



## Decision and Reasons for Decision

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Application Number: 310775 and 311208

Applicant: Stewart

Respondent: SunWater Limited

Third Party: Stanwell Corporation Limited

Decision Date: 21 December 2012

Catchwords: ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – QUESTION OF JURISDICTION – application for documents created prior to 1 July 2009 relating to operation of Tinaroo Dam – whether disclosure of information was captured by section 11A of the repealed *Freedom of Information Act 1992* (Qld) – whether disclosure of information is captured by the definitions in section 11 and schedule 1, section 14 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW – RIGHT TO INFORMATION – QUEENSLAND – JURISDICTION – application for information relating to operation of Tinaroo Dam – whether requested documents are ‘documents of an agency’ – section 12 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION – application for information relating to operation of Tinaroo Dam – whether disclosure could reasonably be expected to found an action for breach of confidence – sections 47(3)(a) and 48 and schedule 3, section 8 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – CONTRARY TO PUBLIC INTEREST INFORMATION – application for information relating to operation of Tinaroo Dam – whether disclosure of information would, on balance, be contrary to the public interest – sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

## REASONS FOR DECISION

### Summary

1. The applicant applied to SunWater Limited (**SunWater**) under the *Right to Information Act 2009 (Qld)* (**RTI Act**) for access to information regarding Tinaroo Dam about:
  - total storage releases and unused allocations, including releases for environment and hydro information broken up into hydro and environment categories plus prices charged for each individual water year commencing 1995/6 to 2010/11 (**First Application**);<sup>1</sup> and
  - releases (in ML and prices) for hydro and environment for 2011/12 (**Second Application**).<sup>2</sup>
2. SunWater gave access to some information and refused access to the balance of the information:<sup>3</sup>
  - in relation to the First Application (**First Decision**), on the grounds that:
    - information created prior to 1 July 2009 is a document to which the RTI Act does not apply under section 11 and schedule 1, section 14 of the RTI Act
    - disclosure of the information created after 1 July 2009 would found an action for breach of confidence and is therefore exempt from disclosure under the RTI Act;<sup>4</sup> and
  - in relation to the Second Application (**Second Decision**), on the ground that disclosure of the information would found an action for breach of confidence and is therefore exempt from disclosure under the RTI Act.<sup>5</sup>
3. The applicant applied<sup>6</sup> to the Office of the Information Commissioner (**OIC**) for external review of the First and Second Decisions refusing access.
4. OIC identified that release of the information may be of concern to Stanwell Corporation Limited (**Stanwell**). OIC consulted with Stanwell who applied to participate in both the external reviews<sup>7</sup> and provided submissions in support of its objection to disclosure of the information.
5. For the reasons set out below, SunWater's:
  - First Decision refusing access to information on the grounds that it is either a document to which the RTI Act does not apply or disclosure would found an action for breach of confidence, is varied by finding that:
    - information created prior to 1 July 2009 is a document to which the RTI Act does not apply
    - information created after 1 July 2009 is neither exempt, nor is its disclosure contrary to the public interest; and

<sup>1</sup> First Application dated 10 August 2011.

<sup>2</sup> Second Application dated 28 August 2012.

<sup>3</sup> First Decision dated 21 September 2011 and Second Decision dated 9 October 2012.

<sup>4</sup> Under schedule 3, section 8 of the RTI Act.

<sup>5</sup> Under schedule 3, section 8 of the RTI Act.

<sup>6</sup> On 2 October 2011 (external review 310775) and 10 October 2012 (external review 311208).

<sup>7</sup> Pursuant to section 89 of the RTI Act.

- Second Decision refusing access to information on the ground that disclosure would found an action for breach of confidence is set aside and a decision that the information is neither exempt, nor is its disclosure contrary to the public interest, is substituted.

## Background

6. Significant procedural steps relating to the applications and external reviews are set out in the Appendix.
7. SunWater developed and now manages a regional network of bulk water supply infrastructure across Queensland<sup>8</sup> including Tinaroo Dam<sup>9</sup> located on the Barron River about 100 kilometres upstream of where the river discharges into the Coral Sea near Cairns.<sup>10</sup>
8. Stanwell is Queensland's largest power generator with the capacity to supply more than 45 per cent of the state's peak power needs.<sup>11</sup> Stanwell operates Barron Gorge Hydro, located 20 kilometres North West of Cairns.<sup>12</sup> Water is sourced from the Barron River and, if required, additional water can be obtained from Tinaroo Dam on the Atherton Tablelands, to produce electricity.<sup>13</sup>

## Reviewable decisions

9. The decisions under review are SunWater's First Decision dated 21 September 2011 and Second Decision dated 9 October 2012.

## Material considered

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

## Information in issue

11. There are two categories of documents:
  - documents created prior to 1 July 2009 (**Category A information**),<sup>14</sup> and
  - documents created after 1 July 2009 (**Category B information**).<sup>15</sup>
12. The Category A and B information is contained within two spreadsheets<sup>16</sup> which list the annual charges<sup>17</sup> and water releases from Tinaroo Dam for Barron Gorge Hydro for the years 2000/2001 to 2011/2012.

## Issues for determination

13. The issues for determination in these external reviews are whether:

<sup>8</sup> See <http://www.sunwater.com.au/about-sunwater/profile>.

<sup>9</sup> Also known as Tinaroo Falls Dam or Lake Tinaroo.

<sup>10</sup> See <http://www.sunwater.com.au/schemes/mareeba-dimbulah>.

<sup>11</sup> See <http://www.stanwell.com/>.

<sup>12</sup> See [http://www.stanwell.com/Files/Fact\\_Sheets/Barron\\_Factsheet\\_Oct\\_2012\(1\).pdf](http://www.stanwell.com/Files/Fact_Sheets/Barron_Factsheet_Oct_2012(1).pdf).

<sup>13</sup> See [http://www.stanwell.com/Files/Fact\\_Sheets/Barron\\_Factsheet\\_Oct\\_2012\(1\).pdf](http://www.stanwell.com/Files/Fact_Sheets/Barron_Factsheet_Oct_2012(1).pdf).

<sup>14</sup> Relating to the First Decision.

<sup>15</sup> Relating to the First and Second Decision.

<sup>16</sup> Each spreadsheet comprises five columns which detail the year, total volume released (ML), volume released minimum river flow (ML), volume released to Stanwell Hydro and charges to Stanwell.

<sup>17</sup> Expressed as the total amount for the year, that is, as one figure that is not broken down into various components.

- (i) the Category A information is a document to which the RTI Act does not apply<sup>18</sup>
  - (ii) the Category B information is exempt information;<sup>19</sup> and
  - (iii) disclosure of the Category B information would, on balance, be contrary to the public interest.<sup>20</sup>
14. The applicant made extensive submissions to OIC in support of his claims that the Category A and B information should be disclosed.<sup>21</sup> I have carefully considered all relevant submissions in making this decision. Some submissions did not relate directly to the issues for determination in this review and accordingly, these submissions are not referred to in these reasons for decision.

## Findings

### (i) *Is the Category A information a document to which the RTI Act does not apply?*

15. Yes, for the reasons that follow.

#### Relevant law

16. Section 23 of the RTI Act establishes a general right of access to documents of an agency<sup>22</sup> subject to the specific provisions of the RTI Act.<sup>23</sup> This right of access applies to documents even if they came into existence before the commencement of the RTI Act.<sup>24</sup>
17. A document of an agency excludes a document to which the RTI Act does not apply.<sup>25</sup> Schedule 1, section 14 of the RTI Act provides that the RTI Act does not apply to documents where the repealed *Freedom of Information Act 1982* (Qld) (**FOI Act**) did not apply to those documents under section 11A of the FOI Act.
18. Section 11A of the FOI Act states that the FOI Act does not apply to certain Government Owned Corporations (**GOCs**)<sup>26</sup> as set out in schedule 2 of the FOI Act.
19. The GOC that was the commercialised business unit known as State Water Projects (**SWP**)<sup>27</sup> in the then Department of Natural Resources is included in schedule 2 of the FOI Act where the document was received or brought into existence in carrying out activities conducted on a commercial basis.<sup>28</sup>

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<sup>18</sup> Section 11 and schedule 1, section 14 of the RTI Act.

<sup>19</sup> Sections 47(3)(a) and 48 and schedule 3 of the RTI Act.

<sup>20</sup> Sections 47(3)(b) and 49 of the RTI Act.

<sup>21</sup> Submissions dated 7 June 2012, 25 August 2012, 11 September 2012 (verbal), 30 October 2012 and 23 November 2012. The applicant also provided OIC with copies of correspondence to other entities regarding the information in issue in these external reviews.

<sup>22</sup> *Document of an agency* is defined in section 12 of the RTI Act as “a document, other than a document to which this Act does not apply, in the possession, or under the control, of the agency whether bought into existence or received in the agency, and includes— (a) a document to which the agency is entitled to access; and (b) a document in the possession, or under the control, of an officer of the agency in the officer’s official capacity.”

<sup>23</sup> Section 44(1) of the RTI Act provides that access should be given to a document unless giving access would, on balance, be contrary to the public interest. This is referred to as the *pro-disclosure bias* in deciding access to documents.

<sup>24</sup> Section 23(2) of the RTI Act.

<sup>25</sup> Section 11 and schedule 1 of the RTI Act.

<sup>26</sup> Section 5 of the Government Owned Corporations Act 1993 (Qld) (**GOC Act**) provides that a GOC is a government entity that is (a) established as a body corporate under an Act or the Corporations Act; and (b) declared by regulation to be a GOC

<sup>27</sup> Prior to the commencement of the GOC Water Projects Regulation in 2000, SWP was identified in Schedule 1 of the *Government Owned Corporations Regulation 1995* (Qld) as a GOC.

<sup>28</sup> Under section 998 of the *Water Act 2000* (Qld) (**Water Act**) as it then was.

20. SunWater was established in 2000 under the *Government Owned Corporations (State Water Projects Corporatisation) Regulation 2000 (GOC Water Projects Regulation)*.<sup>29</sup> This regulation established SunWater as replacing SWP,<sup>30</sup> and declared SunWater to be a GOC.<sup>31</sup>
21. The Category A information will therefore be captured under section 11A of the FOI Act if it is established that it was received or brought into existence by SunWater in carrying out activities that it conducted on a *commercial basis*.

***Was the Category A information received or brought into existence by SunWater in carrying out activities it conducted on a commercial basis?***

22. In *Hansen and Queensland Development Corporation (Hansen)*,<sup>32</sup> the Information Commissioner stated that this requires a determination of:<sup>33</sup>
- the nature of the activity carried out by SunWater in the course of which the information was received or brought into existence; and
  - whether that activity is a commercial activity.
23. Section 998 of the Water Act does not define 'activities conducted on a commercial basis'. No definition of 'commercial' is contained in the Water Act or in the *Acts Interpretation Act 1954* (Qld). The Information Commissioner considered the meaning of 'commercial' in *Hansen* noting that it involves an element of being 'connected with, or engaged in, commerce'; 'having profit as the main aim.'<sup>34</sup>
24. The Category A information comprises Barron Gorge Hydro fees and charges and total releases from Tinaroo Dam prior to 1 July 2009. This information reflects dealings between SunWater and Stanwell, specifically, concerning a Water Release Agreement (**Agreement**), aimed at making a profit. The Agreement sets up the arrangement under which SunWater releases water to Stanwell.
25. On its website, SunWater indicates that it provides the following services to its clients, which include private sector organisations and government bodies, the "...*designing, developing, managing and operating of bulk water infrastructure*".<sup>35</sup> This corresponds with the definition of SunWater's main function of providing water services under section 12 of the GOC Water Projects Regulation including the carrying on of activities in relation to bulk water storage and water distribution. In addition, I note that SunWater is an incorporated organisation<sup>36</sup> limited by shares.
26. I am satisfied that the Category A information reflects dealings between SunWater and Stanwell during the course of the Agreement and that it was created or received by SunWater in the course of carrying out activities on a commercial basis.

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<sup>29</sup> Now repealed.

<sup>30</sup> Section 15 of the GOC Water Projects Regulation. Prior to the commencement of the GOC Water Projects Regulation in 2000, SWP was identified in Schedule 1 of the *Government Owned Corporations Regulation 1995* (Qld) as a GOC.

<sup>31</sup> Section 20(2) of the GOC Water Projects Regulation.

<sup>32</sup> (1996) 3 QAR 265 (**Hansen**).

<sup>33</sup> *Hansen* at paragraph [22].

<sup>34</sup> At paragraphs [25] and [26].

<sup>35</sup> See SunWater's website at <http://www.sunwater.com.au/about-sunwater/profile/what-we-do>.

<sup>36</sup> On 1 July 2008, SunWater transitioned to a Company GOC under the *Corporations Act 2001* and is registered as SunWater Limited ACN 131 034 985.

## Conclusion

27. On the basis of the above information, I am satisfied that the Category A information is a document to which the RTI Act does not apply under section 11 and schedule 1, section 14 of the RTI Act as it comprises information which is captured under section 11A of the FOI Act as it was received or brought into existence by SunWater in carrying out activities that it conducted on a *commercial basis*. Accordingly, SunWater is entitled to refuse access on this basis.

### (ii) *Is the Category B information exempt information?*

28. No.

### **Is the Category B information a document of an agency?**

29. Yes, for the reasons that follow.
30. Both SunWater<sup>37</sup> and Stanwell<sup>38</sup> submit that the fact that Stanwell is an entity to which the RTI Act does not apply<sup>39</sup> is a factor which should be considered.
31. In the context of a submission about whether it was an entity to which the RTI Act applies, Stanwell submitted that:<sup>40</sup>

*It renders the protection afforded to Stanwell nugatory if documents (particularly confidential documents) relating to Stanwell's commercial activities are available via an application to Stanwell's contracting party in circumstances where the information could not be obtained via application directly to Stanwell.*

32. The first issue this submission raises is the question of whether the Category B information comprises a 'document of an agency'.
33. Section 23 of the RTI creates a legally enforceable right for any person to access 'documents of an agency'. Section 12 of the RTI Act relevantly defines 'document of an agency' as follows:

*In this Act, **document**, of an agency, means a document, other than a document to which this Act does not apply, in the possession, or under the control, of the agency whether brought into existence or received in the agency...*

34. The term 'possession' as used in section 12 simply requires that relevant documents be in the physical possession of an agency. As the Information Commissioner stated in *Holt and Reeves and Education Queensland and Anor*:<sup>41</sup>

*...I consider that an interpretation which excludes, from the ambit of the word "possession", documents of which an agency merely has custody, or physical possession without legal possession, is too difficult to reconcile with the presence in the relevant definition of the words "whether ... received in the agency"... In my view, **mere physical possession of documents by an agency** is sufficient to make them "documents of an agency" for the purposes of the FOI Act.*

(My emphasis.)

<sup>37</sup> Submission dated 12 November 2012.

<sup>38</sup> Submission dated 26 October 2012.

<sup>39</sup> Under schedule 2, Part 2, item 19 of the RTI Act, except so far as they relate to community service obligations.

<sup>40</sup> Submission dated 26 October 2012 at page 3.

<sup>41</sup> (1998) 4 QAR 310 at paragraph 22. This decision concerned section 7 of the now repealed *Freedom of Information Act 1992* (Qld) (**FOI Act**), framed in substantially similar terms.

35. This interpretation was subsequently confirmed in *Price v Nominal Defendant*.<sup>42</sup>

*...In Re Holt and Reeves and Education Queensland and Anor (Information Commissioner Qld, Decision No. 98004, 20 April 1998, unreported), I decided that the word "possession" in the above definition is properly to be construed as meaning physical possession rather than legal possession. A document in the physical possession of an agency (or of an officer of an agency in the officer's official capacity), whether created<sup>43</sup> or received in the agency, is a "document of the agency" for the purposes of the FOI Act.*

(My emphasis.)

36. SunWater has not offered any submissions on the issue of whether the Category B information is a document of an agency.

37. In the absence of relevant submissions and evidence, I am satisfied that the documents containing the Category B information were brought into existence by SunWater and are in the physical possession of SunWater and that they comprise 'documents of an agency' within the meaning of section 12 of the RTI Act.

38. The second issue that Stanwell's submission raises is that as Stanwell is an entity that is specifically exempted from the RTI Act, then the Category B information that contains information concerning the exempted entity cannot be accessed even if it is in the possession of an entity to which the RTI Act does apply.

39. I do not agree as:

- the Category B information is not contained within documents that comprise a document of Stanwell within the meaning of section 12 of the RTI Act; and
- the fact that Stanwell is an entity to which the RTI Act does not apply is not relevant as SunWater is the entity which holds the documents containing the Category B information.

40. Therefore, the Category B information is subject to the RTI Act.

#### **Breach of confidence**

41. An agency may refuse access to information where it comprises exempt information.<sup>44</sup> Information is exempt information if its disclosure would found an action for breach of confidence.<sup>45</sup>

42. The requirements for establishing the breach of confidence exemption consist of five cumulative criterion:<sup>46</sup>

- a) information must be capable of being specifically identifiable as information that is secret, rather than generally available

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<sup>42</sup> (1999) 5 QAR 80 at paragraph 18.

<sup>43</sup> Section 12 of the RTI Act uses the words 'brought into existence', in the place of the word 'received' as appeared in the relevant definition used in the FOI Act. This shift in phrasing does not in my view detract from the relevant statement of principle.

<sup>44</sup> Sections 47(3)(a) and 48 and schedule 3 of the RTI Act.

<sup>45</sup> Schedule 3, section 8 of the RTI Act.

<sup>46</sup> See the Information Commissioner's analysis in *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (**B and BNRHA**), applying section 46(1)(a), the equivalent exemption under the repealed *Freedom of Information Act 1992* (Qld) (**FOI Act**). For a restatement of the five criteria in the context of the RTI Act, see Right to Information Commissioner Mead's decision in *TSO08G and Department of Health* (Unreported, Queensland Information Commissioner, 13 December 2011) (**TSO08G**). See also *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) and Anor* (1987) 14 FCR 434 at 437 per Gummow J, and *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39 (**John Fairfax**) per Mason J at 51.

- b) information must have the necessary quality of confidence
- c) circumstances of the communication must create an equitable obligation of confidence
- d) disclosure to the applicant for access must constitute an unauthorised use of the confidential information; and
- e) disclosure must result in detriment to the plaintiff.

### ***Detriment***

43. The test for breach of confidence requires all elements to be established. The crucial element in these reviews is detriment.
44. When considering the requirement of detriment, the test to be applied depends on the type of information in issue. It is accepted that there are various types of information in the public sector including:<sup>47</sup>
- Third party Information—information which has been supplied to government by third parties about their private, personal or business affairs; and
  - Government Information—information about government which has been generated by government.
45. The different approaches to Third Party Information and Government Information have been explained in *John Fairfax* as follows:

*It may be a sufficient detriment to the citizen that disclosure of the information relating to his affairs will expose his action to public discussion and criticism. But it can scarcely be relevant to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information in relation to government when the only vice of that information is that it enables the public to discuss, review and criticise government action.*<sup>48</sup>

46. Therefore, if the Category B information is Government Information, a different approach is to be taken to determine whether disclosure would result in detriment to the plaintiff.
47. According to *John Fairfax*, public bodies claiming that Government Information is confidential must demonstrate that 'the public interest demands non-disclosure' of the information (the **Fairfax Doctrine**).<sup>49</sup> In applying the Fairfax Doctrine in *Esso Australia Resources Ltd & Ors v Plowman & Ors (Esso)*<sup>50</sup>, Mason CJ said:<sup>51</sup>

*The courts have consistently viewed governmental secrets differently from personal and commercial secrets.... As I stated in *The Commonwealth of Australia v John Fairfax and Sons Ltd*...the judiciary must view the disclosure of governmental information "through different spectacles". This involves a reversal of the onus of proof: the government must prove that the public interest demands non-disclosure.... (Citations omitted.)*

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<sup>47</sup> As identified by Finn, P (1991) *Official Information, Integrity in Government Project: Report No. 1*, ANU at 19.

<sup>48</sup> *John Fairfax* at page 51-52.

<sup>49</sup> *John Fairfax* at 52.

<sup>50</sup> (1995) 183 CLR 10.

<sup>51</sup> *Esso* at 31 and 32.



... The approach outlined in *John Fairfax* should be adopted when the information relates to statutory authorities or public utilities because...in the public sector "(t)he need is for compelled openness, not for burgeoning secrecy".

48. Therefore, unless disclosure of Government Information is likely to injure the public interest, it will not be protected. Examples of what is likely to injure the public interest were listed in *John Fairfax* as including 'harm to national security, relations with foreign countries or the ordinary business of government'.<sup>52</sup>

### **Application of the Fairfax Doctrine to the Category B information**

49. Applying the Fairfax Doctrine, the two questions to be answered in determining whether the necessary fifth criterion of detriment is satisfied in the circumstances of this review are:
- are SunWater and Stanwell 'public sector bodies' so as to be affected by the *Fairfax* Doctrine? and, if so,
  - does the public interest require non-disclosure of the information in issue?

### **Public sector body**

50. In *Sullivan v Department of Industry, Science and Technology and Australian Technology Group Pty Ltd*<sup>53</sup>, Senior Member (SM) Bayne of the Administrative Appeals Tribunal (AAT) considered whether disclosure by a Commonwealth department of information relating to a proprietary company largely owned by the Commonwealth could qualify for exemption.<sup>54</sup>

51. Relevantly, SM Bayne noted:

27. *I turn first to whether ATG should be regarded as a public body for the purposes of the Fairfax doctrine. A number of matters are relevant in this respect. In his oral evidence...Mr Harbour deposed that ATG is "99% plus" owned by the Commonwealth, and that the Commonwealth has been the sole source of shareholder funds for the ATG. He conceded that the Commonwealth could wind up ATG without any difficulty. Mr Harbour said that the ATG's auditor is the Commonwealth Auditor-General. This by itself is some indication of the public status of ATG. Furthermore, the "Statement" at annexure B to Dr Read's affidavit included documents called "Draft ATG Guidelines" and "Public Interest Safeguards", and the latter in particular indicates the extent of Commonwealth control over ATG's activities.*
28. *On the other hand, the Respondent pointed to evidence from Mr Harbour that while a public servant and a Senator were directors of this company incorporated under the Corporations Law, the Commonwealth had appointed a majority of the directors from the private sector. Other than through the two non-private sector directors, the Commonwealth had not sought to influence decisions made by the Board of ATG.*
29. *There is very little guidance in the case-law as to what bodies may be regarded as sufficiently public in nature as to be affected by the Fairfax doctrine. What was said above by Mason CJ in [Esso] indicates that the doctrine applies to "statutory authorities or public utilities". **A body such as ATG, albeit that it is a public company almost wholly owned by the Commonwealth, might not in ordinary usage be regarded as a statutory authority or a public utility. But I do not take***

<sup>52</sup> *John Fairfax* at 52.

<sup>53</sup> [1997] AATA 192.

<sup>54</sup> Under section 45 of the *Freedom of Information Act 1982* (Cth) (**Commonwealth FOI Act**), the breach of confidence exemption equivalent to schedule 3, section 8 of the RTI Act.

**Mason CJ's reference to "statutory authorities or public utilities" as exhausting the range of bodies beyond government Departments which are affected by the Fairfax doctrine. The Chief Justice approved of the observation of Professor Finn that in the public sector "(t)he need is for compelled openness, not for burgeoning secrecy". In a functional sense, ATG is a public sector body.**  
(My emphasis.)

52. The criteria relevant to assessing whether an entity is a public sector body, adopting SM Bayne's criteria for determining whether a proprietary company is a 'functional public sector body'<sup>55</sup>, are summarised in *Kalinga Wooloowin Residents Association and Brisbane City Council & Ors*<sup>56</sup>, as ownership, funding and control.<sup>57</sup>
53. From research undertaken by OIC in relation to SunWater, it is noted that:
- SunWater is fully government owned<sup>58</sup>
  - subject to approval of the Queensland Treasurer, SunWater's borrowings are sourced from the Queensland Treasury Corporation SunWater Client Specific Pool<sup>59</sup>
  - SunWater's independent auditor is the Auditor-General of Queensland pursuant to section 30 of the *Auditor-General Act 2009*,<sup>60</sup> and
  - although SunWater's day-to-day management is independent of government (SunWater's board consists of individuals selected for their commercial experience,<sup>61</sup> who are not public servants<sup>62</sup>) its shareholding Ministers have the power to issue directions to the board.<sup>63</sup>
54. From research undertaken by OIC in relation to Stanwell, it is noted that:
- Stanwell is fully government owned<sup>64</sup>
  - subject to approval of the Queensland Treasurer, Stanwell has access to funds from the Queensland Treasury Corporation<sup>65</sup>
  - Stanwell's independent auditor is the Auditor-General of Queensland
  - Stanwell's dividend policy is adopted on the basis that the shareholding Ministers agree to provide the necessary funding for:
    - projects which have received approval
    - the maintenance of Stanwell's approved capital structure; or
    - ensuring the operational viability of Stanwell,<sup>66</sup> and

<sup>55</sup> Paraphrasing SM Bayne's formulation.

<sup>56</sup> Unreported, Queensland Information Commissioner, 9 May 2012 (KWRA & BCC).

<sup>57</sup> KWRA & BCC at paragraph [36].

<sup>58</sup> The shareholding Ministers for SunWater are the Honourable Tim Nicholls, the Treasurer and Minister for Trade, and the Honourable Mark McArdle, the Minister for Energy and Water Supply. See page 9 of SunWater's Annual Report for the 2011-2012 financial year available at <http://www.sunwater.com.au/about-sunwater/media-room/publications>.

<sup>59</sup> See page 37 of SunWater's Annual Report for the 2011-2012 financial year. Except in the case of borrowings by SunWater's subsidiary companies which borrow externally through Queensland Treasury Corporation's generic debt pool.

<sup>60</sup> Section 30(1)(b) of the *Auditor-General Act 2009* provides that the Auditor-General, must for each financial year, audit all public sector bodies.

<sup>61</sup> Section 89 of the GOC Act.

<sup>62</sup> Section 90 of the GOC Act.

<sup>63</sup> Section 115 of the GOC Act.

<sup>64</sup> The shareholding Ministers for Stanwell are the Honourable Tim Nicholls, the Treasurer and Minister for Trade, and the Honourable Mark McArdle, the Minister for Energy and Water Supply. See Stanwell's structure at <http://www.stanwell.com/our-structure.aspx> and page 60 of Stanwell's Annual Report 2012 available at <http://www.stanwell.com/annual-reports.aspx>.

<sup>65</sup> See page 60 of Stanwell's Annual Report 2012.

<sup>66</sup> See paragraph 3.7.4 at page 24 of Stanwell's Amended Statement of Corporate Intent 2011/12 available at <http://www.stanwell.com/Files/Annual Report PDF Files/Stanwell 2011-12 SCI.pdf>.

- although Stanwell's day-to-day management is independent of government (Stanwell's board consists of individuals selected for their commercial experience,<sup>67</sup> who are not public servants<sup>68</sup>) its shareholding Ministers have the power to issue directions to the board.<sup>69</sup>
55. While SunWater has raised and provided submissions about the application of the breach of confidence exemption to the Category B information, it has not made submissions about whether or not it is properly characterised as a public sector body for the purposes of the Fairfax Doctrine. Stanwell was also given an opportunity to provide submissions about the application of the breach of confidence exemption to the Category B information, however, it has not raised or provided submissions on this issue.<sup>70</sup>
56. For the purposes of the test to establish the detriment requirement for the breach of confidence exemption, I am satisfied that both SunWater and Stanwell are, in the 'functional sense' described by SM Bayne, public sector bodies. Like ATG, they are wholly owned by the State, they have access to funds from the Queensland Treasury Corporation (subject to the approval of the Queensland Treasurer), their independent auditor is the Auditor-General of Queensland and their shareholding Ministers have the power to issue directions to their boards.<sup>71</sup>
57. As SunWater and Stanwell are public sector bodies, in the 'functional sense', I am also satisfied that the Category B information is Government Information as:
- it does not comprise information provided to government by a third party, it was created by SunWater
  - it reflects dealings between SunWater and Stanwell during the course of the Agreement
  - SunWater and Stanwell are both entities which are entirely government owned and charged with carrying out duties which would otherwise fall to be performed by public authorities or agencies; and
  - historically, the supply and management of water is a fundamental function of government.

**Does the public interest require non-disclosure of the Category B information?**

58. No.
59. As noted above, the *Fairfax* Doctrine essentially requires me to consider whether disclosure of the information in issue would harm the public interest to a degree such as to require nondisclosure.
60. SunWater has submitted that *"[t]he view that SunWater is a 'monopoly supplier' is overly narrow and does not reflect SunWater's broad business activities in*

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<sup>67</sup> Section 89 of the GOC Act.

<sup>68</sup> Section 90 of the GOC Act.

<sup>69</sup> Section 115 of the GOC Act.

<sup>70</sup> Stanwell was invited to provide a submission in relation to the breach of confidence exemption by correspondence dated 15 October 2012.

<sup>71</sup> I note that Stanwell is not an entity to which the RTI Act applies under section 17 (b) of the RTI Act, in relation to its functions, except so far as they relate to community service obligations. This does not change my view that Stanwell is a public sector body, in the 'functional sense', as all of the elements described by SM Bayne are satisfied.

*Queensland, interstate, and overseas” which “...include engineering design, major construction works, and the operation and maintenance of significant infrastructure.”<sup>72</sup>*

61. In the current case, the Category B information is pricing and water flow information. I am satisfied that SunWater is a monopoly operator in the rural water market in Queensland. From research undertaken by OIC, I note that:
- the Queensland Competition Authority (**QCA**)<sup>73</sup> has responsibility for investigating complaints and accrediting compliance of the business activities of SunWater in relation to competitive neutrality<sup>74</sup>
  - SunWater is the largest single service provider in the State providing retail bulk and retail supply services to agricultural, industrial and rural urban users. It owns and operates 26 dams throughout the State;<sup>75</sup> and
  - Queensland’s irrigation community ‘relies on SunWater’s reliable supply of bulk water...’<sup>76</sup>
62. Disclosure of the Category B information would allow public discussion about how government funds are being spent and the way in which two public sector bodies are operating.
63. I am unable to identify how disclosure of the Category B information would result in a specific and tangible harm to an identifiable public interest.
64. SunWater has not offered any submissions on the issue of harm to the public interest. Rather, SunWater has made submissions on the issue of harm to its commercial interests, stating that the *Fairfax Doctrine* is satisfied in this matter as:<sup>77</sup>
- A. *SunWater’s ordinary commercial business is harmed by the release of this information as it will impact on SunWater’s commercial dealings with other public bodies.*
  - B. *SunWater disagrees with the implication that refusing access contributes to ‘burgeoning secrecy’. Instead, SunWater maintains that it is acting to uphold pre-existing expectations of confidentiality in accordance with the legal framework at the time of entering into the contract, and that this position is reasonable where commercial agreements are concerned.*
65. Stanwell has also not offered any submissions on the issue of harm to the public interest nor has Stanwell made any submissions about the breach of confidence exemption in general.<sup>78</sup>
66. In the absence of relevant submissions and evidence, I am not satisfied that disclosure of the Category B information would cause harm to the public interest (let alone to a degree sufficient to justify nondisclosure).
67. My finding in this regard is sufficient to dispose of a claim for exemption under the breach of confidence exemption. SunWater and Stanwell have not demonstrated

<sup>72</sup> Submission dated 12 November 2012.

<sup>73</sup> The QCA is an independent Statutory Authority which was created as a result of a series of Council of Australian Government agreements which aimed to forge a national approach to the implementation of competition policy. The QCA was established by the *Queensland Competition Authority Act 1997*. See QCA’s website at <http://www.qca.org.au/about/>.

<sup>74</sup> Queensland Competition Authority, *Statement of Regulatory Pricing Principles for the Water Sector*, December 2000, page 1.

<sup>75</sup> See QCA’s website at <http://www.qca.org.au/water/>.

<sup>76</sup> See SunWater’s website at <http://www.sunwater.com.au/water-allocations-for-sale-or-lease>.

<sup>77</sup> Submission dated 12 November 2012.

<sup>78</sup> Stanwell’s submission dated 26 October 2012 is confined to Stanwell’s status under the RTI Act and whether disclosure of the Category B information would, on balance, be contrary to the public interest under section 47(3)(b) and 49 of the RTI Act.

disclosure of the Category B information would cause harm to the public interest.<sup>79</sup> The fifth requirement to establish a breach of confidence (detriment) is not established, and thus, the breach of confidence exemption is not made out.

68. As a consequence, the Category B information is not exempt information within the meaning of sections 47(3)(a) and 48 of the RTI Act.

**(iii) *Would disclosure of the Category B information, on balance, be contrary to the public interest?***

69. No.

#### **Relevant law**

70. An agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.<sup>80</sup>

71. 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.

72. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest<sup>81</sup> and explains the steps that a decision-maker must take<sup>82</sup> in deciding the public interest as follows:

- 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.<sup>83</sup>

#### ***Irrelevant factors***

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

#### ***Factors favouring disclosure of the Category B information***

74. The RTI Act recognises that the public interest will favour disclosure of information where disclosure could reasonably be expected to:

- promote open discussion of public affairs and enhance the government's accountability<sup>84</sup>

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<sup>79</sup> Bearing in mind the formal onus borne by SunWater to justify its decision as imposed by section 87(1) of the RTI Act, and the practical onus on Stanwell as a third party objector to ensure that there is sufficient material before me from which I can be satisfied that each element of the grounds for refusal it relies upon are established: see *Pope and Queensland Health* (1994) 1 QAR 616, paragraph 17 for relevant principles in this regard.

<sup>80</sup> Sections 47(3)(b) and 49 of the RTI Act.

<sup>81</sup> 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 in a particular case.

<sup>82</sup> Section 49(3) of the RTI Act.

<sup>83</sup> As to the correctness of this approach, see *Gordon Resources Pty Ltd v State of Queensland* [2012] QCATA 135.

- contribute to positive and informed debate on important issues or matters of serious interest<sup>85</sup>
- inform the community of the Government's operations;<sup>86</sup> and
- ensure the effective oversight of expenditure of public funds.<sup>87</sup>

75. The applicant submits that:<sup>88</sup>

- water released for hydro purposes is not the highest value use of that water, the highest value use of water is urban
- Tinaroo Dam is close to Cairns and the people of Cairns should be allowed to know how much water gets used in hydro as they could use it rather than having to use unsustainable aquifer water<sup>89</sup>
- people cannot have meaningful input into the Barron River Resource Operating Plan if they do not know the relevant information, such as how much water Barron Gorge Hydro is using and at what cost
- a debate rages in the Cairns region on the need for a new regional dam and the merits of hydro power from Tinaroo Dam
- how can there be an informed debate unless people know how much water is being used by the Barron Gorge Hydro
- water pricing arrangements, in particular those established in the Agreement<sup>90</sup>, reduce the ability of market-based mechanisms (i.e., the tradeable permit system) to effectively allocate water to the highest value use. In support of his argument, the applicant refers to the Council of Australian Government Water Reform Framework, which states that the framework is intended through 'a system of tradeable entitlements to allow water to flow to higher value uses subject to social, physical and environmental constraints';<sup>91</sup> and
- the value of the permits that he holds have been lessened because of the Agreement.

76. SunWater disagrees with the applicant's submissions, stating that:<sup>92</sup>

*...all information that the applicant requires in relation to his ability to seasonally assign his water allocations (...referred to as the tradeable permit system) is in fact published on SunWater's website or contained with [sic] the relevant regulatory framework...*

*The applicant's submission is further flawed as we are unable to see how the disclosure of one of SunWater's commercial agreements to a customer would in fact contribute to public debate about these matters. All commercial agreements would need to be released in order for there to be an informed public debate of those issues...*

77. Water policy, in particular the identification of the most appropriate use of Queensland's limited water supply, is an important issue of public debate.

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<sup>84</sup> Schedule 4, part 2, item 1 of the RTI Act.

<sup>85</sup> Schedule 4, part 2, item 2 of the RTI Act.

<sup>86</sup> Schedule 4, Part 1, Item 3 of the RTI Act.

<sup>87</sup> Schedule 4, part 2, item 4 of the RTI Act.

<sup>88</sup> Submissions dated 6 October 2011, 28 April 2012 and 11 September 2012.

<sup>89</sup> The Macquarie Dictionary Online (<http://www.macquariedictionary.com.au/>) states that an 'aquifer' is "a geological formation which holds water in sufficient quantity to provide a source of water that can be tapped by a bore."

<sup>90</sup> See paragraph 24.

<sup>91</sup> COAG (1994) *Communiqué: Water Reform Framework*, 2.

<sup>92</sup> Submission dated 12 November 2012.

78. There is a manifest public interest in the community having access to information concerning the operation of GOCs such as SunWater: a entity which is entirely government owned and charged with carrying out duties which would otherwise fall to be performed by public authorities or agencies.
79. The public interest in the proper accountability and transparency of government actors – whether those actors are mainstream administrative units, statutory authorities, or State-owned corporate entities such as SunWater – warrants disclosure of information of the kind in issue. Disclosure of the Category B information will serve to further the accountability of SunWater for the manner in which it discharges its functions in managing the regional network of bulk water supply infrastructure that spans across Queensland.
80. I am satisfied that releasing the Category B information, which comprises the annual charges and water releases for Barron Gorge Hydro, would:
- enhance the accountability of SunWater and inform the community of its operations in relation to the allocation of water to Barron Gorge Hydro
  - contribute to positive and informed debate about these matters within the community; and
  - allow the community to assess whether expenditure of public funds delivers better outcomes and value for money.
81. For these reasons, I afford the public interest factors in favour of disclosure substantial weight in the circumstances.

***Factors favouring nondisclosure of the Category B information***

82. SunWater and/or Stanwell claim that disclosure of the Category B information could reasonably be expected to:
- prejudice the private, business, professional, commercial or financial affairs of entities,<sup>93</sup> and
  - prejudice the competitive commercial activities of an agency.<sup>94</sup>
83. Common to these factors is the requirement that the particular prejudice or adverse effect each seeks to guard against could reasonably be expected to flow from disclosure. This phrase requires an expectation that is reasonably based, i.e., neither absurd, irrational or ridiculous.<sup>95</sup> It is not enough to simply assert that disclosure will result in some kind of adverse consequence.
84. Generally speaking, however, SunWater's and Stanwell's submissions consist of broad assertions of this kind. Neither has put before me sufficient information or evidence in relation to any of the relevant nondisclosure/harm factors each claims apply to consider whether there arises an expectation that is reasonably based.

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<sup>93</sup> Schedule 4, part 3, item 2 of the RTI Act. Neither SunWater nor Stanwell have submitted that disclosure would prejudice 'private' or 'professional' affairs and there is nothing on the face of the information to suggest it concerns these interests nor that disclosure would prejudice same. Accordingly, I have considered this factor in terms of prejudice to business, financial and/or commercial affairs.

<sup>94</sup> Schedule 4, part 3, item 17 of the RTI Act.

<sup>95</sup> See *Channel Seven and Redland City Council* (Unreported, Queensland Information Commissioner, 30 June 2011) at paragraph 20 for a contemporary restatement of principles applying to the interpretation of this phrase as it is used throughout the RTI Act.

85. SunWater's and Stanwell's submissions rely heavily on the fact that they are both GOCs established under the *GOC Act* and that they have a key objective of being "commercially successful".<sup>96</sup>
86. SunWater relevantly submits that disclosure of the Category B information "*is likely to adversely affect SunWater's commercial relationship with Stanwell and prejudice future potential agreements between the two parties – as well as with other commercial entities with which SunWater has commercial dealings*" and "*is concerned that [disclosure] would impact a significant number of commercial agreements entered into prior to 2009 that did not include confidentiality clauses.*"<sup>97</sup>
87. Stanwell relevantly submits that "[t]he availability of such information in the market creates an advantage in those who obtain the information and a corresponding disadvantage in the owner of the information, regardless of whether the value of the information is intangible or immediately results in some financial impact."<sup>98</sup>
88. I acknowledge Stanwell submits that it as a GOC is required to operate in a commercial manner in a highly competitive environment and that Stanwell is operating in a highly competitive and mostly privatised Australian electricity market.
89. I also acknowledge that the exemption of Stanwell from the operation of the RTI Act in relation to its functions, except so far as they relate to community service obligations, provides some support to nondisclosure of information with respect to its commercial activities so it is not put at a competitive disadvantage.<sup>99</sup>
90. I also consider that Stanwell can be considered to be a major operator in relation to the generation of electricity within Queensland. Particularly, from research undertaken by OIC, it is noted that Stanwell:
- is Queensland's largest power generator with the capacity to supply more than 45% of the state's peak power needs<sup>100</sup>
  - accounted for 34% of the market share in electricity generation in Queensland for 2011<sup>101</sup>
  - and CS Energy (another State owned corporation) account for around 70% of Queensland's generation capacity;<sup>102</sup> and
  - participates in the National Energy Market (**NEM**) which allows power to flow across State borders to meet customer demand in other jurisdictions. The NEM operates as a competitive spot market<sup>103</sup> in which prices adjust in real time to supply and demand conditions.<sup>104</sup>

<sup>96</sup> SunWater's submission dated 12 November 2012 and Stanwell's submission dated 26 October 2012.

<sup>97</sup> Submission dated 12 November 2012.

<sup>98</sup> Submission dated 26 October 2012.

<sup>99</sup> The effect of disclosure of the Category B information on its commercial activities and the weight to be given to this factor is discussed later in this Decision.

<sup>100</sup> See Stanwell's website at <http://www.stanwell.com/>.

<sup>101</sup> National Electricity Market, *State of the Energy Market 2011*, figure 1.5 at page 32. Available at <http://www.aer.gov.au/node/455>.

<sup>102</sup> *State of the Energy Market 2011*, at page 29.

<sup>103</sup> Spot electricity prices is described in *State of the Energy Market 2011*, at page 33, as:

*Generators provide [the Australian Energy Market Operator (AEMO)] with generation price and quantity offers (bids) for each 5 minute dispatch period. AEMO dispatches the cheapest generator bids first, then progressively more expensive offers until enough electricity is dispatched to satisfy demand. In practice, various factors may modify the dispatch order, including generator ramp rates (that is, how quickly generators can adjust their level of output) and congestion in transmission networks.*

*The dispatch price for a 5 minute interval is the offer price of the highest (marginal) priced [megawatt] of generation that must be dispatched to meet demand. A wholesale spot price is then determined for each half hour (trading interval) from*



91. Taking the above into account, I consider that disclosure of the Category B information could be expected to prejudice the business, financial or commercial affairs of SunWater and/or Stanwell or prejudice the competitive commercial activities of SunWater. Accordingly, I give some weight to these factors.
92. However, the adverse effect required by the relevant nondisclosure factors will almost invariably be financial in nature, whether directly or indirectly (for example, an adverse effect on an entity's '*business reputation or goodwill ... is feared ultimately for its potential to result in loss of income or profits, through loss of customers*').<sup>105</sup> In most instances the question of whether disclosure of information could reasonably be expected to have an adverse effect will turn on whether the information is capable of causing competitive harm to the relevant entity – i.e., SunWater or Stanwell.<sup>106</sup>
93. The mere fact, however, that information discusses commercial issues does not of itself lead to an automatic presumption that disclosure under the RTI Act would, on balance, be contrary to the public interest.
94. An agency seeking to refuse access, or a third party objecting to disclosure, must demonstrate that there is a legitimate ground recognised in the RTI Act on which access to specific information may be refused – that, in this context, disclosure of the information would, on balance, be contrary to the public interest. This, in turn, requires an agency or third party to:
- identify nondisclosure factors,
  - clearly specify the information to which such factors are said to apply,
  - establish the elements particular to a given factor so as to enliven that factor for consideration, and
  - demonstrate that the factor or factors are of sufficient weight so as to outweigh those favouring disclosure.
95. Neither SunWater nor Stanwell have met these requirements in this case.
96. As mentioned in paragraphs 85 and 88, I accept that both SunWater and Stanwell operate on a commercial basis.
97. I also accept in general terms that the pricing information contained within the Category B information (i) concerns the business affairs of both SunWater and Stanwell; and (ii) has a degree of commercial sensitivity for suppliers of goods and services operating in a competitive market. However I also consider that the degree of commercial sensitivity will vary from case to case according to a number of key factors. These key factors include: the nature and detail of the pricing information; whether it is current or merely historical; the nature and custom of the particular market; and a variety of other circumstances which may affect its sensitivity in any particular case.<sup>107</sup>

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*the average of the 5 minute dispatch prices. This is the price that all generators receive for their supply during the half hour, and the price that wholesale customers pay for the electricity they use in that period.*

<sup>104</sup> See the Australian Energy Regulator's website at <http://www.aer.gov.au/node/448>.

<sup>105</sup> *Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 (**Cannon**), at paragraph 82. These comments were made in the context of section 45(1)(c) of the FOI Act but provide useful guidance on the interpretation of schedule 4, part 4, item 7(1)(c) of the RTI Act, drafted in substantially similar form.

<sup>106</sup> *Cannon*, at paragraphs 82 - 84.

<sup>107</sup> *Sexton Trading Co Pty and Department of Health; TK Crow Furnishings Pty Ltd (Third Party)* (1995) 3 QAR 132 (**Sexton**) at paragraph 16.

98. The pricing contained within the Category B information represents the total figure for each year. It does not provide detailed descriptions of the components of the prices or disclose any profit margins or costs or reveal what percentage of income is derived from performing the Agreement. As a result, I consider the degree of commercial sensitivity the pricing information has in this case is low.<sup>108</sup>
99. In the absence of clear and credible submissions demonstrating how disclosure of the Category B information could at the present time subvert SunWater's or Stanwell's position so as to occasion an adverse or prejudicial effect within the meaning of the relevant nondisclosure factors, I am not satisfied these effects could reasonably be expected to occur. I therefore afford these public interest factors in favour of nondisclosure minimal weight in the circumstances.

***Is disclosure of the Category B information, on balance, contrary to the public interest?***

100. I am satisfied that there are a number of public interest considerations favouring disclosure of the Category B information which, for the reasons discussed above, are deserving of substantial weight. These factors favouring disclosure outweigh both of the factors favouring nondisclosure which, for the reasons discussed above, are deserving of minimal weight in the circumstances of this review.
101. Accordingly, I consider disclosure of the Category B information would not, on balance, be contrary to the public interest.

**DECISION**

102. I vary SunWater's decision dated 21 September 2011 by finding that:
- information created prior to 1 July 2009 is a document to which the RTI Act does not apply; and
  - information created after 1 July 2009 is neither exempt, nor is its disclosure contrary to the public interest.
103. I set aside SunWater's decision dated 9 October 2012 and substitute a decision that the information is neither exempt from disclosure, nor is its disclosure contrary to the public interest.
104. I have made these decisions as a delegate of the Acting Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

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**Clare Smith**  
**Right to Information Commissioner**

**Date: 21 December 2012**

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<sup>108</sup> In *Sexton*, the Information Commissioner decided that the total price at which a supplier is prepared to offer particular items would be considered less sensitive than details of the supplier's pricing structure, that is, detailed descriptions of the component elements of a tender price or detailed descriptions of the manner in which tender prices were calculated (which would disclose a company's margins, costs and approach to tendering). See also *Dalrymple Shire Council and Department of Main Roads* (1998) 4 QAR 474 at paragraph 39.

## APPENDIX

### Significant procedural steps

Date	Event
16 August 2011	SunWater receives the applicant's access application ( <b>First Application</b> ).
21 September 2011	SunWater issues its decision granting access to some information and refusing access to the balance of the information on the grounds that: <ul style="list-style-type: none"> <li>the information comprises a document to which the RTI Act does not apply; or</li> <li>the information is exempt from disclosure on the basis that its disclosure would found an action for breach of confidence.</li> </ul>
3 October 2011	OIC receives the applicant's application for external review ( <b>First External Review</b> ).
13 October 2011	OIC advises the applicant and SunWater that the Second External Review has been accepted for review.
28 October 2011	SunWater provides OIC with copies of documents relevant to the review, including the Water Release Agreement between SunWater and Stanwell.
28 April 2012	The applicant provides a written submission.
5 June 2012	OIC conveys a written view to the applicant. The applicant is invited to provide a submission by 19 June 2012 if he does not accept the view.  OIC also conveys a written view to SunWater. SunWater is invited to provide a submission by 19 June 2012 if it does not accept the view.
7 June 2012	The applicant advises OIC that he does not accept the view and provides a written submission.
19 June 2012	SunWater seeks an extension to provide submissions in response to the view. OIC grants an extension until 22 June 2012.
21 June 2012	SunWater advises OIC that it does not accept the view and provides a written submission.
21 August 2012	OIC requests that SunWater provide a copy of the documents dated post 1 July 2009 to which access was refused on the ground that it is exempt from disclosure under schedule 3, section 8 of the RTI Act.
25 August 2012	The applicant seeks to expand the scope of the First Application to <i>'apply to the end of the 2011-2012 water year which is the end of June 2012'</i> .
28 August 2012	OIC advises the applicant that it is unable to consider documents from 2011-2012 and that he may wish to consider making a new access application to SunWater for these documents.  The applicant submits a new access application to SunWater ( <b>Second Application</b> ).
3 September 2012	SunWater provides OIC with a copy of the documents dated post 1 July 2009 relevant to the First External Review.
11 September 2012	The applicant provides a verbal submission and accepts OIC's view that documents dated pre 1 July 2009 are documents to which the RTI Act does not apply.
13 September 2012	SunWater validates the Second Application.
9 October 2012	SunWater issues its decision granting access to some information located in response to the Second Application and refusing access to the balance of the information on the ground that the information is exempt from disclosure on the

	basis that its disclosure would found an action for breach of confidence.
10 October 2012	OIC receives the applicant's application for external review in relation to the Second Application ( <b>Second External Review</b> ).
15 October 2012	<p>OIC conveys a written view to SunWater on the issues in the First and Second External Reviews. SunWater is invited to provide a submission by 29 October 2012 if it does not accept the view.</p> <p>OIC also conveys a written view to Stanwell on the issues in the First and Second External Reviews. Stanwell is invited to:</p> <ul style="list-style-type: none"> <li>• provide a submission by 29 October 2012 if it does not accept the view; and</li> <li>• apply to participate in the First and Second External Reviews.</li> </ul>
16 October 2012	OIC advises the applicant and SunWater that the Second External Review has been accepted for review.
26 October 2012	Stanwell provides a written submission and applies to participate in the First and Second External Reviews.
29 October 2012	SunWater seeks an extension to provide submissions in response to the view. OIC grants an extension until 12 November 2012.
30 October 2012	The applicant provides a written submission.
30 October 2012	SunWater provides OIC with a copy of the documents relevant to the Second External Review.
12 November 2012	SunWater provides a written submission.
23 November 2012	The applicant provides a written submission.