2020	OIC telephoned the Department to discuss the scope of the application and what responsive documents may exist. OIC wrote to the applicant to advise that the external review application had been accepted. OIC wrote to the Department to request a copy of the information in issue.
25 March 2020	The Department provided a submission to OIC that processing the application would substantially and unreasonably divert its resources.
9 April 2020	OIC wrote to the applicant to ask if she wished to proceed with her review in the circumstances.
23 April 2020	The applicant wrote to OIC confirming that she wished to proceed and providing further information.
27 April 2020	The applicant wrote to OIC confirming she wished to proceed.
27 July 2020	The applicant wrote to OIC requesting an update and providing further information.
29 July 2020	OIC wrote to the applicant regarding the scope of her application. The applicant wrote to OIC proposing a narrowed scope.
15 September 2020	OIC wrote to the Department regarding the applicant's narrowed scope and requested further submissions from the Department. OIC provided the applicant with an update.
6 October 2020	The Department requested an extension.
7 October 2020	OIC agreed to the Department's request for an extension.
9 October 2020	The Department provided a submission to OIC confirming it no longer considered that processing the application would substantially and unreasonably divert its resources; however it submitted that certain information may be refused.
23 October 2020	OIC attempted to contact the applicant by phone.
25 October 2020	The applicant wrote to OIC advising of her preference for contact in writing.
30 October 2020	OIC erroneously sent letters finalising the external review.
2 November 2020	OIC contacted the parties to confirm that the external review had not been finalised. The applicant wrote to OIC raising concerns about the delay and requesting an update.

Date	Event
3 November 2020	OIC wrote to the applicant to provide an update.
4 November 2020	OIC wrote to the Department requesting a copy of the information in issue and a submission addressing the grounds for refusal raised by it.
2 December 2020	The Department requested an extension. OIC agreed to the Department's request for an extension.
4 December 2020	The Department requested a further extension. OIC agreed to the Department's further request for an extension.
11 December 2020	The Department provided a submission to OIC.
15 December 2020	OIC telephoned the Department to request further information. The Department wrote to OIC confirming that it would provide a copy of the information in issue.
16 December 2020	OIC wrote to the applicant to provide an update.
7 January 2021	OIC wrote to the Department requesting a copy of the information in issue and confirming that, given the decision under review was a deemed decision, application and processing fees were not payable.
14 January 2021	The Department requested an extension.
15 January 2021	OIC agreed to the Department's request for an extension.
29 January 2021	The Department provided OIC with a copy of the information in issue.
17 March 2021	The applicant wrote to OIC raising concerns about the delay and requesting an update.
22 March 2021	OIC telephoned the Department to obtain further information about the information in issue.
16 April 2021	OIC telephoned the Department to request release of part of the information in issue.
21 April 2021	The Department advised that it would take two weeks to prepare part of the information in issue for release.
30 April 2021	OIC wrote to the applicant to explain the delays and confirm that the majority of the information in issue would soon be released. OIC wrote to the Department to request release of the majority of the information in issue.
27 May 2021	The applicant confirmed she wanted to proceed with the external review in relation to the remaining information in issue and accepted the Department's application of its pre-existing deidentification policy.
8 June 2021	OIC wrote to the applicant to provide a preliminary view that access to the remaining information in issue may be refused as it is exempt on the basis it would found an action for breach of confidence.
14 June 2021	The applicant provided a submission to OIC.
21 July 2021	The applicant wrote to OIC raising concerns about the delay and requesting an update.
23 July 2021	OIC provided the applicant with an update.

Date	Event
20 August 2021	OIC telephoned the Department to provide an update by telephone.
27 August 2021	OIC telephoned the Department to request staff numbers for various schools.
	The Department provided the requested information concerning staff numbers.
	OIC provided the applicant with an update.
7 September 2021	OIC telephoned the Department to query the rules for 'Data Withheld'.
8 September 2021	The Department emailed OIC clarifying the rules for 'Data Withheld'.
17 September 2021	The Department emailed OIC clarifying the rules for 'Data Withheld'.
5 October 2021	OIC telephoned the Department to clarify the rules for 'Data Withheld'.
15 October 2021	OIC conveyed a preliminary view to the applicant that in addition to being exempt, disclosure of the remaining information in issue would, on balance, be contrary to the public interest.
20 October 2021	The applicant provided a submission to OIC.
22 October 2021	OIC emailed the Department requesting clarification about some aspects of the 2018 and 2019 surveys.
5 November 2021	The Department provided the requested information concerning aspects of the 2018 and 2019 surveys