



Decision and Reasons for Decision

Citation:	<i>McDonald and Queensland Building and Construction Commission [2022] QICmr 5 (31 January 2022)</i>
Application Number:	316087
Applicant:	McDonald
Respondent:	Queensland Building and Construction Commission
Decision Date:	31 January 2022
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST INFORMATION - personal information of other individuals - personal information and privacy - whether disclosure of information would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to Queensland Building and Construction Commission (**QBCC**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to documents in the following terms:

I seek details of all costs associated with the QBCC using external legal representation that is associated with my case/s regarding [applicant's property]. This includes copies of all invoices from [Private Law Firm]. This includes copies of all invoices from any other external legal representation.

2. QBCC located 45 pages responsive to the terms of the applicant's access application and decided² to release 24 pages in full and 21 part pages on the basis that some of the information was exempt as it was subject to legal professional privilege,³ and some of the information would, on balance, be contrary to the public interest to disclose.⁴
3. The applicant applied⁵ for internal review of the original decision. On internal review, QBCC varied its original decision and granted access to some additional information,⁶ but maintained its position in refusing access to certain parts of 21 pages on the ground it comprised exempt information subject to legal professional privilege, or was information that would, on balance, be contrary to the public interest to disclose.

¹ On 21 January 2021.

² On 26 March 2021. The applicant granted QBCC further time to process his access application.

³ Section 47(3)(a) and 48 and schedule 3, section 7 of the RTI Act.

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

⁵ On 29 March 2021.

⁶ On 28 April 2021.

4. The applicant then applied⁷ to the Office of the Information Commissioner (**OIC**) for external review.
5. For the reasons set out below, I affirm QBCC's internal review decision and find that disclosure of the information in issue would, on balance, be contrary to the public interest, and access may be refused.⁸

Reviewable decision

6. The decision under review is QBCC's internal review decision dated 28 April 2021.

Evidence considered

7. Significant procedural steps relating to the external review are set out in the Appendix.
8. The evidence, submissions, legislation and other material I have considered in reaching my decision are set out in these reasons (including footnotes and the Appendix).
9. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.⁹ 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 IP Act and the *Right to Information Act 2009* (Qld) (**RTI Act**).¹⁰ 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:¹¹ '*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

Information in issue

10. During the external review, the applicant accepted OIC's preliminary views in respect of the exempt information subject to legal professional privilege, and most of the information that would, on balance, be contrary to the public interest to disclose.¹³ The applicant maintained his request for access to the name of the law graduate (**Graduate's Name**) at the private law firm (**Private Law Firm**). Accordingly, the Graduate's Name is the only information remaining in issue in this review.

Issue for determination

11. The issue for determination is whether access to the Graduate's Name may be refused because its disclosure would, on balance, be contrary to the public interest.

Relevant law

12. Under the RTI Act, a person has a right to be given access to documents of an agency.¹⁴ However, this right is subject to provisions of the RTI Act including the grounds on which

⁷ On 25 May 2021.

⁸ Section 47(3)(b) and 49 of the RTI Act.

⁹ Section 21(2) of the HR Act.

¹⁰ *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].

¹¹ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹² *XYZ* at [573].

¹³ Confirmed by email to the applicant on 16 November 2021. Assistant Information Commissioner Martin issued a preliminary view to the applicant on 24 July 2021, and I issued a preliminary view to the applicant on 28 September 2021.

¹⁴ Section 23 of the RTI Act.

an agency may refuse access to documents.¹⁵ An agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.¹⁶ An external review by the Information Commissioner, or her delegate, is a merits review¹⁷ and as such the Information Commissioner has power to make any decision the agency decision maker could have made under the RTI Act.¹⁸

13. The term public interest refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that, in general, a public interest consideration is one which is common to all members of, or a substantial segment of the community, as distinct from matters that concern purely private or personal interests. (However, there are some recognised public interest considerations that may apply for the benefit of an individual.).
14. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision maker must:¹⁹
 - identify factors irrelevant to the public interest and disregard them
 - identify factors in favour of disclosure of information
 - identify factors in favour of nondisclosure of information; and
 - decide whether, on balance, disclosure of the information would be contrary to the public interest.
15. Schedule 4 of the RTI Act contains non-exhaustive lists of factors that may be relevant in determining where the balance of public interest lies in a particular case. I have considered these lists,²⁰ together with all other relevant information, in reaching my decision. I have kept in mind the RTI Act's pro-disclosure bias²¹ and Parliament's requirement that grounds for refusing access to information be interpreted narrowly.²²

Applicant's submissions

16. During the external review the applicant submitted:²³

It is my submission that the name of the redacted graduate lawyer who worked on this file should be released in the public's interest.

Initially the only name not redacted, was [Lawyer A].

Following an internal appeal, the names of [Lawyer B] and [Lawyer C] were then unredacted. However, the QBCC still redacted the name of a graduate lawyer. This graduate lawyer has charged the QBCC 1.4hrs during the month of October 2020 for example. This is therefore essentially billing the public purse. Within these 1.4hrs it includes fees for calling our solicitor on at least 2 occasions. There is no record, no case notes and no invoice from [applicant's lawyer] for receiving these calls as claimed.

¹⁵ Section 47 of the RTI Act.

¹⁶ Sections 47(3)(b) and 49 of the RTI Act.

¹⁷ This means that OIC stands in the shoes of the agency and can make any decision that was open to the agency to make. OIC's role is to conduct a fresh review of the relevant facts and law and make a fresh decision. See *V45 and Queensland Police Service* [2021] QICmr 30 (16 June 2021) at [17].

¹⁸ Section 105 of the RTI Act particularly notes the information commissioner has, in an addition to any other power, the power to review any decision that has been made by the agency or Minister in relation to the access application and the power to decide any matter in relation to the access application that could, under the RTI Act, have been decided by an agency or Minister.

¹⁹ Section 49(3) of the RTI Act.

²⁰ I have considered each of the public interest factors outlined in schedule 4 of the RTI Act, and any relevant factors are discussed below.

²¹ Section 44 of the RTI Act.

²² Section 47(2) of the RTI Act. In deciding whether disclosure of the information in issue would, on balance, be contrary to the public interest, I have taken no irrelevant factors into account in making my decision.

²³ By email on 24 and 25 July 2021, and 28 September 2021.

I believe it is certainly in the interest of the public to understand who this lawyer is so we can better check that this work occurred as claimed.

In the absence of being able to disprove this, it is my intention to make a complaint to the Legal Services Commission and possibly the Queensland Police Service, as I do not believe that the redacted name undertook the work that they have billed for, and been paid for.

...

It is my view that this is in the Public Interest as this is a university-trained lawyer, who is undertaking work (whether in private practice or not) for a government regulator. These invoices are effectively being paid for by the people of Queensland who should be able to have confidence that they are not paying for services that have not occurred. It is my position that if protections were to be afforded to the graduate, they ought to also apply to those other than the partner [Lawyer A]. On internal appeal, the QBCC decided to release the names of other employees who were billing the QBCC by the hour or part thereof.

While I strongly believe that it is in the Public Interest to release this information, I also strongly believe in the intention of Parliament being pro-disclosure.

I also do not agree that this is easily explained by the likelihood that the graduate lawyer spoke to a paralegal or secretary and left a message, rather than speaking directly to your legal representative. While I am not privileged with viewing the full description for the activity recorded on the itemised bill, my solicitor is currently the only solicitor at [applicant's lawyer]. The only other employee is [Employee A]. It is my understanding that all calls go to the one mobile phone.

It is still my belief that this did not occur. It is certainly my intention to pursue this matter. It is also my strong suspicion that this graduate lawyer is on leave from another position of trust.

Findings

Irrelevant factors

17. In considering whether disclosure of the Graduate's Name would, on balance, be contrary to the public interest, I have not identified or taken any irrelevant factors into account.²⁴

Factors favouring disclosure

18. The applicant's submissions raise a number of factors favouring disclosure in the public interest. Namely:
 - disclosure of the information could reasonably be expected to ensure effective oversight of expenditure of public funds²⁵
 - disclosure of the information could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability²⁶
 - disclosure could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official;²⁷
 - disclosure could reasonably be expected to reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct;²⁸ and

²⁴ Including those listed at schedule 4, part 1 of the RTI Act.

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

²⁶ Schedule 4, part 2, item 1 of the RTI Act.

²⁷ Schedule 4, part 2, item 5 of the RTI Act.

²⁸ Schedule 4, part 2, item 6 of the RTI Act.

- disclosure could reasonably be expected to contribute to the enforcement of the criminal law.²⁹
19. I will deal with each of these in turn.
 20. In relation to the first item, the question to be answered is: Could disclosure of the Graduate's Name reasonably be expected to ensure effective oversight of expenditure of public funds?
 21. I consider the answer to this question is no.
 22. In reaching this conclusion I have taken into account the information that has been disclosed by QBCC, namely: the total invoice amounts paid by QBCC to the Firm; the names of a Partner and two lawyers at the Private Law Firm; and significant portions of the itemised invoices from the Private Law Firm, detailing the actions taken in the legal matter. I consider that disclosure of the total invoice amounts paid by QBCC to the Private Law Firm fully discharges this public interest factor.
 23. As is evident from the applicant's own submission, this information was sufficient for the applicant to ascertain the work charged by the firm and by extension is sufficient to provide oversight of the expenditure by QBCC. By contrast, disclosing the Graduate's Name does not ensure effective oversight of expenditure of public funds by QBCC.
 24. I note the applicant's statement that the information is required, '*so we can better check that this work occurred as claimed.*' The Legal Services Commission is the body authorised under the *Legal Profession Act 2007* (Qld) (**LP Act**) to receive and deal with complaints about lawyers, law practice employees and unlawful operators. Section 429(3)(b) of the LP Act requires the complaint to '*if possible, identify the person about whom the complaint is made*' (my emphasis) when lodging the written complaint. This qualifier, and the detailed complaint form which requests details of the office where the subject person works/worked, suggests that a complaint may still proceed in circumstances where the complainant cannot identify the subject person but can provide enough information to enable their identification by the Legal Services Commission. The applicant already possesses enough information to lodge this complaint with the Legal Services Commission and I am therefore satisfied the public interest factor in relation to ensuring effective oversight of expenditure of public funds is not enlivened by the circumstances of this matter and it does not apply to favour disclosure of the Graduate's Name.³⁰ In short, while the Graduate's Name may obviously be information required by an entity such as the LSC for investigatory purposes, it is *not* information required to be disclosed to the applicant, to enable him to seek investigation by LSC.
 25. In regard to the second factor favouring disclosure in the public interest the question to be answered is: Could disclosure of the Graduate's Name reasonably be expected to promote open discussion of public affairs and enhance QBCC's accountability?³¹
 26. I consider the answer to this question is no.
 27. In assessing whether this public interest factor applies, I have considered the information QBCC disclosed to the applicant (noted at paragraph 22). Sufficient information has been disclosed to promote open discussion about QBCC's engagement of, and expenditure on, lawyers, the issue at the heart of the information in which the Graduate's

²⁹ Schedule 4, part 2, item 18 of the RTI Act.

³⁰ Schedule 4, part 2, item 4 of the RTI Act.

³¹ Schedule 4, part 2, item 1 of the RTI Act.

Name appears; and to keep QBCC accountable to the public. Disclosure of the Graduate's Name, one of many employees of the firm who is part of the firm's operations, does not contribute to that discussion nor to the accountability of QBCC in that regard. Thus, I am satisfied that information already disclosed by QBCC satisfies the public interest of promoting open discussion of public affairs and enhancing QBCC's accountability and that disclosure of the Graduate's Name could not reasonably be expected to promote open discussion of public affairs and enhance QBCC's accountability.³² Consequently, I do not consider this factor is enlivened by the facts of this matter.

28. In regard to the third and fourth factors favouring disclosure identified in paragraph 18 above, relating to the conduct or misconduct of a government official or agency, for either of these factors to apply to favour disclosure of the Graduate's Name, disclosure of the Graduate's Name *itself* must reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of a government agency or official, or reveal or substantiate that a government agency or official has engaged in misconduct or negligent, improper or unlawful conduct.
29. There is no evidence before me to suggest that disclosing the Graduate's Name - an employee of a *private* law firm - would reveal any misconduct, or negligent, improper or unlawful conduct, or allow inquiry into any possible deficiencies of conduct, of QBCC, any QBCC employees, or any other government agency or official. The applicant submits that the Graduate may have billed QBCC for work they did not undertake. If that is the case (and I make no finding that it is) this points to possible misconduct by a private firm or its employee (for which, as noted at paragraph 24 above, there are complaint processes the applicant may pursue), and not a government agency or official. I am satisfied that these two factors are not enlivened, in the circumstances of this matter, to favour disclosure of the Graduate's Name.
30. Furthermore, and as regards the final public interest factor favouring disclosure, listed at paragraph 18 above, the Graduate's Name is not required for the applicant to make a complaint with the Queensland Police Service. As is the case in relation to a complaint to the professional body, noted at paragraph 24 above, sufficient information has been disclosed to the applicant to allow him to make a complaint to the police and for the police to pursue enquiries, and I am not satisfied that disclosure of the Graduate's Name would advance this public interest consideration.
31. I have considered the other public interest factors listed in schedule 4, part 2 of the RTI Act and am satisfied no further factors favouring disclosure apply.³³

Factors favouring nondisclosure

32. Turning to the factors favouring nondisclosure, I have considered whether disclosure of the Graduate's Name could reasonably be expected to prejudice the protection of an individual's right to privacy, and whether a public interest harm could reasonably be expected to result from disclosure as it is the personal information³⁴ of an individual.³⁵ These are two factors favouring nondisclosure identified in the RTI Act and which, if established, would favour nondisclosure of the Graduate's Name. As previously noted by the information commissioner:³⁶

³² Schedule 4, part 2, item 1 of the RTI Act.

³³ For example, disclosure of the Graduate's Name could not reasonably be expected to contribute to the protection of the environment or contribute to the maintenance of peace and order.

³⁴ Schedule 5 of the RTI Act and section 12 of the *Information Privacy Act 2009* (Qld) (**IP Act**).

³⁵ Schedule 4, part 3, item 3 and schedule 4, part 4, section 6 of the RTI Act.

³⁶ *Underwood and Department of Housing and Public Works (No. 1)* [2016] QICmr 11 (17 March 2016) at [44] and [76].

There is, in my view, a manifest and self-evident public interest in ensuring that government protects personal information and the individual privacy of private citizens. Accordingly, I am satisfied that each of these factors warrants substantial weighting.

....

Members of the public are generally entitled to expect that personal information collected from them by government agencies will be handled appropriately, and not subject to routine and unconditional disclosure to others. Safeguarding individual privacy and avoiding public interest harm by protecting personal information are public interest considerations warranting relatively substantial weight, and which outweigh any considerations favouring disclosure in this case.

33. In regard to the first factor favouring nondisclosure in the public interest the question to be answered is: Could disclosure of the Graduate's Name reasonably be expected to prejudice the protection of an individual's right to privacy?
34. Having considered all of the information, submissions and circumstances of this matter, I consider the answer is yes.
35. The concept of 'privacy' is not defined in the RTI Act. It can, however, be viewed as the right of an individual to preserve their personal sphere free from interference from others.³⁷ I have reviewed the Private Law Firm's website and note that, in contrast to the names of the partner and two solicitors disclosed to the applicant by QBCC, the Graduate's Name is not listed anywhere on the Private Law Firm's website. Disclosure of the Graduate's Name would interfere with the Graduate's right to preserve their personal sphere (where and when they work) free from interference from others. I am satisfied this factor arises to favour nondisclosure of the Graduate's Name.
36. In evaluating the weight that should be afforded to this public interest factor, I have taken into account that this relates to the personal information³⁸ of a Graduate employed by a Private Law Firm, rather than a government agency. I also consider the weight of this factor is affected by the fact the Graduate's Name is not disclosed anywhere on the Private Law Firm website, and so is not the public face of the Private Law Firm.³⁹ In the circumstances I consider high weight applies to favour nondisclosure of the Graduate's Name as disclosure could reasonably be expected to prejudice their right to privacy.
37. In regard to the second factor favouring nondisclosure in the public interest the question to be answered is: Could disclosure of the Graduate's Name reasonably be expected to cause a public interest harm by disclosing personal information of an individual?
38. Having considered all of the information, submissions and circumstances of this matter, I consider the answer is yes.
39. The Graduate's Name is their personal information.⁴⁰ Disclosing it, therefore, could reasonably be expected to result in a public interest harm. I am satisfied this factor applies in the circumstances to favour nondisclosure of the Graduate's Name.

³⁷ *Marshall and Department of Police* (Unreported, Queensland Information Commissioner, 25 February 2011) at [27], paraphrasing the Australian Law Reform Commission's definition of the concept in '*For your information: Australian Privacy Law and Practice*' Australian Law Reform Commission Report No. 108 released online on 12 August 2008, at paragraph 1.56.

³⁸ Schedule 5 of the RTI Act and section 12 of the IP Act.

³⁹ *The Barlow Group Pty Ltd and Department of Housing and Public Works; JM Kelly (Project Builders) Pty Ltd (Third Party)* [2014] QICmr 12 (8 April 2014) at [17].

⁴⁰ Schedule 5 of the RTI Act and section 12 of the IP Act.

40. In determining the weight applicable to this nondisclosure factor, I have considered that the Graduate's Name is not published on the Private Law Firm's website and is not generally publicly available. I have also considered the status of the Graduate's position at the Private Law Firm, and that the Graduate is privately employed. In the circumstances I am satisfied high weight applies to favour nondisclosure of the Graduate's Name, as disclosure could reasonably be expected to cause a public interest harm by disclosing personal information of an individual other than the applicant.

Balancing the factors

41. Other than the general pro-disclosure bias applying in favour of disclosure of the Graduate's Name,⁴¹ I am satisfied that no public interest factors favouring disclosure arise in the circumstances of this matter.
42. Weighing in favour of nondisclosure of the Graduate's Name are the two factors that seek to protect the right to privacy and personal information of individuals and to which I have attributed high weight in the circumstances of this matter.⁴² I am satisfied the nondisclosure factors are determinative.⁴³ Accordingly I find that disclosure of the Graduate's Name would, on balance, be contrary to the public interest and access may be refused to that information.⁴⁴ Implicit in both the RTI Act and its counterpart, the IP Act, is the recognition⁴⁵ that individuals should have a measure of control over the personal information collected from them by government. By extension, an access applicant should not be put in a position to control the dissemination of the personal information of others, unless the balance of the public interest demands otherwise in the circumstances of a particular case. Bearing in mind that the applicant is currently possessed of sufficient information to enable him to make a complaint to any appropriate investigatory body, I am not satisfied this is such a case.

DECISION

43. For the reasons outlined in this decision, I affirm QBCC's internal review decision and find that access to the Graduate's Name may be refused under section 47(3)(b) and 49 of the RTI Act on the ground that disclosure would, on balance, be contrary to the public interest.
44. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Assistant Information Commissioner Corby

Date: 31 January 2022

⁴¹ Section 44 of the RTI Act.

⁴² Schedule 4, part 3, item 3 and schedule 4, part 4, section 6 of the RTI Act.

⁴³ Section 49(3) of the RTI Act.

⁴⁴ Section 47(3)(b) and 49 of the RTI Act.

⁴⁵ Which is embodied not only in the personal information and privacy public interest harm and nondisclosure factors discussed in these reasons, but in, for example, restrictions on Disclosure Log publication embodied in section 78(3) and 78B(2)(c) of the RTI Act, and is implicit in the Parliament's very passage of the IP Act.

APPENDIX

Significant procedural steps

Date	Event
25 May 2021	OIC received the application for external review.
26 May 2021	OIC requested preliminary documents and information from QBCC.
3 June 2021	OIC received the preliminary documents and information from QBCC.
16 June 2021	OIC notified the applicant and QBCC that the external review had been accepted. OIC requested copies of the documents in issue from QBCC.
21 June 2021	OIC received the documents in issue from QBCC.
23 July 2021	OIC conveyed a preliminary view to the applicant.
24 and 25 July 2021	OIC received the applicant's submissions in response to OIC's preliminary view.
2 September 2021	OIC received the applicant's submissions.
28 September 2021	OIC relayed a further preliminary view to the applicant. OIC received the applicant's submissions.
28 October 2021	OIC advised the applicant the review would be finalised by a formal decision.
16 November 2021	OIC confirmed the information in issue at the time of decision with the applicant.