



Decision and Reasons for Decision

Citation: *Ringland and Department of Housing and Public Works*
[2020] QICmr 7 (13 February 2020)

Application Number: 314443

Applicant: Ringland

Respondent: Department of Housing and Public Works

Decision Date: 13 February 2020

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - CABINET INFORMATION - community submissions on proposed regulatory reform - whether information disclosure of which would reveal Cabinet consideration or prejudice confidentiality of Cabinet considerations or operations - whether exempt information to which access may be refused - sections 47(3)(a) and 48 and schedule 3, section 2(1)(b) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - community submissions made subject to statement as to nondisclosure - whether disclosure could reasonably be expected to give rise to public interest harm affecting confidential communications and prejudice agency ability to obtain confidential information - whether disclosure 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. In September 2018 the Department of Housing and Public Works (**Department**) released a discussion paper concerning minimum financial requirements for licensing in the building and construction industry (**Discussion Paper**).¹ The Discussion Paper invited community submissions in reply (**Community Replies**). Matters canvassed in the Discussion Paper, and addressed in Community Replies, were the subject of a subsequent Cabinet submission.

¹ 'The proposed improvements to the Minimum Financial Requirements for licensing in the building and construction industry', September 2018, available at https://www.hpw.qld.gov.au/_data/assets/pdf_file/0018/5913/minimumfinancialreqspaper.pdf (accessed 31 January 2020).

2. The applicant applied² to the Department under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to documents relating to the Discussion Paper, including the 'replies and submitted papers' received by the Department in response to the invitation extended in the Discussion Paper.
3. The Department identified several hundred pages. The Department decided³ to release some of these in full and part, and excluded others from consideration on the basis they fell outside the scope of the access application. Access to a large number of pages was refused, on the grounds the information comprised exempt information,⁴ as Cabinet information.⁵
4. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review.⁶ Additional pages were located by the Department during the course of the review,⁷ parts of some pages were released,⁸ while the applicant did not pursue access to other information.⁹
5. For reasons explained below, I am not satisfied that grounds exist for refusing access to all of the information remaining in issue, and that some of this information may therefore be released to the applicant.
6. Of the remainder, I consider that various pages comprise exempt Cabinet information, while disclosure of any of these remaining pages would, on balance, be contrary to the public interest.

Background

7. Significant procedural steps are set out in the Appendix.

Reviewable decision

8. The decision under review is the Department's internal review decision dated 11 January 2019.

Evidence considered

9. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and Appendix).

² Application dated 10 October 2018.

³ Internal review decision dated 11 January 2019.

⁴ Sections 47(3)(a) and 48 of the RTI Act.

⁵ Schedule 3, section 2 of the RTI Act. Access to a small amount of information was also refused on the grounds disclosure would, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act: that information was either released during the review, or access to it was not pursued by the applicant, and it is not in issue. Additionally, the Department's initial decision dated 29 November 2018 also relied on the Parliamentary privilege exemption set out in schedule 3, section 6 of the RTI Act. That exemption was not, however, relied in the Department's internal review decision dated 11 January 2019 (being the decision under review – see paragraph 8), nor on external review.

⁶ External review application dated 8 February 2019.

⁷ And the Department, in response to my queries, confirmed that other pages the possible existence of which were suggested by some of the information in issue did not, in fact, exist (Department letter dated 23 January 2020, replying to my letter dated 19 December 2019).

⁸ Including emails sent by the applicant.

⁹ Identifying information, duplicate information, information outside the scope of the access application and information otherwise available: see generally my letters to the applicant dated 18 June 2019, 15 October 2019, and 19 December 2019, explaining the nature of this information and how it was to be dealt with in the review, which explanations the applicant did not contest. Additionally, the applicant's application for external review queried the whereabouts of two emails sent by him to the Department; this issue was resolved during the review (see my letters dated 18 June 2019 and 19 December 2019).

10. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**),¹⁰ particularly the right to seek and receive information as embodied in section 21 of that Act. 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

Information in issue

11. Most of the information in issue consists of Community Replies, comprising:
- 279 pages¹³ identified by the Department in processing the access application and dealt with in the decision under review (**Original Pages**);¹⁴ and
 - a further 64 pages located by the Department on external review (**Additional Pages**).¹⁵
12. Original Page 7 also contains a public servant's mobile telephone number, to which access has been refused.
13. A set of all relevant pages, marked to depict information not in issue and information to which I consider access may be refused, will accompany the copy of these reasons to be forwarded to the Department.

Issues for determination

14. I must determine whether access may be refused to the information in issue, on the grounds that:
- the information comprises exempt information, as information disclosure of which would reveal a consideration of Cabinet or prejudice the confidentiality of Cabinet considerations or operations; and/or
 - disclosure of the information in issue would, on balance, be contrary to the public interest.

Relevant law

15. The primary object of the RTI Act is to give a right of access to information in the government's possession or under the government's control unless, on balance, it is contrary to the public interest to give the access.¹⁶ The Act is to be applied and interpreted to further this primary object.¹⁷

¹⁰ Which came into force on 1 January 2020.

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 [11].

¹² *XYZ*, [573].

¹³ In whole or part.

¹⁴ Original Pages 7, 11, 30, 34-39; 42-47; 55-64; 141-142; 144-146; 219-226; 228-236; 238-244; 246-258; 260-262; 264; 267-275; 277-283; 285-294; 296-308; 309-315; 317-325; 327-333; 335-341; 343-350; 353-359; 364-404; 406-411; 448-454; 469-471; 473-476; 478-486; 524-530; 546-552; 563-570; 630-640; 642-648; 650-656; 659-665.

¹⁵ Additional Pages 2-9; 18-24; 26-32; 35; 37-53; 54-66; 69-70; 72-80.

¹⁶ Section 3(1) of the RTI Act.

¹⁷ Section 3(2) of the RTI Act.

16. Section 23 of the RTI Act gives effect to the Act's primary object, by conferring a right to be given access to documents. This right is subject to other provisions of the RTI Act,¹⁸ including grounds on which access may be refused.¹⁹ These grounds relevantly allow an agency to refuse access to a document to the extent the document comprises exempt information.²⁰

Exempt information

17. Types of exempt information are set out in schedule 3 of the RTI Act. For the purposes of this decision, the type stated in schedule 3, section 2(1)(b) is relevant:²¹

2 Cabinet information brought into existence on or after commencement

(1) Information is exempt information for 10 years after its relevant date if—

...

(b) its disclosure would reveal any consideration of Cabinet or would otherwise prejudice the confidentiality of Cabinet considerations or operations...

18. 'Consideration' for the purposes of the above exemption provision is defined to include 'discussion, deliberation, noting (with or without discussion) or decision; and consideration for any purpose, including, for example, for information or to make a decision': schedule 3, section 2(5) of the RTI Act.
19. Additionally, the exemption is qualified by an exception in schedule 3, section 2(2) of the RTI Act, which provides that it does not apply to:
- information brought into existence before the commencement of schedule 3, section 2 of the RTI Act;²² or
 - information officially published by decision of Cabinet.

Contrary to public interest information

20. Access may also be refused to a document, to the extent the document comprises information the disclosure of which would, on balance, be contrary to the public interest under section 49 of the RTI Act.²³
21. In deciding whether disclosure would, on balance, be contrary to the public interest, section 49 of the RTI Act requires a decision-maker to:
- identify any irrelevant factors and disregard them

¹⁸ Section 23(1) of the RTI Act.

¹⁹ Section 47 of the RTI Act. The grounds are to be interpreted narrowly (section 47(2)(a) of the RTI Act), and the Act is to be interpreted with a pro-disclosure bias (section 44 of the RTI Act).

²⁰ Sections 47(3)(a) and 48 of the RTI Act.

²¹ Schedule 3, section 2(1)(b) is the provision cited and relied on in the decision under review; that decision does make reference to documents having been 'brought into existence for consideration of Cabinet' – the language of schedule 3, section 2(1)(a) – however the decision contains no reference to that latter exemption, and no reasoning to support its application. As I advised the Department by letter dated 16 April 2019, there appears to be no basis on which a case for exemption under schedule 3, section 2(1)(a) of the RTI Act could be made out.

²² 1 July 2009.

²³ Section 47(3)(b) of the RTI Act. The term 'public interest' refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that, in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests, although there are some recognised public interest considerations that may apply for the benefit of an individual: Chris Wheeler, 'The Public Interest: We Know It's Important, But Do We Know What It Means' (2006) 48 *AIAL Forum* 12, 14.

- identify relevant public interest factors favouring disclosure and nondisclosure
- balance the relevant factors favouring disclosure and nondisclosure; and
- decide whether disclosure of the information in issue would, on balance, be contrary to the public interest.

Findings

22. There are no grounds for refusing access to information in issue appearing on the following pages:²⁴
- Original Pages 55-64; 277-283; 309-315; 630-640; and
 - Additional Pages 54-66.
23. Section 108 of the RTI Act limits the amount of explanation I can give as regards these pages in these reasons;²⁵ my reasoning was detailed in my letters to the Department dated 17 October and 19 December 2019. It is sufficient to note that I am not satisfied that release of relevant pages under the RTI Act would comprise a 'disclosure', as required by sections 48(2)²⁶ and schedule 3, section 2(1)(b) of the RTI Act, and section 47(3)(b) of the RTI Act.
24. Further, release to the applicant of these pages under the RTI Act would not 'reveal'²⁷ any consideration of Cabinet, otherwise prejudice the confidentiality of Cabinet considerations or operations, or give rise to any public interest harms or prejudices that might justify refusal on public interest grounds.
25. The Department has not discharged the onus it carries of establishing that its decision to refuse access to these pages was justified, or that I should give a decision adverse to the applicant.²⁸ Accordingly, the Department has not made out grounds for refusing access to these pages.
26. The Department may, however, refuse access to the balance of the information in issue, being:
- various Community Replies; and
 - the Mobile Number.

Exempt information

27. As noted, most of the Community Replies to which I consider access may be refused were used in the preparation of the Cabinet submission, a copy of which I have reviewed in the course of this external review. Having carefully considered the Cabinet submission,²⁹ and relevant Community Replies,³⁰ I consider that disclosure of the latter would:

²⁴ Noting that there are segments of information appearing on certain pages – generally, identifying information – to which the applicant is not pursuing access and which are therefore not in issue.

²⁵ As they are claimed to be exempt information.

²⁶ Section 48(2) providing that schedule 3 of the RTI Act 'sets out the types of information the **disclosure** of which the Parliament has considered would, on balance, be contrary to the public interest.'

²⁷ 'To make known or show something ... that was previously secret': Cambridge English Dictionary online (accessed 12 December 2019).

²⁸ Section 87(1) of the RTI Act.

²⁹ A copy of which I obtained from the Cabinet Secretary on 18 September 2019; prior to having access to the Cabinet submission, I had conveyed to the Department my preliminary view that it had not established the application of schedule 3, section 2(1)(b) of the RTI Act: letters dated 16 April 2019 and 18 June 2019.

³⁰ Basically, all Community Replies to which I consider access may be refused, other than those noted below at footnote 35.

- reveal a consideration of Cabinet, by revealing information that was considered by Cabinet;³¹ and/or
 - allow reliable inferences to be drawn about Cabinet considerations, thereby prejudicing the confidentiality of Cabinet considerations or operations.³²
28. There is no question that relevant Community Replies are within the 10 year time limit governing schedule 3, section 2(1) of the RTI Act.³³ Further, they do not fall within the exceptions to section 2(1) stated in schedule 3, section 2(2) of the RTI Act.³⁴ Accordingly, I consider they comprise exempt information. Access to relevant Community Replies may, therefore, be refused under sections 47(3)(a) and 48 of the RTI Act.

Contrary to Public Interest Information

Community Replies

29. I am not satisfied that all of the Community Replies were relied on or used by the Department in preparing the Cabinet submission.³⁵ Insofar as a given Community Reply was not used in preparing the Cabinet submission, I cannot see that it can attract exemption under schedule 3, section 2(1)(b) of the RTI Act.
30. I am, however, of the view that disclosure of Community Replies of this kind – ie, that were not used in preparing the Cabinet submission – would nevertheless, on balance, be contrary to the public interest.
31. Additionally, if my findings at paragraphs 27-28 as to the application of schedule 3, section 2(1)(b) are incorrect, then I also consider that disclosure of any Community Replies that were used in preparing the Cabinet submission would, on balance, be contrary to the public interest.³⁶
32. Importantly, the Department advised potential respondents that it:
- ...will not disclose or publish, in full or part, any submissions in response to this discussion paper except as required under the Right to Information Act 2009.*³⁷
33. While appropriately cautioning respondents that it could not, in view of its obligations under the RTI Act, give an absolute guarantee of confidentiality, the Department was in my view nevertheless seeking to assure those lodging replies that they may do so on the understanding that replies would, as far as possible, be treated confidentially.

³¹ Noting that parts of certain Community Replies comprise ‘the very information that was taken into account or noted by Cabinet in its deliberations ... it discloses specific considerations and deliberations of Cabinet.’: *North Queensland Conservation Council Inc and Queensland Treasury* [2016] QICmr 21 (10 June 2016) at [26] (**NQCC**): see, for example, Community Replies comprising Original Pages 304-307 and 473-476.

³² See *Spencer v Commonwealth of Australia* (No 3) [2012] FCA 637 (**Spencer**), the Federal Court upholding a claim of public interest immunity permitting non-disclosure of documents used in preparing Cabinet submissions, where their disclosure would result in similar consequences. *Spencer* was subsequently upheld on appeal by the Full Court of the Federal Court (*Spencer v Commonwealth of Australia* [2012] FCAFC 169), and as it is concerned with avoidance of consequences substantially similar to those against which schedule 3, section 2(1)(b) of the RTI Act is directed, can be usefully applied in interpreting the latter.

³³ Matters of which I am satisfied, having examined the dates of all Replies, and the relevant Cabinet submission.

³⁴ Having been brought into existence after commencement of schedule 3, section 2 of the RTI Act, and there being nothing before me to indicate they have been officially published by decision of Cabinet.

³⁵ See, for example, Community Replies at pages 7, 11, 141-142, 235, 236, 253, 262, 264, 308, 324, 325, 350, and Additional Page 9.

³⁶ Noting that in making all public interest findings, I have followed the steps prescribed in section 49 of the RTI Act, including carefully considering the non-exhaustive lists of factors favouring disclosure and nondisclosure prescribed in schedule 4 of the RTI Act, and disregarding irrelevant factors. I have also kept in mind the RTI Act’s pro-disclosure bias, and Parliament’s requirement that grounds for refusing access be interpreted narrowly.

³⁷ Discussion Paper, page 4.

As far as I am aware, it has done so, and relevant documents have been kept confidential.

34. With this in mind, in the particular circumstances of this specific case, I consider that disclosure of any Community Replies received by the Department in response to the Discussion Paper would, on balance, be contrary to the public interest.
35. While the applicant does not seek access to information directly identifying Community Reply authors (such as names), a number of the Community Replies contain other potentially identifying particulars about those persons, together with the authors' opinions on various matters, some expressed quite candidly. This comprises personal information,³⁸ disclosure of which the RTI Act presumes would give rise to a public interest harm.³⁹ Disclosure of personal information, in circumstances where the Department had made a general statement as to nondisclosure and afforded authors some degree of comfort that they may express views frankly, would give rise to a considerable public interest harm. I weight this factor strongly.
36. Additionally, disclosure of any of the Community Replies could also reasonably be expected⁴⁰ to prejudice the Department's ability to obtain confidential information in the future, giving rise to both a factor favouring nondisclosure in the public interest,⁴¹ and a public interest harm telling against disclosure.⁴²
37. I do not think it irrational, absurd or ridiculous to expect that unconditional disclosure by the Department of confidential⁴³ submissions received from members of the public, in circumstances where the Department had given the general impression that such submissions would not be published or disclosed,⁴⁴ could to some degree discourage persons from participating in similar consultations in the future.⁴⁵ This would potentially limit the range of community views available to government in future policy development processes, causing a relatively significant public interest harm. These factors favouring nondisclosure also warrant a strong weighting.

³⁸ 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': *Information Privacy Act 2009* (Qld) (**IP Act**), section 12.

³⁹ Schedule 4, part 4, section 6 of the RTI Act.

⁴⁰ The phrase 'could reasonably be expected to' calls for a decision-maker to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (eg merely speculative/conjectural 'expectations') and expectations which are reasonably based, ie, expectations for the occurrence of which real and substantial grounds exist: *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at [155] to [160] (**B and BNRHA**). A reasonable expectation is one that is reasonably based, and not irrational, absurd or ridiculous: *Sheridan and South Burnett Regional Council and Others* (Unreported, Queensland Information Commissioner, 9 April 2009) at [189]-[193], referring to *Attorney-General v Cockcroft* (1986) 64 ALR 97.

⁴¹ Schedule 4, part 3, item 16 of the RTI Act.

⁴² Schedule 4, part 4, section 8 of the RTI Act, which provides that disclosure of information could reasonably be expected to cause a public interest harm if the information consists of information of a confidential nature that was communicated in confidence and disclosure of the information could reasonably be expected to prejudice the future supply of information of this type. This harm factor is subject to an exception precluding its application to deliberative process information (including information disclosing a consultation), unless that information was, as is the case with the Community Replies, communicated by entities other than the State, an agency, Ministers, or officers/staff thereof. The exception therefore has no application in this case.

⁴³ The first element for establishing the harm factor prescribed in schedule 4, part 4, section 8 of the RTI Act: *Palmer and Townsville City Council* [2019] QICmr 43 (3 October 2019) at [137]-[143], citing *B and BNRHA*, and noting again that there is nothing before me suggesting relevant Community Replies are other than confidential (see paragraph 33).

⁴⁴ And would thus be treated confidentially – the second requirement, and further noting that at least one of the submissions is endorsed as confidential (see Original Page 412, an email covering Original Pages 448-454 and 469-471), while many are framed or expressed in a manner from which a mutual understanding of confidence can reasonably be implied (*B and BNRHA* at [152]).

⁴⁵ Thereby prejudicing the Department's ability to obtain confidential information (thus giving rise to the nondisclosure factor in schedule 4, part 3, item 16), and satisfying the third of the three requirements necessary to enliven schedule 4, part 4, section 8 of the RTI Act. On this latter point, lodging a Community Reply was a voluntary matter – this was not a case where members of the community were under an obligation to provide submissions in reply, or were required to do so in order to obtain some benefit from government or avoid disadvantage – considerations the Information Commissioner in *B and BNRHA* considered may preclude satisfaction of this requirement (at [161]).

38. There are public interest considerations weighing in favour of some of the Community Replies, being those that were relied on by the Department in preparing the Cabinet submission (assuming, for the sake of argument, that these pages were not exempt information, as discussed above). I acknowledge the general public interest in promoting access to government-held information.⁴⁶ I also acknowledge that disclosure of this category of response may enhance Departmental accountability and transparency,⁴⁷ promote informed debate on matters of serious interest,⁴⁸ and reveal background or contextual information relied on by government in making a decision.⁴⁹ These are important public interest considerations, and I give them considerable weight.
39. Nevertheless, my view is that there is, in the particular circumstances of this case, a greater public interest in protecting communications solicited from the public by government on the basis of non-publication, and in avoiding disclosure of personal information. Weighing competing public interest considerations against one another, I consider that the balance of the public interest favours nondisclosure of these documents.
40. As for Community Replies that may *not* have been relied on by the Department, I can identify no public interest factors of any appreciable weight favouring disclosure of these documents. These particular responses were not, as noted, used in preparation of the Cabinet submission, and thus do not comprise background or contextual information relied on by government in making a decision, nor information disclosure of which would enhance Departmental accountability or transparency. Their disclosure would not promote informed debate on matters of serious interest,⁵⁰ and, while there is, as noted, a general public interest in promoting access to government-held information, that general public interest is in this case insufficient to displace the strong and particular public interest considerations favouring nondisclosure discussed above. Disclosure of these documents would, on balance, therefore be contrary to the public interest.
41. Turning then to the Mobile Number on Original Page 7, the Information Commissioner has consistently found that public servant mobile telephone numbers comprise information the disclosure of which could reasonably be expected to prejudice protection of an individual's right to privacy⁵¹ and which would, on balance, be contrary to the public interest.⁵²

⁴⁶ Implicit, for example, in the object of the RTI Act (section 3).

⁴⁷ Schedule 4, part 2, items 1 and 3 of the RTI Act.

⁴⁸ Schedule 4, part 2, item 2 of the RTI Act.

⁴⁹ Schedule 4, part 2, item 11 of the RTI Act. The applicant also submitted that a range of other factors listed in schedule 4, part 2 of the RTI Act also favour disclosure (submissions dated 28 August 2019). I do not agree. Community Replies do not concern the expenditure of public funds (item 4), or concern agency conduct or administration (item 5). There is nothing before me to suggest that these community submissions, as expressions of opinion held by members of the public, are incorrect, out of date, misleading etc (item 12), and no questions of administration of justice or procedural fairness arise in this case, which might stand to be served by release of submissions obtained as part of a public consultation process (items 10 and 16). Nor could disclosure of these Community Replies reasonably be expected to contribute to innovation and the facilitation of research (item 19).

⁵⁰ Schedule 4, part 2, item 2 of the RTI Act.

⁵¹ Schedule 4, part 3, item 3 of the RTI Act, the prejudice arising from the fact that mobile telephone numbers allow potential contact with officers whilst off duty or engaged in private activity: *Underwood and Minister for Housing and Public Works* [2015] QICmr 27 (29 September 2015) (*Underwood*) at [66]-[67], citing *Kiepe and the University of Queensland* (Unreported, Queensland Information Commissioner, 1 August 2012) (*Kiepe*) at [20].

⁵² See, for example, see *Kiepe, Underwood, Smith and Sunshine Coast Regional Council; Diamond Energy Pty Ltd* (Third Party) [2017] QICmr 42 (5 September 2017) (*Smith*) at [14]-[17] and *D56CNT and Central Queensland University* [2017] QICmr 3 (1 February 2018) at [24]-[31]. I noted OIC's established position in this regard in relation to a separate mobile telephone (on a page no longer in issue) in my letter to the applicant dated 18 June 2019 (footnote 2 of that letter).

42. I see no reason to depart from that approach as regards the Mobile Number in issue in this review. Protecting personal privacy is an important public interest, warranting strong weight. As against this, I can identify only one consideration favouring disclosure of the Mobile Number: the general public interest in promoting access to government-held information.⁵³ There being no broader accountability or transparency considerations to be served by disclosure of this number, I consider this general consideration warrants only minimal weight, and should be subordinated to the public interest in avoiding prejudice to individual privacy specifically prescribed in schedule 4, part 3, item 3 of the RTI Act.
43. Disclosure of the Mobile Number would therefore, on balance, be contrary to the public interest, and access may therefore be refused.

Applicant's submissions

44. The applicant's case for access to the Community Replies was set out in detailed submissions supporting his access application, application for internal review and application for external review, together with further thorough submissions made through the course of the external review. I have given all submissions careful consideration, and, to the extent they are relevant to the issues I have power to determine,⁵⁴ taken them into account in making my decision.
45. As regards application of schedule 3, section 2(1)(b) of the RTI Act, the applicant argued⁵⁵ that the Community Submissions were not submitted to Cabinet and/or were not brought into existence for consideration of Cabinet.
46. The applicant further disputed that disclosure of these documents would prejudice Cabinet confidentiality, while also referring to a decision of the Information Commissioner – *Sunshine Coast Environment Council Inc and Department of National Parks, Sport and Racing; Springborg MP (Third Party)*⁵⁶ (**Sunshine Coast**) – in which information was found not to have qualified for exemption under this provision.
47. On the first point, whether or not documents were submitted to Cabinet is not strictly relevant to establishing schedule 3, section 2(1)(b) of the RTI Act. Nor is the purpose for the bringing into existence of documents pertinent.⁵⁷ The only question is whether disclosure of information would have one of the consequences prescribed in the exemption itself. For reasons explained above, and contrary to the applicant's submissions, I consider that as regard many of the Community Replies, disclosure would give rise to one or more of these consequences.
48. As for *Sunshine Coast*, much of this decision concerned information that *might* have been used in or for future Cabinet processes but for a change of government, rather than information that, as in this case, was actually used. It also⁵⁸ predated the

⁵³ There being nothing to suggest that disclosure of this number could, for example, promote open discussion of public affairs (schedule 4, part 2, item 1 of the RTI Act), or contribute to positive and informed debate on matters of serious interest (schedule 4, part 2, item 2 of the RTI Act).

⁵⁴ Many of the applicant's submissions (such as, for example, his 7 November 2019 submissions) concern his dissatisfaction with the minimum financial requirements and other community consultation processes administered by the Department, and with government policy generally on building industry regulation, matters I have no authority to address. Materials supplied with his application for external review also appear to raise concerns with the manner in which communications from him were handled by the Department, including his application for internal review. Concerns regarding two of these communications were, as noted, resolved during the external review. What may or may not have happened to his application for internal review, meanwhile, is not a reviewable issue in relation to which I have any jurisdiction – noting that as he received an internal review decision, it also appears to be largely immaterial.

⁵⁵ See, particularly, submissions accompanying the applicant's application for external review.

⁵⁶ [2016] QICmr 10 (4 March 2016).

⁵⁷ This being a material question only when assessing the possible application of schedule 3, section 2(1)(a) of the RTI Act.

⁵⁸ As I advised the applicant by letter dated 19 December 2019.

Information Commissioner's decision in *NQCC*,⁵⁹ in which it was explained that the answer to the question as to whether disclosure of information would reveal a consideration of Cabinet or otherwise prejudice the confidentiality of Cabinet considerations or operations '*...largely depends on the particular nature of the information in question, the circumstances relating to creation of the information and the other information available to the decision maker, under the RTI Act.*'⁶⁰

49. Ultimately, whether disclosure of information would have one of the consequences stated in schedule 3, section 2(1)(b) of the RTI Act is a question of fact, to be determined having regard to all relevant circumstances, including, as identified in *NQCC*, all '*...information available to the decision-maker*'. On the information available to me, I consider schedule 3, section 2(1)(b) applies in this case, to the extent and for the reasons discussed above.
50. Turning to public interest arguments, many of the applicant's submissions on this issue were variations on the need for maximum government transparency in relation to significant regulatory reforms impacting the building industry.⁶¹
51. I have dealt with public interests of this kind above, in identifying, weighing and balancing competing public interest considerations.⁶² While I acknowledge the sincerity of the applicant's submissions, I am of the view that the factors favouring nondisclosure should in this case be preferred to those telling in favour. Relevant information in issue is, as noted, information communicated by other members of the public, subject to an assurance that their submissions would be treated with discretion. Disclosure in such circumstances would, as explained, be contrary to the public interest.
52. In a related vein, the applicant also referred to other community consultation processes administered by the Department, which he submits have been conducted on an 'open' basis: for example, in his submissions dated 15 October 2019, the applicant stated that '*Every ...[Departmental] request for industry submissions since the date of the ...[Discussion Paper]...has now and is made public.*'⁶³
53. That may be so. In this case, however, the Department opted not to conduct consultations on an open basis, but to give submitters the assurance quoted in paragraph 32. For the reasons explained above, I consider that unconditional disclosure of Community Replies despite that assurance would, on balance, be contrary to the public interest.
54. In other submissions, the applicant also, for example, appears to query the propriety of the consultation framework and Cabinet processes employed by the Department during the policy review the subject of the Discussion Paper.⁶⁴ Submissions of this kind might conceivably be construed as arguments that disclosure of the information in

⁵⁹ First cited at footnote 31.

⁶⁰ [24].

⁶¹ The applicant in submissions accompanying his application for external review (for example) pressing me to have regard to the preamble to the RTI Act – statements of legislative intent which I must consider, but not to the exclusion or in preference to specific statutory provisions such as grounds for refusing access to information, as enacted by the legislature.

⁶² Noting that I am precluded from taking into account public interest matters when considering the application of schedule 3, section 2(1)(b) of the RTI Act, Parliament having determined that disclosure of exempt information would be contrary to the public interest: section 48(2) of the RTI Act. While agencies such as the Department have a discretion to release exempt information, OIC does not: section 105(2) of the RTI Act.

⁶³ See also his submission dated 6 December 2019, which refers to a consultation process in which submitter identities, if not replies, were apparently published. The balance of this particular submission appears to seek my assistance with obtaining information relating to that particular consultation process; I have no power to do so. The applicant would need to lodge a fresh RTI access application for such information, with the appropriate agency.

⁶⁴ See, for example, submissions dated 18 March and 16 April 2019.

issue could reasonably be expected to allow or assist inquiry into possible deficiencies in agency/official conduct,⁶⁵ and/or reveal or substantiate that an agency or official has engaged in misconduct, negligent improper or unlawful conduct.⁶⁶

55. As I advised the applicant by correspondence dated 19 December 2019,⁶⁷ however, it is not apparent to me that relevant processes were anything other than routine. In any event, I cannot see how unconditional release of submissions and feedback given by members of the public would advance inquiry into or reveal information about government processes.⁶⁸
56. More specifically, in his 8 November 2019 submissions, the applicant appears to submit that release of the requested submissions to him would assist the Queensland Audit Office (**QAO**) in undertaking a proposed audit of the Queensland Building and Construction Commission's licensing functions, so as to give rise to public interest factors or considerations favouring disclosure.⁶⁹
57. QAO has broad powers to obtain information that it considers may be relevant to work it undertakes: see, for example, section 46 of the *Auditor-General Act 2009* (Qld). I do not consider that disclosure to the applicant of public submissions commenting on a matter of proposed legislative reform by the executive government would allow or assist inquiry by QAO in the manner his submissions appear to suggest (or at all), or to otherwise advance any identifiable public interests.

DECISION

58. It was decided in the decision under review that all information the subject of that decision, as remaining in issue in this review, comprised exempt information. My decision deals with additional information only located on external review, and finds that some information may be released, while access to other information may be refused on slightly different grounds to those relied on in the decision under review.
59. Accordingly, it is appropriate that I vary the decision under review. There are no grounds established for refusing access to information identified at paragraph 22 above. Access to the balance of the information in issue may, however, be refused, for the reasons explained above.
60. 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.

Louisa Lynch
Right to Information Commissioner

Date: 13 February 2020

⁶⁵ Schedule 4, part 2, item 5 of the RTI Act.

⁶⁶ Schedule 4, part 2, item 6 of the RTI Act.

⁶⁷ See also footnote 17 to my letter to the applicant dated 15 October 2019, in which I did not accept the application of schedule 4, part 2, item 5 of the RTI Act (among others), and which is substantially paraphrased in footnote 49 above.

⁶⁸ And thus I do not consider either factor identified in paragraph 54 arises to favour disclosure in this case.

⁶⁹ Such as, for example, the factor favouring disclosure stated in schedule 4, part 2, item 5 of the RTI Act: allow or assist inquiry into agency/official conduct or administration.

APPENDIX**Significant procedural steps**

Date	Event
8 February 2019	OIC received the application for external review.
11 February 2019	OIC notified the applicant and the Department that the application for external review had been received and requested procedural documents from the Department. OIC received the requested information from the Department.
18 March 2019	The applicant provided a written submission. OIC notified the applicant and the Department that the application for external review had been accepted and requested a copy of the information in issue.
21 March 2019	OIC received the requested information from the Department.
16 April 2019	OIC conveyed a preliminary view to the Department and requested submissions be provided in response. The applicant provided a written submission.
17 April 2019	OIC provided information from the applicant's submissions to the Department to ensure it was considered in the Department's response to OIC's preliminary view.
28 May 2019	The Department provided OIC with submissions in response to the preliminary view.
18 June 2019	OIC wrote to the Department and the applicant, and requested the Department arrange for release of additional information to the applicant, in addition to inviting a further submission.
25 June 2019	The Department advised OIC it had provided the applicant with additional information.
26 August 2019	OIC requested a copy of the Cabinet Submission from the Cabinet Secretary.
28 August 2019	The application provided a written submission.
18 September 2019	OIC received a copy of the Cabinet Submission from the Cabinet Secretary.
15 October 2019	OIC conveyed a preliminary view to the Department. OIC conveyed a preliminary view to the applicant.
16 October 2019	The applicant provided written submissions.
17 October 2019	OIC wrote to the Department to advise the applicant did not accept OIC's preliminary view and relating aspects of the applicant's 16 October 2019 submissions.
7 November 2019	The applicant provided written submissions.
8 November 2019	The applicant provided written submissions.
28 November 2019	The Department provided written submissions.
2 December 2019	The Department supplied additional documents to OIC.

Date	Event
6 December 2019	The applicant provided a written submission.
19 December 2019	OIC conveyed a final preliminary view to the Department, and requested additional information. OIC conveyed a final preliminary view to the applicant and invited final submissions prior to the issue of a final decision.
9 January 2019	The Department arranged for the release of further documents to the applicant.
16 January 2020	The applicant provided OIC with a final submission.
23 January 2020	The Department provided its final submission and requested information.