



Decision and Reasons for Decision

Citation:	<i>Hart MP and Queensland Building and Construction Commission [2022] QICmr 7 (18 February 2022)</i>
Application Number:	316254
Applicant:	Mr Michael Hart MP
Respondent:	Queensland Building and Construction Commission
Decision Date:	18 February 2022
Catchwords:	<p>ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION – INFORMATION DISCLOSURE OF WHICH WOULD BE CONTEMPT OF COURT OR PARLIAMENT – Parliamentary briefing documents – comments about Parliamentary briefing document – whether disclosure of information would infringe the privileges of Parliament – whether access may be refused under sections 47(3)(a) and 48 and schedule 3, section 6(c)(i) of the <i>Right to Information Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW – RIGHT TO INFORMATION – SUFFICIENCY OF AGENCY SEARCHES – REFUSAL OF ACCESS – DOCUMENTS NONEXISTENT OR UNLOCATABLE – whether agency has taken all reasonable steps to identify and locate documents applied for by applicant – external review function under section 130(2) of the <i>Right to Information Act 2009</i> (Qld) – whether access to further documents may be refused on the basis they are nonexistent or unlocatable – sections 47(3)(e) and 52(1) of the <i>Right to Information Act 2009</i> (Qld)</p>

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Queensland Building and Construction Commission (**QBCC**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to ‘correspondence, diary events, and minutes of meetings between the QBCC and Minister De Brenni and/or Director-General Housing and Public Works’ concerning or containing several keywords including ‘*Kirra Vista*’ for the period September to December 2019.
2. QBCC located 255 pages. QBCC decided² to release a number of pages (in whole or part), and refuse access to others (in whole or part), on the grounds the latter comprised exempt information,³ namely information subject to legal professional privilege⁴ or public disclosure

¹ Application dated 16 February 2021.

² Decision dated 16 July 2021.

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

⁴ Schedule 3, section 7 of the RTI Act.

of which would infringe the privileges of Parliament,⁵ or information the disclosure of which would, on balance, be contrary to the public interest.⁶

3. The applicant applied⁷ to the Office of the Information Commissioner (**OIC**) for external review of QBCC's decision, insofar as it refused access to information on the grounds of legal professional and Parliamentary privilege.⁸ The applicant also queried the adequacy of QBCC searches for relevant documents.
4. QBCC located additional documents during OIC's external review, parts of which were released to the applicant. Further, the applicant did not press his challenge to QBCC's decision insofar as it refused access to information on the basis of legal professional privilege.⁹
5. The applicant continues, however, to contest the application of Parliamentary privilege to certain pages (or parts), and the sufficiency of QBCC's search efforts.
6. For reasons that follow, I am satisfied that the information remaining in issue is information the public disclosure of which would infringe the privileges of Parliament. I am therefore satisfied that this information is exempt information and access to it may be refused. I therefore vary the Department's decision, in terms stated in paragraph 33.
7. I am also satisfied that QBCC has undertaken all reasonable search efforts.

Background

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

Reviewable decision

9. The decision under review is QBCC's decision dated 16 July 2021.

Evidence considered

10. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and Appendix).
11. In making this decision I have had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.¹⁰ I consider that in observing and applying the law prescribed in the RTI Act, an RTI decision-maker will be '*respecting, and acting compatibly with*' this right and others prescribed in the HR Act,¹¹ and that I have done so in making this decision, as required under section 58(1) of the HR Act. In this regard, I note Bell J's observations on the interaction between the Victorian analogues of Queensland's RTI Act and HR Act: '*it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act*'.¹²

⁵ Schedule 3, section 6(1)(c)(i) of the RTI Act.

⁶ Sections 47(3)(b) and 49 of the RTI Act.

⁷ Application dated 10 August 2021.

⁸ The applicant did not seek review of QBCC's decision to refuse access to contrary to public interest information under section 47(3)(b) of the RTI Act; that information is not in issue.

⁹ As confirmed in OIC's letters dated 18 November 2021 and 19 January 2022.

¹⁰ As embodied in section 21(2) of the HR Act.

¹¹ *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

¹² *XYZ* at [573].

Information in issue

12. The '**Information in Issue**' discussed in this decision comprises the following 47 pages (adopting QBCC's file names and numbering, where relevant):
- Kirra Vista File 1, pages 23-25, 32-36, 41-43, 48-50
 - Kirra Vista File 2, page 22 (part page)
 - Kirra Vista File 3, pages 5-7
 - Kirra Vista File 4, pages 4-8, 13-15, 20-22
 - ECM Ministerial pages 15 (part page), 39-41, 43 (part page), 48-52, 57-59, 64-66; and
 - a two page Parliamentary brief located by QBCC during OIC's external review.¹³

Issues for determination

13. The issues for determination in this review are whether:
- the Information in Issue comprises exempt information, namely information the public disclosure of which would infringe the privileges of Parliament; and
 - whether QBCC has taken all reasonable steps to locate information relevant to the access application (such that access to further documents may be refused, on the ground that any documents are nonexistent or unlocatable).¹⁴

Parliamentary privilege

14. Agencies such as QBCC may refuse access to information requested under the RTI Act to the extent the information comprises 'exempt information'.¹⁵ Types of exempt information are prescribed in schedule 3 of the RTI Act,¹⁶ and include information, if its public disclosure would infringe the privileges of Parliament (**Parliamentary Privilege Exemption**).¹⁷
15. A detailed analysis of the Parliamentary Privilege Exemption is set out in OIC's decision in *Waratah Coal Pty Ltd and Department of State Development, Infrastructure and Planning*.¹⁸ Essentially, for information to be exempt under this provision, it must be the case that:
- the information was prepared for the purposes of, or incidental to, the transacting of business of the Parliament; and
 - public disclosure of the information would hinder, impede or impair the making of similar communications in the future for the purpose of transacting the business of the Parliament.
16. Having examined the Information in Issue, I am satisfied that:
- all pages¹⁹ to which QBCC refused access under schedule 3, section 6(c)(i) of the RTI Act in the decision under review; and
 - the additional two page Parliamentary brief located during OIC's external review,
- comprise Parliamentary briefing documents; and are therefore clearly documents prepared for the purposes of or incidental to the transacting of Parliamentary business.²⁰

¹³ A copy of which was supplied to OIC by QBCC on 4 November 2021.

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

¹⁵ Section 47(3)(a) of the RTI Act.

¹⁶ Section 48(4) of the RTI Act.

¹⁷ Schedule 3, section 6(c)(i) of the RTI Act.

¹⁸ (Unreported, Queensland Information Commissioner, 10 December 2012) (*Waratah Coal*).

¹⁹ Being all pages listed in paragraph 12, apart from Kirra Vista File 2, page 22 (part page) and duplicates at ECM Ministerial pages 15 (part page) and 43 (part page) – these are discussed in paragraph 17.

²⁰ Satisfying the first of the two requirements noted in paragraph 15.

17. The remaining Information in Issue comprises a segment of information on Kirra Vista File 2 page 22 (duplicated across ECM Ministerial pages 15 and 43), which QBCC decided was subject to legal professional privilege. As was explained to the applicant during the review,²¹ having objectively assessed this segment of information, I am satisfied that it comprises text in an email commenting about a Parliamentary briefing document, and was therefore prepared for purposes incidental to the transacting of the business of Parliament.
18. Consistently with *Waratah Coal* – and several decisions from other jurisdictions in which courts and tribunals have found that release of similar Parliamentary briefing materials²² would infringe Parliamentary privilege²³ – I am further satisfied that public disclosure of the Information in Issue would hinder, impede or impair the preparation or assembly of documentary information for future debates and proceedings in the Parliament. As the NSW Supreme Court has found, in considering a request for disclosure of analogous Commonwealth Parliament briefing documents:²⁴

...production of these documents would "impeach"... "proceedings in Parliament"... It seems to me necessarily true, and not dependent upon the evidence of the particular case, that if briefings and draft briefings to Parliamentarians for Question Time and other Parliamentary debate are amenable to subpoenas and other orders for production, the Commonwealth officers whose task it is to prepare those documents will be impeded in their preparation, by the knowledge that the documents may be used in legal proceedings and for investigatory purposes that might well affect the quality of information available to Parliament.

19. OIC conveyed the substance of the reasoning at paragraphs 14-18 by letters dated 28 September 2021 and 18 November 2021. In an email dated 23 November 2021, the applicant submitted that OIC should:

...consider in the wider context of Parliamentary Privilege that generally Members of Parliament are not restricted from sharing information with other Members of Parliament but that information would only breach Parliamentary Privilege if it was shared outside of Members of Parliament and the intent of Parliamentary Privilege wasn't to prevent Members of Parliament from accessing information but instead to prevent the public leaking of sensitive information.

20. As we advised the applicant by letter dated 19 January 2022, release under the RTI Act is unconditional: disclosure of the information in issue would, effectively, comprise a release of information ‘...outside of Members of Parliament’. This is because there are no restrictions or limitations on the use which can be made of the disclosed information;²⁵ the release is ‘necessarily unconditional and therefore cannot be controlled’.²⁶ Accordingly, I am satisfied that release of the Information in Issue under the RTI Act would comprise a ‘public disclosure’ contrary to the terms schedule 3, section 6(c)(i) of the RTI Act.

21. By email dated 28 January 2022, the applicant replied:

I also question the QBCC reliance on Parliamentary privilege to not release these PPQ's given I have had PPQ's released to myself directly and to the Opposition, before under RTI. Also ... I accept your point that RTI are released unconditional but that highlights to me there is a problem

²¹ OIC letter dated 28 September 2021.

²² Including drafts.

²³ See *Re OPEL Networks Pty Ltd (in liq)* (2010) 77 NSWLR 128 (**Re OPEL Networks**); *Tziolas v NSW Department of Education and Communities* [2012] NSWADT 69 (**Tziolas**); *Tebbutt v Minister for Lands and Water* [2015] NSWCATAD 95 (12 May 2015) and *Sportsbet Pty Limited v State of New South Wales (No 3)* [2009] FCA 1283 [21], in which equivalent documents in comparable jurisdictions were found to attract Parliamentary privilege.

²⁴ *Re OPEL Networks* at [118] (Austin J).

²⁵ As Judicial Member McGill SC of the Queensland Civil and Administrative Tribunal (**QCAT**) recently observed ‘... the effect of the... [Information Privacy Act 2009 (Qld)] is that, once information has been disclosed, it comes under the control of the person to whom it has been disclosed. There is no provision of that Act which contemplates any restriction or limitation on the use which that person can make of that information, including by way of further dissemination.’: *FLK v Information Commissioner* [2021] QCATA 46 at [17]. These comments are equally applicable to access obtained via the analogous mechanisms of the RTI Act.

²⁶ *Tziolas* at [38].

with the legislation as I am sure the intention of the act was not to limit access to members of parliament via parliamentary privilege.

22. That the applicant may have obtained access to Parliamentary briefing materials analogous to those in issue in this review pursuant to other RTI access applications has no bearing on whether the latter attract exemption under the Parliamentary Privilege Exemption. It may be that the agency fielding any prior RTI access application exercised the discretion conferred on agencies by section 48(3) of the RTI Act to release information, notwithstanding it may otherwise comprise exempt information. The RTI Act expressly denies OIC such discretion under section 105(2) of the RTI Act. It is also possible that the agency may have decided to release such information administratively, rather than via the RTI Act (noting that access via the RTI Act is, as specified in the RTI Act, the access method of last resort).²⁷
23. I can only consider the Information in Issue before me, and the facts and circumstances pertaining to the generation and use of that information. Having done so, I am, for reasons explained above, satisfied that that information attracts Parliamentary privilege.
24. As for the applicant's second submission extracted in paragraph 21 regarding 'a *problem with the legislation*', this is obviously a matter for the legislature, and not a matter I may permissibly take into account on external review: I am obliged to '*...take the Act as it stands...*'.²⁸
25. In these circumstances, I am satisfied that public disclosure of the Information in Issue under the RTI Act would infringe the privileges of Parliament. It therefore comprises exempt information within the meaning of schedule 3, section 6(c)(i) of the RTI Act, to which access may be refused under section 47(3)(a) of the RTI Act.

'Missing' documents and sufficiency of search

26. The Information Commissioner's external review functions include investigating and reviewing whether agencies have taken reasonable steps to identify and locate documents applied for by an applicant.²⁹
27. Additionally, section 47(3)(e) establishes a ground for refusing access to information, where the information is nonexistent or unlocatable.³⁰
28. The applicant submits that QBCC has failed to locate and deal with 'correspondence' concerning matters the subject of his access application. In his email dated 28 January 2022 he submitted:

I consider that there would be correspondence related to any PPQ issued by the QBCC even the email attaching those PPQ would be correspondence so I don't accept the premise that the QBCC has released all correspondence.

29. An applicant raising adequacy or sufficiency of search issues bears a practical onus of demonstrating that the respondent agency has not discharged its search obligations.³¹ The applicant certainly did discharge this onus as regards his initial sufficiency of search

²⁷ Preamble 2 to the RTI Act.

²⁸ *Webb v Information Commissioner* [2021] QCATA 116 at [16] (McGill J).

²⁹ Section 130 of the RTI Act.

³⁰ Within the meaning of section 52 of the RTI Act. For a recent discussion of principles to sufficiency of search and nonexistent document cases, see *V45 and Queensland Police Service* [2021] QICmr 30 (16 June 2021).

³¹ *A51 and Office of the Health Ombudsman* [2020] QICmr 17 (24 March 2020) at [15], citing *Dubois and Rockhampton Regional Council* [2017] QICmr 49 (6 October 2017) at [36].

contentions, ie those flagged in his application for external review. These concerns were then resolved on external review.³²

30. The applicant's submission that there should exist further 'correspondence' as set out in paragraph 28 does not, however, satisfy this practical onus. The only 'correspondence' he has contended ought to exist in QBCC's possession or control – emails attaching Parliamentary briefing materials – have been identified and disclosed to him,³³ as have various other emails.³⁴
31. Beyond that, there is nothing before me to suggest that QBCC should hold any additional 'correspondence'. Further, QBCC has, as we advised the applicant in our letter dated 19 January 2022, conducted comprehensive and appropriately targeted searches, both during initial processing of the applicant's access application and again on external review.³⁵
32. Taking into account both the absence of any probative material pointing to the existence of additional relevant documents, and the totality of searches undertaken by QBCC, I am satisfied that it has taken all reasonable steps to identify and locate documents sought by the applicant. This conclusion fulfils my function under section 130(2) of the RTI Act and justifies my finding that access to further documents may be refused, on the ground that such documents are nonexistent or unlocatable.³⁶

DECISION

33. As noted above, QBCC decided that a segment of the information in issue qualified for exemption under schedule 3, section 7 of the RTI Act, whereas in my view the correct and preferable decision is that this segment attracts Parliamentary privilege, and is thus exempt under schedule 3, section 6(1)(c)(i). Given this, it is appropriate that I vary the decision under review and find that:
 - all Information in Issue³⁷ is exempt information to which access may be refused under section 47(3)(a) of the RTI Act, as information meeting the requirements of section 48 and schedule 3, section 6(c)(i) of the RTI Act; and
 - QBCC has taken all reasonable steps to identify and locate documents relevant to the applicant's RTI access application, and access to further documents may be refused, on the ground that such documents are nonexistent or unlocatable.³⁸
34. I have made this decision under section 110 of the RTI Act, as a delegate of the Information Commissioner, under section 145 of the RTI Act.

A Rickard
Acting Right to Information Commissioner

Date: 18 February 2022

³² The applicant supplying OIC with copies of documents held by him, but which had not been located by QBCC during its processing of the applicant's access application. These (and others) were subsequently located on external review, some of which were then released to the applicant (see OIC's letter to the applicant dated 18 November 2021).

³³ See, for example, the email at Kirra Vista 1, page 22. See also Kirra Vista 1, page 31.

³⁴ Eg, Kirra Vista 1, pages 20-21.

³⁵ The latter across 'many hours' according to QBCC, which advice I have no reason to query: QBCC email dated 4 November 2021.

³⁶ Sections 47(3)(e) and 52 of the RTI Act.

³⁷ Including the information noted at paragraph 17, which QBCC's decision found qualified for exemption under schedule 3, section 7 of the RTI Act.

³⁸ Sections 47(3)(e) and 52 of the RTI Act.

Significant procedural steps

Date	Event
10 August 2021	OIC received the application for external review. OIC notified QBCC that it had received the application for external review and requested preliminary documents from QBCC. OIC received the requested documents from QBCC.
11 August 2021	OIC notified the applicant that it had received the application for external review.
16 August 2021	OIC notified the applicant and QBCC that the application had been accepted and requested the information in issue from QBCC.
1 September 2021	QBCC requested an extension of time to provide the requested information in issue.
7 September 2021	OIC received the information in issue from QBCC.
28 September 2021	OIC conveyed a preliminary view to the applicant. OIC received submissions from the applicant.
5 October 2021	OIC requested information from QBCC.
12 October 2021	OIC received submissions from QBCC.
20 October 2021	OIC asked QBCC to undertake further searches and provide submissions.
4 November 2021	OIC received the requested information from QBCC.
18 November 2021	OIC issued a preliminary view to the applicant, and asked QBCC to arrange for release of certain information to the applicant.
23 November 2021	OIC received further submissions from the applicant contesting OIC's 18 November 2021 preliminary view.
19 January 2022	OIC issued a further preliminary view to the applicant, reiterating OIC's 18 November 2021 view.
28 January 2022	OIC received submissions from the applicant contesting the preliminary view and requesting a formal decision.