



Decision and Reasons for Decision

Citation:	<i>L33 and Department of Resources</i> [2021] QICmr 9 (10 March 2021)
Application Number:	315548
Applicant:	L33
Respondent:	Department of Resources
Decision Date:	10 March 2021
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - BREACH OF CONFIDENCE - consultants' report - whether disclosure would found an action for breach of confidence - whether information is exempt under sections 47(3)(a) and 48 and schedule 3, section 8(1) of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Department of Resources (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to a '[r]eport prepared for the Valuer-General ... in relation to the review of statutory valuations in the Brisbane CBD'.
2. The Department located 90 pages relevant to the application. The Department refused access to these pages,² on the ground they comprised exempt information,³ as information the disclosure of which would found an action for breach of confidence.⁴
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision.⁵ Negotiations by OIC with the applicant narrowed the number of pages in issue to 23 pages, comprising an unabridged final version of the report requested by the applicant (**Report**).⁶
4. Further, the Department agreed to disclose the Report, apart from several segments of information,⁷ access to which the applicant did not seek to pursue.⁸
5. However, a third party consulted by OIC during the external review⁹ objected to disclosure of the entirety of the Report. It is therefore necessary to resolve the question of access to that document by way of formal decision.

¹ Application dated 16 March 2020.

² Decision dated 6 July 2020.

³ Section 47(3)(a) of the RTI Act.

⁴ Section 48 and schedule 3, section 8 of the RTI Act.

⁵ Application dated 3 August 2020.

⁶ Applicant's email dated 1 February 2021, responding to my letter of the same date.

⁷ Departmental email dated 13 November 2020, in response to my email dated 6 November 2020.

⁸ Applicant's email dated 1 February 2021.

⁹ OIC consulted with three third parties; only one ultimately pressed an objection to disclosure.

6. The objecting third party (the **Objector**) did not apply to participate in this review.¹⁰ Accordingly, the Objector is not a participant and is not identified as a third party in the headnote to these reasons.
7. For the reasons set out below, I set aside the decision under review. In substitution, I find that no grounds for refusing access to the Report under the RTI Act have been established. The applicant is therefore entitled to access the Report.¹¹

Background

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

Reviewable decision

9. The decision under review is the Department's decision dated 6 July 2020.

Evidence considered

10. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and the Appendix).
11. To the extent this matter may engage human rights as prescribed in the *Human Rights Act 2019* (Qld) (**HR Act**), I am satisfied they have been allowed for by my observing and applying the RTI Act in making this decision, as required under section 58(1) of the HR Act.¹²

Information in issue

12. The information in issue comprises the Report, apart from certain segments to which the applicant does not seek access, and which are therefore not in issue.¹³

Issue for determination

13. The Department bears the formal onus of establishing that a decision not to disclose the Report is justified.¹⁴
14. As noted above, however, the Department does not now contend that access to the Report may be refused. In these circumstances, there is a practical onus on the Objector to ensure that there is sufficient material before me from which I can be satisfied that a ground for refusing access under the RTI Act has been established.
15. The issue for determination, therefore, is whether the Objector has established the existence of such a ground. For the following reasons, I am not satisfied that this is the case.

Relevant law

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

¹⁰ Declining an invitation to do so: email dated 22 January 2021.

¹¹ Subject to redaction of those segments to which the applicant is not seeking access, canvassed above and discussed further below.

¹² See *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) at [573] and *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111], supporting this view as regards cognate Victorian legislation.

¹³ Specified in my letter to the applicant dated 1 February 2021, and marked on the copy of the Report forwarded by me to the Department on 6 November 2020.

¹⁴ Section 87 of the RTI Act.

¹⁵ Section 3(1) of the RTI Act.

¹⁶ Section 3(2) of the RTI Act.

17. Section 23 of the RTI Act gives effect to the Act's primary object, by conferring a fundamental right to be given access to documents. This right is subject to other provisions of the RTI Act,¹⁷ including grounds on which access may be refused.¹⁸ These grounds include allowing access to information to be refused, to the extent the information comprises exempt information.¹⁹
18. Types of exempt information are set out in schedule 3 of the RTI Act. In this case, the Department decided that the Report comprised information of the type stated in schedule 3, section 8(1) of the RTI Act: information disclosure of which would found an action for breach of confidence.
19. The test for this exemption is to be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, with appropriate standing to bring an action to enforce an obligation of confidence said to be owed to that plaintiff by the Department. This obligation may be contractual, or equitable.²⁰

Findings

20. In this case, there is no evidence before me of any contractual obligation of confidence owed by the Department to the Objector or any other person.²¹
21. As for an equitable obligation, to establish such an obligation it is necessary to show, among other things, that the information was communicated in circumstances binding the recipient – the Department – with an equitable obligation of conscience not to use the confidential information in a way that is not authorised by the confider.²²
22. My view is that no general obligation of the above kind would exist in this case. This is because while consultants, valuers and others who work at the request of or on behalf of government²³ will generally be obliged to maintain the confidentiality of work they produce, the product of that work will normally be the relevant government agency's – in this case, the Department's – information, to do with as it chooses.²⁴ As the Information Commissioner has previously noted:²⁵

Absent exceptional circumstances (and none are present in the instant cases), I am unable to accept that information provided by a valuer to a client, of the kind now in issue..., can constitute confidential information which the valuer is entitled to protect from further disclosure by virtue of a binding legal obligation of confidence owed by the client to the valuer. In my opinion, equity would not recognise or enforce an obligation of conscience owed by the [the agency] to [the valuer] not to use or disclose the matter in issue in a way which is not authorised by [the valuer], nor would the law imply a contractual term to that effect.

¹⁷ Section 23(1) of the RTI Act.

¹⁸ Section 47 of the RTI Act. These grounds are to be interpreted narrowly (section 47(2)(a) of the RTI Act), and the Act is to be interpreted with a pro-disclosure bias (section 44 of the RTI Act).

¹⁹ Sections 47(3)(a) and 48 of the RTI Act.

²⁰ *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (**B and BNRHA**); *Ramsay Health Care Ltd v Information Commissioner & Anor* [2019] QCATA 66 (**Ramsay**).

²¹ On my understanding of the Request for Quote in this paragraph is the third. The others are set out in *B and BNRHA*, [57]-[58]. The fifth discussed in that decision, detriment, no longer appears relevant: *Ramsay*, [91]-[96]. Determining whether this third criteria is established requires a decision-maker to have regard to the whole of the relevant circumstances in which information was communicated: *B and BNRHA*, [84], *Ramsay*, [79].

²² *B and BNRHA*, [76]-[102]. There are four cumulative requirements which must be satisfied to establish an equitable obligation of confidence, of which the requirement summarised in this paragraph is the third. The others are set out in *B and BNRHA*, [57]-[58]. The fifth discussed in that decision, detriment, no longer appears relevant: *Ramsay*, [91]-[96]. Determining whether this third criteria is established requires a decision-maker to have regard to the whole of the relevant circumstances in which information was communicated: *B and BNRHA*, [84], *Ramsay*, [79].

²³ Such as the Report's authors.

²⁴ Including publishing that information, or making it available to an RTI applicant, as the Department has indicated it is prepared to do in this case.

²⁵ *Hopkins & Presotto and Department of Transport* (1995) 3 QAR 59, [39]. This case concerned a specific valuation report, however the principles are applicable to consultancy reports and the like more generally.

23. Similarly, in *Spilsbury and Brisbane City Council; John Wilson & Partners Pty Ltd (Third Party); Environmental Resources Management (Qld) Pty Ltd (Fourth Party)*,²⁶ the Information Commissioner stated:²⁷

24. ... I consider that the relationship between [the consultants], and [the agency], was that of professional and client, given the special skill and knowledge that was involved in the study (see *Re Hopkins & Presotto and Department of Transport (1995) 3 QAR 59 at pp.69-70, paragraph 28* and also *Leicestershire County Council v Michael Farraday and Partners, Limited [1941] 2 KB 205*). While it is a recognised incident of the relationship between professional and client that the professional has a legal duty to keep the client's affairs secret, it is not an ordinary incident of the relationship of professional and client that the client owes a duty of confidence to the professional in respect of information communicated by the professional to the client as part of the service which the professional contracted to perform for the benefit of the client (see *Re Hopkins & Presotto at p.70, paragraph 31*).

25. In this instance, [the agency] contracted with [the consultants] for the provision of professional services (being a consultancy study to develop and recommend an environmentally responsible and economic strategy for the management of Brisbane Water's biosolids to the year 2011) including the provision of a detailed report. As a client, paying for a report from consultants under a contract which gave it full rights to all contract material, [the agency] had every right to expect that it could do as it wished with any part of the Report. **In the ordinary case, a report of this kind becomes the property of the client who has paid for it, to do with as the client pleases. I do not believe that there is anything special or unusual about this case that takes it outside of the ordinary principle that a report prepared by professional consultants, for a client who is paying for the production of a report, becomes the property of the client to be used as the client sees fit.**

24. I understand the Department paid for the Report's production.²⁸ Accordingly, the principles and observations set out in the two paragraphs above are apposite in the present case, given the very similar circumstances. Applying those principles, and taking the whole of the relevant circumstances into account, I am not persuaded that equity would impose on the Department an obligation of confidence restraining it from disclosing a document, the creation of which it²⁹ had funded.³⁰

25. The Objector did assert that release of the Report could result in disclosure of confidential information communicated by third parties to the Report's authors.³¹ While it is possible that the Department may, in certain circumstances, be required to keep genuinely sensitive information communicated by such third parties confidential, I am unable to identify any information of this type in the Report (and neither the Objector nor any other person pointed me to any such information).

26. Much of the Report is framed in general terms, and/or discusses information that would appear to be general industry knowledge,³² matters of public record such as relevant case law or sales history and valuation information, or information that directly concerns the Valuer-General and Departmental operations, rather than external third parties. Without more, I cannot see that these types of information would qualify for exemption under schedule 3, section 8(1) of the RTI Act.

²⁶ (1999) 5 QAR 335.

²⁷ My emphasis.

²⁸ See letter from the Department dated 28 October 2020.

²⁹ And thus, by extension, the public.

³⁰ For completeness, I note that while the Report contains endorsements and recommendations as to confidentiality, marking of this kind is not conclusive of the issue as to whether communication occurred in circumstances giving rise to an equitable obligation of confidence: *B and BNRHA*, [91]. Taking all relevant circumstances into account, particularly those discussed in the preceding two paragraphs, I am satisfied endorsements of this kind do not of themselves give rise to an such obligation in this case.

³¹ See, for example, email to OIC dated 22 January 2021, and attachment dated 5 May 2020 to an email to the Department dated 6 May 2020.

³² Which information cannot usually be said to possess the required quality of confidence – 'information may be characterised as public knowledge though only notorious in a particular industry': *O'Brien v Komarov* (1982) 150 CLR 310, 326, cited in *B and BNRHA*, [71].

27. I conveyed the substance of paragraphs 17-26 to the Objector by letter dated 26 November 2020. While continuing to maintain an objection to disclosure,³³ the Objector put nothing before me that might cause me to resile from the views and conclusions expressed in those paragraphs.
28. Nor did the Objector's correspondence raise any other ground for refusing access to the Report that I can identify.³⁴ In these circumstances, I cannot be satisfied that there exists any ground for refusing access to the Report.

Conclusion

29. The Report does not comprise exempt information to which access may be refused under sections 47(3)(a) and 48 and schedule 3, section 8(1) of the RTI Act.
30. I can identify no other ground for refusing access to the information in issue. The applicant is therefore entitled to access that document, in accordance with the right of access prescribed in section 23 of the RTI Act.

DECISION

31. I set aside the decision under review. In substitution, I find that no grounds for refusing access to the Report under the RTI Act have been established. The applicant is therefore entitled to access the Report.
32. I have made this decision under section 110 of the RTI Act, as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Louisa Lynch
Right to Information Commissioner

Date: 10 March 2021

³³ Email dated 22 January 2021, briefly raising the argument addressed in paragraph 25.

³⁴ In its letter dated 28 October 2020, the Department raised a concern that disclosure of the Report may impair an author's reputation. A similar comment was made by the Objector in a communication with OIC on 23 November 2020. Neither party pressed any such contention in subsequent communications, nor tendered evidence in support of same; the Department, as noted, agreeing to disclosure of most of the Report, and the Objector developing no submission on the point. Given this, and bearing in mind the Department's legal and the Objector's practical onus to establish grounds for refusing access, I cannot be satisfied that disclosure could reasonably be expected to have such a consequence, let alone to a degree sufficient to enliven a ground for refusing access under the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
3 August 2020	OIC received the application for external review.
4 August 2020	OIC requested procedural documents from the Department.
6 August 2020	The Department supplied requested procedural documents.
2 September 2020	OIC notified the applicant and Department the application for external review had been accepted. OIC requested further documentation from the Department, including a copy of the Report.
15 September 2020	The Department supplied requested documents.
17 September 2020	OIC wrote to the Department, conveying a preliminary view the Report did not comprise exempt information to which access may be refused.
28 October 2020	The Department made submissions in reply to OIC's preliminary view.
6 November 2020	OIC emailed the Department, reiterating OIC's 17 September 2020 preliminary view. OIC forwarded to the Department a copy of the Report, marked up to depict segments of information disclosure of which may be of concern to the Department. OIC asked the Department to advise whether it would be agreeable to disclosure of the Report, with marked-up information redacted.
13 November 2020	The Department accepted OIC's 6 November 2020 proposal, agreeing to disclosure of most of the Report.
18 November 2020	OIC emailed two third parties (including the Objector), advising them of the external review and seeking their views as to possible disclosure of the Report. OIC asked the Department to forward to each a copy of the Report.
23 November 2020	The Department relayed to OIC the Objector's objection to disclosure of the Report. OIC communicated with the Objector.
26 November 2020	OIC wrote to the Objector and another third party, conveying a preliminary view that the Report did not comprise exempt information to which access may be refused. Each addressee was invited to make submissions in reply, and apply to participate in the review, by 10 December 2020.
20 January 2021	Having received no reply to OIC's 26 November 2020 letter, OIC emailed relevant third parties, advising that in accordance with the terms of that letter, OIC would proceed on the basis neither third party objected to disclosure of the Report and did not wish to participate in the review. The Objector replied, advising a response had been made.
21 January 2021	OIC wrote to the Objector, advising we had no record of receiving any reply to our 26 November 2020 letter. The Objector was invited to make any submissions, and apply to participate in the review, by 5 February 2021.
22 January 2021	The Objector wrote to OIC, confirming objection to disclosure of the Report and declining to apply to participate in the review.
1 February 2021	OIC wrote to the applicant providing an update on progress in the review and seeking the applicant's agreement to exclude segments of information from the information in issue in this review. The applicant replied, agreeing to exclude relevant segments.

Date	Event
4 February 2021	OIC wrote to a further third party (additional to the two previously consulted in the review), advising them of the external review and seeking their views as to possible disclosure of the Report. OIC advised that if no reply was received by 18 February 2021, OIC would proceed on the basis the addressee did not object to disclosure of the Report and did not wish to participate in the review. No reply was received.