



Decision and Reasons for Decision

Application Number: 311112

Applicant: O'Hagan

Respondent: Building Services Authority

Decision Date: 4 December 2012

Catchwords: ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – applicant seeks access to information contained in a House Builder Questionnaire completed by a Builder – 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. The applicant made an application to the Building Services Authority (**BSA**)¹ under the *Right to Information Act 2009 (Qld)* (**RTI Act**) for access to the license files of a nominated builder (**Builder**) and the Builder's company and to the claim file in relation to the applicant's property.
2. The BSA granted full access to 869 pages, partial access to 100 pages and refused access to 19 pages in full.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the BSA's decision² to refuse access to information on the basis that its disclosure would, on balance, be contrary to the public interest as it comprised the personal information of third parties.³
4. For the reasons set out below, the BSA's decision refusing access to information on the basis that its disclosure would, on balance, be contrary to the public interest is affirmed.

Background

5. Significant procedural steps relating to the application and external review are set out in the appendix.

¹ References to the BSA in this decision also include the BSA's predecessor, the Builders Registration Board.

² Dated 28 June 2012.

³ The applicant also sought external review of whether the BSA had correctly identified that information was not relevant to the access application and whether the BSA had taken all reasonable steps to locate documents responsive to the access application. The applicant is no longer seeking review on these grounds following informal negotiations during the course of the external review.

Reviewable decision

6. The decision under review is the BSA's decision dated 28 June 2012.

Evidence considered

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

Information in issue

8. The information under consideration⁴ in this external review comprises the Builder's name, address, signature, date of completion and hand written responses to questions (**Information in Issue**) contained within a House Builder Questionnaire (**Questionnaire**).⁵

Issue for determination

9. The issue for determination is whether it is contrary to the public interest to disclose the Information in Issue.⁶
10. The applicant made extensive submissions to OIC in support of his view that the Information in Issue should be disclosed⁷ and in making my decision in this review, I have carefully considered all of the submissions. Some submissions did not relate directly to the issues for determination in this review, for example, they were unrelated to the test for applying particular public interest factors. Accordingly, such submissions are not referred to in these reasons for decision as they do not relate to the issue for determination, as set out above.

Would disclosure of the Information in Issue, on balance, be contrary to the public interest?

11. Yes, for the reasons that follow.

Relevant law

12. An agency may refuse access to information under the RTI Act where its disclosure would, on balance, be contrary to the public interest.⁸ The term 'public interest' refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.
13. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest⁹ and explains the steps that a decision-maker must take¹⁰ in deciding the public interest as follows:

⁴ Following informal negotiations during the course of the external review.

⁵ Numbered pages 239 to 254 of File 1-925763 for the purposes of the access application and external review.

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

⁷ Submissions to OIC dated 22 July 2012, 15 August 2012, 19 September 2012 and 12 October 2012.

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

⁹ Schedule 4 of the RTI Act sets out the factors for deciding whether disclosing information would, on balance, be contrary to the public interest. However, this list of factors is not exhaustive. In other words, factors that are not listed may also be relevant.

¹⁰ Section 49(3) of the RTI Act.

- identify any irrelevant factors and disregard them
- 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

Irrelevant factors

14. I do not consider any irrelevant factors arise in this case.

Factors favouring disclosure and nondisclosure in the public interest

15. The RTI Act recognises that disclosure is favoured in circumstances where disclosure could reasonably be expected to:
- promote open discussion of public affairs and enhance the government's accountability¹¹
 - reveal the reason for a government decision and any background or contextual information that informed the decision;¹² and
 - contribute to the administration of justice generally, including procedural fairness.¹³
16. The RTI Act recognises factors favouring nondisclosure in circumstances where disclosure could reasonably be expected to:
- prejudice an individual's right to privacy;¹⁴ and
 - cause a public interest harm if disclosure would disclose personal information of a person.¹⁵

Balancing the public interest factors favouring disclosure and nondisclosure

17. The applicant seeks access to the Information in Issue contained within the Questionnaire which was completed by the Builder and is held on the Builder's license file with the BSA.
18. The applicant submits that disclosing the Information in Issue would significantly enhance the BSA's accountability as the Questionnaire formed part of the process to issue the Builder with a builder's license at the relevant time and would reveal whether or not the Builder was validly licensed initially and then subsequently thereafter. This submission raises the public interest factor in promoting open discussion of public affairs and enhancing the BSA's accountability.
19. Among other responsibilities, the BSA regulates the building industry through the licensing of contractors, educating consumers about their rights and handling disputes fairly and equitably.¹⁶ In 1991, the process for obtaining a builder's license for an applicant who held no formal technical qualifications included sitting a four hour exam

¹¹ Schedule 4, part 2, item 1 of the RTI Act.

¹² Schedule 4, part 2, item 11 of the RTI Act.

¹³ Schedule 4, part 2, item 16 of the RTI Act.

¹⁴ Schedule 4, part 3, Factor 3 of the RTI Act.

¹⁵ Schedule 4, part 4, section 6(1) of the RTI Act.

¹⁶ See the BSA's website at <http://www.bsa.qld.gov.au/Pages/BuildingServicesAuthority.aspx>

- at an office of the BSA which was then assessed by a BSA building inspector who recommended whether or not the applicant for a builder's license should be licensed by the BSA.¹⁷
20. The BSA confirms¹⁸ that the Questionnaire comprises the exam which the Builder completed in 1991 to obtain their builder's license.
 21. The Information Commissioner has previously recognised that it is essential for the public to have confidence in the way a regulatory agency performs its functions.¹⁹ It may be that disclosing information about whether or not requirements were met by an applicant for a builder's license would enable the community to scrutinise the BSA's regulatory functions for the building industry in Queensland.
 22. Relevantly, I note in this matter that:
 - in 1991 the Questionnaire was one of the requirements to be met in an assessment of an individual's eligibility to obtain a builder's license²⁰
 - the Questionnaire was completed by the Builder more than 20 years ago
 - the Builder was issued with a builder's license
 - the Builder subsequently had their builder's license renewed on numerous occasions²¹
 - the applicant has received access to other documents relating to the Builder's application for, and renewal of, a builder's license including information contained within the application form and references;²² and
 - the BSA has agreed to release the questions contained within the Questionnaire to the applicant.²³
 23. Given that the BSA has agreed to release the questions on the Questionnaire, the Information in Issue is predominantly the Builder's hand written answers (and some other personal information). I note that there are no comments by an examiner, no indication of a score or mark awarded by an examiner; in short, there is nothing in the Information in Issue which reveals how the BSA assessed the answers given by the Builder, nor how it decided to grant the Builder a builder's license.
 24. Thus, the Information in Issue is of no value in enhancing the accountability of the BSA in regard to its regulatory functions as it does not show how those functions were exercised. I note that being possessed of the questions themselves and other documents relating to the Builder's application for, and renewal of, a builder's license, provides the applicant (and more generally the public) with the ability to scrutinise the BSA's exercise of its regulatory functions because it shows the processes and practices of the BSA at the time.
 25. Therefore, disclosure of the Information in Issue cannot reasonably be expected to promote open discussion of public affairs (namely, the exercise by the BSA of its

¹⁷ Verbal submission provided by the BSA on 30 October 2012.

¹⁸ Verbal submission provided by the BSA on 30 October 2012.

¹⁹ See *Kenmatt Projects Pty Ltd and Building Services Authority* (Unreported, Queensland Information Commissioner, 27 September 1999) at [47] and *Seven Network (Operations) Limited and Redland City Council; A third party* (Unreported, Queensland Information Commissioner, 30 June 2011) at [25].

²⁰ Applicants for a builder's license were also required to complete an application form, pay a fee and provide details of experience, references and a financial statement.

²¹ As detailed in the information released to the applicant by the BSA. For example, correspondence to the applicant dated 10 November 2008 (page 96 of 925763 EDRMS) and 2 December 2009 (page 104 of 925763 EDRMS) confirms the renewal of the applicant's license.

²² As confirmed by the applicant in his submission dated 12 October 2012.

²³ Submission dated 16 November 2012.

- regulatory functions) and enhance the BSA's accountability. Accordingly, I afford this factor in favour of disclosure no weight in the circumstances.
26. The applicant submits that the Information in Issue is required to allow him to understand what was before the BSA when the Builder was issued with a builder's license. This submission raises the public interest factor in revealing the reasons for a decision and any background or contextual information.
 27. As noted at paragraph 23, there is nothing on the face of the document to indicate that the answers provided by the Builder have been assessed, that is, the Questionnaire does not indicate whether or not the Builder should be licensed. I am therefore satisfied that disclosure of the Information in Issue would not reveal the reason for the BSA's decision to issue the Builder with a builder's license. For this reason, I afford this factor no weight in the circumstances.
 28. The applicant submits that the Information in Issue is required to allow him to assess whether he has suffered any injustices as a result of the BSA's actions in licensing the Builder. This submission raises the question of whether disclosure could reasonably be expected to contribute to the administration of justice generally, which is a public interest factor in favour of disclosure.
 29. The Information Commissioner considered the issue of whether disclosure of information could reasonably be expected to contribute to the administration of justice generally²⁴ in the context of the repealed *Freedom of Information Act 1992* (Qld), in the case of *Willsford and Brisbane City Council*.²⁵ In that case, the Information Commissioner reasoned that a public interest consideration favouring disclosure will be established if an applicant can demonstrate:
 - loss or damage or some kind of wrong has been suffered 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
 - that disclosure of the information held by the agency would assist the applicant to pursue the remedy, or to evaluate whether a remedy is available or worth pursuing.²⁶
 30. Setting aside the question of whether a remedy is or may be available to the applicant against the BSA, I am not satisfied that disclosure of the Information in Issue would assist the applicant to pursue such a remedy or evaluate whether a remedy is available or worth pursuing. As noted above at paragraphs 23 and 24, as the Information in Issue does not reveal how the BSA assessed the answers given by the Builder nor does it reveal why the BSA decided to issue the Builder with a builder's license, its disclosure cannot reasonably be expected to contribute to the administration of justice. Therefore, I afford this factor no weight in the circumstances.
 31. The applicant submits that the Information in Issue, other than the Builder's name which may appear within the Questionnaire, does not comprise the personal information of the Builder. Rather, the applicant submits that the answers contained within the Questionnaire are an indication of the Builder's knowledge which was used to seek a professional license. The applicant further submits that any interest the Builder has in the Information in Issue is outweighed by the public interest as the

²⁴ Schedule 4, part 2, item 16 of the RTI Act.

²⁵ (1996) 3 QAR 368 (*Willsford*).

²⁶ *Willsford* at paragraph 17.

Builder has been found by the BSA to have undertaken defective work and has been in bankruptcy twice, meaning that the Builder can no longer be licensed by the BSA.

32. Personal information is '*information or an opinion... whether true or not ... about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion*'²⁷ and includes a person's name, address, signature, handwriting, details about their education or education activities and opinions given by them.²⁸
33. As detailed at paragraph 8, the Information in Issue comprises the Builder's name, address, signature, date of completion and hand written responses to questions contained within the Questionnaire (which amounts to details about the Builder's education or education activities). I am therefore satisfied that the Information in Issue comprises the personal information of the Builder. For this reason, I afford the public interest in protecting an individual's right to privacy and protecting an individual from harm by disclosure of their personal information significant weight in the circumstances.
34. In summary and on the basis of the matters set out above, I am satisfied that:
- the public interest factors favouring nondisclosure of the Information in Issue outweigh the factors favouring disclosure; and
 - disclosure of the Information in Issue would, on balance, be contrary to the public interest.

DECISION

35. I affirm the Building Services Authority decision to refuse access to the Information in Issue on the basis that its disclosure would, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act.
36. I have made this decision as a delegate of the Acting Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

Assistant Information Commissioner Corby

Date: 4 December 2012

²⁷ See section 12 of the *Information Privacy Act 2009* (Qld).

²⁸ See OIC's Guideline: *What is Personal Information?* available from OIC's website at <http://www.oic.qld.gov.au/information-and-resources/guidelines/guidelines-privacy-principles/what-personal-information>

APPENDIX**Significant procedural steps**

Date	Event
11 May 2012	The BSA receives the applicant's application for access dated 10 May 2012.
28 June 2012	<p>The BSA locates 988 pages and decides to release 869 pages in full and refuse access to parts of 100 pages and all 19 pages. Access to the information was refused on the basis that it was either not relevant to the access application or its disclosure would, on balance, be contrary to the public interest.</p> <p>The applicant is advised that as a third party was consulted and objected to release of the documents consulted upon, access to these documents or any parts is deferred until expiry of the appeal rights of the third party.</p>
23 July 2012	OIC receives the applicant's application for external review dated 22 July 2012.
27 July 2012	OIC receives a copy of the relevant documents from the BSA.
2 August 2012	The BSA provides the applicant access to the deferred documents or any parts following expiry of the appeal rights of the third party.
3 August 2012	The BSA provides a submission to OIC about additional searches undertaken.
10 August 2012	OIC advises the applicant and the BSA that the application has been accepted for review. OIC conveys a preliminary view to the applicant that the BSA is entitled to refuse access to personal information as disclosure would, on balance, be contrary to public interest. OIC also advises the applicant that BSA has taken all reasonable steps to locate the documents requested in the access application. OIC asks the applicant to advise by 17 August 2012 whether he wishes to proceed with the external review.
15 August 2012	The applicant advises OIC that he wishes to proceed with the external review and provides a submission.
13 September 2012	<p>OIC conveys a verbal preliminary view to the applicant in relation to:</p> <ul style="list-style-type: none"> • information not relevant to the access application • information the disclosure of which would, on balance, be contrary to public interest; and • the sufficiency of searches conducted by the BSA. <p>The conversation is confirmed in writing and the applicant is invited to provide a submission by 20 September 2012 if he does not accept the preliminary view.</p>
20 September 2012	OIC receives a submission from the applicant dated 19 September 2012 in response to the preliminary view.
3 October 2012	<p>OIC conveys a further preliminary view to the applicant in relation to:</p> <ul style="list-style-type: none"> • information not relevant to the access application; and • information the disclosure of which would, on balance, be contrary to public interest.

	The applicant is invited to provide a submission by 12 October 2012 if he does not accept the preliminary view.
15 October 2012	OIC receives a submission from the applicant dated 12 October 2012 in response to the preliminary view.
30 October 2012	The BSA provides a verbal submission.
14 November 2012	OIC conveys a view to the BSA that the Questionnaire can be released to the applicant subject to the deletion of personal information. The BSA is requested to advise OIC by 21 November 2012 whether it agrees with this view.
16 November 2012	The BSA accepts the view that the Questionnaire can be released to the applicant subject to the deletion of personal information.