



## Decision and Reasons for Decision

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Citation:	<i>A56 and Surveyors Board Queensland [2021] QICmr 10 (10 March 2021)</i>
Application Number:	315122
Applicant:	A56
Respondent:	Surveyors Board Queensland
Decision Date:	10 March 2021
Catchwords:	<p><b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - request for information concerning the applicant's complaint - personal information of or about other individuals - whether disclosure would, on balance, be contrary to the public interest - whether access may be refused under sections 47(3)(b) and 49 of the <i>Right to Information Act 2009 (Qld)</i></b></p> <p><b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT OR UNLOCATABLE DOCUMENTS - whether agency has taken all reasonable steps to locate documents requested by the applicant - whether access to further documents may be refused on the basis that they do not exist or cannot be located - sections 47(3)(e) and 52(1) of the <i>Right to Information Act 2009 (Qld)</i></b></p>

### REASONS FOR DECISION

#### Summary

1. The applicant applied to the Surveyors Board Queensland (**Board**) under the *Right to Information Act 2009 (Qld)* (**RTI Act**) to access information concerning his complaint about a surveyor.<sup>1</sup>
2. The Board located relevant documents and granted the applicant full access to 47 pages. The Board decided to refuse access, on various grounds, to 22 full pages, parts of 7 pages and located video recordings.<sup>2</sup> Certain irrelevant information was also deleted from the documents disclosed to the applicant.

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<sup>1</sup> Access application dated 14 November 2019.

<sup>2</sup> On 17 December 2019.

3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Board's decision and raised concerns that the Board had not located all relevant documents.<sup>3</sup>
4. During the review, the Board disclosed some additional information to the applicant, however, the Board maintains that access can be refused to the remaining refused information.
5. The applicant remains dissatisfied with the level of documentation that has been located and released to him.
6. Having considered the submissions made by the Board and the applicant on external review, as well as the specific information in issue, I have decided to vary the Board's decision and find that:
  - access may be granted to additional parts of two pages of information as I do not agree with the Board's submissions on external review that disclosure of this information would, on balance, be contrary to the public interest
  - access may be refused to the remaining information in issue, on the ground its disclosure would, on balance, be contrary to the public interest; and
  - access to any further information may be refused on the ground it does not exist or cannot be located.

## Background

7. The Board was established under section 7 of the *Surveyors Act 2003* (Qld) (**Surveyors Act**) and its functions include:
  - authorising investigations, whether because of a complaint or on its own initiative, of registrants' professional conduct<sup>4</sup>
  - taking disciplinary proceedings against registrants;<sup>5</sup> and
  - referring disciplinary matters, for hearing, to professional conduct review panels and the Queensland Civil and Administrative Tribunal (**QCAT**).<sup>6</sup>
8. Part 5 of the Surveyors Act contains provisions concerning complaints and investigations about registrants' professional conduct. Those provisions empower the Board to deal with matters without conducting investigations of a registrants' professional conduct.<sup>7</sup> Where the Board reasonably suspects that a registrant has engaged in professional misconduct, it may ask the registrant, by written notice, to attend before the Board (or some of its members) to give information, answer questions or produce a document.<sup>8</sup> Where a registrant complies with such a request, the Board may decide that it can satisfactorily deal with the matter,<sup>9</sup> without authorising an investigation.<sup>10</sup>

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<sup>3</sup> External review application received 17 January 2020.

<sup>4</sup> Section 9(g) of the Surveyors Act.

<sup>5</sup> Section 9(h) of the Surveyors Act.

<sup>6</sup> Section 9(i) of the Surveyors Act.

<sup>7</sup> Section 86 of the Surveyors Act.

<sup>8</sup> Section 86 of the Surveyors Act. However, registrants are not required to comply with such requests and there is a statutory privilege against self-incrimination (sections 86(4) and (5) of the Surveyors Act).

<sup>9</sup> By cautioning, advising or reprimanding the registrant; or requiring the registrant to correct a survey or undergo training/a competency assessment (section 86(2)(a) of the Surveyors Act).

<sup>10</sup> Section 86(6) of the Surveyor's Act. The Board has similar decision powers under section 87(2) of the Surveyors Act where a registrant has not complied with a request and the Board reasonably believes the registrant has engaged in professional misconduct. Part 5, Division 2 of the Surveyors Act identifies the actions to be taken following completion of an authorised investigation.

9. The applicant lodged a complaint with the Board about the conduct of a particular surveyor (**Complaint**). After reviewing information that it had received and obtained about the Complaint, the Board notified the applicant in October 2019 that it had found no evidence of the surveyor's professional misconduct and had closed its complaint file.<sup>11</sup>
10. Significant procedural steps taken during the external review are set out in the Appendix.

### Reviewable decision

11. The decision under review is the Board's decision dated 17 December 2019.

### Evidence considered

12. Evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and the Appendix).
13. The applicant provided extensive submissions (together with supporting information) to OIC. I have considered all this material and have extracted those parts which have relevance to the issues to be determined in this external review.
14. I have also had regard to the *Human Rights Act 2019* (Qld),<sup>12</sup> particularly the right to seek and receive information.<sup>13</sup> I consider a decision-maker will be '*respecting*' and '*acting compatibly with*' that right and others prescribed in the HR Act, when applying the law prescribed in the RTI Act.<sup>14</sup> 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:<sup>15</sup> '*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*'.<sup>16</sup>

### Information in issue

15. Certain issues were resolved during the review.<sup>17</sup> The information remaining for consideration (**Information in Issue**) comprises:
  - 22 full pages
  - parts of a one page file note
  - segments of information within the Board's minutes dated 25 July 2019 and 5 September 2019; and
  - four video files.
16. I am constrained as to the level of detail I can provide about the Information in Issue,<sup>18</sup> however, I can confirm that it comprises the names of individuals other than the applicant; company names; information provided to the Board by other individuals; and communications between the Board and other individuals.

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<sup>11</sup> What constitutes professional misconduct is defined in schedule 3 of the Surveyors Act.

<sup>12</sup> Referred to in these reasons as the **HR Act**, and which came into force on 1 January 2020.

<sup>13</sup> Section 21 of the HR Act.

<sup>14</sup> *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].

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

<sup>16</sup> *XYZ* at [573].

<sup>17</sup> As noted in paragraph 4 above, the Board disclosed additional information to the applicant. The Board did not seek to contest OIC's preliminary view that 22 refused pages did not comprise exempt information and the applicant did not seek to access information the Board had deleted as irrelevant in the disclosed documents (as confirmed to the applicant on 19 November 2020).

<sup>18</sup> Section 108(3) of the RTI Act, which relevantly prevents OIC from revealing information claimed to be contrary to the public interest information.

## Issues for determination

17. The issues to be determined are whether:
  - access to the Information in Issue can be refused on the ground disclosure would be contrary to the public interest;<sup>19</sup> and
  - access to further relevant documents may be refused on the basis they do not exist or cannot be located.<sup>20</sup>
18. The Board has the onus of establishing that its decision refusing access to information was justified.<sup>21</sup>

## Public interest

19. Under the RTI Act, an individual has a right to access documents of an agency.<sup>22</sup> Although the RTI Act is to be administered with a pro-disclosure bias,<sup>23</sup> this right of access is subject to certain limitations, including grounds for refusal of access.
20. One such ground of refusal is where disclosure would, on balance, be contrary to the public interest.<sup>24</sup> 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.<sup>25</sup>
21. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest and explains that a decision maker must take the following steps in deciding the public interest:<sup>26</sup>
  - identify any irrelevant factors and disregard them
  - identify any relevant public interest factors favouring disclosure and nondisclosure
  - balance the relevant factors favouring disclosure and nondisclosure; and
  - decide whether disclosure would, on balance, be contrary to the public interest.
22. No irrelevant factors arise in the circumstances of this review and I have not taken any into account in making my decision.

## Factors favouring disclosure

### Accountability and transparency

23. The RTI Act recognises the following factors favouring disclosure will arise where disclosing information could reasonably be expected to:
  - enhance the government's accountability<sup>27</sup>

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<sup>19</sup> Sections 47(3)(b) and 49 of the RTI Act.

<sup>20</sup> Sections 47(3)(e) and 52 of the RTI Act.

<sup>21</sup> Section 87(1) of the RTI Act.

<sup>22</sup> Section 23 of the RTI Act.

<sup>23</sup> Section 44 of the RTI Act.

<sup>24</sup> Section 47(3)(b) of the RTI Act.

<sup>25</sup> However, there are some recognised public interest considerations that may apply for the benefit of an individual.

<sup>26</sup> Section 49(3) of the RTI Act.

<sup>27</sup> Schedule 4, part 2, item 1 of the RTI Act.

- inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by the Government in its dealings with members of the community;<sup>28</sup> and
  - reveal the reason for a government decision and any background or contextual information that informed the decision.<sup>29</sup>
24. The applicant submits that these factors apply and deserve significant weight because the Board did not provide him with '*any reasonable feedback*' and he believes the complaint information he provided to the Board (together with information provided on his behalf) was '*persuasive evidence*'.<sup>30</sup> More specifically, the applicant contends that the Board's accountability and transparency can only be achieved by full disclosure of all the information received by the Board, together with details of how that information was considered and how conflicting evidence was weighed up.<sup>31</sup>
25. The Board must be transparent and accountable for how it deals with the complaints it receives about the conduct of registered surveyors. In this matter, the Board notified the applicant that it had found no evidence of professional misconduct by the surveyor who was the subject of the Complaint. The Board has also disclosed information to the applicant which includes a copy of the Board's '*Complaints and Disciplinary Policy and Procedures*'. This has, to some extent, advanced the Board's accountability and transparency.
26. As the applicant is the complainant in this matter, it is understandable that he seeks to be more informed about the Board's decision concerning the Complaint. However, although there is a public interest in affording relevant parties with an understanding of an agency's complaint processes, the agency's complaint conclusions and any outcomes which arise from those conclusions, this does not extend to affording the complainant the right to reinvestigate the agency's conclusions.
27. Taking into account the nature of the Information in Issue, the Complaint outcome and the information which has been disclosed to the applicant, I am satisfied that disclosure of the Information in Issue would, to an extent, further advance the Board's accountability and transparency and inform the community about the Board's complaint procedures. In these circumstances, I afford these factors moderate weight.

### **Applicant's personal information**

28. There is a public interest in individuals being able to access their own personal information.<sup>32</sup> The applicant contends that all information which the surveyor who is the subject of the Complaint provided to the Board relates to his property and should be disclosed.<sup>33</sup>
29. I have reviewed the Information in Issue and, while most of it generally concerns the applicant's property, only a small amount comprises the applicant's personal information.<sup>34</sup> Accordingly, this factor favouring disclosure applies to that information comprising the applicant's personal information and I afford it significant weight.

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<sup>28</sup> Schedule 4, part 2, item 3 of the RTI Act.

<sup>29</sup> Schedule 4, part 2, item 11 of the RTI Act.

<sup>30</sup> Submissions dated 27 October 2020.

<sup>31</sup> Submissions dated 27 October 2020.

<sup>32</sup> Schedule 4, part 2, item 7 of the RTI Act.

<sup>33</sup> External review application.

<sup>34</sup> '*Personal information*' is defined in section 12 of the *Information Privacy Act 2009* (Qld) as '*information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion*'.

30. This personal information of the applicant is intertwined with the personal information of other individuals to such an extent that it cannot be disclosed without also disclosing the personal information of those other individuals, which raises a factor favouring nondisclosure discussed below.

### Administration of justice for the applicant

31. A public interest factor favouring disclosure<sup>35</sup> will arise where disclosing information could reasonably be expected to contribute to the administration of justice for a person. In determining whether this public interest factor in favour of disclosure applies, I must consider whether:<sup>36</sup>
- the applicant has suffered loss, or damage, or some kind of wrong, in respect of which a remedy is, or may be, available under the law
  - the applicant has a reasonable basis for seeking to pursue the remedy; and
  - disclosing the information held by an agency would assist the applicant to pursue the remedy, or evaluate whether a remedy is available or worth pursuing.
32. The applicant submits that ‘*very high weight*’ should be afforded to this factor<sup>37</sup> because:
- he ‘*need[s] to know*’ what the surveyor has given in evidence to the Board to advance two QCAT proceedings he has already commenced and for the pending encroachment claims he considers may be brought against him<sup>38</sup>
  - it will not be possible for him to ‘*properly pursue those remedies because potentially denied evidence*’ will prevent the applicant from determining if criteria identified in *Olindaridge Pty Ltd and Anors v Tracey and Anor*<sup>39</sup> exists to prove negligence at common law and/or specific contractual breaches<sup>40</sup>
  - disclosing the Information in Issue will enhance his attempt to ‘*achieve justice in QCAT*’<sup>41</sup> and he has identified aspects of his commenced proceedings that would ‘*potentially benefit from the submissions made by [the surveyor] to the Board*’<sup>42</sup>
  - he believes nondisclosure will make his private insurance claim ‘*more difficult*’, as the Information in Issue may include evidence qualifying him for insurance that was previously declined;<sup>43</sup> and
  - he considers it unfair for the Board to withhold this information when the RTI Act has a pro-disclosure bias<sup>44</sup> and disclosure will also assist ‘*resolution*’ for certain building subcontractors.<sup>45</sup>
33. I acknowledge the encroachment impacts outlined in the applicant’s submissions. However, unlike the circumstances in *Willsford* and *1OS3KF*, the applicant already possesses details of the relevant entities and circumstances involved in the encroachment issue which is the subject of the Complaint and the applicant is already pursuing a number of remedies in respect of those issues, based on that information.

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<sup>35</sup> Schedule 4, part 2, item 17 of the RTI Act.

<sup>36</sup> *Willsford and Brisbane City Council* (1996) 3 QAR 368 (*Willsford*) at [17] and confirmed in *1OS3KF and Department of Community Safety* (Unreported, Queensland Information Commissioner, 16 December 2011) (*1OS3KF*) at [16].

<sup>37</sup> Submissions dated 18 January 2021.

<sup>38</sup> External review application and submissions dated 27 October 2020.

<sup>39</sup> [2016] QCATA 23.

<sup>40</sup> Submissions dated 18 January 2021.

<sup>41</sup> External review application.

<sup>42</sup> Submissions dated 18 January 2021.

<sup>43</sup> Submissions dated 27 October 2020.

<sup>44</sup> Submissions dated 18 January 2021. More specifically, the applicant submits that it is unfair for the Information in Issue to be withheld when the ‘*entire factual matrix must be presented to QCAT*’.

<sup>45</sup> Submissions dated 27 October 2020. The applicant’s submissions do not identify how disclosure of this particular Information in Issue to the applicant would lead to such resolution.

34. There is insufficient evidence before me to indicate that disclosure of the Information in Issue is required to enable the applicant (or any other individual or entity) to pursue a remedy or evaluate whether a remedy is available or worth pursuing.<sup>46</sup> On this basis, I afford no weight to this disclosure factor.

35. I also consider the Information Commissioner's comments in *Phyland and Department of Police*<sup>47</sup> are relevant:

*The RTI Act was not ... designed to serve as an adjunct to court processes, but to comprise a stand-alone mechanism for enabling public access to government-held information. Obviously, the applicant is entitled to elect to pursue access under the right of access conferred by the RTI Act. In doing so, however, she must accept the qualifications upon and limitations to that right imposed by the Act itself, including refusal of access where ... disclosure would disclose personal information or infringe upon an individual's right to privacy.*

36. In this regard, I note that it is reasonable to expect that the applicant may use disclosure processes available to him in the already commenced proceedings to seek further information he believes to be relevant to those proceedings.

### **Advance fair treatment and procedural fairness**

37. The RTI Act also gives rise to factors favouring disclosure in circumstances where disclosing information could reasonably be expected to:

- advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies;<sup>48</sup> and
- contribute to the administration of justice generally, including procedural fairness.<sup>49</sup>

38. The applicant submits that these factors favour disclosure of the Information in Issue and should be afforded significant weight.<sup>50</sup>

39. The public interest factor relating to advancing the fair treatment of individuals does not require a decision-maker to ensure that an applicant is provided with sufficient information to enable the applicant to be subjectively satisfied that he or she received fair treatment. Rather, it is about providing information to ensure fair treatment in an applicant's future dealings with agencies.<sup>51</sup>

40. I acknowledge the applicant's view that he has been provided with insufficient detail of the basis for the Board's decision. However, taking into consideration the nature of the Information in Issue, the information which has been disclosed to the applicant and the Board's notified decision about the Complaint, there is no evidence before me which indicates disclosing the Information in Issue could reasonably be expected to advance, or advance in any significant way, the applicant's future dealings with the Board or any other agency. Accordingly, to the extent this factor favouring disclosure applies, I afford it low weight.

41. The applicant contends that there has been a denial of natural justice because, although the surveyor who is the subject of the Complaint was given an opportunity to respond to

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<sup>46</sup> In respect of the already commenced QCAT proceedings, the Refused Information is not required to pursue or evaluate the review that the applicant has already requested.

<sup>47</sup> (Unreported, Queensland Information Commissioner, 31 August 2011) at [24], cited in *Sedlar and Logan City Council* [2017] QICmr 52 (7 November 2017) at [59].

<sup>48</sup> Schedule 4, part 2, item 10 of the RTI Act.

<sup>49</sup> Schedule 4, part 2, item 16 of the RTI Act.

<sup>50</sup> External review application and submissions dated 27 October 2020.

<sup>51</sup> *F60XCX and Department of Natural Resources and Mines* [2017] QICmr 19 (9 June 2017) (**F60XCX**) at [101].

the Complaint, he was not then given an opportunity to consider the surveyor's response.<sup>52</sup>

42. The fundamental requirements of procedural fairness—that is, an unbiased decision-maker and a fair hearing—should be afforded to a person who is the subject of a decision.<sup>53</sup> As the complainant in this matter, the applicant was afforded the opportunity to put forward relevant information supporting the Complaint (which he did) and he has been notified of the Board's decision about the Complaint. Although the applicant may disagree with the Board's decision, there is no evidence before me which indicates the Board did not properly consider the information provided by, or on behalf of, the applicant in support of the Complaint. On this basis, I afford this factor no weight.

### Consumer protection

43. In *Seven Network (Operations) Limited and Redland City Council; A Third Party*<sup>54</sup> (**Seven Network**), the Information Commissioner identified a factor favouring disclosure, where disclosing information could reasonably be expected to enhance consumer protection by creating a safe, informed and competitive marketplace.<sup>55</sup>
44. The applicant submits that the surveyor's conduct which is the subject of the Complaint is a significant consumer protection issue<sup>56</sup> and this factor should be afforded significant weight in favour of disclosure.<sup>57</sup> The matters which are the subject of the Complaint relate to the conduct of a particular surveyor at a particular residential property. While I acknowledge the significance to the applicant of the matters raised in the Complaint, I note that the subject matter of the information considered in both *Seven Network* and *Ardent Leisure* concerns health and safety issues that had the potential to impact a large section/s of the community. Taking into account the nature of the Information in Issue, I am satisfied that, to the extent this factor applies, it deserves only low weight.

### Deficiencies in agency conduct

45. Where disclosure of information could reasonably be expected to allow or assist inquiry into possible conduct deficiencies of agencies or officials, or reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct, public interest factors favouring disclosure will arise.<sup>58</sup> Although these factors favouring disclosure were not specifically raised by the applicant, given the applicant's submissions raise general concerns about how the Board dealt with the Complaint, I have considered whether they apply.
46. After carefully considering the Information in Issue (together with the applicant's submissions and the information which has been released to the applicant), I am satisfied that there is nothing in the Information in Issue which gives rise to an expectation that disclosure would allow or assist enquiry into, reveal or substantiate, agency or official

<sup>52</sup> External review application and submissions dated 27 October 2020. However, in the submissions dated 27 October 2020, when referring to the Information Commissioner's observations at [89]-[90] in *F60XCX*, the applicant also comments that: 'They are simply about the principal of natural justice of which I am not making any complaint whatsoever. I am comfortable that the [Board] allowed me to provide a submission and that of our surveyor... That is not my concern'.

<sup>53</sup> The fair hearing aspect of procedural fairness requires that, before a decision that will deprive a person of some right, interest or legitimate expectation is made, the person is entitled to know the case against them and to be given the opportunity of replying to it (*Kioa v West* (1985) 159 CLR 550 at 582 per Mason J).

<sup>54</sup> (Unreported, Queensland Information Commissioner, 30 June 2011).

<sup>55</sup> At [33]-[45].

<sup>56</sup> External review application. The applicant also relies on *Australian Workers' Union and Queensland Treasury; Ardent Leisure Limited (Third Party)* [2016] QICmr 28 (28 July 2016) (**Ardent Leisure**).

<sup>57</sup> Submissions dated 27 October 2020.

<sup>58</sup> Schedule 4, part 2, items 5 and 6 of the RTI Act.



conduct deficiencies. In these circumstances, I afford no weight to these factors favouring disclosure.

### **Other factors favouring disclosure**

47. I have taken into account the pro-disclosure bias of the RTI Act<sup>59</sup> and considered whether any other public interest factors favouring disclosure apply, including those listed in schedule 4, part 2 of the RTI Act.<sup>60</sup> I cannot identify any other public interest consideration favouring disclosure of the Information in Issue that would carry weight in these circumstances.<sup>61</sup>

### **Factors favouring nondisclosure**

#### **Personal information and privacy of other individuals**

48. The RTI Act recognises that disclosing an individual's personal information to someone else can be considered harmful to the public interest due to the impact of disclosure on that individual's privacy and also that the public interest will favour nondisclosure of information which could reasonably be expected to prejudice the protection of an individual's right to privacy.<sup>62</sup>
49. The applicant contends that:
- '*there is unlikely to be any information that identifies any personal information*' of the surveyor, as the survey in question was conducted by a corporation;<sup>63</sup> and
  - these nondisclosure factors carry no weight.<sup>64</sup>
50. I note that the Complaint relates to a survey (and associated documentation) certified by a particular registered surveyor, on behalf of a registered surveying company and both the surveyor, and the corporate entity, are registrants with the Board. Having carefully reviewed the Information in Issue, I am satisfied that most of it comprises the personal information of other individuals, as it includes their identities, information about them and their opinions, observations and recollections.<sup>65</sup> As noted above, some of this information is intertwined with the applicant's personal information.
51. The Board maintains that small portions of information on one page<sup>66</sup> should be refused as they identify certain Board members and '*decisions and opinions made by Board members should remain confidential in this instance*'.<sup>67</sup> However, the Board has not otherwise detailed any prejudice or negative impact that it contends would flow from disclosure of this information. I note that Board members are required to be appointed by the Governor in Council and their names, and public profiles, are in the public

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<sup>59</sup> Section 44 of the RTI Act.

<sup>60</sup> Taking into account the nature of the Information in Issue, I am unable to identify how disclosure could, for example, reveal the information was incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant (schedule 4, part 2, item 12 of the RTI Act); contribute to the protection of the environment (schedule 4, part 2, item 13 of the RTI Act); reveal environmental or health risks or measures relating to public health and safety (schedule 4, part 2, item 14 of the RTI Act); or contribute to the enforcement of the criminal law (schedule 4, part 2, item 18 of the RTI Act).

<sup>61</sup> In the event that further relevant factors apply in favour of disclosure, I am satisfied that there is no evidence to indicate that any would carry sufficient weight to outweigh the significant weight that I have afforded to the public interest factors that favour nondisclosure, as discussed below.

<sup>62</sup> Schedule 4, part 4, section 6(1) of the RTI Act and Schedule 4, part 3, item 3 of the RTI Act.

<sup>63</sup> External review application. Similar contentions are made in submissions dated 27 October 2020.

<sup>64</sup> Submissions dated 27 October 2020.

<sup>65</sup> By way of example, the Information in Issue on page 7 appears within the Board's file note of conversations with two individuals on 10 and 11 June 2019.

<sup>66</sup> Page 45.

<sup>67</sup> Submissions dated 2 October 2020.

domain.<sup>68</sup> On this basis, I am satisfied that any prejudice or privacy impact that could be expected to arise from disclosing these portions of information would be negligible.

52. The remaining personal information of other individuals appears in the context of a regulator's consideration of a received conduct complaint. Taking into account the Board's notified Complaint decision and the nature and context of this personal information, I consider its disclosure would be a significant intrusion into the privacy of these individuals and the extent of the harm that would arise from its disclosure would be significant.
53. I acknowledge that the applicant may be aware of some of the Information in Issue. However, I do not consider that reduces the weight of these nondisclosure factors to any significant degree, particularly as there can be no restriction on the use, dissemination or republication of information disclosed under the RTI Act.
54. On this basis, I afford these factors favouring nondisclosure significant weight only with respect to the personal information of individuals other than Board Members.

### **Flow of information**

55. A public interest factor favouring nondisclosure will also arise if disclosing information could reasonably be expected to prejudice the flow of information to a regulatory agency.<sup>69</sup>
56. The Board submits that if information that is provided to the Board in a response to a received complaint is not treated as confidential by the Board, this could impact the provision of information to future complaint processes,<sup>70</sup> thereby significantly restricting the Board's ability to address and process future complaints.<sup>71</sup> The applicant, on the other hand, submits that this nondisclosure factor does not apply because he considers the surveyor was compelled to provide information to the Board under the Surveyors Act<sup>72</sup> and there is no evidence that '*a surveyor, subject of a complaint, would need any incentive to provide evidence before its own governing body*'.<sup>73</sup>
57. I am unable to address the applicant's belief that the Information in Issue includes information provided by any person or entity pursuant to a regulatory notice issued by the Board.<sup>74</sup> However, as noted in paragraph 8 above, while the Board's powers include requesting a registrant to attend before the Board to give information, answer questions or produce a document, the Surveyors Act also specifically contemplates that a registered surveyor may elect not to comply with such requests.<sup>75</sup>
58. It is generally recognised that there is very strong public interest in protecting the ability of regulatory agencies, such as the Board, to communicate openly with relevant parties concerning a received complaint and to obtain information which it considers relevant to

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<sup>68</sup> For example, on the Board's website at <<https://sbq.com.au/about-us/our-boardmembers/>>.

<sup>69</sup> Schedule 4, part 3, item 13 of the RTI Act.

<sup>70</sup> For example, by registrants refusing to attend meetings and provide information pursuant to section 86 of the Surveyors Act.

<sup>71</sup> Submissions dated 1 May 2020.

<sup>72</sup> In the external review application, the applicant referenced sections 86(2) and 136 of the Surveyors Act as being examples of the Board's power to compel the provision of information.

<sup>73</sup> Submissions dated 27 October 2020.

<sup>74</sup> Section 108(3) of the RTI Act.

<sup>75</sup> Section 86(4) of the Surveyors Act. I also note that where an investigation is undertaken, a person is not required to comply with an investigator's information production or attendance notice where they have a reasonable excuse (refer, for example, to section 137(1) of the Surveyors Act).

its consideration of a received complaint.<sup>76</sup> Taking into account the regulatory complaint framework and the submissions received from the Board and the applicant, I consider that disclosing communications with individuals involved in the Board's complaint processes (including information the Board has obtained in such processes) may discourage individuals involved in future complaints from candidly providing information required for the Board's consideration of those future complaints, which will negatively impact the Board's effective discharge of its regulatory functions. In these circumstances, I afford this factor favouring disclosure significant weight.

### **Prejudice fair treatment**

59. The RTI Act also provides that a factor favouring nondisclosure arises where 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.<sup>77</sup>
60. The Board submits that access should be refused to one portion of the Information in Issue<sup>78</sup> because it is '*an opinion which, at that point in time, had not been clarified in any way by either surveyor*' and it could raise concerns about the professional conduct of a surveyor.<sup>79</sup> I accept that this portion of information records an opinion expressed by the applicant at a point in time, however, the Board has not detailed how its disclosure could prejudice the fair treatment of any involved individual. On that basis, I am not satisfied this factor applies to this one portion of information.
61. The Board also maintains that access should also be refused to other small portions of information on one page<sup>80</sup> because '*[c]onsequential issues such as potential liabilities and societal issues could arise by reason of any further disclosure*'.<sup>81</sup> As the Board has not detailed how these claimed issues would arise from disclosure of these particular portions of information, I am not satisfied this factor applies to favour nondisclosure of that information.
62. The applicant submits that this factor should be afforded low weight, as the Board provided no evidence to him explaining their Complaint decision and a decision that no professional misconduct was found does not equate to the Complaint being unsubstantiated.<sup>82</sup> As previously noted, the Complaint raises specific concerns about a surveyor's conduct, namely, that certifying documentation was '*either misleading or inaccurate*' and the surveyor had failed to correct it. While I acknowledge the applicant's submission that the Board does not investigate negligence, as the Complaint decision found no professional *misconduct*, I consider this factor applies to the remaining Information in Issue and carries significant weight in favour of nondisclosure.

### **Balancing the public interest**

#### **Information for disclosure**

63. Firstly, I have taken into account the pro-disclosure bias in deciding access to documents under the RTI Act and note that this is the starting point with respect to the disclosure of

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<sup>76</sup> See for example: *P6Y4SX and Department of Police* (Unreported, Queensland Information Commissioner, 31 January 2012), *SW5Z7D and Queensland Police Service* [2016] QICmr 1 (15 January 2016) and *Marshall and Department of Police* (Unreported, Queensland Information Commissioner, 25 February 2011).

<sup>77</sup> Schedule 4, part 3, item 6 of the RTI Act.

<sup>78</sup> Which appears on page 34.

<sup>79</sup> Submissions dated 2 October 2020.

<sup>80</sup> On page 45.

<sup>81</sup> Submissions dated 2 October 2020.

<sup>82</sup> Submissions dated 27 October 2020.

the Information in Issue.<sup>83</sup> I also note that the Board has the onus of demonstrating that access to information should be refused.<sup>84</sup>

64. With respect to parts of two pages,<sup>85</sup> I am not satisfied that disclosure of this information would, on balance be contrary to the public interest. This is because I consider that public interest factors favouring disclosure, including those relating to the Board's transparency and accountability and consumer protection, outweigh the minimal weight that can be attributed to the factors I have identified above favouring nondisclosure.<sup>86</sup> These portions of information do not comprise the sensitive personal information of private individuals, and the Board has not established that disclosure of this information would prejudice the flow of information to the Board or the fair treatment of any individual.

### **Information to which access may be refused**

65. I am satisfied that the public interest factors favouring nondisclosure attract much more significant and determinative weight with respect to the remaining Information in Issue.<sup>87</sup> I have afforded significant weight to the factor favouring disclosure of the applicant's personal information within this remaining Information in Issue,<sup>88</sup> however, that personal information of the applicant is inextricably intertwined with the personal information of other individuals. In addition, and for the reasons outlined above, I have identified additional factors favouring disclosure (including those relating to the Board's transparency and accountability, consumer protection, fair treatment and the administration of justice).<sup>89</sup> However, taking into account the nature of the Information in Issue, I afford these factors moderate, low and no weight.
66. On the other hand, for most of the remaining Information in Issue, I have afforded significant weight to the nondisclosure factors which relate to protecting the personal information and right to privacy of other individuals and ensuring the fair treatment of individuals.<sup>90</sup> I am also satisfied that protecting the flow of information to regulatory agencies such as the Board is a significant factor telling in favour of nondisclosure in relation to this information.<sup>91</sup>

### **Conclusion**

67. Accordingly, I find that disclosure the Information in Issue, apart from certain portions on two pages, would, on balance, be contrary to the public interest and access may be refused on this basis.<sup>92</sup>

### **Nonexistent or unlocatable documents**

68. The Information Commissioner's functions on external review include investigating and reviewing whether an agency has taken reasonable steps to identify and locate documents applied for by applicants.<sup>93</sup> However, where the requested documents do not exist or cannot be located, access may be refused.<sup>94</sup>

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<sup>83</sup> Section 44(1) of the RTI Act.

<sup>84</sup> Section 87(1) of the RTI Act.

<sup>85</sup> Pages 34 and 45.

<sup>86</sup> Schedule 4, part 2, items 1, 3, 10, 11 of the RTI Act. I have afforded no weight to the factors in schedule 4, part 2, items 16 and 17 of the RTI Act with respect to these two discrete portions of the information in issue.

<sup>87</sup> Comprising 22 full pages, four video files and parts of three pages numbered 7, 34 and 45.

<sup>88</sup> Schedule 4, part 2, item 7 of the RTI Act.

<sup>89</sup> Schedule 4, part 2, items 1, 3, 10, 11, 16 and 17 of the RTI Act.

<sup>90</sup> Schedule 4, part 4, section 6 and schedule 4, part 3, items 3 and 6 of the RTI Act.

<sup>91</sup> Schedule 4, part 3, item 13 of the RTI Act.

<sup>92</sup> Sections 47(3)(b) and 49 of the RTI Act.

<sup>93</sup> Section 130(2) of the RTI Act.

<sup>94</sup> Sections 47(3)(e) and 52 of the RTI Act.

69. A document is *nonexistent* if there are reasonable grounds to be satisfied the document does not exist.<sup>95</sup> To be satisfied of this, a decision-maker must rely on their particular knowledge and experience and have regard to key factors including:<sup>96</sup>
- the administrative arrangements of government
  - the agency's structure
  - the agency's functions and responsibilities
  - the agency's practices and procedures; and
  - other factors reasonably inferred from information supplied by the applicant, including the nature and age of the requested documents, and the nature of the government activity to which the request relates.
70. If searches are relied on to justify a finding that documents do not exist, all reasonable steps must be taken to locate the documents. What constitutes reasonable steps will vary from case to case, depending on which of the key factors are most relevant in the particular circumstances.
71. A document is *unlocatable* if it has been or should be in the agency's possession and all reasonable steps have been taken to find the document but it cannot be found.<sup>97</sup> Determining whether a document exists, but is unlocatable, requires consideration of whether there are reasonable grounds for the agency to be satisfied that the requested document has been or should be in the agency's possession; and whether the agency has taken all reasonable steps to find the document. In answering these questions, regard should be had to the circumstances of the case and the relevant key factors.<sup>98</sup>
72. Although the agency that made the decision under review has the onus of establishing that the decision was justified,<sup>99</sup> where the issue of missing documents is raised, the applicant bears a practical onus of demonstrating that the agency has not discharged its obligation to locate all relevant documents.<sup>100</sup>

### Findings

73. The applicant contends that the following documents had not been disclosed by the Board:
- internal procedural documents;<sup>101</sup> and
  - audio and video recordings, specifically including any video recording of the '*contributions to the Board*' that were made by the surveyor who is the subject of the Complaint and audio recordings of Board meetings.<sup>102</sup>

<sup>95</sup> Section 52(1)(a) of the RTI Act.

<sup>96</sup> See *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) (*Pryor*) at [19], *Lester and Department of Justice and Attorney-General* [2017] QICmr 17 (16 May 2017) at [11] and *Van Veendendaal and Queensland Police Service* [2017] QICmr 36 (28 August 2017) at [23], which adopt the Information Commissioner's comments in *PDE and University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*) at [37]-[38]. *PDE* concerned the application of section 28A of the now repealed *Freedom of Information Act 1992* (Qld). Section 52 of the RTI Act is drafted in substantially the same terms as the provision considered in *PDE* and, therefore, the Information Commissioner's findings in *PDE* are relevant.

<sup>97</sup> Section 52(1)(b) of the RTI Act.

<sup>98</sup> *Pryor* at [21]. See also, *F60XCX and Office of the Queensland Parliamentary Counsel* [2016] QICmr 42 (13 October 2016) at [84] and [87], and *Underwood and Minister for Housing and Public Works* [2015] QICmr 27 (29 September 2015) at [33]-[34] and [49].

<sup>99</sup> Section 87(1) of the RTI Act.

<sup>100</sup> See *Mewburn and Department of Local Government, Community Recovery and Resilience* [2014] QICmr 43 (31 October 2014) at [13].

<sup>101</sup> Item 3 of the access application seeks '*Any policy, procedure, document that confirms the process of consideration that was actually applied in connection with our application and the letter*' [original emphasis].

<sup>102</sup> External review application.

74. OIC sought information from the Board about its record keeping systems and practices and the searches it conducted for information requested in the access application. As noted above, the Board disclosed additional information to the applicant during the review, including a document titled '*Complaints and Disciplinary Policy and Procedures*'.
75. The Board confirmed that information relating to a received complaint is stored in a complaint file created for the specific complaint. The search records and certifications provided to OIC relevantly confirm that searches for information relevant to application were conducted of the hard copy complaint file maintained in respect of the Complaint, the Board's telephone grievance file, Board agenda files, the Board's email records and the Board's file server.
76. With respect to video recordings, I note that the Information in Issue, that is the information that the Board has identified but not granted access to, includes video recordings. I am prohibited<sup>103</sup> from disclosing the content of those video recordings or confirming whether they comprise the particular video recordings that the applicant is seeking in this review. However, for the purposes of considering whether the Board has taken all reasonable steps to identify video recordings, generally, I note that certain video recordings have been identified and considered in this external review.
77. In respect of audio recordings of the Board's meetings, the Board submits that:
- recorded audios of its board meetings are stored on sim cards, which are progressively cleared or deleted on a rolling basis once the minutes for the recorded meetings have been approved; and
  - audio recordings of board meetings of interest to the applicant in this external review have been deleted in accordance with the Board's standard practice.<sup>104</sup>
78. On external review, the question I must determine is whether the Board has taken reasonable steps to locate documents relevant to the access application.<sup>105</sup> On the information before me (including the Board's search certifications and submissions), I consider the Board has undertaken comprehensive searches of locations where it would be reasonable to expect that the types of information requested in the access application would be found. I also consider that staff with working knowledge of the relevant record keeping systems made targeted searches and enquiries to locate relevant information.
79. For these reasons, I am satisfied that:
- the Board has taken all reasonable steps to locate relevant information; and
  - there is a reasonable basis to be satisfied that any further information is nonexistent or unlocatable and access may therefore be refused on this ground.<sup>106</sup>
80. I understand the applicant is disappointed that video and audio recordings have not been disclosed to him and I acknowledge his concerns about the timing of the audio recording deletion.<sup>107</sup> However, I do not consider that the applicant's concerns reasonably lead to a conclusion that the requested audio recordings still exist.

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<sup>103</sup> Section 108(3) of the RTI Act.

<sup>104</sup> The approved, written minutes of Board meetings relevant to the access application have been partially disclosed to the applicant.

<sup>105</sup> Section 130(2) of the RTI Act.

<sup>106</sup> Section 47(3)(e) of the RTI Act.

<sup>107</sup> Submissions dated 27 October 2020. As explained to the applicant on 19 November 2020, OIC's jurisdiction on external review does not extend to addressing his concerns about the Board's record keeping practices or obtaining (and disclosing) information about when the audio recordings were deleted and whether such deletion was in compliance with applicable governance policies.

## DECISION

81. For the reasons set out above, I vary<sup>108</sup> the Board's decision and find that:

- access cannot be refused parts of the Information in Issue appearing on two pages
- access can be refused to the remaining Information in Issue on the ground disclosure would, on balance, be contrary to the public interest; and
- access to any further information may be refused on the basis it is nonexistent or unlocatable.

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**S Martin**  
**Assistant Information Commissioner**

**Date: 10 March 2021**

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<sup>108</sup> As a delegate of the Information Commissioner, under section 145 of the RTI Act.

## APPENDIX

### Significant procedural steps

Date	Event
17 January 2020	OIC received the external review application.
26 February 2020	OIC notified the applicant and the Board that the external review application had been accepted and asked the Board to provide information.
27-28 February 2020	OIC received the requested information from the Board.
27 April 2020	OIC conveyed a preliminary view to the Board concerning refusal of access issues and asked the Board to provide further information.
1 May 2020	OIC received the Board's submissions.
22 September 2020	<p>OIC conveyed a preliminary view to the applicant concerning refusal of access and search issues and invited him to provide submissions if he did not accept the preliminary view.</p> <p>OIC conveyed a preliminary view to the Board concerning information which OIC considered may be disclosed and invited the Board to provide submissions if it did not accept the preliminary view.</p>
2 October 2020	OIC received the Board's further submissions, partially accepting the preliminary view.
27 October 2020	OIC received the applicant's submissions.
19 November 2020	<p>OIC asked the Board to release the further information it had agreed to disclose and conveyed a further preliminary view about portions of information OIC considered may be disclosed. OIC received the Board's confirmation that it did not wish to make any further submissions.</p> <p>OIC conveyed a further preliminary view to the applicant concerning refusal of access issues and invited him to provide final submissions if he did not accept the preliminary view.</p>
19 January 2021	OIC received the applicant's further submissions.