



## Decision and Reasons for Decision

---

**Application Number:** 310903

**Applicant:** Mary Valley Heritage Railway Museum Association Inc

**Respondent:** Department of Transport and Main Roads

**Third Party:** 8S1UCF

**Decision Date:** 3 September 2012

**Catchwords:** RIGHT TO INFORMATION – DECISION GRANTING ACCESS – objection to disclosure of report into applicant’s operations – whether exempt from disclosure – sections 47(3)(a) and 48 of the *Right to Information Act 2009* (Qld)

### REASONS FOR DECISION

#### Summary

1. The third party applied<sup>1</sup> to the Department of Transport and Main Roads (**Department**) under the *Right to Information Act 2009* (Qld) for access to:  
*Investigation reports & audit reports regarding the Mary Valley Heritage Rail Line – Track, Rail Bridges...external report.*
2. The Department identified 92 documents. The Department consulted with the applicant under section 37 of the RTI Act, seeking its views as to possible disclosure of these documents to the third party.
3. The applicant objected to disclosure of the documents. Despite this objection, the Department nevertheless decided to release the documents to the third party.<sup>2</sup>
4. The applicant applied to the Information Commissioner for review of the Department’s disclosure decision. As a result of steps taken on external review, the documents in issue were reduced to a 78-page report prepared by external consultants concerning the applicant’s operations (**External Report**) and dated 1 July 2011.<sup>3</sup>
5. The Department’s decision is set aside, and a decision substituted that access to the External Report may be refused.

#### Background

---

<sup>1</sup> By application dated 1 August 2011.

<sup>2</sup> By initial decision dated 13 October 2011, subsequently affirmed on internal review by decision dated 8 December 2011.

<sup>3</sup> A nine-page report prepared by the Department was released to the third party during the course of the review. Additionally, the Department had treated as relevant a five-page email and attachment from the applicant to the Department. By letters to the third party and Department dated 18 July 2012, I advised my view that these latter documents did not fall within the scope of the third party’s access application, as they were not ‘external reports and audit reports’, and did not therefore comprise information in issue in this review. Neither the applicant nor the Department has contested my view in this regard.

6. As noted, the Department decided to release the External Report to the third party, on the basis its disclosure would not, on balance, be contrary to the public interest.<sup>4</sup>
7. On external review, I initially formed a preliminary view in agreement with the Department's disclosure decision.
8. The applicant did not accept that preliminary view, and provided me with, among other things, a copy of an email from the Department's then-Acting Manager (Audits), Rail Safety Regulation, dated 8 June 2011, foreshadowing a visit to the applicant's operations by the external consultants for the purposes of producing the External Report. The email relevantly states:

*As support to our T&H railways we have engaged some consultants to visit all our T&H railways to review their SMS and maintenance practices.*

*The aim is to produce a report for each and every railway on the gaps between their current SMS and the requirements of the Transport (Rail Safety) Act 2010.*

*This will be confidential for so you will receive only the report for MVHR...*

*...*

*The report will be given to us and you.*

*They will not be like one of our audits in that it is a guide not a mandated set of recommendations or nonconformances that you must fix. ...*

9. The terms of this email in my view oblige the Department to treat the External Report confidentially.<sup>5</sup>
10. Significant procedural steps relevant to this external review are further detailed in the Appendix to this decision.

### **Reviewable decision**

11. The decision under review is the Department's internal review decision dated 8 December 2011.

### **Information in issue**

12. The relevant information the subject of this decision comprises the External Report noted in paragraph 4.

### **Issues in this review**

13. The issue in this review is whether the External Report comprises exempt information under section 48 of the RTI Act, to which access may be refused under section 47(3)(a) of the Act.

### **Relevant Law**

#### ***Onus***

14. As the decision being reviewed is a disclosure decision,<sup>6</sup> the applicant bears the onus of establishing that a decision to not disclose the External Report is justified or that the Information Commissioner should give a decision adverse to the third party (as the

---

<sup>4</sup> The Department did not in its decision consider the application of any exemption provisions.

<sup>5</sup> After receiving this email from the applicant, I subsequently issued a further preliminary view to this effect to the Department and the third party. The Department has, via email dated 19 July 2012, advised me that it accepts this further preliminary view.

<sup>6</sup> 'Disclosure decision' is defined in section 87(3) of the RTI Act as a decision to disclose a document or information contrary to the views of a relevant third party obtained under section 37 of the RTI Act.

access applicant).<sup>7</sup>

### **Right to access information**

15. The RTI Act confers on persons a right to be given access to documents of an agency. This right is subject to other provisions of the RTI Act, including grounds on which access may be refused. Relevantly, access may be refused to exempt information.<sup>8</sup>

### **Requirements for breach of confidence exemption**

16. Information will be exempt if its disclosure would found an action for breach of confidence.<sup>9</sup> The words of the breach of confidence section refer to an action based in equity for breach of an equitable obligation of confidence.
17. The following must be established to give rise to an equitable obligation of confidence:<sup>10</sup>
- a) information must be capable of being specifically identifiable as information that is secret, rather than generally available;
  - b) information must have the necessary quality of confidence, ie, the information must not be trivial or useless information, and it must have a degree of secrecy sufficient for it to be the subject of an obligation of conscience;
  - c) circumstances of the communication must create an equitable obligation of confidence; and
  - d) disclosure to the applicant for access must constitute an unauthorised use of the confidential information
  - e) disclosure would result in detriment to the plaintiff (that is, the applicant).
18. I consider all five of these cumulative criteria are satisfied as regards the External Report. The information is specifically identifiable<sup>11</sup> (comprising the External Report), is not trivial or useless and is confidential as against the third party.<sup>12</sup>
19. I also consider that the information contained in the External Report was obtained by the Department (through its agents, the external consultants) in circumstances so as to give rise to an equitable obligation of confidence binding the Department not to disclose the information.<sup>13</sup>
20. The Department, through the email extracted above, expressly advised the applicant the rail review process was to be '*confidential*', and noted that the External Report would '*only be given to us and you*'. In these circumstances, it is my view the email comprised an assurance that the Report would be treated confidentially; an assurance which the applicant was entitled to rely upon.
21. I am therefore satisfied that the External Report was obtained by the Department in circumstances giving rise to an equitable obligation of confidence.
22. Finally, it is also my preliminary view that, as the applicant objects to disclosure of the External Report, its release would constitute an unauthorised use of the information,<sup>14</sup> and that such release would cause detriment to the applicant.<sup>15</sup>

<sup>7</sup> Section 87(2) of the RTI Act.

<sup>8</sup> Sections 47(3)(a) and 48 of the RTI Act.

<sup>9</sup> Schedule 3, section 8 of the RTI Act.

<sup>10</sup> See *B and Brisbane North Regional Health Authority* [1994] 1 QAR 279 (*B and BNRHA*) at paragraphs 57-58; and *Callejo v Department of Immigration and Citizenship* [2010] AATA 244 at paragraphs 163-171 and 176.

<sup>11</sup> Therefore satisfying requirement (a).

<sup>12</sup> Requirement (b).

<sup>13</sup> Requirement (c).

<sup>14</sup> Requirement (d).

<sup>15</sup> Requirement (e). The requirement of detriment can be easily established by a non-government plaintiff such as the applicant: *B and BNRHA*, at paragraph 111. The detriment suffered by the plaintiff need not be of a financial nature and may include embarrassment, loss of privacy, or fear, or an indirect detriment, for example, disclosure of the confidential information may injure some relation or friend.

23. Accordingly, I am satisfied the five requirements necessary to establish the breach of confidence exemption are satisfied in this case.

### ***Third party's submissions***

24. The third party does not accept that the External Report comprises exempt information, and lodged submissions in support of his case for access.<sup>16</sup>
25. As regards the breach of confidence exemption, the third party argues that:<sup>17</sup>
- the information in the External Report was 'not likely to be secret',<sup>18</sup> as it was open to the public to view parts of the track on which the applicant operates, and
  - information contained in the report cannot not be taken to have been communicated in circumstances giving rise to an equitable obligation of confidence, as the Report was funded by the taxpayer.
26. Dealing with the third party's first submission, it may well be that the track on which the applicant conducts its physical operations is publicly observable. The Expert Report, however, consists of a detailed review and assessment of both the applicant's physical and administrative operations, practices and systems, largely based upon observation of select aspects of the applicant's operations, and information obtained by the consultants from the applicant.<sup>19</sup> Contrary to the third party's speculations, I am satisfied that it is not information known to the third party.
27. As to the second submission, I understand the applicant's argument in this regard to be that the Expert Report is essentially the product of a public agency, and that it should therefore not be the subject of an equitable obligation of confidence restricting its disclosure to a member of the public.
28. Reading this submission in its entirety, I consider it is better read as a public interest argument that disclosure would enhance the transparency of the Department for the way in which it supervises rail operations, an issue which I have canvassed briefly below.
29. Insofar as this submission may, however, be directed toward requirement (c) of the breach of confidence exemption, I do note that information concerning public entities can be subject to different and additional requirements, when a government actor is the party seeking to restrict disclosure on the basis of an equitable obligation of confidence.<sup>20</sup>
30. In this case, however, the entity to which the information in the External Report relates is not a public sector entity, but a private association, to which the ordinary principles of confidence as outlined above apply. As recorded above, I am satisfied the applicant participated in the review process after having received an express assurance the process and the resulting Report would be treated confidentially.

<sup>16</sup> Dated 13 August 2012, in response to my letter dated 18 July 2012 conveying my further preliminary view on the application of the breach of confidence exemption.

<sup>17</sup> The third party also raised various other submissions purportedly contesting the application of the breach of confidence, which I consider are either better regarded as public interest arguments in favour of disclosure, or misconceived: in this latter regard, the third party sought to contest the satisfaction of requirement (d), by apparently arguing that disclosure to the third party should not comprise an unauthorised use of information as the third party had previously received the applicant's information from an internal source and at the time the Department gave its undertaking as to confidentiality it had not been against the applicant's internal rules for this to occur. I am not satisfied that releases of information to the applicant in this earlier context were necessarily 'authorised'. In any event, I am in this review required to consider the material facts and circumstances applicable as at the date of my decision: *Woodyatt and Minister for Corrective Services* (1995) 2 QAR 383 at paragraph 35. As noted, I am satisfied the applicant objects to disclosure of the information.

<sup>18</sup> Therefore failing to satisfy requirement (b).

<sup>19</sup> And noting that the concept of 'communication' of information for the purposes of requirement (c) extends to the acquisition, obtaining and receipt of information: see generally *Franklin v Giddins* [1978] Qd R 72 per Dunn J at paragraph 80; *Moorgate Tobacco Co Ltd v Phillip Morris Ltd [No 2]* (1984) 156 CLR 414 per Deane J at paragraph 437; *Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd* [1979] VR 167 at paragraphs 190-194.

<sup>20</sup> That is, the principles relating to claims of confidence by government actors as set out in *Commonwealth of Australia v John Fairfax and Sons Ltd* (1980) 147 CLR 39 and *Esso Australia Resources Ltd & Ors v Plowman & Ors* (1995) 183 CLR 10.

31. The third party also raised various submissions as to why disclosure of the information would serve the public interest, which can be broadly summarised as arguments that disclosure would:
- reveal information concerning the standard of the rail service offered by the applicant, and ultimately allow members of the community to fully assess and evaluate any risks, and
  - enhance the transparency and accountability of the Department for the way in which it conducts the important regulatory role of monitoring and maintaining rail safety.
32. I have some sympathy with the third party's submissions in this regard, which were largely the basis on which I had formed my original preliminary view that disclosure of the External Report would not, on balance, be contrary to the public interest.<sup>21</sup>
33. When considering the application of an exemption provision, I am, however, proscribed from taking public interest considerations of this kind into account. This is because Parliament has declared that disclosure of 'exempt information' is presumed to be contrary to the public interest.
34. For the reasons explained above, I am satisfied that the External Report comprises exempt information, disclosure of which section 48(2) of the RTI Act expressly prescribes would be contrary to the public interest.

#### **Discretion to release information**

35. The third party also noted the discretion expressly conferred<sup>22</sup> on an agency or Minister to release documents, even where those documents otherwise satisfy the requirements for refusal of access.<sup>23</sup>
36. The exercise of this discretion is a matter for the Department to consider: I do not have the same discretion. I am bound by the provisions of the RTI Act<sup>24</sup> and have no discretion to release documents that I decide are exempt.

#### **DECISION**

37. I set aside the decision under review. In substitution, I find that the External Report comprises exempt information in accordance with section 47(3)(a), section 48 and schedule 3, section 8 of the RTI Act, to which access may be refused.

---

**Jenny Mead**  
**Acting Information Commissioner**

**Date: 3 September 2012**

---

<sup>21</sup> A view formed prior to consideration of the email extracted in paragraph 8.

<sup>22</sup> Section 48(3) of the RTI Act.

<sup>23</sup> The third party's submissions refer to 'the Minister', however it is clear the External Report is a document of the Department; the discretion to release is therefore held by the Department.

<sup>24</sup> Section 105(2) of the RTI Act.

**APPENDIX****Significant procedural steps**

<b>Date</b>	<b>Event</b>
3 August 2011	The original access applicant ( <b>Third Party</b> ) applied to the Department of Transport and Main Roads ( <b>Department</b> ) for access to investigation and audit reports relating to the Mary Valley Heritage Railway, including track, rail and bridges.
1 September 2011	The Department consulted with the Mary Valley Heritage Railway Museum Association Inc. ( <b>Applicant</b> ) to seek their views on the proposed disclosure of documents.
19 September 2011	The Department received a response from the Applicant objecting to the disclosure of the documents ( <b>information in issue</b> ).
13 October 2011	The Department issued its initial decision to the Third Party and the Applicant, deciding to disclose the documents.
11 November	The Applicant sought internal review of the Department's initial decision.
8 December 2011	The Department issued its internal review decision to the Applicant, affirming the initial decision.
9 January 2012	The Applicant applied to the Office of the Information Commissioner ( <b>OIC</b> ) for external review of the Department's internal review decision.
18 January 2012	OIC informed the Applicant their application had been accepted for external review.
16 April 2012	The Applicant withdrew its objection to disclosure of some of the information in issue - a nine-page 'Rail Safety Audit' report.
2 May 2012	OIC conveyed a preliminary view to the Applicant that disclosure of the remaining information in issue would not, on balance, be contrary to the public interest and the Third Party was entitled to access the information.
17 May 2012	The Applicant advised OIC it did not accept the preliminary view and lodged submissions in response.
28 May 2012	OIC sought a response from the Department in relation to the applicant's submissions.
28 May 2012	OIC invited the Third Party to participate in the external review.
12 June 2012	OIC received submissions from the Department.
18 July 2012	OIC issued a further preliminary view to the Third Party and Department that some of the information in issue fell outside the scope of the Third Party's access application, while the balance comprised exempt information to which access may be refused.
19 July 2012	The Department advised OIC it concurred with OIC's further preliminary view.
26 July 2012	The Third Party advised of intention to lodge submissions in response to further preliminary and requested additional time in which to do so.
27 July 2012	OIC granted the Third Party an extension of time until 13 August 2012 to provide submissions in response to OIC's further preliminary view.
8 August 2012	OIC received submissions from the Third Party in response to the further preliminary view.