



## Decision and Reasons for Decision

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Citation:	<i>Mewburn and SunWater Limited</i> [2014] QICmr 44 (4 November 2014)
Application Number:	311927
Applicant:	Mewburn
Respondent:	SunWater Limited
Decision Date:	4 November 2014
Catchwords:	<p><b>ADMINISTRATIVE LAW – RIGHT TO INFORMATION – DOCUMENT OF AN AGENCY – DOCUMENT TO WHICH ACT DOES NOT APPLY – fee for service documents – whether documents subject to section 11A of the repealed <i>Freedom of Information Act 1992</i> (Qld) – activities conducted on a commercial basis – community service obligations – whether document of an agency – section 11 and schedule 1, section 14 of the <i>Right to Information Act 2009</i> (Qld)</b></p> <p><b>ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – CONTRARY TO PUBLIC INTEREST INFORMATION – names, addresses, property details, private contractual arrangements, billing information and telephone call records relating to landowners, as well as dealings with their water allocations, land and water use – personal information – whether disclosure would, on balance, be contrary to the public interest – sections 47(3)(b), 49 and schedule 4 of the <i>Right to Information Act 2009</i> (Qld)</b></p> <p><b>ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – OTHER ACCESS AVAILABLE – documents available through access schemes under the <i>Land Title Act 1994</i> (Qld) or <i>Water Act 2000</i> (Qld) – whether applicant can reasonably access documents under another Act – sections 47(3)(f) and 53(a) of the <i>Right to Information Act 2009</i> (Qld)</b></p>

## 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 '[a]ll procedures, processes & information pertaining to providing [11 named property lot numbers] access to Sunwater allocations and infrastructure & all relevant related matters' within the date range 2000-2013.<sup>1</sup>

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<sup>1</sup> The date range extends until 19 November 2013, being the date of the access application: section 27(1) of the RTI Act.

2. SunWater located 46 documents<sup>2</sup> deciding that they were documents to which the RTI Act does not apply and also that their disclosure would, on balance, be contrary to the public interest. Additionally and in order to demonstrate to the applicant the types of documents SunWater generates as a result of its business operations that related to the scope of the access application, SunWater provided partial access to 8 documents chosen as 'samples' from the 46 located documents. It redacted information in these 'sample' documents on the basis that disclosure would, on balance, be contrary to the public interest.
3. The applicant sought internal review of this decision, submitting also that SunWater had failed to find all relevant documents. On internal review SunWater:
  - decided that:
    - the 46 located documents were documents to which the RTI Act does not apply; and
    - the 8 'sample' documents were documents of an agency, and access could be provided in their redacted form;<sup>3</sup> and
  - did not locate any further documents.
4. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of SunWater's internal review decision, raising concerns about:
  - the public interest factors relied on by SunWater
  - SunWater's decision that the RTI Act does not apply to the located documents; and
  - SunWater's failure to locate further documents.
5. Searches conducted on external review located 410 additional documents, and SunWater also provided OIC with 4 documents which it had initially considered to be out of scope.
6. For the reasons set out below, I set aside the decision under review, and find that:
  - the RTI Act does not apply to the documents that were received or brought into existence by SunWater both:
    - prior to 1 July 2009; and
    - in carrying out the supply of 'fee for service' activities by SunWater in relation to the relevant properties; and
  - the RTI Act *does* apply to the remaining documents,<sup>4</sup> but access may be refused to them because:
    - the applicant can reasonably access some of these documents under other Acts; and
    - disclosure of the remainder of the documents would, on balance, be contrary to the public interest.

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<sup>2</sup> This number of documents represents the number of distinct documents located by the Department, some of which comprise more than one page. Therefore, the number of pages located exceeds the number of documents listed. This is the same for all numbers of documents referred to in this decision.

<sup>3</sup> As explained above at paragraph 2, these 8 'sample' documents were drawn from the 46 located documents. My decision in respect of the 8 original documents from which these 'samples' were drawn is that the RTI Act does not apply to them: see my reasoning at paragraphs 17-23. As the 8 'sample' documents were created after the access application was received, the applicant is not entitled to review under the RTI Act of a decision made about them: section 27(2) and (3)(b) of the RTI Act.

<sup>4</sup> That is, documents that were either received or brought into existence by SunWater either:

- on or after 1 July 2009; or
- in establishing or carrying out the supply of rural irrigation water to the relevant properties.

## Background

7. Significant procedural steps relating to the application and the external review process are set out in the Appendix.

## Reviewable decision

8. The decision under review is SunWater's internal review decision dated 10 February 2014.

## Evidence considered

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

## Information in issue

10. The documents in issue are divided into two categories in these reasons:
  - **Fee For Service Documents:**<sup>5</sup> documents that were received or brought into existence by SunWater both:
    - prior to 1 July 2009; and
    - in carrying out the supply of 'fee for service' activities<sup>6</sup> by SunWater in relation to the relevant properties; and
  - **Other Documents:**<sup>7</sup> the remaining documents, being those that were either received or brought into existence by SunWater either:
    - on or after 1 July 2009; or
    - in establishing or carrying out the supply of rural irrigation water<sup>8</sup> to the relevant properties.

## Fee For Service Documents

### Relevant law

11. Section 23 of the RTI Act establishes a general right of access to '*documents of an agency*', subject to the specific provisions of the RTI Act. This right of access applies to documents of an agency even if the documents came into existence before the commencement of the RTI Act.<sup>9</sup>
12. The term '**document, of an agency**' is defined to exclude documents to which the RTI Act does not apply.<sup>10</sup> The RTI Act does not apply to certain documents of Queensland government owned corporations (**GOCs**), and these provisions (referred to in this decision as the **exclusion provisions**) are explained below.
13. A '*document to which the [RTI Act] does not apply*' means a document mentioned in schedule 1 of the RTI Act.<sup>11</sup> Schedule 1, section 14 of the RTI Act provides that the

<sup>5</sup> 31 documents located initially, and 29 documents located on external review.

<sup>6</sup> 'Fee for service' activities are the services provided by SunWater other than the supply of rural irrigation water (for example, special meter reads). The price for these services is set by SunWater and is not subject to direction by government.

<sup>7</sup> 15 documents located initially, 4 documents which were initially considered to be out of scope, and 381 documents located on external review.

<sup>8</sup> In this decision, the '*supply of rural irrigation water*' means the supply of water to which a rural pricing direction notice applies under section 999 of the *Water Act 2000* (Qld) (**Water Act**) (or formerly section 1120 of that Act).

<sup>9</sup> Section 23(2) of the RTI Act.

<sup>10</sup> Section 12 of the RTI Act provides:

*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, 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>11</sup> Section 11 of the RTI Act.

RTI Act does not apply to documents to which the repealed *Freedom of Information Act 1992* (Qld) (**FOI Act**) did not apply under section 11A of the FOI Act. Section 11A of the FOI Act provided that the FOI Act did not apply to documents received, or brought into existence, in carrying out activities of a GOC<sup>12</sup> mentioned in schedule 2 of the FOI Act to the extent provided under the application provision mentioned for the GOC in that schedule.

14. One of the GOCs mentioned in schedule 2 of the FOI Act is '[t]he GOC that was the commercialised business unit known as State Water Projects in the Department of Natural Resources'. SunWater replaced State Water Projects in 2000.<sup>13</sup>
15. The application provision set out in schedule 2 of the FOI Act that applies to SunWater (and previously State Water Projects) is section 998 of the Water Act. Section 998 of the Water Act relevantly provided that the FOI Act did not apply to a document received or brought into existence by the GOC in carrying out its 'excluded activities'.<sup>14</sup> The term 'excluded activities' is defined to mean:
  - activities conducted on a 'commercial basis'; or
  - 'community service obligations' prescribed under the regulations.<sup>15</sup>
16. Accordingly, the RTI Act does not apply to documents received or brought into existence by SunWater both:
  - prior to 1 July 2009<sup>16</sup>; and
  - in carrying out activities conducted on a 'commercial basis'.

### Findings

17. The Fee For Service Documents were received or brought into existence by SunWater both:
  - prior to 1 July 2009; and
  - in carrying out the supply of 'fee for service' activities in relation to the relevant properties.
18. In order to determine whether the exclusion provisions apply to these documents, it is necessary to characterise the nature of the 'fee for service' activities and determine whether they are activities conducted on a 'commercial basis'.
19. The term 'commercial' is not defined in any of the relevant legislation.<sup>17</sup> Accordingly, the Information Commissioner has previously cited dictionary definitions of this term, such as 'of, connected with, or engaged in, commerce', with the term 'commerce' having the corresponding meaning of 'the activity embracing all forms of the purchase and sale of goods and services'.<sup>18</sup> It has also been noted that a subsidiary meaning of the term 'commercial' is 'having profit as the main aim'.<sup>19</sup>

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<sup>12</sup> Section 5 of the *Government Owned Corporations Act 1993* (Qld) (**GOC Act**) states that a GOC is a government entity that is:

- established as a body corporate under an Act or the *Corporations Act 2001* (Cth); and
- declared by regulation to be a GOC.

<sup>13</sup> The *Government Owned Corporations (State Water Projects Corporatisation) Regulation 2000* (Qld) established SunWater as replacing State Water Projects (section 15), and declared SunWater to be a GOC (section 20(2)).

<sup>14</sup> Section 998(2) of the Water Act, as it then was. The enactment of the RTI Act omitted section 998 from the Water Act.

<sup>15</sup> Section 998(3) of the Water Act. 'Community service obligations' are not 'excluded activities' unless they are prescribed under the regulations. No relevant regulations exist.

<sup>16</sup> The commencement date of the RTI Act.

<sup>17</sup> Namely, the RTI Act, FOI Act, Water Act or *Acts Interpretation Act 1954* (Qld) (**Acts Interpretation Act**).

<sup>18</sup> *Hansen and Queensland Industry Development Corporation* (1996) 3 QAR 265 [25].

<sup>19</sup> *Hansen and Queensland Industry Development Corporation* (1996) 3 QAR 265 [26]. See also *Stewart and SunWater Limited* (Unreported, Queensland Information Commissioner, 21 December 2012) [22]-[23].

20. Here, the 'fee for service' activities can generally be described as installation of new infrastructure on the relevant properties and other services provided to landowners in relation to the relevant properties (other than the supply of rural irrigation water) for a price. One example of a 'fee for service' activity is a special meter read.
21. Accordingly, 'fee for service' activities are in the nature of the purchase and sale of goods and services, with profit as the main aim. In contrast to the supply of rural irrigation water (which is discussed below), SunWater sets the price in relation to these activities. For these reasons, 'fee for service' activities are, in my view, activities conducted by SunWater on a 'commercial basis'.
22. On this basis, I consider that the Fee For Service Documents:
- satisfy the requirements of schedule 1, section 14 of the RTI Act; and
  - are therefore documents to which the RTI Act does not apply under section 11 of the RTI Act.
23. Accordingly, I am satisfied that there is no right of access under the RTI Act to these documents.

### **Other Documents**

24. The Other Documents were received or brought into existence by SunWater either:
- on or after 1 July 2009;<sup>20</sup> or
  - in establishing or carrying out the supply of rural irrigation water to the relevant properties.<sup>21</sup>

### **Findings – that the RTI Act applies to the Other Documents**

25. For the reasons set out below, I find that the RTI Act applies to the Other Documents, as the exclusion provisions do not apply to them.

#### **Documents received or brought into existence on or after 1 July 2009**

26. The exclusion provisions do not apply to documents created on or after 1 July 2009.<sup>22</sup> Consequently, the RTI Act applies to all located documents which were created on or after 1 July 2009.

#### **Documents relevant to the supply of rural irrigation water**

27. The documents that were received or brought into existence by SunWater in establishing or carrying out the supply of rural irrigation water to the relevant properties can generally be described as contracts for the supply of rural irrigation water in relation to the relevant properties (and associated material) and related documents concerning contract amendments, billing, dealings with allocations, water use and meter reading.
28. I consider that the exclusion provisions do not apply to these documents because:

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<sup>20</sup> 96 documents located on external review.

<sup>21</sup> 15 documents located initially, 4 documents which had initially considered to be out of scope, and 285 documents located on external review.

<sup>22</sup> The repeal of the FOI Act become effective on 1 July 2009: section 194 of the RTI Act and *Subordinate Legislation 2009 No. 132 - Proclamation* (Qld). This means that the exclusion in section 11A of the FOI Act (given effect by section 11 and schedule 1, section 14 of the RTI Act) only applies to documents received or brought into existence by a GOC prior to this date.

- the supply of rural irrigation water is conducted in accordance with government directions<sup>23</sup> with which SunWater must comply;<sup>24</sup> and
- this is a 'community service obligation' for SunWater, being an activity that:
  - is not in the commercial interests of SunWater to perform;<sup>25</sup> and
  - arises because of a direction to which section 121 of the GOC Act applies.<sup>26</sup>

29. Accordingly, establishing and carrying out the supply of rural irrigation water to the relevant properties is not an activity conducted on a 'commercial basis' by SunWater because it is, by definition, one which is not in the commercial interests of SunWater to perform. Consequently, I am satisfied that the RTI Act applies to documents that were received or brought into existence by SunWater in establishing or carrying out the supply of rural irrigation water to the relevant properties.

### Relevant law

30. Given my finding that the RTI Act applies to the Other Documents, it is necessary to consider whether SunWater is entitled to refuse access to these documents (or parts thereof).

31. Under the RTI Act, a person has a right to be given access to documents of an agency.<sup>27</sup> However, this right is subject to other provisions of the RTI Act, including the grounds on which an agency may refuse access to documents.<sup>28</sup> Access to a document may be refused if:

- other access is available to the document, including where the applicant can reasonably access it under another Act;<sup>29</sup> or
- disclosing the document would, on balance, be contrary to the public interest.<sup>30</sup>

### Findings – other access available

32. The relevant documents comprise five Transfer forms (Form 1) and their attachments. These documents relate to the transfer of the fee simple interests and/or water

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<sup>23</sup> Various directions (and amendments to these directions) have been in place over this time: *Rural Water Pricing Direction Notice (No 01) 2000*, gazetted on 6 October 2000 at pages 429 to 432; *Rural Water Pricing Direction Notice (No 01) 2002*, gazetted on 28 June 2002 at page 803; *Rural Water Pricing Direction Notice (No 02) 2002*, gazetted on 27 September 2002 at page 268; *Amendment of Rural Water Pricing Direction Notices (No 01) 2005*, gazetted on 1 July 2005 at page 678; *Rural Water Pricing Direction Notice (No 01) 2006*, gazetted on 14 July 2006 at page 1187; *Amendment of Rural Water Pricing Direction Notice (No 01) 2011*, gazetted on 1 July 2011 at pages 553-554; and *Rural Water Pricing Direction Notice 2012 (No. 1)*, gazetted on 13 July 2012 at page 816.

<sup>24</sup> These directions have been made under section 999 of the Water Act (or previously, former section 1120 of the Water Act), and have been in place since 2000. Section 999(2) of the Water Act provides that SunWater must comply with such directions.

<sup>25</sup> Section 121(1)(a) of the GOC Act. Under this provision, for an obligation to be a 'community service obligation', the GOC must establish to the satisfaction of its shareholding Ministers that the obligations are 'not in the commercial interests of the GOC to perform'.

<sup>26</sup> Section 121(1)(b) of the GOC Act. Section 121(2)(h) of the GOC Act provides that section 121 of the GOC Act applies to a statutory duty to perform activities that arise under an Act applying specifically to a GOC. I consider that section 999(2) of the Water Act comprises such a duty, and further note that both SunWater's *Annual Report 2013-2014* <[http://www.sunwater.com.au/data/assets/pdf\\_file/0007/13975/SunWater\\_Annual-Report\\_2013-2014\\_web.pdf](http://www.sunwater.com.au/data/assets/pdf_file/0007/13975/SunWater_Annual-Report_2013-2014_web.pdf)> at page 26 and *Statement of Corporate Intent 2013-14* <[http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB0QFjAA&url=http%3A%2F%2Fwww.sunwater.com.au%2F\\_data%2Fassets%2Fpdf\\_file%2F0003%2F2001%2FSunWater\\_SCI\\_2013-2014\\_web.PDF&ei=97pRVLSqE4378QWuilE4&usq=AFQjCNEQXlzweOskk-35OH09zJLcJ0Qg&bvm=bv.78597519,d.dGc](http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB0QFjAA&url=http%3A%2F%2Fwww.sunwater.com.au%2F_data%2Fassets%2Fpdf_file%2F0003%2F2001%2FSunWater_SCI_2013-2014_web.PDF&ei=97pRVLSqE4378QWuilE4&usq=AFQjCNEQXlzweOskk-35OH09zJLcJ0Qg&bvm=bv.78597519,d.dGc)> at page 10 indicate that SunWater considers its community service obligations to include the provision of rural irrigation water.

<sup>27</sup> Section 23 of the RTI Act.

<sup>28</sup> As set out in section 47 of the RTI Act.

<sup>29</sup> Sections 47(3)(f) and 53(a) of the RTI Act.

<sup>30</sup> Sections 47(3)(b) and 49 of the RTI Act. The term 'public interest' refers to considerations affecting the good order and functioning of the community and government affairs for the wellbeing 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.

allocations for some of the property lots listed in the access application. A person may, on payment of the fee prescribed under regulations, search and obtain a copy of:

- a registered instrument under the *Land Title Act 1994 (Qld)* (**Land Title Act**);<sup>31</sup> or
- an instrument registered in relation to a water allocation.<sup>32</sup>

33. An officer of the Queensland Titles Registry confirmed to OIC that Transfer forms are available for purchase by a member of the public, and OIC has provided the applicant with sufficient details in order for her to be able to access the relevant documents. The fact that a fee is payable is irrelevant to the issue of whether access may be refused under this provision.<sup>33</sup>
34. Accordingly, I am satisfied that the applicant can reasonably access the five Transfer forms under the Land Title Act or the Water Act, and that access may therefore be refused to these documents under sections 47(3)(f) and 53 of the RTI Act.

### **Findings – public interest**

35. My findings in this section apply to all of the Other Documents **excluding** the five Transfer forms dealt with at paragraphs 32 to 34 above.
36. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest<sup>34</sup> and explains the steps that a decision-maker must take<sup>35</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 nondisclosure; and
  - decide whether disclosure of the information in issue would, on balance, be contrary to the public interest.

### **Irrelevant factors**

37. The applicant has submitted<sup>36</sup> that the '*real reason*' for refusing access to documents is found in schedule 4, part 1, item 1 of the RTI Act—namely, that disclosing the information could reasonably be expected to cause embarrassment to or a loss of confidence in the government.
38. I have been unable to identify any information in the Other Documents that has the potential to cause embarrassment to or a loss of confidence in the government or SunWater. In any event, I have not taken this factor into account as it is irrelevant to deciding the public interest under schedule 4, part 1, item 1 of the RTI Act. Nor have I taken any other irrelevant factors into account.

### **Factors favouring disclosure**

39. All of the applicant's submissions have emphasised the need for accountability, transparency and scrutiny of SunWater. For example, the applicant has submitted:

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<sup>31</sup> Section 35(1)(a)(ii) of the Land Title Act.

<sup>32</sup> Section 153(a)(ii) of the Water Act.

<sup>33</sup> Section 53(a) of the RTI Act, and *Underwood and Department of Housing and Public Works* (Unreported, Queensland Information Commissioner, 18 May 2012) [75].

<sup>34</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.

<sup>35</sup> Section 49(3) of the RTI Act.

<sup>36</sup> Applicant's submission dated 19 May 2014.

- as a fully government owned corporation, SunWater is accountable under administrative law and is open to judicial review of its operations, decisions and processes<sup>37</sup>
  - SunWater is accountable to the paramount purpose and intent of the RTI Act, accountability, public interest scrutiny, fairness and equity and also the rule of law<sup>38</sup>
  - factors favouring disclosure in the public interest in this case are found in schedule 4, part 2, items 1-6 and 10-12 of the RTI Act, and these greatly outweigh the reasons for nondisclosure<sup>39</sup>
  - *'vested interests of staff seems or is apparent, and is in need of public scrutiny'*<sup>40</sup>
  - the refusal of access to information amounts to a *'dictator's attempt at censorship'*<sup>41</sup>
  - public scrutiny of government decisions is not welcomed by the *'administration'* and it is apparent that they have much to hide, whereas *'people who have nothing to hide, hide nothing'*;<sup>42</sup> and
  - covering up corruption is not in the public's interest.<sup>43</sup>
40. The applicant states that SunWater and the Department of Natural Resources and Mines (**DNRM**) have provided bulk water for a subdivision (non-agricultural) and neighbouring residence (non-commercial), and that DNRM documents reveal that DNRM classified the subdivision water allocations as agricultural use.<sup>44</sup> The applicant states that the public is aware that subdivision and water allocation took place on agricultural land in a *Soil Conservation Act 1986* (Qld) area, and contends that quasi judicial decisions have been made by government, which affect property and breach fundamental property rights.<sup>45</sup> The applicant submits that this raises *'public interest questions'* regarding the authorisation of the subdivision and water allocation and other matters relating to this.<sup>46</sup>
41. The submissions raise the issue of whether disclosing the Other Documents could reasonably be expected to:
- promote open discussion of public affairs and enhance government accountability<sup>47</sup>
  - contribute to positive and informed debate on important issues or matters of serious interest<sup>48</sup>
  - inform the community of the government's operations<sup>49</sup>
  - ensure effective oversight of expenditure of public funds<sup>50</sup>
  - allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official<sup>51</sup>
  - reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct<sup>52</sup>
  - advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies<sup>53</sup>

<sup>37</sup> External review application.

<sup>38</sup> Applicant's submission dated 19 May 2014.

<sup>39</sup> Applicant's submission dated 19 May 2014.

<sup>40</sup> Applicant's submission dated 19 May 2014.

<sup>41</sup> Applicant's submission dated 19 May 2014.

<sup>42</sup> Applicant's submission dated 26 August 2014.

<sup>43</sup> Applicant's submission dated 9 October 2014.

<sup>44</sup> Applicant's submission dated 19 May 2014.

<sup>45</sup> Applicant's submission dated 9 October 2014.

<sup>46</sup> Applicant's submission dated 9 October 2014.

<sup>47</sup> Schedule 4, part 2, item 1 of the RTI Act.

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

<sup>49</sup> Schedule 4, part 2, item 3 of the RTI Act.

<sup>50</sup> Schedule 4, part 2, item 4 of the RTI Act.

<sup>51</sup> Schedule 4, part 2, item 5 of the RTI Act.

<sup>52</sup> Schedule 4, part 2, item 6 of the RTI Act.

<sup>53</sup> Schedule 4, part 2, item 10 of the RTI Act.



- reveal the reason for a government decision (or any background or contextual information informing the decision);<sup>54</sup> or
  - reveal the information was incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant.<sup>55</sup>
42. Having carefully reviewed the Other Documents, I consider it arguable that only the following two factors favouring disclosure apply:
- informing the community of SunWater's operations, by showing the conditions and processes that apply in relation to the supply of water to the relevant properties; and
  - ensuring effective oversight of expenditure of public funds, as some documents provide information about the price and conditions of water supply, which (in the case of rural irrigation water) is subsidised by the government.
43. However, I note that, in general, the documents comprise information that is administrative or transactional in nature, or concerns the practicalities of water supply. None of the documents primarily concern the categorisation of the relevant land as agricultural or otherwise.<sup>56</sup> Accordingly, on the information before me, there is nothing to indicate that other factors favouring disclosure apply—including those referenced by the applicant, as identified in paragraph 39—and I have not taken them into account. I also note that the applicant does not advance any arguments about how some of the factors she referenced expressly apply in this matter. As previously stated, the applicant's submissions may be described as founding an overall concern for ensuring the accountability, transparency and scrutiny of SunWater.
44. Accordingly, given the administrative and transactional nature of the Other Documents, I consider the weight to be attributed to the factors concerning informing the community of the government's operations and ensuring the effective oversight of expenditure of public funds is low.

#### **Factors favouring nondisclosure**

45. The RTI Act recognises that:
- disclosure of information could reasonably be expected to cause a public interest harm if disclosure would disclose personal information of a person other than the applicant;<sup>57</sup> and
  - a factor favouring nondisclosure arises where disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy.<sup>58</sup>
46. SunWater's initial decision and submission to OIC<sup>59</sup> identified these as factors favouring nondisclosure.
47. The documents reveal the names, addresses, property details, private contractual arrangements, billing information and telephone call records relating to landowners, as well as dealings with their water allocations, land and water use.
48. In view of the nature of the information, I consider that these factors relating to personal information and privacy apply and attract moderate weight.

<sup>54</sup> Schedule 4, part 2, item 11 of the RTI Act.

<sup>55</sup> Schedule 4, part 2, item 12 of the RTI Act.

<sup>56</sup> The applicant's submission dated 19 May 2014 raised concerns about this matter.

<sup>57</sup> Schedule 4, part 4, item 6 of the RTI Act.

<sup>58</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>59</sup> Dated 15 September 2014.

### **Balancing the public interest**

49. I have afforded low weight to the factors identified as favouring disclosure of the Other Documents. On the other hand, I consider that moderate weight can be attributed to the factors favouring nondisclosure of the relevant information.
50. Accordingly, I consider that access can be refused to the Other Documents, on the basis that disclosing them would, on balance, be contrary to the public interest under sections 47(3)(b) and 49 of the RTI Act.

### **Deletion of contrary to public interest information**

51. Under section 75 of the RTI Act, if:
  - it is practicable to give access to a copy of the Other Documents from which the contrary to the public interest information (ie, the private and personal information) has been deleted; and
  - it appears (whether from the terms of the application or after consultation with the applicant) that the applicant would wish to be given access to the copy,

access must be given accordingly.

52. Given that the terms of the access application seek information about 11 specific properties, deletion of significant amounts of information would be required to ensure that the landowners' personal information could not reasonably be ascertained from the documents. Deletion of this amount of information would mean that the documents would, in most cases, become nonsensical, and in any event, would mean that the documents do not reveal any information that would fall within the scope of the access application (ie, information about providing the relevant lots with SunWater allocations and infrastructure). This is supported by the applicant's comment that the 8 'sample' documents released by SunWater '*have no information*'.<sup>60</sup>
53. I therefore consider that it is not practicable to give access to the Other Documents from which the landowners' personal and private information has been deleted.

### **Applicant's submissions regarding interpretation of the RTI Act**

54. In contesting OIC's preliminary views and in providing submissions in response, the applicant submitted that OIC had erred in interpreting the RTI Act by failing to give precedence to the pro-disclosure bias. The applicant's submissions appear to relate to OIC's application of both the exclusion provisions and the public interest test. In particular, the applicant submits:<sup>61</sup>
  - the purpose of the RTI Act is '*paramount*', as required by section 14A of the Acts Interpretation Act
  - the basic purpose of freedom of information legislation generally has been found by the High Court to be '*to reinforce "the three basic principles of democratic government, namely, openness, accountability and responsibility"*'<sup>62</sup>
  - OIC's references to '*subordinate sections*' of the RTI Act, in preference to the RTI Act's actual overriding purpose and indeed the objects section, results in wholly frustrating the RTI Act and its purpose

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<sup>60</sup> External review application.

<sup>61</sup> Applicant's submission dated 9 October 2014.

<sup>62</sup> *Osland v Secretary to the Department of Justice* [2008] HCA 37 [62] (Kirby J). Justice Kirby was citing New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 2 June 1988 at 1399 which cited *Commissioner of Police v District Court of New South Wales and Another* (1993) 31 NSWLR 606, 612.

- the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority*<sup>63</sup> has judicially upheld meaning which gives effect to legislative purpose<sup>64</sup>
  - it was not Parliament's intent to use the shield of the Crown to protect government agents or its decision makers from scrutiny; and
  - OIC's preliminary views breach the purpose of the RTI Act and Parliament's intent.
55. The RTI Act must be applied and interpreted to further the primary object of that Act, which is to give a right of access to information in the government's possession or under the government's control unless, on balance, it is contrary to the public interest to give access.<sup>65</sup> It is Parliament's intention that the RTI Act should be administered with a pro-disclosure bias,<sup>66</sup> and also that if an access application is made to an agency for a document, the agency should decide to give access to the document unless giving access would, on balance, be contrary to the public interest.<sup>67</sup> Section 14A(1) of the Acts Interpretation Act provides that, in the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation. In contrast to the applicant's submissions, I do not consider that section 14A of the Acts Interpretation Act requires the purpose of an Act itself to be '*paramount*'.
56. In the context of the exclusion provisions, reference to the purpose or object of the RTI Act is not of particular assistance, given that Parliament has clearly made provision for certain documents to be inaccessible under the RTI Act, by setting out those documents to which the RTI Act does not apply.<sup>68</sup> Although these provisions may be complex and require examination of a number of other current and repealed pieces of legislation, the result in the end is unambiguous, and I do not consider it necessary to have regard to the purpose or object of the RTI Act in forming a conclusion on the interpretation of the exclusion provisions.
57. Similarly, in applying the public interest test, I have followed the test set out in the RTI Act.<sup>69</sup> While the RTI Act does expressly note that it should be administered with a pro-disclosure bias,<sup>70</sup> it also makes clear that Parliament's intention and the primary object of the RTI Act are that access should be given unless, **on balance**, it is contrary to the public interest to give access.<sup>71</sup> This does not mean that the factors favouring disclosure should always outweigh those favouring nondisclosure. Rather, a decision-maker is required—as I have done above—to identify the relevant factors, balance them and decide whether, on balance, disclosure of the information would be contrary to the public interest. It does not follow that because I have not decided in favour of the applicant, I have by that very fact disregarded the object of the RTI Act.

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<sup>63</sup> (1998) 194 CLR 355.

<sup>64</sup> The applicant cites *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 [70] which states (with citations omitted and emphasis added by the applicant):

*Reconciling conflicting provisions will often require the court "to determine which is the **leading provision** and which the **subordinate provision**, and which must give way to the other". Only by determining the hierarchy of the provisions will it be possible in many cases to **give each provision the meaning which best gives effect to its purpose** and language while maintaining the unity of the statutory scheme.*

<sup>65</sup> Section 3 of the RTI Act.

<sup>66</sup> Section 44(4) of the RTI Act.

<sup>67</sup> Section 44(1) of the RTI Act.

<sup>68</sup> See also *Davis v City North Infrastructure Pty Ltd* [2011] QSC 285 [25]; and *Fendley Consultancy Pty Ltd and Queensland Treasury and Trade* (Unreported, Queensland Information Commissioner, 26 April 2013) [29] for examples of decisions which had to consider the interpretation of specific provisions within the RTI Act, but which found that the purpose or object of the RTI Act was of no particular assistance in resolving the interpretation issues.

<sup>69</sup> As described above at paragraph 36, and noting that the Queensland Civil and Administrative Tribunal accepted OIC's approach to the public interest balancing test in *Gordon Resources Pty Ltd v State of Queensland acting through Treasury and Trade* [2012] QCATA 135.

<sup>70</sup> Section 44(4) of the RTI Act.

<sup>71</sup> Sections 3 and 44(1) of the RTI Act.

## DECISION

58. I set aside the decision under review, and find that:

- the RTI Act does not apply to the Fee For Service Documents, in accordance with section 11 and schedule 1, section 14 of the RTI Act
- the RTI Act *does* apply to the Other Documents, but access may be refused to them because:
  - the applicant can reasonably access some of these documents under other Acts;<sup>72</sup> and
  - disclosure of the remainder of the documents would, on balance, be contrary to the public interest.<sup>73</sup>

59. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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**L Lynch**  
**Assistant Information Commissioner**

**Date: 4 November 2014**

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<sup>72</sup> Under sections 47(3)(f) and 53(a) of the RTI Act.

<sup>73</sup> Under sections 47(3)(b) and 49 of the RTI Act.

## APPENDIX

### Significant procedural steps

Date	Event
19 November 2013	SunWater received the applicant's access application.
23 December 2013	SunWater issued its initial decision.
15 January 2014	SunWater received the applicant's internal review application.
10 February 2014	SunWater issued its internal review decision.
18 February 2014	OIC received the applicant's external review application.
19 February 2014	OIC notified SunWater of the external review application and requested procedural documents in relation to the application.
25 February 2014	SunWater provided OIC with the requested procedural documents.
28 February 2014	OIC notified the applicant and SunWater that OIC had accepted the external review application. OIC requested that SunWater provide a copy of the documents located in response to the access application, as well as its search records.
17 March 2014	OIC received a copy of the located documents and SunWater's search records.
5 May 2014	OIC issued the applicant with a preliminary view that: <ul style="list-style-type: none"> <li>• the RTI Act does not apply to the located documents; and</li> <li>• any further documents which the applicant submitted exist would also likely be documents to which the RTI Act does not apply.</li> </ul>
19 May 2014	OIC received a submission from the applicant, contesting the preliminary view.
7 July 2014	OIC wrote to SunWater, requesting details about the properties or services which are the subject of the access application, including whether any 'community service obligations' are relevant to them.
11 July 2014	OIC telephoned SunWater to discuss the 7 July 2014 letter and ask for further information about whether any further documents relevant to the scope exist.
14 July 2014	OIC received SunWater's submission in response to OIC's 7 July 2014 letter.
17 July 2014	SunWater notified OIC that a large number of additional documents had been located which were relevant to the scope. OIC wrote to SunWater, requesting further searches and information relating to these searches.
1 August 2014	SunWater telephoned OIC to discuss the further searches. OIC requested a copy of any further located documents.
14 August 2014	OIC received a copy of the further located documents and SunWater's submission regarding disclosure of all located documents.
22 August 2014	OIC advised the applicant that further documents had been located, but, following OIC's initial assessment, OIC's view was likely to be that access to the documents could be refused, albeit for reasons different from those given in the 5 May 2014 letter.
26 August 2014	The applicant wrote to OIC, providing a submission regarding the public interest in disclosing the located documents and raising an issue regarding OIC's 22 August 2014 correspondence.
1 September 2014	OIC wrote to the applicant, informing her that OIC was seeking submissions from SunWater and that OIC would seek submissions from her in due course. OIC also responded to the applicant's issue regarding OIC's 22 August 2014 correspondence.

1 September 2014	<p>OIC issued SunWater with a preliminary view that:</p> <ul style="list-style-type: none"><li>• the RTI Act does not apply to certain located documents; and</li><li>• while the RTI Act applies to the remaining located documents, disclosing them would be contrary to the public interest or other access is available to them.</li></ul>
15 September 2014	<p>SunWater notified OIC that it has no objection to the position set out in OIC's preliminary view.</p>
19 September 2014	<p>OIC issued the applicant with a preliminary view to the same effect as OIC's preliminary view to SunWater dated 1 September 2014.</p>
10 October 2014	<p>OIC received a submission from the applicant, contesting the preliminary view and requesting that her submissions and related documents be placed on the internet.</p>
15 October 2014	<p>OIC advised the applicant that OIC's preliminary view remained as set out in the 19 September 2014 letter and that OIC would proceed to prepare a formal decision. OIC informed the applicant that her submissions would not be uploaded to OIC's website.</p>