



Decision and Reasons for Decision

Application Number: 210258

Applicant: Mr William-Graham Boulton

Respondent: Whitsunday Regional Council

Decision Date: 30 June 2008

Catchwords: **FREEDOM OF INFORMATION – section 46(1)(a) of the *Freedom of Information Act 1992 (Qld)* – whether disclosure of document would found an action for breach of confidence – whether iniquity exception applies**

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REASONS FOR DECISION

Summary

1. On the information available to me, I am satisfied that the document to which the applicant seeks access is exempt from disclosure under section 46(1)(a) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**).

Background

2. By application dated 26 February 2007, the applicant applied to the Whitsunday Regional Council¹ (**Council**) for access to:

'...a copy of the Infrastructure Agreement between Whitsunday Shire Council and F.K.P./Carmist in the matter of proposed Outrigger Resort development on public land (foreshore carpark at Airlie Beach).'

3. By letters dated 23 March 2007 and 5 April 2007, Mr Andrew Ireland, Council's Executive Manager Corporate and Community Services, advised the applicant that Council refused access to the relevant infrastructure agreement and accompanying schedules (**Agreement**) on the basis of the objections to release lodged by the other parties to the Agreement.²
4. By letter dated 24 April 2007, the applicant applied for internal review of Mr Ireland's decision.
5. By letter dated 14 June 2007, Council wrote to the applicant acknowledging receipt of the application for internal review.
6. An internal review decision was not made by Council within the statutory timeframe provided by the FOI Act.
7. By letter dated 25 June 2007³, the applicant sought external review of the Council's deemed decision.

Decision under review

8. The decision under review is Council's deemed affirmation of Mr Ireland's decision (referred to above).

Steps taken in the external review process

9. By letter dated 25 July 2007, this Office wrote to Council to obtain a copy of the Agreement claimed to be exempt by Council.
10. By letter dated 14 August 2007, Council (through its solicitors) provided this Office with a copy of the Agreement.

¹ Formerly the Whitsunday Shire Council.

² These objections were based on the parties' view that they remained bound by an enforceable obligation of confidence in respect of the Agreement which rendered the Agreement exempt from disclosure under section 46(1)(a) of the FOI Act.

³ Received by this Office on 28 June 2007.

11. In August and September 2007, a staff member of this Office had various telephone discussions with representatives of the parties to the Agreement in relation to the possible informal resolution of this matter.
12. By letter dated 1 October 2007, the Acting Information Commissioner communicated a preliminary view to the applicant that:
 - the parties to the Agreement continued to object to its disclosure on the basis that they were bound by the terms of the Agreement to maintain its confidentiality
 - the Agreement qualified for exemption from disclosure under section 46(1)(a) of the FOI Act.
13. By letter dated 14 October 2007⁴, the applicant:
 - advised that he did not accept the preliminary view set out in the letter dated 1 October 2007
 - alleged bias in respect of the decision maker
 - provided this Office with submissions and documents in support of his case.⁵
14. By letter dated 8 November 2007, the Acting Information Commissioner wrote to the applicant in response to the matters raised in the submission dated 14 October 2007.
15. By letter dated 18 November 2007, the applicant again advised this Office that he did not accept the previous preliminary view and provided further submissions, a sworn affidavit and other documents in support of his case.
16. I assumed carriage of this matter on 7 January 2008.
17. By letter dated 27 March 2008⁶, the applicant:
 - enquired about the delay in progress of the external review
 - advised of the withdrawal of the relevant development application and the amalgamation of Council with the Bowen Shire Council.
18. By letter dated 3 April 2008, I wrote to the applicant to advise that I would consider the matters raised in his letter of 27 March 2008.
19. In April 2008, staff members of this Office contacted the parties to the Agreement to again canvas the possibility of informally resolving this matter.
20. By letter dated 28 April 2008, I informed the applicant that informal resolution was not able to be reached and that I would proceed to form a preliminary view in respect of the application of the FOI Act to the Agreement.
21. By letter dated 26 May 2008⁷, the applicant provided further submissions and documentary evidence in support of his case.

⁴ Received by this Office by fax on 15 October 2007.

⁵ These documents were supplied in support of the applicant's argument that the Agreement had not been frustrated (a point with which I agree – see paragraph 36 of this decision).

⁶ Received by this Office on 1 April 2008.

⁷ Received by this Office on 29 May 2008.

22. By letter dated 5 June 2008, I communicated a preliminary view to the applicant that the Agreement was exempt from disclosure in its entirety under section 46(1)(a) of the FOI Act.
23. By facsimile dated 18 June 2008, the applicant:
- advised that he did not accept the preliminary view set out in the letter dated 5 June 2008
 - made submissions in relation to the 'public interest' by reference to issues raised in 'The Right to Information' report (**FOI Report**)⁸
 - requested that I carry out an investigation into 'a corporate entity of doubtful original and validity'
 - sought an extension of time in which to provide further submissions to enable him to review various authorities and properly consider the FOI Report in its entirety.
24. By letter dated 19 June 2008⁹, I wrote to the applicant:
- confirming the preliminary view that on the information available to me, disclosure of the Agreement would found an action for breach of confidence under section 46(1)(a) of the FOI Act
 - clarifying that as stated in the FOI Report, there is no public interest test to be applied in the application of section 46(1)(a) of the FOI Act, and advising that it is therefore not relevant to raise the issues of 'public interest' in the sense referred to in other parts of the FOI Report which in no way relate to the section 46(1)(a) exemption provision
 - advising that I have no jurisdiction to undertake the requested investigation of a corporate entity
 - providing the applicant with an extension of time in which to make further and final submissions to this Office after considering relevant authorities.
25. By facsimile dated 27 June 2008, the applicant provided the requested submissions including that:
- he has been unable to properly respond to my letter of 19 June 2008 as he has been in Brisbane
 - this external review '*falls within the present problem area identified in the [FOI Report], which has caused the recommendation for ... a privacy Commissioner and the upgrading of [this Office] ...*'
 - '*[w]ould it not be reasonable that [the] preliminary view be tempered by knowledge that in terms of the [FOI Report], [the Agreement] would in all probability, be accessible once the [FOI Report] is acted upon? ... based upon the subjective aspect (i.e. opinion factor) of interpretation of Sec 46(1)(a) of the current act.*'
 - he has '*no doubt that a change in mindset will occur within your office in terms of the coming 'right to know' concept and the enlightenment regarding the term 'public interest' being reference in fact, to the people collectively from whom all power and authority emanates – a fact which presently seems to be ignored.*'

⁸ On 17 September 2007, the Queensland Government appointed an independent expert panel to review the FOI Act. The panel prepared a discussion paper on 30 January 2008 for public consultation, and the final report 'The Right to Information' was delivered to the Premier of Queensland on 10 June 2008.

⁹ Which was faxed to the applicant on the morning of 20 June 2008.

- the preliminary view does not reflect the FOI Report's recommendation that this Office be the '*champion of FOI*'
- specifically, the preliminary view in respect of section 46(1)(a) of the FOI Act which requires determination of whether disclosure of the Agreement *would* found an action for breach of confidence does not place me in the category of '*champion of FOI*'
- an action for breach of confidence would:
 - in itself bring the issue into the public domain, therefore there is '*... some element of doubt that disclosure would found an action for breach of confidence ...*'
 - '*be tantamount to agreement to release the supposed confidential information*'
- he is '*at a decided disadvantage in the matter of meeting of minds regarding this issue, as [he does not] have access to the contents of the [FOI] report*' however he concedes that he would agree with my interpretation of section 46(1)(a) of the FOI Act if the section used the words *may* or *could* as opposed to *would*
- he is not in a position to judge whether there is a clearly identifiable plaintiff as that party '*is unknown and unidentified*' to him
- he is not convinced that the iniquity exemption does not apply, '*since the profound secrecy surrounding all aspects of the document may well suggest nefarious activity by one or more of the parties.*'
- my '*presumption that Australia is [a] common law jurisdiction ... is incorrect ... [as] our courts operate in admiralty jurisdiction ... under roman law ...*'.

26. In making my decision in this matter, I have taken the following into consideration:

- applicant's FOI application to Council dated 26 February 2007
- Mr Ireland's initial decision dated 23 March 2007 and 5 April 2007
- applicant's internal review application dated 24 April 2007
- applicant's external review application dated 25 June 2007
- applicant's submissions dated 14 October 2007 (including the attachments)
- applicant's affidavit sworn 17 November 2007
- applicant's submissions dated 18 November 2007 (including the attachments)
- letter from the Department of Public Works dated 22 November 2007
- applicant's letter dated 27 March 2008 (including the attachments)
- applicant's letter dated 29 May 2008 (including the attachments)
- applicant's submissions dated 18 June 2008 (including the attachments)
- applicant's submissions dated 27 June 2008
- the documents which the applicant seeks access to, including attachments
- relevant legislation, cases and previous decisions of this Office.

Matter in issue

27. The matter in issue in this review comprises the Agreement.

Issue on external review

28. The issue on external review is whether disclosure of the Agreement would found an action for breach of confidence under section 46(1)(a) of the FOI Act.

Findings

Section 46(1)(a) of the FOI Act

29. Section 46(1) of the FOI Act provides that:

46 Matter communicated in confidence

(1) *Matter is exempt if -*

(a) *its disclosure would found an action for breach of confidence*

Application of section 46(1)(a) of the FOI Act

30. The Information Commissioner set out the correct approach to the interpretation and application of section 46(1) of the FOI Act in the decision of *'B' and Brisbane North Regional Health Authority*¹⁰:

- an action for breach of confidence may be based on either a contractual or equitable obligation of confidence¹¹
- the test for exemption under section 46(1)(a) of the FOI Act is to be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, with appropriate standing to bring an action to enforce an obligation of confidence claimed to bind the agency not to disclose the information in issue¹².

31. I will consider each of these issues in turn.

Obligation of confidence

32. I have carefully examined the terms of the Agreement.

33. On the basis of this examination, I am satisfied that the terms of the Agreement expressly impose a contractual obligation of confidence on the parties to the Agreement.

Identifiable plaintiff with standing

34. To assess whether there is an identifiable plaintiff with appropriate standing to bring an action for breach of confidence in a hypothetical legal action, I must consider:

- how the Agreement came to an end, including whether it was terminated
- if the Agreement was terminated, whether the contractual obligation of confidence provided for in the Agreement survives termination.

35. I will consider each of these sub-issues in turn.

¹⁰ (1994) 1 QAR 279 ('B').

¹¹ 'B' at paragraph 43.

¹² 'B' at paragraph 44.

How the Agreement came to an end

36. Section 87 of the FOI Act prevents me from disclosing the terms of the Agreement. However, after careful consideration of the Agreement, I am satisfied that it was terminated by the operation of one of its clauses, that is, by an outcome contemplated and provided for by the parties to the Agreement.

Survival of the contractual obligation of confidence

The applicant's submissions

37. In his submissions to this Office dated 14 October 2007, the applicant states:

'... Would it not be true that any Confidentiality Clause contained within the agreement became ultra vires at the instant that the agreement itself became ultra vires (lapsed), thus relieving the contracting parties of any perceived previously binding obligation?... On what basis would the terms remain confidential, notwithstanding that the agreement by which such terms originated, is itself ultra vires?'

38. In his submissions to this Office dated 18 November 2007, the applicant states:

'...Could it not be said that you do not appear to understand (or do not wish to understand) that because the contract is now void, the conditions therein, including alleged confidentiality, are no longer relevant?'

Analysis

39. Certain contractual terms will operate after a contract has been terminated.
40. Some terms may expressly provide for operation after the contract has been terminated. Where there is no express provision for a term's ongoing operation, it is necessary to assess the parties' intention to determine whether there is an implied intention¹³. This must be done objectively, for example by assessing what a reasonable person would consider the parties' intention to have been¹⁴.
41. Having read the terms of the Agreement, I am satisfied that:
- there is no express intention in the words of the Agreement as to the ongoing operation of the relevant confidentiality clause
 - it is necessary to consider whether the parties intended that the confidentiality clause was to continue in effect after the Agreement was terminated.
42. The type of clause in question is a relevant consideration in the objective determination of whether a contractual term was intended to operate after termination.
43. Clauses may be categorised in the following manner:

¹³ Lindy Willmott, Sharon Christensen and Des Butler, *Contract Law* (2001) 646 at [20.530].

¹⁴ See, for example, *Hutton v Watling* [1948] 1 All ER 803 per Lord Greene MR, CA; *Pacific Carriers Ltd v BNP Paribas* (2004) 208 ALR 213 at 222 per the Full High Court; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] 1 All ER 98 per Lord Hoffmann (Lords Goff, Hope and Clyde agreeing), HL; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451; *Homestake Australia Ltd v Metana Minerals NL* (1991) 11 WAR 435 at 446 per Ipp J.

- primary clauses (that is, a clause that creates a substantive primary performance obligation. For example, party A must obtain a particular financial approval within a particular timeframe). These clauses are generally not enforceable after a contract has been terminated¹⁵
 - secondary clauses (that is, procedural clauses. For example, the type of alternative dispute resolution the parties agree to submit to in certain circumstances, restraints of trade, agreed damages and obligations of confidentiality). In contrast to primary clauses, secondary clauses may be effective after a contract has been terminated and may be enforced by the parties¹⁶.
44. As set out above, terms such as confidentiality clauses represent obligations of a secondary or procedural nature rather than primary obligations under a contract.
45. These secondary or procedural terms will usually be enforced by a court after a contract has been terminated, subject to questions of policy¹⁷.
46. Again, I note the applicant's submission that he is not in a position to judge whether there is a clearly identifiable plaintiff (as required to establish an action for breach of confidence) as that party '*is unknown and unidentified*' to him.
47. I note that a party to an agreement is able to commence proceedings under that agreement. This ability or right is known as 'standing'. The identity of a party does not affect their standing.
48. For the reasons set out above, I am satisfied that:
- there is no evidence before me which supports the proposition that the parties did not intend for the relevant obligation of confidence to continue after termination of the Agreement, therefore, on balance, a court is likely to infer or imply an intention that the contractual obligation of confidence set out in the Agreement continues after its termination
 - there is a clearly identifiable plaintiff with appropriate standing to bring an action to enforce an obligation of confidence against the Council¹⁸
 - the Matter in Issue is exempt from disclosure under section 46(1)(a) of the FOI Act.

¹⁵ Except where there are accrued obligations such as the right to damages: *Moschi v Lep Air Services Ltd* [1972] 2 All ER 393 per Lord Diplock; *Delaney v Staples (t/as De Montfort Recruitment)* [1992] 1 All ER 944 per Lord Browne-Wilkinson.

¹⁶ See, for example, *FJ Bloemen Pty Ltd v Gold Coast City Council* [1972-73] ALR 481; *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194 at 196 per Giles J (arbitration provision in sub-contract); *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709 at 715 per Giles J (provisions for mediation).

¹⁷ Lindy Willmott, Sharon Christensen and Des Butler, *Contract Law* (2001) 646 at [20.530]. Questions of policy include those contracts that are at common law, contrary to public policy including contracts in restraint of trade, contracts containing clauses that attempt to oust the jurisdiction of the court and contracts prejudicial to the status of marriage: at [18.25].

¹⁸ That party or parties being the other parties to the Agreement.

Other matters raised by the applicant

Proper construction of section 46(1)(a) of the FOI Act – ‘would’

The applicant’s submissions

49. In his affidavit sworn 17 November 2007, the applicant states at point 6:

‘The undersigned has not seen or been presented with any material facts or evidence which demonstrates that the matter is exempt pursuant to 46(1)(a) of the Freedom of Information Act 1992 (Qld) in that ‘its disclosure WOULD found an action for breach of confidence’ and believes that none exists.’

50. In his submissions to this Office dated 18 November 2007, the applicant states:

*‘Your letter indicates that you have formed a preliminary view that the issue qualifies for exemption under Section 46(1)(a) of the Act. I reject your view because the operative word in the subsection is ‘would’, and **is it not beyond your jurisdiction and competence to determine that disclosure ‘would’ necessarily and absolutely found an action for breach of confidence? Had the words ‘may’ or ‘could’ be used then your assessment could be valid but the semantics preclude absolute, unarguable determination in the manner which you propose.’***

[my emphasis]

56. Further, in his submissions to this Office dated 18 June 2008, the applicant states:

‘Since your office has not responded to Point 6 of my Affidavit dated 17 November 2007 by its sworn ... Affidavit, then your presumption that ‘its disclosure WOULD found an action of breach of confidence’ is simply just that; a presumption which I have successfully refuted. Whether there may still exist a contractual obligation of confidence and whether such presumed obligation has any bearing upon release of the documents, would depend entirely upon the original intent of the word would in Section 46(1)(2) [sic] and not upon any convoluted argument founded upon those authorities given by yourself. Indeed your argument is based upon your own wording... ‘will usually be enforced by a court...’ Does this not imply that you have transposed words such as may or could for the word would in your understanding of Section 46(1)(2)[sic]? I reject your interpretation of the original intent of this section as a flawed presumption.’

57. The applicant also makes the following statements in his submissions to this Office dated 27 June 2008:

‘Is there not some element of doubt that disclosure ‘would’ found an action for breach of confidence, bearing in mind that such action in itself, would bring the issue into the public domain? Would this not be tantamount to agreement to release the supposed confidential information? I am at a decided disadvantage in the matter of meeting of minds regarding this issue, as I do not have access to the contents of the report; however I concede that I would agree with your interpretation had the words ‘may’ or ‘could’ appeared in Sec 46(1)(a) in lieu of ‘would’.

...Would it not be reasonable that your preliminary view be tempered by knowledge that in terms of the [FOI Report] this document would in all probability, be accessible once the report is acted upon?’

Analysis

58. I have carefully considered the applicant’s submissions on this point.

59. The Information Commissioner has previously indicated in 'B' that the test for exemption under section 46(1)(a) of the FOI Act is to be evaluated by reference to a 'hypothetical legal action'.

61. Paragraph 44 of 'B' relevantly states:

'...I consider that the terms of s.46(1)(a) require the test of exemption to be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, possessed of appropriate standing to bring a suit to enforce an obligation of confidence said to be owed to that plaintiff, in respect of information in the possession or control of the agency or minister...'

60. As the Information Commissioner's delegate¹⁹, I have the power to investigate and review an agency's decision to refuse access to documents in accordance with an application under section 25 of the FOI Act²⁰.

61. In considering the application of section 46(1)(a) of the FOI Act:

- a) I am required to form a judgment as to whether disclosure of a particular document, being the Agreement, would be actionable under the general law²¹
- b) I am not deciding proceedings in an action for breach of confidence²²
- c) I am not required to consider the merits of proceedings in an action for breach of confidence, or whether any proceedings would be successful.

62. On the basis of the matters set out above, I find that:

- as the test for exemption has been made out, disclosure of the Agreement would found an action for breach of confidence
- the Agreement is exempt from disclosure under section 46(1)(a) of the FOI Act.

FOI Report

Applicant's submissions

70. In his submissions dated 18 June 2008, the applicant states:

'Would it not be true to say that a cursory reading of the [FOI] Report makes it very clear that a culture of defensive protection of matters pertaining to sensitive governmental issues has developed within agencies, including the Office of the Information Commissioner? This is well and concisely put in the statement.... 'The lack of Openness and the default setting of 'Confidential' are issues that need resolution [sic] (P.17 Chapter 3).

...The report recognises the 'spin' and bias which has contaminated the approach to the concept of 'Public Interest' and clarifies the issue by recommending that.... 'Access is to be provided to matter unless its disclosure, on balance, would be contrary to the public interest.' This recommendation is made... 'to make it more likely that it will be applied in the way the legislation intended.' In other words, the report identifies the original intent of the present legislation.

¹⁹ Section 90 of the FOI Act.

²⁰ Section 101C(c) of the FOI Act.

²¹ *Corrs Pavey Whiting and Byrne v Collector of Customs (Vic) and anor* [1987] FCA 266.

²² Rather I am deciding whether there is an obligation of confidence and a plaintiff with standing.

...I ask that you carefully examine the [FOI]Report, to which you no doubt have access, and mirror the recommendations against your performance to date, having regard to the revelations of the entrenched anti-public interest culture which has insidiously crept upon agencies dealing with FOI matters...'

71. I note the applicant's final submissions (contained in his facsimile dated 27 June 2008) that:

'This particular external review falls within the present problem area identified in the [FOI] Report, which has caused the recommendation for appointment of a privacy Commissioner and the upgrading of the Office of the Information Commissioner as the 'champion of FOI'... I believe that your interpretation of Sec 46(1)(a) does not place yourself within this category....'

Would it not be reasonable that your preliminary view be tempered by knowledge that in terms of the [FOI] Report, this document would in all probability, be accessible once the report is acted upon?... I ask this question based upon the subjective aspect (i.e. opinion factor) of interpretation of Sec 46(1)(a) of the current act.

I have no doubt that a change in mindset will occur within your office in terms of the coming 'right to know' concept and the enlightenment regarding the term 'public interest' being reference in fact, to the people collectively from whom all power and authority emanates – a fact which presently seems to be ignored.'

72. I have considered the applicant's submissions on this point.
73. The FOI Report sets out the authors' recommendations for legislative and other changes in respect of a broad range of issues including the freedom of information regime in Queensland. I note that these recommendations have not yet been implemented by the Queensland Government and any legislative amendments remain to be debated by the Parliament.
74. The FOI Report specifically refers to section 46(1)(a) of the FOI Act in the following paragraph at page 135:

*'...[Section 46] contains two parts. The first, subsection 1(a) provides that matter is exempt if 'its disclosure would found an action for breach of confidence.' **There is no public interest test to be applied. The Panel does not propose any change to this [section].'***

[my emphasis]

75. As stated in the FOI Report, there is no public interest test relevant to the application of section 46(1)(a) of the FOI Act. Much of the applicant's submissions to date consist of argument in support of his case that on balance, the 'public interest' favours disclosure of the Agreement.
76. The only issue of 'public interest' which is relevant to section 46(1)(a) of the FOI Act is the iniquity exception, which is not analogous to the 'public interest tests' set out in the FOI Act to which the FOI Report refers.

Extensions of time

The applicant's submissions

77. I note the applicant's submissions dated 18 June 2008:

'...I wish to advise that I seek to contest your preliminary view, however the time limit given does not allow me adequate time for a comprehensive response. This situation has arisen due to a 400 page report released 10 June 2008, being a comprehensive review of the F.O.I laws, together with the various authorities referenced in your letter... I am well aware of the fact that this F.O.I. matter is subject to existing laws, however it is the application of these laws, and specifically the Freedom of Information Act 1992, upon which I seek to contest your preliminary view.'

78. In his final submissions dated 27 June 2008, the applicant also states that he has had *'insufficient time to properly respond'* to my letter dated 19 June 2008, which clarified the matters contained in my preliminary view dated 5 June 2008.

Analysis

79. In respect of the FOI Report, I acknowledge that it is an extensive document of 326 pages plus appendices. However, I consider that the applicant has had a reasonable opportunity to respond to the preliminary view and subsequent letter of clarification, given that:
- the only exemption provision relevant to this external review is section 46(1)(a) of the FOI Act dealing with 'matter communicated in confidence'
 - the FOI Report's reference to section 46(1)(a) of the FOI Act consists of one paragraph on page 135 and does not contain any proposed change to this section
 - the applicant has had three weeks to respond to the preliminary view.
80. On the basis of the matters set out above, I consider that the applicant has had sufficient time to respond to my preliminary view that the Agreement is exempt from disclosure under section 46(1)(a).

Common law jurisdiction

Applicant's submissions

81. In his submissions dated 18 June 2008, the applicant states:

'Your job as I see it, is to administer the Act strictly in accordance with the original intent.... I believe that you have erred in referring to past decisions of the Office of Information Commissioner because nowhere in the Act can I find authority to deviate from the original intent by reliance upon all or any such decisions. Should these decisions not be regarded only as heresay [sic] since they have been shown within the report to be contaminated by the very culture identified by the report?'

82. In his submissions dated 27 June 2008, the applicant also states:

'Your presumption that Australia is a common law jurisdiction is incorrect, therefore your claim of precedent reliance being applicable to your decision is not a valid one. Our courts operate in admiralty jurisdiction (sometimes referred to as summary jurisdiction) and they are strictly courts of commerce operating under roman law, governed by the Uniform Commercial Code as regulated by the Uniform Civic [sic] Procedure rules. The High Court only sits in common law jurisdiction when the full bench adopts the role of court of original jurisdiction whilst adjudicating Constitutional matters.'

Analysis

83. It is accepted by Australian courts and the wider legal profession that Australia is a common law jurisdiction²³.
84. The term 'common law' is used to describe the body of legal principles that has been developed through decisions by the Courts and tribunals. In common law systems, decisions established in earlier cases are followed in later cases. This body of precedent binds future decisions where there is no authoritative statement of the law. The doctrine of *stare decisis* is to stand or abide by a precedent. On this basis, courts and tribunals usually follow their own decisions and are bound by decisions of superior courts in the same hierarchy.
85. The applicant is correct in his submissions that I have referred to past decisions of the Office of the Information Commissioner. I consider this approach to be consistent with common law principles and entirely reasonable in the circumstances.
86. On the basis of the matters set out above, I remain of the view that the Agreement is exempt from disclosure under section 46(1)(a) of the FOI Act. I will now consider whether any exception or defence applies in the circumstances.

The iniquity exception

63. It has been accepted by Australian courts that in certain circumstances, the iniquity exception may apply to deny protection to information that would otherwise be confidential.
64. Accordingly, it is necessary for me to consider whether the iniquity exception applies in the current circumstances²⁴.
65. The iniquity exception applies only to third party information (that is, information provided to government by third parties). It does not apply to government information (that is, information which is solely about government *and* is generated by government). I have carefully reviewed the content of the Agreement and am satisfied that it is properly categorised as third party information rather than government information.
68. The iniquity exception will only be successful in a narrow range of circumstances.
69. In this regard, I note Mason J's comments in *Commonwealth of Australia v John Fairfax & Sons Ltd*²⁵:

'the defence [of iniquity] applies to disclosures of things done in breach of national security, in breach of the law (including fraud) and to disclosure of matters which involve danger to the public.'

87. Cases subsequent to *John Fairfax* have further narrowed the circumstances in which the defence of iniquity will be successful. In the decision of *AFL and Anor v The Age*

²³ DC Pearce and R Geddes, *Statutory Interpretation in Australia* (2006) 6th ed.

²⁴ In *B* at paragraph 119, the Information Commissioner considered whether the statutory construction of section 46(1)(a) of the FOI Act allowed the consideration of defences to actions for breach of confidence and concluded that '*... s46(1)(a) should be interpreted as requiring defences to an action for breach of confidence to be taken into account.*'

²⁵ (1980) 147 CLR 39 at 57.

*Company Limited and Ors*²⁶ Kellam J considered that in order to rely on the iniquity exception, it is necessary for the person relying on the defence to establish that:

- (a) *the proposed disclosure will in fact disclose the existence of or the real likelihood of, the existence of an iniquity that is a crime, civil wrong or serious misdeed of public importance;*
- (b) *that the iniquity to be disclosed affects the community as a whole, or affects the public welfare; and*
- (c) *that the person who is seeking to protect the confidence is doing so in order to prevent disclosure to a third party with a real and direct interest in redressing the alleged crime, wrong or misdeed.*

88. In summary, it is accepted that courts of equity will not protect information concerning illegal activity, breach of the law (including fraud) or serious misbehaviour²⁷.

The applicant's submissions

89. I note the applicant's submissions on this point, including that:

'... the public interest/transparency consideration is of even greater importance at present, since the Crime and Misconduct Commission has been investigating certain matters in relation to the Whitsunday Shire Council.'

[and]

'...I am not convinced that the iniquity exemption does not apply, since the profound secrecy surrounding all aspects of the document may well suggest nefarious activity by one or more of the parties.

I have no doubt that a change in mindset will occur within your office in terms of the coming 'right to know' concept and the enlightenment regarding the term 'public interest' being reference in fact, to the people collectively from whom all power and authority emanates – a fact which presently seems to be ignored.'

Analysis

90. I have carefully considered the applicant's submissions and the terms of the Agreement.

91. In considering whether the Agreement should be disclosed, I must determine whether there is any evidence before me of illegal activity, breach of the law (including fraud) or serious misbehaviour. If there is evidence of such activity, the iniquity exception will operate to prevent protection of such information as serious harm to the public may occur if confidentiality is maintained.

92. I note the applicant's submissions that:

- secrecy surrounding the Agreement *may* suggest 'nefarious activity' by one or more of the parties to it
- the Crime and Misconduct Commission is investigating or has investigated matters related to Council.

²⁶ [2006] VSC 308 at 69 (AFL).

²⁷ In particular, see *Corrs Pavey Whiting and Byrne v Collector of Customs (Vic) and anor* [1987] FCA 266.

93. On the information available to me including the content of the Agreement and the applicant's submissions on this point, I am satisfied that:
- there is no evidence before me to suggest that the Agreement contains information concerning illegal activity, breach of the law or serious misbehaviour
 - there is no evidence before me to suggest that serious harm to the public may occur if confidentiality is maintained
 - the iniquity exception does not apply in the circumstances.
94. Given my finding that the iniquity exception does not apply to override the exemption of the Agreement from disclosure, I remain satisfied that the Agreement is exempt from disclosure in its entirety under section 46(1)(a) of the FOI Act.

DECISION

51. I vary the decision under review and find that the matter in issue is exempt from disclosure under section 46(1)(a) of the FOI Act.
52. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

Assistant Commissioner Henry

Date: 30 June 2008