



Decision and Reasons for Decision

Citation: *Z83 and Department of Education (Office of Industrial Relations)* [2019] QICmr 55 (5 December 2019)

Application Number: 314636

Applicant: Z83

Respondent: Department of Education (Office of Industrial Relations)

Decision Date: 5 December 2019

Catchwords: **ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION – LEGAL PROFESSIONAL PRIVILEGE** – information relating to an investigation by Workplace Health and Safety Queensland into an incident of asbestos demolition and disposal – whether information would be privileged from production in a legal proceeding on the ground of legal professional privilege – whether exempt information to which access may be refused – sections 47(3)(a) and 48 and schedule 3, section 7 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION – PREJUDICE A PERSON'S FAIR TRIAL OR THE IMPARTIAL ADJUDICATION OF A CASE – objection by third party to disclosure of information – third party challenging decision of Workplace Health and Safety Queensland in legal proceedings – whether disclosure could reasonably be expected to prejudice a person's fair trial or the impartial adjudication of a case – whether exempt information to which access may be refused – sections 47(3)(a) and 48 and schedule 3, section 10(1)(e) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION – INFORMATION GIVEN UNDER COMPULSION UNDER AN ACT THAT ABROGATED PRIVILEGE AGAINST SELF-INCRIMINATION – whether exempt information to which access may be refused – sections 47(3)(a) and 48 and schedule 3, section 10(3) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – CONTRARY TO PUBLIC INTEREST INFORMATION – whether disclosure of information would,

on balance, be contrary to the public interest – sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the Office of Industrial Relations (**OIR**)¹ under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to certain documents associated with an investigation that Workplace Health and Safety Queensland (**WHSQ**) conducted into a complaint that structures containing asbestos had been demolished without proper safety measures being taken, and that the asbestos had not been properly or safely disposed of.
2. After identifying 140 responsive pages, OIR issued the applicant with a Charges Estimate Notice (**CEN**).² The applicant revised the scope of his application upon receipt of the CEN. OIR then issued the applicant with a revised CEN.³ The applicant agreed to pay the revised CEN.⁴
3. By decision dated 10 May 2019, OIR advised the applicant that it had decided to give him full access to one page; partial access to 39 pages; and to refuse access to 100 pages on the grounds that disclosure would, on balance, be contrary to the public interest.
4. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of OIR's decision.⁵ In addition to making submissions in support of the release of responsive documents, the applicant also made various complaints about OIR and its decision-making process.
5. For the reasons set out below, I vary OIR's decision by finding that access to the information in issue may be refused under the RTI Act on the grounds that some information is exempt information, and the disclosure of all information would, on balance, be contrary to the public interest.

Background

6. In 2015, a number of fishing huts situated on private land near Townsville were demolished. The huts contained asbestos. Townsville City Council notified WHSQ that complaints had been made to it about the demolition of the huts and the way in which the asbestos had been handled and disposed of.
7. WHSQ conducted an investigation into the matter during which it carried out site inspections; arranged for waste samples from the demolition site to be laboratory tested; interviewed witnesses; and required documents and information to be provided to it pursuant to notices issued under section 171 of the *Work Health and Safety Act 2011* (Qld) (**WHS Act**).
8. At the conclusion of its investigation, WHSQ decided to issue statutory improvement notices under the WHS Act to two entities involved in the asbestos incident.

¹ OIR is part of the Department of Education.

² 2 April 2019.

³ 30 April 2019.

⁴ 1 May 2019.

⁵ 31 May 2019.

Reviewable decision

9. The decision under review is OIR's decision dated 10 May 2019.

Evidence considered

10. Evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and the appendix).

Information in issue

11. The information in issue comprises documents or parts of documents concerning WHSQ's investigation into the asbestos incident, including the investigation report, witness statements and other information provided by parties involved in the incident, notices to produce issued under the WHS Act, emails and correspondence between the WHSQ investigator and a range of persons and entities, including witnesses and others involved in the incident, and the investigator's handwritten notes of conversations with various parties (**Information in Issue**).

Issues for determination

12. The two issues for determination are:

- whether the Information in Issue is exempt information; and/or
- whether disclosure of the Information in Issue would, on balance, be contrary to the public interest.

Applicant's complaints

Against OIR

13. During the course of the external review, the applicant reiterated complaints he had made about the processing of his application by OIR. He had complained to OIR about what he regarded as the decision-maker's *'evasions and delaying tactics'* and *'secretive and possibly obstructive efforts to deny key items of [his] application...'*⁶ He also complained about the processing charges levied by OIR and the advice by OIR that it would need to consult with various third parties. The applicant advised OIR that he was aware that another party (a consulted third party in this review) had made an application to OIR to access the same documents, and that it was therefore unreasonable for OIR to undertake fresh third party consultations or to charge the applicant for work conducted in processing his application that would already have been undertaken in respect of the other application.⁷

14. The applicant later made a formal complaint to OIR⁸ about OIR's decision-maker to which OIR responded. The applicant raised that complaint again with OIR in October 2019, as well as making wider complaints about the general conduct of the asbestos investigation by WHSQ and *'related conflicts of interest and suspicious obstructions and reversals'* including the reversal by WHSQ of its decision to re-open the investigation after new evidence was provided, and *'how the original two ... investigators suspiciously named in*

⁶ Applicant's email to OIR dated 10 May 2019.

⁷ I note that the applicant agreed to pay the Second Charges Estimate Notice issued by OIR on 30 April 2019 in the amount of \$231.00.

⁸ Dated 31 May 2019.

the ... documents seem to have disappeared on leave, refused to respond to queries and generally became 'unavailable' in relation to these matters'.⁹

15. The applicant then advised OIC in his email dated 25 October 2019 that OIR had indicated to him that his various complaints would be dealt with by OIC as part of the external review process.
16. In terms of any complaints the applicant may have made to OIR about the conduct of the asbestos investigation and the actions of WHSQ or its officers either during or after the investigation, OIC has no jurisdiction in respect of such matters when conducting an external review under the RTI Act. OIC's jurisdiction is limited to reviewing the agency's decision made under the RTI Act about access to documents, and deciding whether that decision should be affirmed, varied or set aside.¹⁰
17. In respect of the various complaints the applicant has made about OIR's decision-making process, I understand that OIR responded to those complaints. With the exception of section 113 of the RTI Act, the Information Commissioner has no jurisdiction to deal with complaints made about agency RTI decision-makers. There is insufficient evidence before me to give rise to grounds for invoking the Information Commissioner's disciplinary powers under section 113 of the RTI Act. I would simply observe that I do not consider it is unreasonable for an agency to undertake a fresh round of third party consultations about the same documents when the identity of the access applicant is different. A third party's views about disclosure may differ depending on the identity of the applicant. So, too, it is not unreasonable to expect that additional work may be required by an agency to consider, mark up or otherwise deal with the responsive documents for a second time, depending on the views of the third party about release (or part release) of the documents to the particular applicant, and any other relevant considerations that the agency identifies at the time of giving its decision.

Against OIC

18. Upon commencement of the external review, OIR advised OIC that the applicant had not paid the processing charge he agreed to pay on 1 May 2019. As such, he had not been given access to the small amount of information that OIR had decided to release.
19. By letter dated 15 August 2019, I advised the applicant that if he did not pay the processing charge, as issue arose as to the utility of proceeding with the external review. This was because even if I were to decide at the conclusion of the external review process that further information should be released to him, OIR would be entitled to refuse to release that information to him without payment of the processing charge, and there would therefore be no practical purpose served in conducting the review.
20. In a telephone call on 19 August 2019 and a subsequent email to OIC on 20 August 2019, the applicant complained about having to pay processing charge for a decision by OIR that *'wholly or partly redacted 51 out of 52 documents'* and again raised issues about OIR *'double-dipping'* in charging him for processing an application that it had already processed for another applicant. He stated that he *'was happy to commit \$231 for any successful application to get accessible versions of the documents requested'* but was *'not enthusiastic about a late tight ultimatum to pay the OIR for documents of no value in their present format'*. He complained about my handling of this issue and subsequent interactions with him about payment of the charge. He accused me of not appreciating

⁹ Submission dated 25 October 2019.

¹⁰ Section 110 of the RTI Act.

the gravity of the background to his application, and raised what he considered to be a strong public interest in release of the documents.

21. The applicant paid the processing charge to OIR on 21 August 2019 under protest.
22. I acknowledge the applicant's evident frustration. However, payment of a processing charge is no guarantee of the release of the documents by an agency deciding the application, or on external review. Section 56 of the RTI Act provides that a processing charge is payable to an agency in connection with the work undertaken by the agency in searching for or retrieving responsive documents, and in making, or doing things related to making, a decision on the application. Section 60(1) of the RTI Act provides that before an applicant is given access to documents, the applicant must pay the applicable processing charge and access charge. Section 60(2) provides that an applicant must pay the applicable processing charge even if access to the documents is refused. Section 86 provides that a decision about the amount of a charge in a CEN is not a decision that is reviewable by the Information Commissioner on external review.
23. The applicant agreed to pay the processing charge to OIR but did not do so upon receiving OIR's decision. I do not consider it was unreasonable to ask him to consider payment to OIR on commencement of the external review. Firstly, the RTI Act provides that OIR is entitled to be paid for the work it undertook in processing the access application. Secondly, OIC's resources are limited and it is required to deal with and decide a large volume of external review applications, all competing for priority attention. In ensuring a fair allocation of those limited resources, it is relevant to consider whether a review has any practical utility, and, where it does not, to then consider whether the discretion in section 94 of the RTI Act to decide not to deal with a review should be exercised.

Third party consultation

24. When processing the access application, OIR advised the applicant that it would be necessary under section 37 of the RTI Act to consult with a number of third parties referred to in the Information in Issue to determine whether or not they objected to disclosure to the applicant of the information that concerned them. The applicant objected to this process as he anticipated that some third parties would object to disclosure so as to avoid scrutiny, and he considered the strong public interest in disclosure should override any objection that third parties might have to disclosure. OIR eventually decided not to undertake any third party consultations, but refused access to the bulk of the Information in Issue on various grounds.
25. On external review, I advised the applicant that third party consultation was necessary under section 37 and section 89 of the RTI Act as there was a considerable number of third parties referred to in the Information in Issue and I considered that disclosure of the Information in Issue could reasonably be expected to be of concern to them.
26. The third party consultation process commenced and two responses were received from third parties.¹¹ Neither applied to become a participant in the review under section 89(2) of the RTI Act, but both objected to disclosure of the Information in Issue. In summary, both considered that disclosure of the Information in Issue could reasonably be expected to have a prejudicial effect on their business/commercial affairs. In addition, the lawyers for one third party advised that their client objected to disclosure because they had commenced proceedings in the Queensland Industrial Relations Commission (**QIRC**) in which they were seeking review of the decision of WHSQ to issue a statutory

¹¹ Dated 30 September 2019 and 9 October 2019.

improvement notice. The third party's lawyers argued that disclosure of the Information in Issue, when those legal proceedings had not been finalised, would have various prejudicial effects on their clients.

Relevant law

Exempt information

27. The RTI Act gives a right of access to documents of government agencies.¹² This right is subject to other provisions of the RTI Act, including grounds on which access may be refused. Access may be refused to information to the extent the information comprises 'exempt information'.¹³
28. Based on the information provided by OIR and consulted third parties during the course of the review,¹⁴ the relevant exemption grounds that arise for consideration are:
- schedule 3, section 7 of the RTI Act – information is exempt information if it would be privileged from production in a legal proceeding on the ground of legal professional privilege
 - schedule 3, section 10(1)(e) of the RTI Act – information is exempt information if its disclosure could reasonably be expected to prejudice a person's fair trial or the impartial adjudication of a case; and
 - schedule 3, section 10(3) of the RTI Act – information is exempt information if it consists of information given in the course of an investigation of a contravention or possible contravention of the law, and the information was given under compulsion under an Act that abrogated the privilege against self-incrimination.

Contrary to the public interest information

29. A further ground on which access to information may be refused under the RTI Act is where disclosure of the information would, on balance, be contrary to the public interest¹⁵ within the meaning of section 47(3)(b) and section 49 of the RTI Act. Non-exhaustive lists of public interest factors weighing both for and against disclosure of information are contained in schedule 4 to the RTI Act.
30. The steps a decision-maker must take in considering the application of the public interest balancing test to particular information are as follows:¹⁶
- identify any irrelevant public interest factors and disregard them
 - identify relevant public interest factors favouring disclosure and nondisclosure
 - balance the relevant factors; and
 - decide whether disclosure of the information in issue would, on balance, be contrary to the public interest.
31. In his submissions,¹⁷ the applicant did not specifically identify public interest factors listed in schedule 4 of the RTI Act in favour of disclosure of the Information in Issue. I have therefore considered the possible application of all public interest factors favouring

¹² Section 23 of the RTI Act.

¹³ Section 47(3)(a) of the RTI Act.

¹⁴ OIR submission dated 4 October 2019 and emails from consulted third parties dated 30 September 2019 and 9 October 2019.

¹⁵ The words '*public interest*' refer to considerations affecting the good order and functioning of the community and government affairs for the wellbeing of citizens. This means that, in general, a public interest is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests.

¹⁶ Section 49(3) of the RTI Act.

¹⁷ Dated 31 May 2019, 20 August 2019 and 25 October 2019.

disclosure contained in schedule 4, part 2 of the RTI Act. Following that consideration, and having careful regard to the information provided by the applicant, I have identified the following factors as having possible application to the Information in Issue:

- a) schedule 4, part 1, item 1 – disclosure could reasonably be expected to promote open discussion of public affairs and enhance the Government’s accountability
- b) schedule 4, part 2, item 2 – disclosure could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest
- c) schedule 4, part 2, item 3 – disclosure could reasonably be expected to inform the community of the Government’s operations
- d) schedule 4, part 2, item 5 – disclosure could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official
- e) schedule 4, part 2, item 6 – disclosure could reasonably be expected to reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct
- f) schedule 4, part 2, item 10 – disclosure could reasonably be expected to advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies
- g) schedule 4, part 2, item 11 – disclosure could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision
- h) schedule 4, part 2, item 13 – disclosure could reasonably be expected to contribute to protection of the environment
- i) schedule 4, part 2, item 14 – disclosure could reasonably be expected to reveal environmental or health risks or measures relating to public health and safety; and
- j) schedule 4, part 2, items 16 and 17 – disclosure could reasonably be expected to contribute to the administration of justice generally, including procedural fairness, as well as to the administration of justice for a person.

32. Based on OIR’s decision and submission, and the responses by the consulted third parties, the following nondisclosure factors arise for consideration:

- a) schedule 4, part 3, item 2 – disclosure could reasonably be expected to prejudice the private, business, professional, commercial affairs or financial affairs of entities
- b) schedule 4, part 3, item 3 – disclosure could reasonably be expected to prejudice the protection of the right to privacy of individuals involved in WHSQ’s investigation
- c) schedule 4, part 3, item 6 – disclosure could reasonably be expected to prejudice the fair treatment of individuals and the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct;
- d) schedule 4, part 3, items 8 and 9 – disclosure could reasonably be expected to impede the administration of justice generally, as well as the administration of justice for a person; and
- e) schedule 4, part 3, item 15 – disclosure could reasonably be expected to prejudice the business affairs of a person.

33. In regard to the application of schedule 4, part 4 of the RTI Act – factors favouring nondisclosure in the public interest because of a public interest harm in disclosure – the following factors (**Harm Factors**) arise for consideration:

- f) schedule 4, part 4, section 6 – disclosure could reasonably be expected to cause a public interest harm if disclosure would disclose personal information of a person, whether living or dead; and
- g) schedule 4, part 4, section 7(1)(c) – disclosure could reasonably be expected to cause a public interest harm because it would disclose information concerning the business or commercial affairs of a person and could reasonably be expected to have an adverse effect on those affairs.

Submissions

Applicant

34. The relevant central points raised by the applicant in his submissions in support of release of the Information in Issue are summarised as follows:
- a) WHSQ's investigation resulted in a miscarriage of justice, with a third party falsely and unfairly blamed for the asbestos incident
 - b) disclosure of the Information in Issue would ensure that that third party receives a fair hearing and is afforded natural justice
 - c) disclosure of the Information in Issue would allow public scrutiny of the investigation, the reasons why certain decisions were taken and/or reversed
 - d) disclosure of the Information in Issue would allow public scrutiny of the involvement of particular parties in the asbestos incident whom the applicant considers have previously engaged in illegal and corrupt conduct
 - e) parties responsible for the asbestos incident have not been held accountable
 - f) parties involved in the investigation provided false or misleading information to the investigator
 - g) disclosure of the Information in Issue will *'demonstrate and confirm that serious crime and corruption activities have taken place that must be investigated further'*,¹⁸
 - h) WHSQ failed to take appropriate action in respect of the asbestos incident with the result that no action has taken place to remedy the contamination of beaches and tidal flats;
 - i) WHSQ failed to re-open its investigation upon the presentation of new evidence; and
 - j) the refusal to grant access to information is part of *'wider efforts of obstruction and cover-up which seem to reliably indicate serious public interest concerns about related illegality and corruption activities'*.¹⁹
35. In support of his argument that there was a strong public interest in release of the Information in Issue so as to allow public scrutiny of the investigation, the applicant raised community concerns about the incident and the conduct of particular parties, and provided excerpts from posts made on a community residents/ratepayers' Facebook page, to which he had contributed, which discussed the asbestos incident, the parties involved, and related matters. I note that in his submissions, and on the Facebook posts that he provided, an extraordinary range of claims and allegations are made about other, unrelated business dealings of an entity and its local agent that were involved in the asbestos incident. He accuses this entity of having a *'notorious reputation for crime and corruption allegations, as well as human rights abuses and destructive impacts upon local communities wherever they go'*.²⁰ He alleges that government agencies are in collusion with these parties in relation to various 'secret deals' and that there is a strong

¹⁸ Submission dated 25 October 2019.

¹⁹ Submission dated 25 October 2019.

²⁰ Submission dated 20 August 2019.

public interest in disclosure of the Information in Issue to expose these secret deals and the related fraudulent and malicious conduct. The applicant also submits that interactions between these parties and members of his family about an unrelated matter, which he alleges involved extortions attempts and an *'ongoing intimidation campaign'*, should be taken into account in finding that the public interest weighs in favour of disclosure of the Information in Issue.

36. I do not consider that any of these submissions or allegations made by the applicant concerning unrelated incidents and business dealings by parties involved in the asbestos incident are relevant to my consideration of the application of the public interest balancing test to the Information in Issue in this review. Firstly, the allegations are contained in Facebook posts made by the applicant and are unsubstantiated. But in any event, my role as decision-maker under the RTI Act in applying the public interest balancing test is to assess whether disclosure of the specific information that is in issue before me would, on balance, be contrary to the public interest. In making that assessment, it is not appropriate to take account of submissions by the applicant that disclosure would generally be in the public interest because he alleges that parties involved in the asbestos incident have a history of engaging in separate instances of illegal or corrupt conduct. The Information in Issue relates to the asbestos incident only, and I must consider the application of the public interest balancing test to that information. Its disclosure would neither prove nor disprove any of the other allegations the applicant has made about separate matters.
37. The applicant also made general submissions about the current campaign being run by various media outlets (*'Your Right to Know'*) and associated public concern about what some regard as the increasing lack of accountability of government agencies. He stated:²¹

I hope you bear this in mind when ensuring that as a matter of public interest (a) I am able to get the whole 51 documents unredacted sometime soon (even if it is after the OIR [sic] external hearing for [a third party]), (b) that the OIR are held to account about how the redacted documents were just one aspect of how they seem to have tried to evade or obstruct my original RTI application, and (c) that the OIR should not use this OIC external review as some kind of excuse for ignoring not only related but other complaints about their wilful failures to properly investigate in the first place, to reverse a decision to re-open the investigation, and to generally appear to have colluded with the Townsville Council as well as [a third party] to cover up what seems to be a serious case involving extensive illegality and corruption.

38. I am, of course, aware of the current media campaign to which the applicant refers. I also acknowledge the pro-disclosure bias in the RTI Act. However, it is important to remember that section 44(1) of the RTI Act provides that it is Parliament's intention that an agency should decide to give access to a document *'unless giving access would, on balance, be contrary to the public interest'*. Where an agency and third parties raise objections to the release of documents on public interest grounds, regardless of media campaigns about government accountability and the pro-disclosure bias in the RTI Act, the Information Commissioner's role on external review is to fairly and independently consider the documents and the arguments both for and against disclosure, and to apply the provisions of the RTI Act in deciding whether or not giving access to the documents would, on balance, be contrary to the public interest.
39. Some of the applicant's submissions concerned one of the consulted third parties and the application made by that party to OIR under the RTI Act to access the same documents as the applicant. The applicant discussed the history of the third party's legal

²¹ Submission dated 25 October 2019.

representation and, according to the applicant, apparent inconsistencies in the current position taken by the third party in objecting to disclosure of information to the applicant in this review. The applicant appears to consider that this is part of a wider conspiracy to withhold information from him. I do not consider that those submissions are relevant to the issues for determination in this review and I take no account of them. The third party is legally represented and has made submissions to me in support of his position in this review. He objects to disclosure of the Information in Issue to the applicant. It is not open to, nor appropriate for, me to question, on the basis of the applicant's suspicions, the position taken by the third party in objecting to disclosure, his reasons or motivation for taking that position, or the advice given to him by his legal representatives.

Third Parties

40. In a brief email to OIC dated 30 September 2019, one consulted third party responded as follows:

I do not wish for the information to be given to [the applicant] My reason being that some of this information could be misconstrued by the general public as [the applicant] is a blogger on numerous sites and could end up having a detrimental effect on my business I believe [a third party] is to be facing court this month and any Rumours or Wrong information would not be beneficial to his case for a fair trial.

41. The lawyers for the second consulted third party responded to OIC's consultation letter as follows:²²

The basis for our client's objection is that the investigation by WHSQ into the ... asbestos incident is an ongoing matter currently under external review before the Queensland Industrial Relations Commission. [Our client] is challenging the reasonableness of a decision of the relevant WHSQ investigator to issue a notice to our client in respect of certain remediation work.

Were those documents to be released ... to another third party, our client considers that there is a risk that, within the meaning of section 48(9) [sic] and schedule 4 (part 3) of the RTI Act:

- *disclosure of the information would reasonably be expected to prejudice the business and commercial affairs of our client, given the full circumstances of the relevant events may not be borne out of the relevant documents and the decision arrived at by the relevant investigator may yet be determined by the QIRC. If the documents are released, there may be unnecessary and avoidable (and, to an extent, irreversible) reputational damage to our clients and their commercial interests;*
- *disclosure of the information would reasonably be expected to prejudice the fair treatment of our clients, given the information relates to, in part, allegations of improper conduct which, as set out above, are under review at the instigation of our clients.*

Our clients concerns as set out above are exacerbated by their concern that the applicant ... may, if the information is released to him as sought, be at risk of publicising and disseminating any such documents very widely, as he has been previously known to do.

OIR

42. In its decision, OIR refused access to the Information in Issue on the grounds that its disclosure would, on balance, be contrary to the public interest. During the course of the external review, OIR also argued that the Information in issue, or parts of it, comprised

²² 9 October 2019.

exempt information under schedule 3, section 7 and schedule 3, section 10(3) of the RTI Act.²³

Discussion

Exempt information – application of schedule 3, section 7 of the RTI Act

43. Information is exempt information under schedule 3, section 7 of the RTI Act if it satisfies the common law test for attracting legal professional privilege (**LPP**). At common law, LPP attaches to confidential communications between a client and their lawyer, made for the dominant purpose of giving or obtaining legal advice or the provision of legal services.²⁴ When these requirements are met, LPP is established. Qualifications and exceptions to LPP²⁵ may, in particular circumstances, affect the question of whether information attracts or remains subject to it.
44. OIR submitted that pages 27 to 30 of the WHSQ report are subject to LPP. I note that each of these pages are marked as being for the consideration by the Workplace Health and Safety Prosecution Services Unit and subject to legal professional privilege. They contain a summary of prosecution action conclusions for the consideration of the Prosecution Services Unit.
45. OIR submitted that:

The relationship between Work Health and Safety and the Office of Industrial Relations and the Office of the Work Health and Safety Prosecutor is that of client and legal advisor.

Work Health and Safety are the regulator for asbestos removal and licensing. Where a reportable event merits an investigation, this section of the investigation report contains information where inspectors make an assessment whether or not the matter will be referred to the Office of the Work Health and Safety Prosecutor for consideration as a potential prosecution.

While the assessment and recommendations on pages 27-30 ... are an assessment of the investigation findings, written by investigators, the intended audience for this particular section of an investigation report is the Office of the Work Health and Safety Prosecutor (formerly the Director of Prosecutions, Work Health and Safety).²⁶

46. I am satisfied that pages 27 to 30 of the WHSQ investigation report satisfy the test for LPP and are exempt information under schedule 3, section 7 of the RTI Act in that they comprise a confidential communication between lawyer and client made for the dominant purpose of giving or receiving professional legal advice or assistance.

Exempt information – application of schedule 3, section 10(1)(e) of the RTI Act

47. Information is exempt information under schedule 3, section 10(1)(e) of the RTI Act if its disclosure could reasonably be expected to prejudice a person's fair trial or the impartial adjudication of a case.
48. The phrase '*a person's fair trial*' refers to the trial of a person charged with a criminal offence, but the phrase '*impartial adjudication of a case*' is broad enough to refer to any

²³ Letter dated 4 October 2019.

²⁴ *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at [9].

²⁵ Such as waiver or improper purpose.

²⁶ Letter dated 4 October 2019.

kind of case involving a dispute between parties which is to be formally adjudicated by an impartial decision-maker.²⁷

49. The provision can only apply if a specific case to be adjudicated is identified.²⁸
50. For information to qualify for exemption on this basis, it must be established that disclosure of the information '*could reasonably be expected to*' result in the anticipated prejudice.²⁹ The term '*could reasonably be expected to*' requires the relevant expectation to be reasonably based; that is, neither irrational, absurd nor ridiculous,³⁰ nor merely a possibility.³¹ It is not necessary '*to be satisfied upon a balance of probabilities*' that disclosing the document will produce the anticipated result.³² Whether the expected consequence is reasonable requires an objective examination of the relevant evidence.³³ Importantly, the expectation must arise as a result of disclosure, rather than in other circumstances.³⁴
51. At the conclusion of WHSQ's investigation, two entities, including one of the consulted third parties, were issued with statutory improvement notices under the WHS Act. An inspector will issue an improvement notice for a contravention of the legislation that does not result in the issue of a prohibition notice, unless the contravention can be remedied while the inspector is on site. The improvement notice will order the person receiving the notice to fix:
 - the contravention
 - things or operations causing the contravention; and
 - things or operations to prevent a possible contravention from occurring in the future.
52. An improvement notice will:
 - explain that the inspector believes the law is being broken
 - specify the part of the law under question
 - outline how the law is being or has been broken
 - set out the action that must be taken to rectify the contravention; and
 - state the day by which the contravention must have been remedied.
53. It is clear from the WHSQ report that is in issue, and the information provided to the inspector by various parties involved in the asbestos incident, that conflicting and contradictory evidence was provided about the asbestos incident, the roles played by relevant parties, and their knowledge about certain material facts. The investigation was complicated further by the fact that a key witness to the incident died before the commencement of the investigation, meaning that some of the contradictions in the evidence were unable to be clarified, or various allegations substantiated.
54. The improvement notice issued to the third party was based upon information provided to the inspector about the third party's knowledge of, and involvement in, the asbestos incident. The notice required the third party to undertake certain remediation work at the site. The third party is challenging the improvement notice (as well as, presumably, the

²⁷ *Uksi and Redcliffe City Council; Cook (Third Party)* (1995) 2 QAR 629 (**Uksi**).

²⁸ *Uksi* at [26].

²⁹ *North Goonyella Coal Mines Pty Ltd and Millard and Department of Natural Resources and Mines* (Unreported, Queensland Information Commissioner, 26 June 2012).

³⁰ *Attorney-General v Cockcroft* (1986) 64 ALR 97 at 106.

³¹ *Murphy and Treasury Department* (1995) 2 QAR 744 (**Murphy**).

³² *Sheridan and South Burnett Regional Council (and Others)* (Unreported, Queensland Information Commissioner, 9 April 2009).

³³ *Murphy* at paragraphs 45-47.

³⁴ *Murphy* at paragraph 54.

veracity of the information upon which it was based), in QIRC proceedings that are yet to be determined.

55. In order to find that disclosure of the Information in Issue could reasonably be expected to prejudice the impartial adjudication of the third party's case in the QIRC, I must find that there is a reasonably based expectation that the commissioner who determines the matter may be influenced by public disclosure of the Information in Issue and any ensuing public commentary or debate, to such an extent as to prejudice their ability to impartially adjudicate the matter.
56. While different considerations may arise in the case of a trial by jury, where information relevant to the issues to be determined by the jury is publicly disclosed and discussed prior to the jury's determination, it is more difficult to envisage circumstances where the requisite prejudice will occur where the matter is to be determined by an independent and appropriately professionally qualified commissioner who is charged with the duty to assess and determine the relevance of issues and arguments presented by the parties, and reach a fair decision based on the evidence.
57. I am not satisfied on the basis of the material before me that there are reasonable grounds for expecting that the impartial adjudication of the QIRC proceedings would be prejudiced by disclosure of the Information in Issue. I do not accept it is reasonable to expect that a commissioner hearing the matter would be influenced by public discussion of the information, such as to affect their ability to impartially determine the issues.
58. I find that the Information in Issue is not exempt information under schedule 3, section 10(1)(e) of the RTI Act.

Exempt information – application of schedule 3, section 10(3) of the RTI Act

59. OIR submitted that some Information in Issue is exempt information under schedule 3, section 10(3) of the RTI Act because it was provided in the course of WHSQ's investigation and it was provided by persons in response to a compulsory notice issued to them under section 171 of the WHS Act, which abrogates the privilege against self-incrimination.
60. Having reviewed the Information in Issue, I am satisfied that notices were issued by WHSQ to two persons under section 171 of the WHS Act. Those notices required the persons to provide information and/or documents in response to a list of questions posed by the investigator. I am further satisfied that section 172 of the WHS Act abrogates the privilege against self-incrimination in that it provides that a person is not excused from answering a question or providing information or a document under this part on the ground that the answer to the question, or the information or document, may tend to incriminate the person or expose the person to a penalty.
61. I therefore find that information that was provided by the two persons in response to the notices issued under section 171 of the WHS Act is exempt information under schedule 3, section 10(3) of the RTI Act, including that information as it is summarised in the WHSQ report.

Public interest balancing test

Irrelevant factors

62. I have not taken account of any irrelevant factors, including factors mentioned in schedule 4, part 1 of the RTI Act, in applying the public interest balancing test.

Factors favouring disclosure

63. The factors identified from the applicant's submissions that favour disclosure of the Information in Issue are set out at paragraph 31 above. In respect of factors a), b), c) and g), I accept that disclosure of the Information in Issue would advance each of these factors. The Information in Issue indicates that the asbestos incident was of a relatively serious nature and that there was an apparent failure to take appropriate safety measures in demolishing the fishing huts and in disposing of the asbestos in accordance with relevant legislative safety standards and requirements. This resulted in an environmental and public health hazard.
64. Disclosure of the Information in Issue could reasonably be expected to enhance the accountability and transparency of WHSQ in conducting the investigation, and permit public scrutiny of the information gathered by WHSQ, the steps it took to investigate the incident, the decisions it made at the conclusion of the investigation and the reasons for those decisions. I therefore afford these four public interest factors significant weight in the public interest balancing test.
65. Factors d) and e) relate to the public interest in allowing or assisting inquiry into possible deficiencies in the conduct of an agency or official, and the public interest in revealing or substantiating that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct. It is clear that the applicant considers that parties involved in the asbestos incident are, or have been, engaged in illegal or corrupt conduct. However, these two public interest factors are directed at the conduct of agencies or public officials, rather than private entities. The applicant has made general submissions about what he considers to be 'suspicious' conduct on the part of OIR/WHSQ. He alleges that a decision to issue a statutory improvement notice to another party involved in the asbestos incident was subsequently reversed, and there was a refusal by WHSQ to re-open its investigation despite the applicant's contention that fresh evidence ought to have been taken into account. The applicant alleges that OIR was [complicit] *in serious illegality and corruption revolving around an asbestos contamination and related scandals at Townsville*.³⁵ He also alleges that OIR colluded with both the local council and a party involved in the asbestos incident to cover up *'what seems to be a serious case involving extensive illegality and corruption'*.³⁶
66. I am unable to identify anything on the face of the Information in Issue to support the allegations that the applicant has made against OIR/WHSQ. There is no information before me to support the applicant's contentions that OIR/WHSQ colluded with any other party to cover up the asbestos incident, or engaged in suspicious/illegal/corrupt etc. conduct in conducting its investigation and in making decisions in connection with the investigation.
67. In terms of the conduct of any other government agency that was involved in investigating the asbestos incident, section 108(3) of the RTI Act prevents me from disclosing Information in Issue in a decision. I am therefore constrained in discussing the application of these two public interest factors to specific information contained in the WHSQ report. It will be sufficient for me to find that I am satisfied that there is information contained in the WHSQ report the disclosure of which could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency. Given the nature of the information, I afford this factor (in paragraph 31d) above) significant weight in the public interest.

³⁵ Submission dated 25 October 2019.

³⁶ Submission dated 25 October 2019.

68. However, while the information in question may allow or assist inquiry into possible deficiencies in an agency's conduct, I am not satisfied that it is of such a nature that its disclosure could reasonably be expected to 'reveal or substantiate' that an agency has engaged in 'misconduct or negligent, improper or unlawful conduct' within the meaning of the factor set out at paragraph 31e) above. Again, section 108(3) of the RTI Act prevents me from disclosing the particular information in question and meaningfully discussing the application of this factor to that information. I will observe, however, that the information in question expresses one entity's views and criticisms about certain events and actions taken (or not taken) by another entity. As far as I am aware, those criticisms have not formally been put to the other entity for response, nor otherwise investigated as far as I am aware. I am not in a position, on the basis of the information before me, to be satisfied that the conduct in question amounts to misconduct or negligent, improper or unlawful conduct, or that disclosing it would 'substantiate' that it is conduct of this nature. As such, I am not satisfied that the factor in paragraph 31e) applies to the Information in Issue.
69. The factors in paragraph 31f) and j) above concern the public interest in advancing the fair treatment of individuals in accordance with the law in their dealings with agencies, and in contributing to the administration of justice either generally or for a person. Based on the submissions he has made, the applicant's apparent concern is that a third party which was issued with an improvement notice by WHSQ, and which is seeking review of that decision in the QIRC, has been unfairly and unjustly blamed for the asbestos incident when, according to the applicant, another party involved in the incident should bear responsibility. The applicant argues that release of the Information in Issue will permit scrutiny of the information and evidence that the relevant parties provided to the investigator, and allow the veracity of that information to be examined, thereby contributing to the fair treatment and administration of justice for the party in question.
70. It is clear that the third party also considers that it should not be made to bear responsibility for the asbestos incident, and seeks to challenge the improvement notice that was issued to it. However, the third party opposes disclosure of the Information in Issue to the applicant because it considers that public release, prior to the conclusion of the QIRC proceedings, would in fact prejudice, rather than enhance, the administration of justice for, and the fair treatment of, the third party.
71. I acknowledge that not all of the Information in Issue is directly about the applicant. Some of it concerns and was supplied by other parties involved in the asbestos incident. The applicant would no doubt argue that disclosure of the information concerning the entity that he considers should bear responsibility for the asbestos incident could reasonably be expected to have the positive effects he contends for, and help to 'clear' the third party's name. However, I consider the information that was supplied to the investigators from all parties involved in the asbestos incident is inextricably intertwined, such that it is not possible to consider the release of any of it separately without recognising that such release may prejudice or harm the position of another party. Some of the information is conflicting and contradictory. In addition, I am unable to identify precisely how disclosure of the Information in issue to the applicant under the RTI Act could reasonably be expected to contribute to the administration of justice or the fair treatment of the third party beyond what the third party itself is seeking to do by commencing proceedings in the QIRC. 'Administration of justice' indicates the pursuit of a legal remedy or legal proceedings of some sort. The applicant has not suggested that he seeks access to the Information in issue in order to, for example, commence his own legal proceedings in respect of the asbestos incident, or to pursue a legal remedy on his own behalf.

72. Taking account of the third party's position, and the QIRC proceedings, I consider that disclosure of the Information in Issue to the applicant would not materially advance the public interest in the fair treatment of the third party. I therefore afford only low weight to the public interest factor in paragraph 31f). I am not satisfied disclosure could reasonably be expected to contribute to the administration of justice either generally, or for the third party individually, beyond the QIRC proceedings that the third party has commenced on his own behalf. As such, I do not consider that the public interest factors in paragraph 31j) apply to the Information in Issue and I afford them no weight in the public interest balancing test.
73. Factors h) and i) in paragraph 31 relate to contribution to the protection of the environment, and the revealing of environmental or health risks or measures relating to public health and safety.
74. The Information in Issue contains details of breaches of safety regulations and standards relating to the handling and disposal of a significant quantity of asbestos. The safety hazards identified included uncontained asbestos both on the surface of, and beneath, the ground. While the land upon which the demolition took place is private and the affected area apparently was fenced, public health risks were presented by the spread of airborne asbestos particles.
75. The current state of the land in question, and to what extent remediation works have been undertaken, are unclear to me. The decision by WHSQ to issue improvement notices to two entities requiring remediation of the land was made in mid-2018. However, as noted, one of the entities is challenging that decision in current proceedings in the QIRC, at least raising the suggestion that remediation works may not be complete. The applicant submits that the contamination of *'public beaches and fragile adjacent tidal flats'* remains unaddressed some four years after the asbestos incident took place, with health risks continuing to be posed to members of the public.
76. There is already a significant amount of information in the public domain regarding the asbestos incident and resultant contamination of the subject land.³⁷ While I accept that disclosure of the Information in Issue could reasonably be expected to further inform the community about the incident and its environmental impact, it is not clear how disclosure could reasonably be expected to contribute to the protection of the environment, beyond the legislative actions that WHSQ has already taken to require remediation of the land. I therefore afford the factor in paragraph 31h) low weight in the public interest balancing test. As to the factor in paragraph 31i), I accept that disclosure of the Information in issue could reasonably be expected to reveal measures put in place by WHSQ that relate to public health and safety. I afford this factor significant weight in the public interest balancing test.

Factors favouring nondisclosure

77. The relevant public interest factors favouring nondisclosure in the public interest, as well as the relevant Harm Factors (as identified from the decision and submissions of OIR, and responses by consulted third parties), are set out at paragraphs 32 and 33 above.
78. For the factors set out at paragraphs 32a) and 32e) – prejudice/adverse effect to the business/commercial affairs of entities and individuals – I accept that such prejudice/adverse effect could reasonably be expected to be significant given the nature of the Information in Issue and the seriousness of the asbestos incident. The WHSQ

³⁷ See the Facebook post-dated 1 March 2018 by the Townsville Residents and Ratepayers Association: <<https://www.facebook.com/tsvratepayers/posts>>.

report indicates that a number of structures containing asbestos were demolished in a sensitive coastal area without safety precautions being taken, and further, that the asbestos was then not properly or safely disposed of. Regardless of who is to blame for the incident and the veracity or otherwise of information provided to investigators by the parties involved (and I make no comment or finding about that), I find that disclosure of the Information in Issue could reasonably be expected to have the requisite prejudicial/adverse effect on the business and/or commercial affairs of various of the parties involved, which includes both entities and individuals. I consider there are reasonable grounds for expecting that disclosure of the Information in Issue may cause damage to the business reputations and standing of a number of entities and persons in the local community, thereby adversely affecting their business/commercial affairs. I afford both of these factors significant weight in the public interest balancing test.

79. For these same reasons, I also afford significant weight to the associated Harm Factor set out in paragraph 33g) above.
80. The nondisclosure factor at paragraph 32b) and the associated Harm Factor at paragraph 33f) are directed at protection of the personal information/privacy interests of individuals. 'Personal information' is information or an opinion, 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: section 12 of the *Information Privacy Act 2009* (Qld) (**IP Act**). The concept of 'privacy' is not defined in either the RTI Act or the IP Act. It can, however, essentially be viewed as the right of an individual to preserve their personal sphere free from interference from others.³⁸
81. There is a wealth of personal information contained in the Information in Issue that concerns the numerous parties involved in the asbestos incident or its aftermath, and who were interviewed by WHSQ in connection with their involvement. There is also the personal information of a person who died before the WHSQ investigation commenced, as well as personal information of that person's family members. Where information is an individual's personal information, a public interest harm expressly and automatically arises from its disclosure. Much of the information is sensitive in nature, and I am also mindful that some of it was provided under compulsion, pursuant to legislation that abrogated the privilege against self-incrimination. Moreover, at least one party involved in the investigation is challenging, in legal proceedings, the veracity of information provided to WHSQ concerning that party's involvement in the asbestos incident. As such, I consider that the public interest in protecting the right to privacy of the relevant persons concerned is high.
82. For these reasons, I afford significant weight to the nondisclosure factor identified at paragraph 32b) above, and significant weight to the Harm Factor at paragraph 33f).
83. The nondisclosure factor in paragraph 32c) provides that disclosure of information will be contrary to the public interest if it could reasonably be expected to prejudice the fair treatment of individuals and the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct.
84. The consulted third party who has initiated proceedings in the QIRC argues that the Information in Issue, upon which the decision of WHSQ to issue an improvement notice was based, contains unsubstantiated allegations about misconduct or unlawful, negligent or improper conduct. The third party contends that public disclosure of this

³⁸ See the Australian Law Reform Commission's definition of the concept in "For your information: *Australian Privacy Law and Practice*", *Australian Law Reform Commission Report No. 108*, released 11 August 2008, at paragraph 1.56.

information under the RTI Act, when the QIRC's review of the matter is not yet complete, could reasonably be expected to prejudice the third party's fair treatment.

85. Given the sensitive nature of the Information in Issue, I accept that its disclosure before the QIRC proceedings have been finalised and a decision made about the veracity or reliability of the allegations directed at the third party regarding its involvement in the asbestos incident, could reasonably be expected to harm or prejudice the fair treatment of the third party. I consider that there are reasonable grounds for expecting that, if the Information in Issue were to be disclosed in those circumstances, the third party's reputation and business interests in the local community may be unfairly damaged. I therefore afford this factor significant weight in the public interest balancing test.
86. The final nondisclosure factors identified at paragraph 32d) above are directed at preventing impediment to the administration of justice, either generally or for an individual. While I accept that disclosure of the Information in Issue is perhaps likely to result in speculation, discussion and debate within the local community, I am not satisfied that that, of itself, is sufficient to give rise to a reasonably based expectation that the administration of justice will somehow be impeded. For the reasons I explained at paragraphs 55-57, I do not accept it is reasonable to expect that a QIRC commissioner who determines the QIRC proceedings would be influenced by public discussion and debate to such an extent as to impede their ability to fairly and independently administer justice either generally, or for the third party individually. I therefore find that these two factors do not arise for consideration in the public interest balancing test.

Balancing the public interest

87. For the reasons explained, I give significant weight to the public interest factors favouring disclosure identified at paragraphs 31a), b), c), d), g) and i) and low weight to the public interest factors favouring disclosure identified at paragraph 31f) and h). I do not consider that the public interest factors identified at paragraphs 31e) and j) apply to the Information in Issue.
88. I afford significant weight to the public interest factors favouring nondisclosure identified at paragraphs 32a), b), c) and e). I also afford significant weight to the Harm Factors identified at paragraphs 33f) and g). I find that the public interest nondisclosure factor identified at paragraph 32d) does not apply to the Information in Issue.
89. The public interest factors favouring disclosure and nondisclosure of the Information are finely balanced. However, I note that two factors favouring nondisclosure to which I have given significant weight are Harm Factors. That is, the RTI Act recognises that a specific and tangible harm to the public interest would be caused by disclosure of the Information in Issue. I also am mindful of the importance, from a fairness aspect, of permitting the third party to receive a decision from QIRC before information that could reasonably be regarded as damaging to the third party's interests, is publicly released under the RTI Act. Taking account of all of the relevant circumstances, I find that disclosure of the Information in Issue would, on balance, be contrary to the public interest.
90. In his submission of 25 October 2019, the applicant argued that even if I took the view that the public interest favoured nondisclosure of the Information in Issue whilst the QIRC proceedings remained on foot, I should find that the Information in Issue should be released to him once those proceedings were finalised because of the strong public interest in disclosure. However, I am required to apply the provisions of the RTI Act with regard to the relevant circumstances as they exist at the time I make my decision. It is not appropriate for me to make a decision based upon some future event with an uncertain timeline and an uncertain outcome. Once the QIRC proceedings are finalised,

the applicant may consider making a fresh application for access to the Information in Issue within the confines of section 43 of the RTI Act.

Findings

91. I find that some of Information in Issue is exempt information under schedule 3, section 7, or schedule 3, section 10(3), of the RTI Act. I find that disclosure of all Information in Issue would, on balance, be contrary to the public interest.

DECISION

92. I vary the decision under review by finding that access to the Information in Issue may be refused under the RTI Act on the grounds that some information is exempt information, and disclosure of all information would, on balance, be contrary to the public interest.
93. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Louisa Lynch
Right to Information Commissioner

Date: 5 December 2019

APPENDIX**Significant procedural steps**

Date	Event
31 May 2019	OIC received the application for external review. OIC requested that OIR provide procedural documents.
3 June 2019	OIR requested an extension of time to provide procedural documents.
3 July 2019	OIR provided procedural documents.
8 July 2019	OIC advised the applicant and OIR that the application for external review had been accepted. OIC requested that OIR provide copies of the Information in Issue. The applicant advised that he would be overseas until 10 August 2019.
18 July 2019	OIR provided copies of the Information in Issue.
15 August 2019	OIC requested that the applicant consider payment to OIR of the processing charge.
20 August 2019	The applicant sent an email to OIC making complaints as well as submissions in favour of disclosure of the Information in Issue.
5 September 2019	OIR confirmed that the applicant had paid the processing charge.
12 September 2019	OIC advised the applicant that it was necessary to undertake a number of third party consultations.
30 September 2019	Response received from a consulted third party objecting to disclosure.
4 October 2019	Brief submissions received from OIR.
9 October 2019	Response received from lawyers for a consulted third party, objecting to disclosure.
14 October 2019	Preliminary view communicated to the applicant by OIC.
25 October 2019	Submissions received from the applicant.
8 November 2019	Third party's lawyers advised that their client did not wish to become a formal participant in the review.