



## Decision and Reasons for Decision

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**Citation:** *Department of Energy and Public Works and Queensland Health; Cairns Regional Council (Third Party) [2021] QICmr 15 (31 March 2021)*

**Application Number:** 315008

**Applicant:** Department of Energy and Public Works

**Respondent:** Queensland Health

**Third Party:** Cairns Regional Council

**Decision Date:** 31 March 2021

**Catchwords:** ADMINISTRATIVE LAW - RIGHT TO INFORMATION - DISCLOSURE DECISION - EXEMPT INFORMATION - BREACH OF CONFIDENCE - documents about cladding material on hospital building - whether disclosure would found an action for breach of confidence - whether access may be refused under sections 47(3)(a) and 48 and schedule 3, section 8 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - DISCLOSURE DECISION - EXEMPT INFORMATION - LAW ENFORCEMENT OR PUBLIC SAFETY INFORMATION - documents about cladding material on hospital building - whether disclosure could reasonably be expected to endanger security of a building or a person's life or safety - prejudice to a system or procedure for protection of persons - whether access may be refused under sections 47(3)(a) and 48 and schedule 3, sections 10(1)(c), (h) and (i) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - DISCLOSURE DECISION - CONTRARY TO PUBLIC INTEREST INFORMATION - documents about cladding material on hospital building - accountability of regulatory agency response - prejudice to deliberative process, agency's ability to obtain confidential information, the economy of the State and intergovernmental relations, security and public safety, and business affairs - whether disclosure of information would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

## REASONS FOR DECISION

### Summary

1. Cairns Regional Council (**Council**) applied to Queensland Health (**QH**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) to access certain information about cladding material at the Cairns Base Hospital (**Hospital**).<sup>1</sup>
2. QH located relevant information and consulted a number of third parties, including the then Department of Housing and Public Works<sup>2</sup>, about its disclosure.<sup>3</sup> While the Department objected to disclosure of all located information,<sup>4</sup> the other consulted third parties raised no disclosure objections.
3. QH decided<sup>5</sup> to disclose 282 pages, subject to the deletion of information which Council had agreed to exclude.<sup>6</sup> The Department applied to the Office of the Information Commissioner (**OIC**) for external review of QH's decision<sup>7</sup> and maintains that access should be refused to all the information QH had decided to disclose, on the grounds that it comprises exempt information and disclosure would, on balance, be contrary to the public interest.
4. For the reasons below, I affirm QH's decision to disclose information, on the basis that it is not exempt nor would it, on balance, be contrary to the public interest to disclose.

### Background

5. All jurisdictions across Australia have undertaken audits to understand the extent of potentially combustible cladding incorporated within their respective built environments. In Queensland, this work was initially undertaken by the Non-Conforming Building Products Audit Taskforce (**Audit Taskforce**), which was established on 30 June 2017 and comprised representatives from the Department, the Queensland Fire and Emergency Services and the Queensland Building and Construction Commission.<sup>8</sup> In 2018, the Audit Taskforce delivered a Status Report,<sup>9</sup> which stated that:

*Rectification of government buildings is progressing well, and those identified through the audit will continue to be managed by asset-owning agencies under the guidance of [the Department]. There are no government buildings that pose an imminent risk to safety.*<sup>10</sup>

6. Following the identification of combustible materials in government buildings, a Cladding Investigation and Remediation Program (**CIRP**) was established to undertake further

<sup>1</sup> Application dated 27 June 2019. The date range of the application is 1 January 2015 to 27 June 2019.

<sup>2</sup> After the review commenced, a 12 November 2020 machinery of government change transferred building policy and asset management functions from the Department of Housing and Public Works to the Department of Energy and Public Works (**Department**). Therefore, the Department is named as the applicant in the review.

<sup>3</sup> Under section 37 of the RTI Act.

<sup>4</sup> By letter dated 27 September 2019.

<sup>5</sup> Decision dated 11 October 2019. QH notified its disclosure decision to the Department on 31 October 2019.

<sup>6</sup> Comprising remediation costings provided by third party businesses, meeting minutes not relevant to the Hospital and personal mobile telephone numbers. The excluded information is not in issue in this review and is not addressed in this decision.

<sup>7</sup> Application for external review dated 25 November 2019.

<sup>8</sup> Information about the Audit Taskforce can be accessed at: <[https://www.epw.qld.gov.au/about/initiatives/ncbp-audit-taskforce?SQ\\_VARIATION\\_7214=0](https://www.epw.qld.gov.au/about/initiatives/ncbp-audit-taskforce?SQ_VARIATION_7214=0)>.

<sup>9</sup> The Status Report was tabled in Parliament on 17 May 2018 and can be accessed at: <[https://www.hpw.qld.gov.au/\\_\\_data/assets/pdf\\_file/0022/5719/claddingtaskforcereport.pdf](https://www.hpw.qld.gov.au/__data/assets/pdf_file/0022/5719/claddingtaskforcereport.pdf)>.

<sup>10</sup> At page 11 of the Status Report. The terms of reference for the Audit Taskforce can be accessed at: <[https://www.hpw.qld.gov.au/\\_\\_data/assets/pdf\\_file/0018/12456/safer-buildings-taskforce-tor.pdf](https://www.hpw.qld.gov.au/__data/assets/pdf_file/0018/12456/safer-buildings-taskforce-tor.pdf)>. In October 2019, the Safer Building Taskforce was established to focus on delivering the necessary policy and practice to ensure the safety of Queensland's building infrastructure is maintained and build on the work of the Audit Taskforce. The Department's website contains information about the work undertaken by the Safer Building Taskforce. Further information about the Safer Building Taskforce can be found at <<https://www.epw.qld.gov.au/about/initiatives/safer-buildings-taskforce>>.

investigation and, if required, remedial actions. The published schedule of notified government buildings with confirmed combustible external cladding, as at 29 May 2020, includes the Hospital and lists QH as relevant asset owner.<sup>11</sup> In respect of these notified buildings, the Department's website states:

*It is important to understand that these facilities are deemed safe to occupy whilst remedial works are being undertaken.*

*Interim risk mitigation measures have commenced with staff and building occupants notified. The facility is subject to heightened Queensland Fire and Emergency Services (QFES) response. Where rectification works have been completed to the satisfaction of a specialist fire engineer, such facilities will be removed from the schedule of notified Government buildings.<sup>12</sup>*

7. Extensive media reporting has identified that flammable cladding exists at certain locations within the Hospital<sup>13</sup> and, on 29 August 2019, the Department awarded a design and construct contract for replacement of external cladding at the Hospital.<sup>14</sup>
8. On external review, OIC invited the parties to consider document inspection, as an option to informally resolve the review. On 6 March 2020, the Department indicated to OIC that it would be willing to resolve the review through inspection access being provided to 60 pages<sup>15</sup> relating to 'cladding product identification and material properties', which it considered would be in the public interest to release to Council.<sup>16</sup>
9. Unfortunately, the Department did not wish to discuss informal resolution options directly with Council's representatives and the parties were ultimately unable to agree upon the inspection conditions to achieve informal resolution. In May 2020, the Department advised OIC of its revised position that it objected to disclosure of *all* the information QH decided to disclose because it considered there was a real possibility that the information if disclosed, could be used by arsonists and terrorists to inflict serious injury or death on vulnerable persons using the Hospital.
10. Significant procedural steps relating to this review are set out in the Appendix.

## **Reviewable decision and evidence considered**

11. The decision under review is QH's disclosure decision dated 31 October 2019.
12. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and the Appendix).

<sup>11</sup> This schedule is published on the Department's website at <<https://www.epw.qld.gov.au/about/initiatives/safer-buildings-taskforce>>. It is noted that the Queensland Government initially stated that there was no evidence of any flammable cladding at the Hospital (Refer to statement of the Minister for Housing Public Works and Minister for Sport on 30 July 2017, accessible at: <<https://statements.qld.gov.au/statements/82110>>).

<sup>12</sup> <<https://www.epw.qld.gov.au/about/initiatives/safer-buildings-taskforce>>. I note that there has been media reporting of these statements and the schedule of notified government buildings. Refer for example, to the article dated 20 July 2020 – 'Almost 3000 private buildings yet to be cleared of cladding concerns': <<https://www.brisbanetimes.com.au/national/queensland/almost-3000-private-buildings-yet-to-be-cleared-of-cladding-concerns-20200720-p55dpn.html>>.

<sup>13</sup> Refer for example, to - 'Staff at Cairns Hospital relieved about potentially combustible cladding removal', 22 December 2018, <<https://www.cairnspost.com.au/news/cairns/staff-at-cairns-hospital-relieved-about-potentially-combustible-cladding-removal/news-story/0164f7348be43812e8291ba7f6ea4653>> and 'Cairns Hospital Cladding to be replaced over flammability concerns', 20 December 2018, <<https://www.tropicnow.com.au/2018/december/20/cairns-hospital-cladding-to-be-replaced-over-flammability-concerns>>.

<sup>14</sup> Details of this awarded contract can be found in the Queensland Government's 'QTenders' information at <<https://qtenders.hpw.qld.gov.au/qtenders>>. The Aodeli website (<<https://aodeli.com.au/cairns-hospital-safely-reclad-in-aodeli-sap-panels/>>) also contains details, includes photos, of the recladding works at the Hospital.

<sup>15</sup> Subject to redaction of certain private information within four of those pages.

<sup>16</sup> The Department submitted that the remaining pages were irrelevant to the application scope.

13. Individuals in Queensland have human rights under the *Human Rights Act 2019* (Qld) (**HR Act**). Although all review participants are public entities, the Department submits that the human rights to life, privacy, liberty and security of person and health services are relevant considerations in this matter.<sup>17</sup> In making this decision, I have observed and respected the law prescribed in the RTI Act.<sup>18</sup> Doing so is construed as '*respecting and acting compatibly with*' the rights prescribed in the HR Act.<sup>19</sup> I have therefore satisfied the requirements of section 58(1) of the HR Act.<sup>20</sup>

### Information in issue

14. The information in issue comprises the information which QH decided to disclose within 282 pages (**Information in Issue**). The RTI Act limits the level of detail I can include in these reasons to describe the particular content of the Information in Issue<sup>21</sup> however, I can confirm that it comprises:
- various assessment reports prepared for the CIRP by third parties dated in July and November 2018
  - a December 2018 report prepared by the Department for the CIRP (which attaches further copies of some of the third party reports)
  - parts of QH minutes of a CIRP project meeting held in January 2019
  - parts of a June 2019 QH briefing note; and
  - correspondence between QH and the Department concerning the CIRP project, dated in December 2018 and July 2019.

### Issues for determination

15. The Department bears the onus of establishing that a decision refusing access to Information in Issue is justified.<sup>22</sup>
16. As demonstrated in the Appendix, a significant period of time during the external review process was devoted to exploring options for informal resolution. However, as the parties were unable to reach a consensus as to the informal resolution conditions, in making my findings below, I have only considered the parties' submissions to the extent they relate to the issue of whether a decision refusing access to the Information in Issue is justified.
17. The Department has raised numerous grounds as the basis for refusing access to the Information in Issue. Therefore, the issues to be determined in this review are whether the Department has discharged its onus of demonstrating that access can be refused to the Information in Issue on the grounds:

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<sup>17</sup> Sections 16, 24, 29(1) and 37 of the HR Act. Kingham J in *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33 at [90] recently confirmed that where section 58(1) of the HR Act applies, there need be no move to raise human rights issues because that section requires the relevant public entity to properly consider engaged human rights and to not act or make a decision that is not compatible with human rights.

<sup>18</sup> For example, in considering exemptions and public interest factors arising from the Department's safety and security submissions.

<sup>19</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].

<sup>20</sup> In accordance with the following observations of Bell J in *XYZ* at [573] about the interaction between the Victorian analogues of Queensland's RTI Act and *Information Privacy Act 2009* (Qld) and HR Act would apply: '*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>21</sup> Section 108(3) of the RTI Act.

<sup>22</sup> Section 87(2) of the RTI Act.

- it is exempt, because disclosure would found an action for breach of confidence; endanger the life and safety of persons or the Hospital; and/or prejudice a system or procedure for the protection of persons, property or the environment;<sup>23</sup> and/or
- disclosure would, on balance, be contrary to the public interest.<sup>24</sup>

### Preliminary issues – scope and third party consultation

18. Before considering the issues for determination, it is necessary to deal with two procedural issues raised in the Department's submissions.
19. During QH's processing of the application, Council agreed to narrow the application scope.<sup>25</sup> On external review, the Department argued that 222 pages of the Information in Issue are not relevant to the narrowed application.<sup>26</sup>
20. Section 37 of the RTI Act limits the grounds for objection which may be raised by a consulted third party to the issues of exempt or contrary to public interest information<sup>27</sup> and the Information Commissioner has previously found that a consulted third party is not entitled to object to the disclosure of information on the basis of scope.<sup>28</sup> Taking into consideration the decision in *Campbell* and the language used in section 37 of the RTI Act, I find no merit to the Department's arguments regarding scope. In any event, having examined the terms of the narrowed application objectively and without undue technicality,<sup>29</sup> I am satisfied that the Information in Issue falls within the narrowed scope.
21. The Department also asserts that reports and other documents prepared by third parties cannot be disclosed on external review unless I am satisfied that QH has taken all reasonably practicable steps to obtain the views of relevant third parties under section 37 of the RTI Act.<sup>30</sup>
22. The procedure to be followed on external review is, subject to the RTI Act, within the Information Commissioner's discretion.<sup>31</sup> I have reviewed the steps taken by QH's decision-maker, the Information in Issue, the information which was excluded by Council and the standard contractual provisions which the Department submits are relevant to documents prepared by its contractual counterparties (as discussed below). It is evident from the information before me that QH's decision-maker sought the views of relevant third parties about proposed disclosure of information and considered the views received from those parties when making its disclosure decision. On the other hand, in the context of the supplied contractual provisions and publicly accessible information, the Department has not explained how disclosing reports prepared by its contractual counterparties over two years ago, could reasonably be expected to be of concern of

<sup>23</sup> Schedule 3, sections 8, 10(1)(c), 10(1)(h) and/or 10(1)(i) of the RTI Act.

<sup>24</sup> Sections 47(3)(b) and 49 of the RTI Act.

<sup>25</sup> On 19 July 2019, Council agreed to confine the application scope to (i) the latest document regarding the type of cladding material used on the Hospital and (ii) any document regarding proposed remedial options in respect of the cladding, within the period 1 January 2015 to 27 June 2019.

<sup>26</sup> Submissions dated 6 March 2020. Section 108(3) of the RTI Act prevents me from providing details of the Department's submissions in this regard.

<sup>27</sup> Section 37 of the RTI Act provides that an agency may give access to a document that contains information the disclosure of which may reasonably be expected to be of concern to a government, agency or person only if the agency has taken the steps that are reasonably practicable to obtain the views of the relevant third party about whether the document is a document to which the RTI Act does not apply or the information is exempt information or contrary to the public interest information.

<sup>28</sup> *Campbell and North Burnett Regional Council; Melior Resources Incorporated (Third Party)* [2016] QICmr 4 (29 January 2016) (*Campbell*) at [18].

<sup>29</sup> *Cannon and Australian Quality Egg Farms Ltd* (1994) 1 QAR 491 at [8] and *O80PCE and Department of Education and Training* (Unreported, Queensland Information Commissioner, 15 February 2010) at [33].

<sup>30</sup> Submissions dated 6 August 2020.

<sup>31</sup> Section 95(1)(a) of the RTI Act.

those entities. I also note that, in seeking to discharge its onus in this review,<sup>32</sup> the Department has not sought the disclosure views of these entities.

23. In these circumstances, I am satisfied that the requirement to consult with any further third parties was not enlivened on external review. I now turn to consideration of the substantive issues to be determined in this review.

### Breach of confidence

24. Although the RTI Act is to be administered with a pro-disclosure bias,<sup>33</sup> the right to access documents of an agency is subject to certain limitations, including grounds for refusal of access.<sup>34</sup> Access to a document can be refused to the extent that it comprises exempt information<sup>35</sup> and information will qualify as exempt where its disclosure would found an action for breach of confidence.<sup>36</sup> This exemption encompasses actions for breach of contractual obligations of confidence, as well as equitable actions for breach of confidence.<sup>37</sup>
25. The Department has provided standard contractual provisions to OIC and submits these provisions apply to arrangements between itself and the third parties who prepared some of the reports within the Information in Issue and they require the contractual parties to treat information, including the prepared reports, as confidential.<sup>38</sup>
26. I have considered the material provided by the Department. While I accept these standard conditions impose certain confidentiality obligations upon the contractual parties, they do not establish an obligation to treat as confidential *'the subject documents prepared'*,<sup>39</sup> within the Information in Issue as the Department contends. In any event, I am not satisfied the material relied on by the Department establishes that disclosure of any of the Information in Issue by QH under the RTI Act would breach an obligation of confidence contractually owed to any entity.
27. The Department also submits<sup>40</sup> that:
- the Information in Issue consists of reports obtained from third parties and is not in the public domain
  - the information was communicated in circumstances of confidence, as it refers to *'scope and limitations including confidence, copyright, and an intention not to disseminate to third parties'*; and
  - disclosure *'may cause a detriment to the entity as it contains information and research which constitute preliminary opinions and intellectual property'*.
28. The material before me does not establish that, under relevant contractual provisions, any third party owns copyright in any of the Information in Issue. However, to the extent that the Department has raised disclosure concerns based on third party copyright

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<sup>32</sup> Section 87(2) of the RTI Act.

<sup>33</sup> Section 44 of the RTI Act.

<sup>34</sup> These grounds of refusal are identified in section 47(1) of the RTI Act. Section 47(2)(a) confirms that it is Parliament's intention that these refusal grounds are to be interpreted narrowly.

<sup>35</sup> Sections 47(3)(a) and 48 of the RTI Act. Schedule 3 of the RTI Act sets out various types of exempt information.

<sup>36</sup> Schedule 3, section 8(1) of the RTI Act. I note that schedule 3, section 8(2) contains an exception to this exemption, however, that exception does not arise in the circumstances of this matter and therefore, is not addressed in these reasons for decision.

<sup>37</sup> *Ramsay Health Care Ltd v Information Commissioner & Anor* [2019] QCATA 66 (**Ramsay**) at [66].

<sup>38</sup> As the Department provided this information to OIC on a confidential basis, I am unable to provide any detail about these contractual provisions, however, I can confirm that the material provided by the Department did not include executed copies of the agreements entered in respect of these third party reports within the Information in Issue.

<sup>39</sup> Submissions dated 6 August 2020.

<sup>40</sup> Submissions received 15 May 2020. The Department's submissions dated 6 August 2020 repeat and rely upon these submissions.

ownership, these concerns are relevant only to the form of access to be given to documents,<sup>41</sup> and are not themselves evidence which supports application of the breach of confidence exemption.

29. To found an action for breach of an equitable obligation of confidence:

- (i) the information must be identifiable with specificity
- (ii) the information must have the necessary quality of confidence
- (iii) the information must have been received in circumstances importing an obligation of confidence; and
- (iv) there must be an actual or threatened misuse of the information.<sup>42</sup>

30. I accept that the Information in Issue meets the first requirement. The Department:

- relies upon the standard contractual provisions referenced above and certain limited use/dissemination statements within the Information in Issue to establish the second and third requirements; and
- submits that the fourth requirement is satisfied in this case, having regard to the standard contractual provisions and '*all the circumstances*'.<sup>43</sup>

31. As to whether the Information in Issue has the necessary quality of confidence, there is nothing before me to suggest that it has been reproduced in the public domain. As noted above, I am not satisfied the standard contractual provisions require the contracting parties to treat third party reports within the Information in Issue as confidential. I also note that, although some of the Information in Issue indicates that it '*may contain*' confidential information, the Information in Issue itself is not marked as being confidential.<sup>44</sup>

32. Assessing whether the third requirement is satisfied requires an evaluation of all relevant circumstances surrounding the communication in question, so as to determine whether the recipient '*should be fixed with an enforceable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it*'.<sup>45</sup> As noted above, the Department points to standard contractual provisions and certain limited use/dissemination statements as the relevant circumstances. However, none of this material speaks to the circumstances in which the Information in Issue was received, or created, by QH.

33. I am not satisfied that the standard contractual provisions provided by the Department evidence that certain reports within the Information in Issue were received in circumstances importing an obligation of confidence or that disclosure by QH under the RTI Act would be an actual or threatened misuse of that information. I have carefully considered the limited use/dissemination statements within the Information in Issue, however, I am not satisfied they establish that relevant documents were received by QH in circumstances importing an obligation of confidence or that disclosure of these documents by QH under the RTI Act would constitute an unauthorised use. Apart from these general contentions of confidentiality and misuse, the Department has not provided

<sup>41</sup> Under section 68(4) of the RTI Act, inspection access may be provided where disclosing copies of a document would involve an infringement of copyright of a person other than the State.

<sup>42</sup> *Ramsay* at [94] and [95], adopting *Optus Networks Pty Ltd v Telstra Corporation Ltd* [2010] 265 ALR 281 and *Smith Kline & French Laboratories (Aust) Ltd v Secretary to the Department of Community Services & Health* (1990) 22 FCR 73; [1989] FCA 384.

<sup>43</sup> Submissions dated 6 August 2020.

<sup>44</sup> Though this is not determinative to a finding in favour of the second criterion.

<sup>45</sup> *B and Brisbane North Regional Health Authority* [1994] QICmr 1 (*B and BNRHA*), a decision of the Information Commissioner analysing the equivalent exemption in the repealed *Freedom of Information Act 1992* (Qld) at [76]. Refer also to Daubney J in *Ramsay* at [82].

any evidence which reasonably indicates that the Information in Issue was created or received by QH under a mutual understanding of confidence, or that disclosure under the RTI Act constitutes an actual or threatened misuse of that information.

34. Therefore, on the material before me and taking into account that the Department bears the onus in this review, I am not satisfied that all of the requisite elements are established to give rise to an equitable action for breach of confidence.
35. For these reasons, I find that the Information in Issue is not exempt under schedule 3, section 8 of the RTI Act and access may not be refused to it under section 47(3)(a) of the RTI Act.

### Endanger security of a building

36. Information will also be exempt if its disclosure could reasonably be expected to endanger the security of a building, structure or vehicle.<sup>46</sup>
37. For this exemption to apply, there must be a reasonable expectation that disclosing the Information in Issue could endanger the security of the Hospital. When assessing whether an outcome could reasonably be expected, I must distinguish '*between what is merely possible ... and expectations that are reasonably based*' and for which '*real and substantial grounds exist*'.<sup>47</sup>
38. The Department concedes that information which merely identifies the investigation, presence and removal of combustible cladding at one block of the Hospital is '*unlikely to endanger the security of the hospital in circumstances where that information is in the public domain and [the block] has been remediated*'.<sup>48</sup> However, notwithstanding its review onus, the Department has not identified the specific Information in Issue which it does contend could endanger the security of the Hospital if disclosed. Instead, it submits<sup>49</sup> that:
- although the names of government buildings with combustible cladding are in the public domain, the actual location of the cladding has not been made public
  - if information about the precise location of combustible cladding at the Hospital was in the public domain, the hospital '*could be a potential target for acts of arson or pyro-terrorism*'; and
  - it is not inconceivable that an arson attack could be directed at the Hospital.<sup>50</sup>
39. In the decision under review, QH noted that its Capital Assets Services branch had confirmed the classification of certain cladding as combustible did not equate to that cladding being easily set alight and that panels which were not being replaced would be put through a mitigation process.<sup>51</sup> As I have previously noted, extensive media reporting has already identified that cladding exists at various locations in the Hospital, that it was the subject of the Queensland Government's CIRP and that certain cladding will be

<sup>46</sup> Schedule 3, section 10(1)(h) of the RTI Act.

<sup>47</sup> *B and BNRHA* at [154]-[160]. Other jurisdictions have similarly interpreted the phrase '*as distinct from something that is irrational, absurd or ridiculous*': See *Smolenski v Commissioner of Police, NSW Police* [2015] NSWCATAD 21 at [34], citing *Commissioner of Police, NSW Police Force v Camilleri (GD)* [2012] NSWADTAP 19 at [28], *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 at [61] and *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 at [190].

<sup>48</sup> Submissions dated 6 August 2020.

<sup>49</sup> Submissions dated 6 August 2020.

<sup>50</sup> Certain of the Department's submissions concerning the application of this exemption were identified by the Department as being confidential and are not set out in this decision. However, in making this decision, I have carefully considered all the submissions and supporting material provided by the Department during the review.

<sup>51</sup> Pages 3-4 of the decision under review.



replaced.<sup>52</sup> I also understand cladding replacement works (conducted pursuant to the Department's awarded tender) are underway.<sup>53</sup> In these circumstances, the Department has not adequately explained how disclosure of any particular information about cladding at the Hospital could be expected to endanger the security of the Hospital.

40. Based on the material before me and taking into account the Department's onus in this review, I am not satisfied the Department has established there is a reasonable expectation that disclosure of the Information in Issue would endanger the security of the Hospital. I therefore find that access to the Information in Issue cannot be refused<sup>54</sup> on the basis it comprises exempt information under schedule 3, section 10(1)(h) of the RTI Act.

#### **Endanger life or safety or prejudice system for protection of persons or property**

41. Information will also be exempt where its disclosure could reasonably be expected to endanger a person's life or physical safety or prejudice a system or procedure for the protection of persons, property or the environment.<sup>55</sup>

42. The Department submits that:

- there is a risk disclosure could make the Hospital a potential target for acts of arson or terrorism, thereby endangering people's lives<sup>56</sup>
- disclosure has the '*potential for serious public safety implications*'<sup>57</sup>
- disclosure could prejudice current security arrangements, procedures and interventions for minimising fire risks associated with the cladding<sup>58</sup>
- I should place little reliance on QH's decision to disclose the Information in Issue, as QH has failed to consider the risks posed by disclosing the presence, location and/or flammable risk associated with combustible cladding at the Hospital<sup>59</sup>
- the Department, unlike QH, has significant expertise in combustible cladding and building safety/risks, given its role in the Audit Taskforce and the CIRP team;<sup>60</sup> and
- the Explanatory Notes to the *Building and Construction Legislation (Non-Conforming Building Products – Chain of Responsibility and Other Matters) Amendment Act 2017* and the *Building and Other Legislation (Cladding) Amendment Regulation 2018* highlight the significance of safety and security issues with cladding on buildings.<sup>61</sup>

43. For these exemptions to apply, there must be a reasonable expectation that disclosing this specific Information in Issue, rather than a generalised risk of uncontrolled fire resulting from targeted arson/terrorist actions, could lead to the submitted outcomes.

44. The Department's submissions refer to the 'potential' risks for uncontrolled fire and serious safety implications. In the context of previous media reporting and the

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<sup>52</sup> For example, refer to 'Cairns hospital cladding to be replaced over flammability concerns, 20 December 2018, <<https://www.tropicnow.com.au/2018/december/20/cairns-hospital-cladding-to-be-replaced-over-flammability-concerns.html>> and <<https://www.cairnspost.com.au/news/cairns/cairns-hospital-wont-be-spending-its-own-money-to-remove-potentially-combustible-cladding/news-story/04ea4520ccac839e5939b7f1>>. Many of these articles also include pictures of the relevant hospital block.

<sup>53</sup> The Department's submissions dated 6 August 2020 refer to remediation works as being '*nearly completed*'.

<sup>54</sup> Under section 47(3)(a) of the RTI Act.

<sup>55</sup> Schedule 3, section 10(1)(c) and 10(1)(i) of the RTI Act.

<sup>56</sup> Submissions received 15 May 2020 and 7 August 2020.

<sup>57</sup> Submissions received 15 May 2020.

<sup>58</sup> Submissions dated 6 August 2020. Given the sensitive nature of these submissions, I am unable to provide any further detail of them in this decision.

<sup>59</sup> Submissions dated 6 August 2020.

<sup>60</sup> Submissions dated 6 August 2020.

<sup>61</sup> Submissions dated 6 August 2020.

remediation works already being underway at the Hospital, those submissions do not establish real and substantial grounds supporting the Department's contention that disclosing the Information in Issue would give rise to these risks. I accept the significance of safety and security concerns associated with the presence of combustible cladding at the Hospital and that there may be systems and procedures currently in place which are generally designed to minimise those risks. However, the Department has not identified these systems and procedures with any specificity and has failed to detail how disclosure of this particular Information in Issue would cause the broadly asserted endangerment and prejudice. Although I also recognise that the legislative changes made in 2018 are intended to address the widely accepted safety risks associated with combustible cladding, this does not support a conclusion that disclosure of the Information in Issue would endanger lives or safety or prejudice the Hospital's fire risk systems and procedures.

45. Taking into account the Department's onus in this review, I am not satisfied the Department has established there is a reasonable expectation that disclosure of the Information in Issue would endanger the lives or safety of patients, hospital workers, the local community or any other person. I am also not satisfied that the Department has established any prejudice to the Hospital's fire risk systems and procedures could be expected to arise from disclosing the Information in Issue. I therefore find that the Information in Issue is not exempt information under schedule 3, section 10(1)(c) or 10(1)(i) of the RTI Act and access cannot be refused<sup>62</sup> on that basis.

### Public interest

46. Under the RTI Act, access to documents may be refused to the extent they comprise information the disclosure of which would, on balance, be contrary to the public interest.<sup>63</sup> The term public interest refers to considerations affecting the good order and functioning of the community and government affairs for the well-being 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.<sup>64</sup>
47. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision maker must:<sup>65</sup>
- identify factors irrelevant to the public interest and disregard them
  - identify factors in favour of disclosure of information
  - identify factors in favour of nondisclosure of information; and
  - decide whether, on balance, disclosure of the information would be contrary to the public interest.

### Irrelevant factors

48. The Department raised a concern that disclosure of the Information in Issue would '*confuse and mislead the public*'.<sup>66</sup> Although the Department's submission does not address how this concern arises in the context of publicly accessible information about

<sup>62</sup> Under section 47(3)(a) of the RTI Act.

<sup>63</sup> Sections 47(3)(b) and 49 of the RTI Act.

<sup>64</sup> However, there are some recognised public interest considerations that may apply for the benefit of an individual. See Chris Wheeler, 'The Public Interest: We Know It's Important, But Do We Know What It Means' (2006) 48 AIAL Forum 12, 14.

<sup>65</sup> Section 49(3) of the RTI Act.

<sup>66</sup> Submissions received 15 May 2020. In contrast, when proposing inspection to 60 pages of the Information in Issue, the Department submitted that it was in the public interest to release that information '*because it will assist the Council and community in understanding the risks posed by the buildings*'.

cladding at the Hospital, an applicant misunderstanding or misinterpreting a document is an irrelevant consideration in deciding the public interest.<sup>67</sup>

49. Accordingly, I have not taken this concern, or any other irrelevant factor into account in making my decision.

### **Factors favouring disclosure**

50. The presence of flammable cladding in public buildings is an issue of genuine concern in the community. The steps being taken to assess and remove non-conforming and non-compliant building products from public buildings are also matters of significant public interest. I also note that, when proposing inspection to 60 pages of the Information in Issue,<sup>68</sup> the Department submitted that it was in the public interest to release that information *'because it will assist the Council and community in understanding the risks posed by the buildings'*.
51. I am satisfied that disclosure of the Information in Issue could reasonably be expected to:
- enhance the Government's accountability, by providing contextual information about the government's regulatory processes for combustible cladding and demonstrate how Government has responded to concerns raised about the practical impacts of those regulatory processes;<sup>69</sup> and
  - contribute to a positive and informed debate about how risks associated with flammable cladding at the Hospital are being addressed.<sup>70</sup>
52. Given the significant level of community concern about flammable cladding and the need for scrutiny in relation to how cladding at the Hospital is being addressed, I afford significant weight to these disclosure factors in relation to all of the Information in Issue.

### **Factors favouring nondisclosure**

53. The Department submits that a large number of factors favour nondisclosure of the Information in Issue and these carry significantly more weight than the factors which favour disclosure.<sup>71</sup>

### **Deliberative process**

54. The RTI Act seeks to protect deliberative processes of government<sup>72</sup> and recognises that there is a public interest harm in disclosing an opinion, advice or recommendation that has been obtained, prepared or recorded in the course of or for the deliberative processes involved in the functions of government.<sup>73</sup> Deliberative processes involved in the functions of government have been defined as *'...thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action'*.<sup>74</sup> It has also been defined as *'careful consideration with a view to decision'*.<sup>75</sup>

<sup>67</sup> Schedule 4, part 1, item 2 of the RTI Act.

<sup>68</sup> While exploring informal resolution options for the review.

<sup>69</sup> Schedule 4, part 2, items 1, 3 and 11 of the RTI Act.

<sup>70</sup> Schedule 4, part 2, items 2 and 14 of the RTI Act.

<sup>71</sup> Submissions received 15 May 2020.

<sup>72</sup> Schedule 4, part 3, item 20 of the RTI Act.

<sup>73</sup> Schedule 4, part 4, section 4(1) of the RTI Act. Exceptions to the public interest harm factor appear in schedule 4, part 4, section 4(3) and (4) of the RTI Act.

<sup>74</sup> *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at [28-30], citing with approval the definition given in *Re Waterford and Department of Treasury* (No.2) (1984) 5 ALD 588 at [606].

<sup>75</sup> *Ibid.*

55. The Department submits that some of the Information in Issue comprises deliberative process information and the public interest harm factor applies in respect of that information because:
- it is of a preliminary nature, obtained to assist the government in determining fire safety issues and assessing available options<sup>76</sup>
  - its disclosure would reasonably prejudice the Department's cladding decision and the remediation works at the Hospital and, as a result of further media publicity, may also result in the Department remaking its cladding decision, delay and/or increased remediation costs.<sup>77</sup>
56. While the Department broadly asserts that disclosing some of the Information in Issue would delay ongoing remediation works or require it to remake an already made cladding decision, it has provided no evidence that this is more than a merely possible disclosure outcome. In these circumstances, I afford these factors low weight to the extent they apply to the Information in Issue.

### **Confidential information**

57. The Department contends that the Information in Issue is confidential and its disclosure could be reasonably be expected to prejudice the future supply of this type of information<sup>78</sup> or an agency's ability to obtain information of this nature.<sup>79</sup> In respect of these factors, the Department relies upon the standard contractual provisions it has provided to OIC and certain limited use/dissemination statements within the Information in Issue.
58. As noted above, the Information in Issue is not marked as being confidential and the Department has not provided information which reasonably indicates that this information was communicated on a confidential basis. While there may be a level of sensitivity about some of the Information in Issue, this does not necessarily equate to such information being confidential.
59. Even if some of the Information in Issue could be characterised as confidential, I must also be satisfied that disclosure could reasonably be expected to prejudice an agency's ability to obtain confidential information or the future supply of this type of information. To the extent the Information in Issue comprises reports prepared pursuant to contractual arrangements, I consider there is a low likelihood that disclosure would make third parties reluctant to enter contractual arrangements for preparation of similar reports in the future. As to the remaining Information in Issue, the Department has offered no evidence that disclosure would prejudice, in any way, the preparation of future reports, minutes or briefings by agencies or interactions between agencies. Accordingly, I afford these factors favouring nondisclosure low weight.

### **Security, law enforcement or public safety**

60. As noted above, the Department submits that disclosing information which identifies the presence, location and or risk associated with cladding at the Hospital could reasonably

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<sup>76</sup> Submissions received 15 May 2020. In submissions dated 6 August 2020, the Department further asserted that '*the need to protect the security of the hospital and the safety of the persons using it, is paramount and should be afforded substantially more weight than any other factors favouring disclosure (in isolation or in combination)*'.

<sup>77</sup> Submissions dated 6 August 2020.

<sup>78</sup> Schedule 4, part 4, section 8(1) of the RTI Act.

<sup>79</sup> Schedule 4, part 3, item 16 of the RTI Act.

be expected to endanger the security of the Hospital, life or safety of persons using the Hospital and/or prejudice system for protection of persons or property at the Hospital.<sup>80</sup>

61. A factor favouring nondisclosure will arise where disclosing information could reasonably be expected to the prejudice security, law enforcement or public safety.<sup>81</sup> For this factor to apply, I must be satisfied there is a reasonable expectation that disclosing this specific Information in Issue, rather than a general risk of uncontrolled fire resulting from targeted arson/terrorist actions, could lead to the submitted endangerment and prejudice. For reasons set out in paragraphs 44-45 above, I am not satisfied the Department has established there is a reasonable expectation that disclosure of the Information in Issue would:
- endanger the lives or safety of patients, hospital workers, the local community or any other person; or
  - prejudice to the Hospital's fire risk systems and procedures.
62. Accordingly, to the extent this nondisclosure factor applies, I afford it only low weight.

### **Business affairs**

63. The Department submits that nondisclosure factors concerning prejudice to business affairs<sup>82</sup> apply to the Information in Issue, as it contains information, research, financial estimates,<sup>83</sup> intellectual property, trade secrets and opinions of a preliminary nature which *'may not reflect the actual or real position'* and disclosing that information may cause a detriment to third party entities.<sup>84</sup> The Department also argues that disclosure could *'hinder the ability of government to obtain open and frank advice and opinion from industry in the future'*, noting that there is currently a critical shortage of relevantly qualified and experienced third parties prepared to provide this type of information.<sup>85</sup>
64. The RTI Act recognises that public interest harm will arise where:
- it would disclose trade secrets of an agency or another person
  - the disclosure of information that has a commercial value to an agency or another person could reasonably be expected to destroy or diminish the commercial value of that information; and
  - the disclosure of information concerning the business, professional, commercial or financial affairs of an agency or another person could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of this type to government.<sup>86</sup>
65. Apart from generalised claims that unwanted publicity arising from disclosure will decrease the willingness of third parties to contractually provide similar expert services to government in the future, the Department has not particularised the prejudice or adverse effect that it argues could reasonably be expected to occur as a result of disclosure. I am not satisfied that disclosure of the Information in Issue, rather than existing marketplace shortages, would lead to the Department's claimed outcomes. It is also unclear on the material before me, including the standard contractual terms provided by the Department, how any part of the Information in Issue could be properly

<sup>80</sup> Submissions received 15 May 2020 and 7 August 2020.

<sup>81</sup> Schedule 4, part 3, item 7 of the RTI Act.

<sup>82</sup> Schedule 4, part 3, items 2 and 15 of the RTI Act.

<sup>83</sup> I note that costings provided by third party businesses form part of the information excluded by Council and do not form part of the Information in Issue.

<sup>84</sup> Submissions received 15 May 2020.

<sup>85</sup> Submissions dated 6 August 2020.

<sup>86</sup> Schedule 4, part 4, sections 7(1)(a), (b) and (c) of the RTI Act.

characterised as comprising the trade secrets of any entity or that any specific commercial value it has to any entity would be destroyed or diminished by disclosure.

66. For these reasons, I afford low weight to these factors.

#### **Prejudice management function and effectiveness of testing and auditing procedures**

67. The Department submits that, as the Department has not reached its final position with respect to the fire safety issues on the Hospital, *'[p]remature disclosure of these matters may prejudice government deliberations, management functions and future testing processes by diverting staff from their functions to deal with undue pressure from specific interest groups seeking to influence deliberations'*.<sup>87</sup> Apart from these broad claims, the Department has not demonstrated a sufficient connection between disclosure of the Information in Issue and any prejudice to agency management functions or the testing and auditing procedures of the Department, QH or any other agency.<sup>88</sup> Therefore, I am not satisfied these nondisclosure factors apply.

#### **Prejudice the economy of the State and intergovernmental relations**

68. The Department argues that:<sup>89</sup>
- as combustible cladding is a significant and sensitive issue across Australia, the State Government is required to *'take a cautionary approach'* so as to maintain relationships with the Federal, State and Territory governments and facilitate a uniform approach to this issue; and
  - given the potentially substantial rectification costs associated with cladding across the industry, releasing the Information in Issue may *'further encourage some interest groups to seek to influence how government addresses the issue of rectification costs which could prejudice the State's economy'*.
69. Apart from these broad assertions, the Department has not identified the nature of the prejudice, adverse effect or damage it claims disclosure will cause to the economy or financial interests of the State<sup>90</sup> or to intergovernmental relations.<sup>91</sup> Nor has the Department demonstrated a causal link between disclosure of the Information in Issue and such prejudice. On this basis, I do not consider these factors favouring nondisclosure apply.

#### **Other factors**

70. The Department bears the onus of establishing that disclosure would, on balance, be contrary to the public interest. However, for completeness, I have considered all factors listed in schedule 4, parts 3 and 4 of the RTI Act, and I can identify no other public interest considerations favouring the nondisclosure of the Information in Issue.<sup>92</sup>

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<sup>87</sup> Submissions received 15 May 2020.

<sup>88</sup> Schedule 4, part 3, items 19 and 21 and schedule 4, part 4, sections 3(a), (c) and (d) of the RTI Act.

<sup>89</sup> Submissions received 15 May 2020.

<sup>90</sup> Schedule 4, part 3, item 12 and schedule 4, part 4, sections 9(1)(a) and 10 of the RTI Act.

<sup>91</sup> Schedule 4, part 3, item 14 and schedule 4, part 4, section 1(1)(a) of the RTI Act.

<sup>92</sup> In the event that further relevant factors exist in favour of nondisclosure, I am satisfied that there is no evidence before me to suggest that any would carry sufficient weight to outweigh the significant weight I have afforded to the public interest factors that favour disclosure.

### ***Balancing the public interest***

71. The steps government is taking to address the presence of flammable cladding in public buildings are matters of serious community, and national, interest. I have found that disclosure factors relating to government accountability, transparency and public health and safety measures deserve significant weight. With respect to the nondisclosure factors, for the reasons outlined above, I have found that they are deserving of low weight. Essentially, this is because I am not satisfied that there is a reasonable expectation of prejudice or adverse effect, as anticipated by those factors, arising from disclosure of this particular Information in Issue.
72. On balance, I am satisfied that the public interest factors favouring disclosure outweigh the factors favouring nondisclosure. Accordingly, I find that disclosure of the Information in Issue would not, on balance, be contrary to the public interest.

### **DECISION**

73. I affirm QH's decision to disclose the Information in Issue, as it may not be refused under section 47(3)(a) or (b) of the RTI Act.
74. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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**K Shepherd**  
**Assistant Information Commissioner**

**Date: 31 March 2021**

## APPENDIX

### Significant procedural steps

Date	Event
25 November 2019	OIC received the application for external review.
2 January 2020	OIC advised the Department and QH that the application for external review had been accepted and requested information from QH.
24 January 2020	OIC received the requested information from QH.
31 January 2020	OIC wrote to Council asking if it would be willing to accept inspection access in the interests of resolving the matter informally.
21 February 2020	OIC received Council's conditions for the informal resolution proposal.
24 February 2020	OIC provided a copy of Council's conditions to the Department and requested the parties communicate directly, with a view to reaching a consensus as to the terms of informal resolution.
6 March 2020	OIC received the Department's alternate informal resolution proposal.
10 March 2020	OIC conveyed the alternate informal resolution proposal to Council.
8 April 2020	OIC received Council's conditions for the informal resolution proposal.
9 April 2020	OIC wrote to the Department seeking a response to Council's informal resolution conditions and conveyed a preliminary view to the Department that it had not discharged its onus in the review. OIC requested that the Department provide submissions supporting its disclosure objections in the event the Department did not agree to Council's informal resolution conditions.
30 April 2020	The Department requested an extension of time to respond to OIC.
1 May 2020	OIC granted the requested extension for the Department's response.
15 May 2020	The Department notified OIC that it did not accept Council's informal resolution conditions and provided a submission objecting to disclosure of all the Information in Issue.
22 May 2020	OIC notified Council that, as the parties had been unable to reach a consensus as to the terms of information resolution, OIC would proceed to determine the substantive issue in the review.
26 June 2020	OIC conveyed a preliminary view to the Department that it had not discharged its onus in the review and invited the Department to provide further submissions by 17 July 2020 if it maintained that access should be refused to the Information in Issue.
16 July 2020	The Department requested an extension of time to respond to OIC.
20 July 2020	OIC notified the Department that the next step in the review would be for a formal decision would be issued, based on information available to OIC at 31 July 2020.
31 July 2020	The Department requested a further extension to 6 August 2020 to respond to OIC and OIC granted the requested extension.
7 August 2020	OIC received the Department's further submissions.
3 September 2020	OIC provided a copy of the Department's further submissions to QH and invited QH to provide submissions in response.
8 September 2020	OIC provided an update to Council.
10 September 2020	QH advised OIC that it did not intend to provide submissions in response.



<b>Date</b>	<b>Event</b>
22 October 2020	OIC advised the Department and Council that a decision was required to finalise the review.
28 October 2020	OIC received Council's application to participate in the review and Council was recorded as a participant.
17 March 2021	OIC provided an update to the Department about the expected timeframe for issuing the decision.