



## Decision and Reasons for Decision

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Citation:	<i>Lake and Toowoomba Regional Council [2025] QICmr 27 (28 May 2025)</i>
Application Number:	318131
Applicant:	Lake
Respondent:	Toowoomba Regional Council
Decision Date:	28 May 2025
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - BREACH OF CONFIDENCE - attachment to a Council Minute and an agreement between Council and a third party - whether disclosure would found an action for breach of confidence - sections 47(3)(a) and 48 of the <i>Right to Information Act 2009</i> (Qld)

## REASONS FOR DECISION

### Summary

1. The applicant made an application<sup>1</sup> to Toowoomba Regional Council (**Council**) under the *Right to Information Act 2009* (Qld) (**RTI Act**). The applicant referred to an Ordinary Meeting held by Council on 12 December 2023, during which the meeting was closed<sup>2</sup> to consider a bulk water supply agreement between Council and Wellcamp Business Park Pty Limited (**Wellcamp**). The applicant stated that he was seeking access to 'CONFIDENTIAL Attachment 2' (**Attachment**) as referred to in the Minutes of the Meeting or the ensuing bulk water supply agreement (**BWS Agreement**).
2. Council decided<sup>3</sup> to refuse access to the information on the ground that its disclosure could found an action for breach of confidence.<sup>4</sup>
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of Council's decision.<sup>5</sup>
4. For the reasons set out below, I affirm the decision under review.

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<sup>1</sup> On 10 June 2024.

<sup>2</sup> Under 254J(3)(g) of the *Local Government Regulations 2012* (Qld) (**Regulations**).

<sup>3</sup> In a decision dated 27 June 2024.

<sup>4</sup> Section 47(3)(a) and schedule 3, section 8(1) of the RTI Act.

<sup>5</sup> External review application received on 12 July 2024.

## Background

5. As noted at paragraph 1, the applicant is seeking access to a document considered by Council during the closed part of an Ordinary Meeting. The extract of the Minutes of the Meeting provided by the applicant indicate that Council resolved to enter into the BWS Agreement with Wellcamp.

## Reviewable decision

6. The decision under review is Council's decision dated 27 June 2024.

## Evidence considered

7. Significant procedural steps relating to the external review are set out in the Appendix.
8. The evidence, submissions, legislation and other material I have considered in reaching my decision are set out in these reasons (including footnotes and the Appendix). I have taken into account the applicant's submissions to the extent they are relevant to the issue for determination in this review.
9. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.<sup>6</sup> I consider a decision-maker will be '*respecting, and acting compatibly with*' that right, and others prescribed in the HR Act, when applying the law prescribed in the *Information Privacy Act 2009* (Qld) and RTI Act.<sup>7</sup> I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act. I also note the observations of Bell J on the interaction between equivalent pieces of Victorian legislation:<sup>8</sup> '*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*'.<sup>9</sup>

## Information in issue

10. The information in issue comprises 89 pages, being made up of the Attachment referred to in the Minutes of the Meeting and the BWS Agreement (**Information in Issue**).

## Issue for determination

11. The issue for determination is whether access to the Information in Issue may be refused on the ground that disclosure would found an action for breach of confidence and is therefore exempt information.<sup>10</sup>

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<sup>6</sup> Section 21(2) of the HR Act.

<sup>7</sup> *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111]. I further note that OIC's approach to the HR Act set out in this paragraph was considered and endorsed by the Queensland Civil and Administrative Tribunal (**QCAT**) in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23] (where Justice Member McGill saw '*no reason to differ*' from OIC's position).

<sup>8</sup> *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>9</sup> *XYZ* at [573].

<sup>10</sup> During the review the applicant submitted that in a previous external review matter, Council had agreed to disclose a bulk water agreement that it had entered into with a different third-party and that in effect this created a precedent, and Council should agree to disclose the Information in Issue in this matter. In my letter dated 17 March 2025, I explained to the applicant why I did not accept his view in this respect. The applicant did not make any further submissions in relation to this issue and accordingly it has not been addressed as part of this decision.

## Relevant law

12. The RTI Act confers a right of access to documents of government agencies.<sup>11</sup> However, this access right is subject to other provisions of the RTI Act, including grounds on which access may be refused.<sup>12</sup> Section 47(3)(a) of the RTI Act permits an agency to refuse access to documents to the extent they comprise exempt information.<sup>13</sup> Under schedule 3, section 8(1) 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*.<sup>14</sup>
13. 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 Council.<sup>15</sup>

## Findings

14. To found an action in *contract* for breach of confidence, it is necessary to be satisfied that the information in question is subject to an express contractual clause that binds the parties to keep the information confidential, supported by consideration.
15. Council's decision only stated that disclosure of the Information in Issue would found an action for breach of confidence and did not provide any further information in support of its decision. Given this, OIC asked Council to provide a submission explaining how the disclosure of the Information in Issue would found such an action.<sup>16</sup> In response, Council provided OIC with a copy of the Information in Issue.
16. Following consideration of the Information in Issue, OIC conveyed a preliminary view to the applicant that the BWS Agreement contained an express contractual clause that binds the parties, being Council and Wellcamp to keep information confidential.<sup>17</sup>
17. In response, the applicant submitted:<sup>18</sup>

*Realising that the [BWS Agreement] itself might be protected by a confidentiality clause (as it has now been confirmed), my original application ... was for a copy of the [Attachment] ...*

*Please note the primary documentation requested is the report presented as [the Attachment] on which [Council's] actions are founded as, unlike the final legal document, it would normally contain the principles and processes considered in making the final recommendations to be incorporated in the [BWS Agreement]. Thus while you have confirmed the [BWS Agreement] contains a specific confidentiality clause (presumably to prevent any external examination of what [C]ouncil has agreed to), I strongly suspect [the Attachment] does not include such specific protection.*

*It is important to recognise that in reaching its recommendations for adoption by resolution and inclusion in the final [BWS Agreement], the report [Attachment] will have considered arguments and claims that may also be applicable to other existing, and future, consumers, yet will remain undiscoverable from normal public enquiry.*

<sup>11</sup> Section 23 of the RTI Act.

<sup>12</sup> 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).

<sup>13</sup> The types of exempt information are set out in schedule 3 of the RTI Act.

<sup>14</sup> *Ramsay Health Care v Office of the Information Commissioner & Anor* [2019] QCATA 66.

<sup>15</sup> *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (*B and BNRHA*) at [44].

<sup>16</sup> Letter to Council dated 27 August 2024.

<sup>17</sup> Letter to the applicant dated 3 February 2025.

<sup>18</sup> Letter to OIC dated 16 February 2025.

18. The Attachment does not contain any deliberative process information. Rather the Attachment comprises a draft copy of the BWS Agreement ready for signature. Given this, I am satisfied that the Attachment is not excluded from the terms of schedule 3, section 8(1) of the RTI Act, by schedule 3, section 8(2) of the RTI Act.<sup>19</sup>
19. Having considered both the BWS Agreement and the Attachment, I am satisfied that:
  - the BWS Agreement contains an express confidentiality clause that binds both parties to keep certain information confidential
  - while I am prevented from revealing or discussing the operation of the confidentiality clause in any detail,<sup>20</sup> the confidentiality clause in the BWS Agreement covers the BWS Agreement and extends to the Attachment; and
  - the confidentiality clause continues to bind Council.
20. While the obligation of confidence created in the Agreement does provide for disclosure in certain circumstances, I am satisfied that none of those circumstances arise in the present case. I am also satisfied that the Agreement provides for the payment of consideration.<sup>21</sup>
21. Given the above, I am satisfied that, if Council were to disclose the Information in Issue under the RTI Act, Wellcamp would have standing to bring an action for breach of confidence against Council.
22. In supporting his view that the Information in Issue should be disclosed, the applicant raised a number of public interest considerations.<sup>22</sup> Generally, he noted the need for Council to be transparent in its decision-making process so that customers can understand what they are paying relative to other customers. In this regard, he noted the legislative requirement that Council disclose information regarding classes of consumers provided with water and sewerage at an amount below full cost and the amount and cross-subsidies.<sup>23</sup> More specifically, he referred to a duty and responsibility on Council's part to ensure that all customers of its water and sewerage services are dealt with fairly and equitably. In this regard, he referred to the interest in allowing the public to scrutinise the conditions on which Council is supplying water to Wellcamp and determine whether the BWS agreement impacts the charges levied to the public either directly or indirectly, and thus whether the content of the BWS Agreement is '*sensibly in line with [C]ouncil's long held and universally applied charging principles*'.
23. QCAT confirmed in its decision in *Adani Mining Pty Ltd v Office of the Information Commissioner & Ors*<sup>24</sup> 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

<sup>19</sup> Which provides that deliberative process information is not exempt under schedule 3, section 8(1) of the RTI Act, unless it consists of information communicated by an entity other than an agency or an officer of an agency.

<sup>20</sup> Section 108 of the RTI Act.

<sup>21</sup> In *B and BNRHA* at [45], Information Commissioner Albiets 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 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.*

<sup>22</sup> Letters to OIC dated 16 February 2025 and 30 March 2025.

<sup>23</sup> Here, the applicant referred to section 41(1)(e) and (f) of the Regulations.

<sup>24</sup> [2020] QCAT 52 (*Adani*) at [32] to [39].

imposed by the BWS Agreement, or that would suggest that the parties entered into the BWS Agreement for a collateral or improper purpose sufficient to render the clauses unenforceable.<sup>25</sup> Accordingly, while I acknowledge the public interest considerations raised by the applicant, it is not necessary, nor appropriate, for me to take them into account in this review, in circumstances where it is established that a contractual obligation of confidence applies.

24. Based on the information before me, I am satisfied that the Information in Issue is subject to a binding contractual obligation of confidence arising from the BWS Agreement and that its disclosure would therefore found an action in contract for breach of confidence under schedule 3, section 8(1) of the RTI Act.

## DECISION

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

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**A Rickard**  
**Assistant Information Commissioner**

**Date: 28 May 2025**

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<sup>25</sup> 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
12 July 2024	OIC received the application for external review. OIC requested preliminary documents from Council.
18 July 2024	OIC received preliminary documents from Council.
27 August 2024	OIC advised the applicant and Council that the external review application had been accepted and requested a submission from Council about the basis on which it had refused access to the Information in Issue.
10 September 2024	OIC received a copy of the Attachment.
5 December 2024	OIC requested further information from Council.
30 December 2024	OIC received further information from Council, including an executed copy of the BWS Agreement.
3 February 2025	OIC conveyed a preliminary view to the applicant.
16 February 2025	OIC received a submission from the applicant.
11 March 2025	OIC requested further information from Council.
14 March 2025	OIC received a response from Council.
17 March 2025	OIC conveyed a further preliminary view to the applicant.
30 March 2025	OIC received a submission from the applicant.