



Decision and Reasons for Decision

Citation:	<i>The Sunrise Project Australia Limited and Sunwater Limited [2023] QICmr 24 (1 June 2023)</i>
Application Number:	316772
Applicant:	The Sunrise Project Australia Limited (ABN 65 159 324 697)
Respondent:	Sunwater Limited (ACN 131 034 985)
Decision Date:	1 June 2023
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - BREACH OF CONFIDENCE - correspondence between Sunwater and the third party - whether disclosure would found an action for breach of confidence - section 47(3)(a) and section 48 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The Sunrise Project made an application¹ to Sunwater Limited (**Sunwater**) under the *Right to Information Act 2009* (Qld) (**RTI Act**)² for all correspondence between Sunwater and Adani Mining Pty Ltd, Adani Infrastructure Pty Ltd, Carmichael Rail Network Pty Ltd or Bravus Mining and Resources (**Bravus**)³ for the period June 2021-February 2022.
2. Sunwater consulted Bravus as a third party under section 37 of the RTI Act about the potential disclosure of information to the applicant. Bravus objected to the release of the information on the grounds that it comprised exempt information as its disclosure would found an action for breach of confidence under section 47(3)(a) and schedule 3, section 8 of the RTI Act.⁴
3. Sunwater accepted Bravus' objection and decided to refuse access to the information.⁵
4. The Sunrise Project applied to the Office of the Information Commissioner (**OIC**) for external review of Sunwater's decision.⁶
5. For reasons set out below, I affirm the decision under review. I am satisfied that access to the information in issue can be refused under section 47(3)(a) of the RTI as it

¹ Access application dated 25 February 2022.

² Sunwater is a government owned corporation and therefore meets the definition of 'agency' under section 14 of the RTI Act.

³ For ease of reference, I have referred to the various entities (Adani Mining Pty Ltd, Adani Infrastructure Pty Ltd, Carmichael Rail Network Pty Ltd or Bravus Mining and Resources) as 'Bravus' in this decision.

⁴ Bravus submitted that, in the alternative, disclosing the information would be contrary to public interest under section 47(3)(b) of the RTI Act. It also submitted some of the information was outside the scope of the access application.

⁵ Decision dated 10 June 2022.

⁶ External review application dated 29 July 2022.

comprises exempt information as its disclosure would found an action for breach of confidence under section 47(3)(a) and schedule 3, section 8 of the RTI Act.

Background

6. Significant procedural steps taken in these reviews are set out in the appendix.

Reviewable decision

7. The decision under review is Sunwater's decision dated 10 June 2022.

Evidence considered

8. The evidence, submissions, legislation, and other material I have considered in reaching this decision are referred to in these reasons (including footnotes and the appendix).
9. In making this decision I have had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), in particular the right of the applicant to seek and receive information.⁷ I consider that a decision-maker will, when observing and applying the RTI Act, be '*respecting and acting compatibly with*' these rights and others prescribed in the HR Act.⁸ I further consider that, having done so when reaching my decision, I have acted compatibly with and given proper consideration to relevant human rights, as required under section 58(1) of the HR Act.⁹

Information in issue

10. During the external review, OIC identified that a small number of the pages located by Sunwater were not relevant to the terms of the application because they either:
 - fall outside the date range of the request or are blank pages; or
 - are internal Sunwater documents (i.e. not correspondence between Sunwater and Bravus).
11. There are also a small number of pages which are within scope and do not comprise exempt information. However, these pages contain purely administrative information and are trivial in nature. They do not reveal any information relating to the substance of the application; rather they relate to staff availability at certain times.
12. The applicant did not continue to seek access to that information on external review and this information is no longer in issue.
13. The information in issue (**Information in Issue**) is approximately 232 pages and comprises correspondence between Sunwater and Bravus in the relevant timeframe.

Issue for determination

14. The issue for determination is whether Sunwater correctly decided to refuse access to the Information in Issue under section 47(3)(a) of the RTI Act on the grounds that it

⁷ Section 21 of the HR Act.

⁸ See *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; and *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

⁹ I note the observations by Bell J on the interaction between similar pieces of Victorian legislation in *XYZ* at [573]: '*it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act.*' I also note that OIC's approach to the HR Act set out in this paragraph has recently been considered and endorsed by the Queensland Civil and Administrative Tribunal (**QCAT**) in *Lawrence v Queensland Police Service* [2022] QCAT 134 at [23] (noting that Judicial Member McGill saw '*no reason to differ*' from our position).

comprises exempt information as its disclosure would found an action for breach of confidence.

Findings

15. The RTI Act confers a right of access to documents of government agencies.¹⁰ However, this access right is subject to other provisions of the RTI Act, including grounds on which access may be refused.¹¹ Section 47(3)(a) of the RTI Act permits an agency to refuse access to documents to the extent they comprise exempt information.¹² Under schedule 3, section 8 of the RTI Act, information will be exempt information where its disclosure would found an action for breach of confidence. The cause of action referred to in schedule 3, section 8(1) of the RTI Act can arise in either contract or equity.¹³
16. The test for exemption under schedule 3, section 8(1) of the RTI Act must 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 an agency such as Sunwater.¹⁴ I find that Bravus comprises 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 Sunwater.
17. In its decision, Sunwater explained that the Information in Issue arises from, and concerns the performance of, contracts between Sunwater and certain third parties and that each of the relevant contracts Sunwater has entered into contains confidentiality provisions which prohibit the unauthorised disclosure of documents or information to which the confidentiality provisions apply. Bravus' submission to Sunwater identified the relevant agreements and set out the specific confidentiality clauses in each of them.
18. In reaching these findings, I have carefully considered these contractual arrangements (**Agreements**). They each contain express confidentiality clauses that bind the parties to keep certain information confidential. I am prevented from revealing or discussing the operation of these confidentiality clauses in any detail as I consider they extend to the terms of the Agreement themselves.¹⁵ I acknowledge that the inability of the applicant to examine the confidentiality clauses means that it is not able to make meaningful submissions about whether or not the scope of the asserted confidentiality exists, or if it does, whether it is restricted in some material way. However, that is the effect of the relevant nondisclosure provisions in the RTI Act.¹⁶
19. While the obligations of confidence created in the Agreements do provide for disclosure in certain circumstances, I am satisfied that none of those circumstances have arisen in the present case. I am also satisfied that the confidentiality clauses continue to operate at the time of making this decision and bind the parties and that there was an exchange of consideration moving between the parties to the Agreements in this case.¹⁷

¹⁰ Section 23 of the RTI Act.

¹¹ Section 47 of the RTI Act. In reaching my view, I have also taken into account that the refusal grounds are to be interpreted narrowly (section 47(2)(a) of the RTI Act) and the RTI Act be administered with a pro-disclosure bias (section 44 of the RTI Act).

¹² The types of exempt information are set out in schedule 3 of the RTI Act.

¹³ *Ramsay Health Care v Office of the Information Commissioner & Anor* [2019] QCATA 66 (**Ramsay**). The applicant submits on external review that the five cumulative elements referred to in *Ramsay* at [16] are the relevant elements for me to consider in this case. However, those elements apply to an *equitable* breach of confidence, rather than a *contractual* breach of confidence. As I am satisfied that there exists a contractual breach of confidence in this review, it is not necessary for me to consider whether there is also an equitable breach of confidence, even though I addressed this briefly in my preliminary view letter to the applicant. It is therefore irrelevant for me to consider the five elements required to establish an equitable breach of confidence, and the applicant's submissions to the extent they address those elements.

¹⁴ *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (**B and BNRHA**) at [44].

¹⁵ Refer to the restrictions placed on the Information Commissioner under section 108 of the RTI Act.

¹⁶ As also noted in *Park and Moreton Bay Regional Council & Ors* [2020] QICmr 39 (23 July 2020) (**Park**) at [17].

¹⁷ In *B and BNRHA* at [45], Information Commissioner Albietz discussed the requirement for there to be an exchange of consideration in these circumstances and relevantly explained: *A contractual term requiring that certain information be kept secret*

20. The applicant submits that the release of a document in another matter highlights an inconsistency in the view that disclosing the Information in Issue in this review would found an action for breach of confidence. The relevant document is located on the Department of Regional Development, Manufacturing and Water's Disclosure Log¹⁸ and can be identified as 'Application for Permit to Take Water from Mistake Creek – Supporting Document' dated 22 May 2020 created by Adani Infrastructure Pty Ltd (**Permit Application**). This document is publicly available and is not in issue in this review.
21. I have considered the content of the Permit Application and references within that document to Sunwater. The Permit Application relates to the development of the Carmichael Coal Mine and section 1.6 of the Permit Application relevantly provides that '*...water is to be extracted from a variety of locations and water sources for construction activities, including Mistake Creek. These sources are: ... Sunwater – 1,270 ML from Sunwater supply until 31 August 2020.*' Appendix C of the Permit Application (Water Demand & Source Breakdown) provides some monthly usage figures which relate to Sunwater. The applicant acknowledges that the information which has been disclosed is not the same as the Information in Issue in this review.¹⁹ I am not satisfied that the Information in Issue in this review has been published within that document – even in summarised form. In these circumstances, I do not consider that the publication of the Permit Application on the Disclosure Log is inconsistent with the parties' claim of confidentiality over the Information in Issue in this review.
22. The applicant asked me to consider Principle 4 of the Government Owned Corporations Release of Information Arrangements (Proactively Push Information to Public Domain) and advise whether the documents in issue could be redacted to remove exempt information and the remainder released. These arrangements provide:²⁰

The "push" model means the Government expects all GOCs to provide information to the public as a matter of course unless there are good public interest reasons for not doing so. Those documents assessed as being of public interest should be made available to the public. The Office of the Information Commissioner has published a guideline that explains the concept of administrative access to information and how it supports proactive disclosure of information. Examples of exceptions to this would include information that is assessed as commercially sensitive, subject to legal professional privilege, or information that would breach privacy principles if it were to be released. If part of a document is assessed as not being able to be publicly released, this does not preclude the rest of the document being publicly released.

23. I note generally that the RTI Act is to be administered with a pro-disclosure bias in deciding access to documents which means that an agency should decide to give access unless giving access would, on balance, be contrary to the public interest.²¹ However, both the 'push' model and pro-disclosure bias, recognise that there are necessary exceptions and limitations to the disclosure of information – one of those being in the case of exempt information. In this case, I have carefully considered the information before me, which includes the Information in Issue and the Agreements, and I am

will not necessarily equate to a contractual obligation of confidence: an issue may arise as to whether an action for breach of the contractual term would satisfy the description of an "action for breach of confidence" (so as to fall within the scope of s.46(1)(a) of the FOI Act). An express contractual obligation of confidence ordinarily arises in circumstances where the parties to a disclosure of confidential information wish to define clearly their respective rights and obligations with respect to the use of the confidential information, thereby enabling the parties to anticipate their obligations with certainty. A mere promise to keep certain information secret, unsupported by consideration, is incapable of amounting to a contractual obligation of confidence, and its effectiveness as a binding obligation would depend on the application of the equitable principles discussed in more detail below.

¹⁸ https://www.daf.qld.gov.au/_data/assets/pdf_file/0006/1630464/20-442.pdf.

¹⁹ Submissions to OIC on 28 March 2023.

²⁰ <https://s3.treasury.qld.gov.au/files/Release-of-Information-Arrangements.pdf>.

²¹ Section 44(1) of the RTI Act.

satisfied that the confidentiality clauses in the Agreements operate to bind Sunwater and apply to the Information in Issue *in its entirety* and that disclosing the Information in Issue would found an action for breach of confidence under schedule 3, section 8(1) of the RTI Act. It is therefore not necessary, nor appropriate for me to consider part release of the Information in Issue to the applicant.

24. I note also that there is no scope for discretion in determining this issue in the sense that I may grant access to the Information in Issue, notwithstanding that it comprises exempt information, on the basis of public interest considerations or other factors arising in the circumstances of this case. While an agency has a discretion under the RTI Act to grant access to exempt information,²² the Information Commissioner does not.²³
25. Sunwater decided, on the alternative basis, that access to the Information in Issue could be refused as its disclosure would, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act. As a result, the applicant's submissions on external review address in detail why the public interest favours disclosure of the Information in Issue. However, once information is found to be exempt, as is the case here, this removes the need for any further consideration of public interest matters, or for any engagement in a public interest balancing exercise. Therefore, it is not necessary for me to review this aspect of Sunwater's decision.
26. In submissions to OIC,²⁴ the applicant contends that section 48(1) of the RTI Act requires OIC to determine if the disclosure would, on balance, be contrary to public interest. The applicant's submissions on the public interest factors can be summarised as follows:
- There has been significant interest in the Carmichael Coal Mine's impact on Queensland's water resources and the source of water Adani has secured for the construction and operation of the project.
 - Adani has adopted a deliberate strategy to obscure details about the source of its water supply. The Queensland Government refused to look into Adani's undisclosed sources of water after Adani told the media its undisclosed water sources were 'legal' but 'commercial in confidence'. There is therefore significant public interest in identifying the source of Adani's water and significant obfuscation from Adani and a lack of transparency about its sources of water.
 - The information will provide critical insight into the extent of water resources required to support the project and the impact that may have on water supplies across the state of Queensland.
 - The application is for information about the supply of publicly owned resources by a publicly owned entity to a foreign owned coal mining company, the Adani Group. The taxpayers of Queensland should be entitled to this information as they ultimately own the water resources that Sunwater is trading on their behalf.
27. The applicant's submission in this regard is misconceived. Section 48(2) of the RTI Act provides that schedule 3 sets out the types of information the disclosure of which the Parliament has considered would, on balance, be contrary to the public interest, in all circumstances.²⁵ As explained above, I have not considered the application of public interest factors, as my view is that the Information in Issue comprises exempt

²² Section 44(4) of the RTI Act.

²³ Section 105(2) of the RTI Act.

²⁴ Submissions to OIC on 29 June 2022 and 28 March 2023.

²⁵ See *Park* at [30] where the RTI Commissioner explained that: ... *in enacting schedule 3 to the RTI Act, Parliament has already decided that disclosure of information in the cases identified in schedule 3 would, on balance, be contrary to the public interest. The proposition advanced by the applicant which is, in effect, that it must be shown, in a particular case, that the balance of the public interest is in favour of disclosure in a case falling within schedule 3, would involve adopting an interpretation which overrides the judgment of Parliament.*

information. Accordingly, it is not necessary, nor appropriate, for me to take public interest considerations into account in this review.

28. QCAT confirmed in the decision in *Adani Mining Pty Ltd v Office of the Information Commissioner & Ors (Adani)*²⁶ that, apart from the possibility of disclosure arising from the nature of 'responsible government', there is no public interest exception in respect of a contractual obligation of confidence. In any event, there is nothing in the material before me that would raise an issue about the genuineness of the obligations of confidentiality imposed by the Agreements, or that would suggest that the parties entered into the Agreements for a collateral or improper purpose sufficient to render the clauses unenforceable.²⁷
29. I acknowledge the applicant's submissions about the public interest in disclosing the Information in Issue. However, for the reasons explained above, I am satisfied that the Information in Issue meets the requirements for exemption under schedule 3, section 8(1) and there is no basis upon which public interest considerations can be taken into account.
30. In summary, and for the reasons set out above, I find that:
- the confidentiality clauses in the Agreements cover the Information in Issue in this review and continue to operate at the time of making this decision
 - there was an exchange of consideration moving between the parties to the Agreements creating a binding agreement
 - the terms of those Agreements and the specific confidentiality clauses within, bind Sunwater as a party to those Agreements and do not permit disclosure of the Information in Issue in these circumstances
 - disclosing the Information in Issue to the applicant under the RTI Act would found an action for breach of a contractual obligation of confidence; and
 - Bravus as the plaintiff would have appropriate standing to bring an action to enforce the obligation of confidence owed by Sunwater.

DECISION

31. For reasons explained above, I affirm Sunwater's decision. I am satisfied that access to the Information in Issue can be refused under section 47(3)(a) of the RTI Act on the basis that its disclosure would found an action for breach of confidentiality.
32. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

T Mainwaring
Principal Review Officer _____

Date: 1 June 2023

²⁶ [2020] QCATA 52 at [32]-[39].

²⁷ These being the only such matters which may prevent a contractual confidentiality clause from imposing an obligation of contractual confidence under the schedule 3, section 8(1) exemption: *Adani* at [32]-[39].

APPENDIX

Significant procedural steps

Date	Event
29 June 2022	OIC received the external review application. OIC requested preliminary documents from Sunwater.
4 July 2022	OIC received preliminary documents from Sunwater
18 July 2022	OIC advised the applicant and Sunwater that the external review application had been accepted. OIC requested relevant documents from Sunwater.
1 August 2022 and 15 August 2022	OIC received the requested documents from Sunwater.
21 December 2022	OIC requested further submissions from Sunwater.
16 January 2023	OIC received further submissions from Sunwater.
28 February 2023	OIC conveyed a preliminary view to the applicant and invited the applicant to provide submissions supporting its case if it did not accept the preliminary view.
28 March 2023	The applicant notified OIC it did not accept the preliminary view and provided submissions supporting its case.