



## **Decision and Reasons for Decision**

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**Application Number:** 210424

**Applicant:** Mr P Kelsall

**Respondent:** Department of Main Roads

**Decision Date:** 21 August 2008

**Catchwords:** **FREEDOM OF INFORMATION - section 37(1) of the *Freedom of Information Act 1992 (Qld)* - Executive Council matter - matter submitted to Executive Council - matter prepared for briefing a Minister in relation to a matter submitted to Executive Council - copies of official records of Executive Council**

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## REASONS FOR DECISION

### Summary

1. In this decision I have found that the Applicant is not entitled to access the documents remaining in issue in this review because they are exempt from disclosure under section 37(1) of the *Freedom of Information Act 1992 (Qld)* (**FOI Act**).
2. I have also found that there are no reasonable grounds to believe that additional relevant documents are in the possession or under the control of the Department of Main Roads (**Department**).

### Background

3. By email dated 4 October 2007 (**FOI Application**), the Applicant applied to the Department for access, under the FOI Act, to documents which:
  - show the value of the property with ID 99-109 Lutwyche Road Windsor
  - contain the background information to the agreement between Brisbane Lord Mayor Campbell Newman and the Queensland State Government concerning Brisbane City Council's contribution to Airport Link and the Northern Busway
  - led to the publication of the Taking of Land Notice in the Queensland Government Gazette (**Gazette**) No. 44 on 30 June 2006 (including the Minister's approval and signed copy).
4. By letter dated 31 October 2007, Ms L Vasta, Administrative Law Coordinator of the Department's Corporate Office<sup>1</sup>, informed the Applicant that:
  - no documents were located in response to the FOI Application
  - she had decided to refuse access to the documents sought in the FOI Application on the basis of section 28A of the FOI Act (**Original Decision**).
5. By email dated 6 November 2007, the Applicant applied for internal review of the Original Decision on the basis that documents responsive to the FOI application should have been located by the Department.
6. Following receipt of the internal review application, the Department consulted with two third parties under section 51 of the FOI Act on the basis that documents falling within the scope of the FOI Application may be of substantial concern to those parties.
7. One of the third parties consulted by the Department objected to the release of the documents on the basis that they:
  - were prepared for Executive Council
  - constitute exempt matter under section 37 of the FOI Act.
8. By letter dated 20 December 2007, Ms J Mitchell, Acting Executive Director of the Department's Corporate Office, informed the Applicant that following further searches conducted by the Department, 44 folios had been located in response to the FOI Application. With respect to those folios, Ms Mitchell decided to (**Internal Review Decision**):

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<sup>1</sup> This Corporate Office also services Queensland Transport but for the purpose of this external review, the Department of Main Roads is the relevant respondent agency.

- grant full access to 21 folios
- refuse access to the remaining 23 folios on the basis that they constitute exempt matter under section 37(1)(a) of the FOI Act.

9. By email dated 14 January 2008, the Applicant applied to this Office for external review of the Internal Review Decision (**External Review Application**).

### **Decision under review**

10. The decision under review is the Internal Review Decision of Ms Mitchell dated 20 December 2007.

### **Steps taken in the external review process**

11. By email dated 20 January 2008, the Applicant provided this Office with submissions identifying documents which he considers should have been located by the Department in response to the FOI Application.

12. By letter dated 25 January 2008, this Office asked the Applicant to:

- provide further submissions with respect to the additional documents which he contends should have been located by the Department
- confirm whether he was seeking review of the Department's refusal of access to folios 1-23 on the basis of section 37(1) of the FOI Act.

13. By email dated 2 February 2008, the Applicant responded to this Office's letter dated 25 January 2008 by providing a copy of an email dated 28 January 2008 which he had sent to the Department in response to the Internal Review Decision.<sup>2</sup> In that email, the Applicant:

- identified the reasons why he did not accept the Department's decision to refuse access to folios 1-23 on the basis of section 37(1) of the FOI Act
- requested the name of the person who objected to the release of folios 1-23.<sup>3</sup>

14. By letter dated 10 March 2008, the Department provided this Office with further submissions concerning the documents in issue in this review and advised that it no longer objected to the disclosure of folios 2, 5, 7-8 and 17-23 because they comprise copies of:

- material already published in the Gazette (folios 2, 5 and 7-8)
- documents already released to the Applicant (folios 17-23).

15. By letters dated 29 July 2008, I informed the Applicant and the Department that I had formed the preliminary view that:

- folio 1 is a copy of an official record of Executive Council and is therefore exempt from disclosure under section 37(1)(g) of the FOI Act

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<sup>2</sup> The Applicant did not however provide any submissions regarding the additional documents which he contends the Department should have located.

<sup>3</sup> The third party who objected to disclosure of folios 1-23 was the Office of the Minister for Main Roads (**Minister's Office**). The Minister's Office was consulted by the Department under section 51 of the FOI Act because of the Minister's connection to the documents in issue.

- folios 3-4, 6, 9 and 10-14 comprise matter that was submitted to Executive Council and are therefore, exempt from disclosure under section 37(1)(a) of the FOI Act
  - folios 15-16 were prepared for briefing the Minister in relation to a matter submitted to Executive Council and are therefore, exempt from disclosure under section 37(1)(c)(i) of the FOI Act
  - there are no reasonable grounds to believe that additional documents relevant to the FOI Application are in the possession or under the control of the Department.
16. In my letter to the Applicant dated 29 July 2008, I also indicated that the Department was willing to release folios 2, 5, 7-8 and 17-23 and that the Applicant could obtain copies of those folios by directly contacting the Department.
17. By letter dated 14 August 2008, the Applicant informed this Office that he did not accept the preliminary view dated 29 July 2008 and provided submissions in support of his contentions.
18. In making this decision, I have taken into account the following material:
- FOI Application
  - Original Decision
  - Internal Review Decision
  - correspondence exchanged between the Department and third parties in accordance with section 51 of the FOI Act during December 2007
  - External Review Application
  - documents in issue
  - file notes of telephone conversations held between this Office and the Department on 31 January 2008 and 28 February 2008
  - the Department's submissions received by this Office on 10 March 2008
  - the Applicant's submissions dated 2 February 2008 and 14 August 2008
  - relevant sections of the FOI Act, case law from Australian jurisdictions and previous decisions of the Information Commissioner.

### Matter in issue

19. The documents remaining in issue in this external review are 12 of the 23 folios to which the Department refused the Applicant access on the basis of section 37(1)(a) of the FOI Act.<sup>4</sup>
20. The table below sets out a description of the documents in issue and identifies the FOI Act exemption provision on which the Department relies in this external review:

Folio No.	Document description	Exemption claimed by the Department
1	Sealed copy of Executive Council Minute	section 37(1)(a) - submitted to Executive Council
3-4	Minister's statement re Taking of Land Notice (No. 1027) 2006	section 37(1)(a) - submitted to Executive Council

<sup>4</sup> During the course of this external review, the Department agreed to release the other 11 folios to the Applicant (folios no. 2, 5, 7-8 and 17-23). Accordingly, those folios are not in issue for the purpose of this decision.

Folio No.	Document description	Exemption claimed by the Department
6	Minister's statement re Taking of Land Notice (No. 1028) 2006	section 37(1)(a) - submitted to Executive Council
9	Minister's statement re Taking of Land Notice (No. 1030) 2006	section 37(1)(a) - submitted to Executive Council
10-14	Explanatory memorandum to Folios 3-4, 6 and 9	section 37(1)(a) - submitted to Executive Council
15-16	Memorandum to the Minister for Main Roads regarding the North South Bypass Tunnel Project	Section 37(1)(c)(i) - prepared for briefing the Minister in relation to a matter submitted to Executive Council <sup>5</sup>

21. In light of the Applicant's submission that additional documents should have been located by the Department in response to the FOI application, this decision also examines the issue of sufficiency of search.

## Findings

### Section 37(1) of the FOI Act

22. The parts of section 37(1) of the FOI Act relevant to this external review provide:

#### **37 Executive Council matter**

*(1) Matter is exempt if—*

*(a) it has been submitted to Executive Council ...*

*...*

*(c) it was prepared for briefing, or the use of, the Governor, a Minister, or a chief executive in relation to a matter—*

*(i) submitted to Executive Council; or*

*...*

*(d) it is, or forms part of, an official record of Executive Council; or*

*...*

*(g) it is a copy of or extract from, or part of a copy of or extract from, matter mentioned in paragraphs (a) to (f).*

23. Sub-section 37(4) of the FOI Act defines the terms **official record** and **submit**, as they are used in section 37(1) of the FOI Act, as follows:

**official record**, of Executive Council, includes an official record of matters submitted to Executive Council.

**submit** matter to Executive Council includes bring the matter to Executive Council, irrespective of the purpose of submitting the matter to Executive Council, the nature of the matter or the way in which Executive Council deals with the matter.

<sup>5</sup> In its submissions received in this Office on 10 March 2008, the Department revised its original exemption claim in respect of folios 15-16 from section 37(1)(a) of the FOI Act to section 37(1)(c)(i) of the FOI Act.

24. Sub-section 37(2) of the FOI Act provides that subsection (1) of section 37 does not apply to matter officially published by decision of the Governor in Council.<sup>6</sup>
25. The application of section 37 of the FOI Act turns on what are essentially questions of fact. Information will be exempt from disclosure if it falls within a defined class or category<sup>7</sup>, irrespective of whether disclosure of the particular information would have any prejudicial consequences. Accordingly, an agency can establish that matter is exempt from disclosure under section 37(1) of the FOI Act merely by proving the facts which bring the matter in issue within one of the defined classes or categories.<sup>8</sup>
26. Although a number of provisions in the FOI Act contain a public interest balancing test, section 37(1) of the FOI Act is not subject to a public interest balancing test. Accordingly, in applying this provision, no account can be taken of public interest considerations which might favour disclosure of matter which falls within one of the defined classes or categories in section 37(1) of the FOI Act.

### **Application of section 37(1) of the FOI Act to the matter in issue**

#### ***Folio 1***

27. Folio 1 is a copy of a sealed Executive Council Minute concerning Taking of Land Notices.
28. The Department contends that this folio is exempt from disclosure under section 37(1)(a) of the FOI Act because it constitutes matter that was submitted to Executive Council.
29. Based on the information before me in this review, I am satisfied that:
  - section 37(1)(a) of the FOI Act does not apply to Folio 1 because the document itself was not submitted to Executive Council
  - the original version of Folio 1 would qualify for exemption under section 37(1)(d) of the FOI Act because that document is an Executive Council Minute and an Executive Council Minute is an '*official record of Executive Council*'<sup>9</sup>
  - as Folio 1 is a copy of an official record it is exempt from disclosure under section 37(1)(g) of the FOI Act.

#### ***Folios 3-4, 6 and 9***

30. Folios 3-4, 6 and 9 comprise three Minister's Statements concerning Taking of Land Notices in respect of the North-South Bypass Tunnel Project.
31. The presentation of these folios (and the respective Taking of Land Notices)<sup>10</sup> to Executive Council resulted in the passage of the Executive Council Minute (Folio 1).

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<sup>6</sup> I have no evidence before me to suggest that any of the documents remaining in issue have been officially published by decision of the Governor in Council.

<sup>7</sup> Those categories are described in sections 37(1)(a)-(g) of the FOI Act.

<sup>8</sup> See *Lindeberg and Department of Families, Youth and Community Care* (1997) 4 QAR 14 at paragraph 13.

<sup>9</sup> Official records are held by the Executive Council Secretariat, whereas copies of such documents are held by the relevant agency.

<sup>10</sup> The Taking of Land Notices which were attached to the Minister's Statements were also presented to Executive Council. However, as set out in paragraph 14 of this decision, the Department withdrew

32. Accordingly, I am satisfied that folios 3-4, 6 and 9:

- were submitted to Executive Council
- constitute exempt matter under section 37(1)(a) of the FOI Act.

**Folios 10-14**

33. Folios 10-14 comprise an Explanatory Memorandum signed by the Minister and Director-General of the Department. This Explanatory Memorandum was presented to Executive Council with the Minister's Statements (folios 3-4, 6 and 9) and corresponding Taking of Land Notices.

34. The submission of the Explanatory Memorandum to Executive Council resulted in the passage of the Executive Council Minute (Folio 1). Accordingly, I am satisfied that folios 10-14:

- were submitted to Executive Council
- constitute exempt matter under section 37(1)(a) of the FOI Act.

**Folios 15-16**

35. Folios 15-16 comprise a Memorandum to the Minister for Main Roads concerning the North South Bypass Tunnel Project (**Memorandum**).

36. The Department submits that the Memorandum is:

*... a briefing note submitted to the then Minister for ... Main Roads dealing with a matter going to Executive Council. Attached to this briefing note was the relevant Executive Council folder.*

37. The Department contends that the Memorandum is exempt from disclosure under section 37(1)(c)(i) of the FOI Act. In order for information to fall within this exemption provision, the Department must establish that the Memorandum was:

- (i) prepared for the purpose of briefing, or the use of, the Governor, a Minister or a chief executive
- (ii) in relation to a matter submitted to Executive Council.

38. I examine each of these requirements below.

*(i) prepared for the purpose of briefing, or the use of, the Governor, a Minister or a chief executive*

39. The words following the verb '*prepared*' in section 37(1)(c) of the FOI Act convey that the document must have been prepared for one or more of the purposes identified in the provision and that purpose must be the **dominant** purpose for which the document was prepared.<sup>11</sup>

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its objection to disclosure of the Notices and those folios (2, 5 and 7-8) have since been released to the Applicant.

<sup>11</sup> *Little & Ors and Department of Natural Resources* (1996) 3 QAR 170 at paragraphs 28 and 34. Referred to as *Little* in this decision.

40. To determine whether the dominant purpose for preparing the document in issue was one of the qualifying purposes under section 37(1)(c) of the FOI Act, the relevant primary facts and circumstances must be examined objectively.<sup>12</sup>
41. I have carefully examined the Memorandum. From that analysis, I consider that the Memorandum was prepared for the dominant purpose of:
- briefing the Minister for Main Roads on the relevant background facts and reasons for the Brisbane City Council (**Council**) application for the taking of land under section 9 of the *Acquisition of Land Act 1967* (Qld)
  - providing the Minister for Main Roads with the information necessary for him to make an informed recommendation to the Governor-in-Council regarding the Council's application.

*(ii) in relation to a matter submitted to Executive Council*

42. The term 'in relation to' is not defined by the FOI Act or the *Acts Interpretation Act 1954* (Qld). The explanatory notes to the *Freedom of Information Amendment Act 1995* (Qld), which inserted section 37(1)(c) of the FOI Act in its present form, do not assist with the interpretation of this phrase.
43. In *O'Grady v Northern Queensland Company Ltd*<sup>13</sup>, Dawson J explained the meaning of the phrase 'in relation to'<sup>14</sup> as follows:

*The words 'in relation to', read out of context are wide enough to cover every conceivable connexion. But those words should not be read out of context, which in this case is provided by the [relevant legislation]. What is required is a relevant relationship, having regard to the scope of the Act. Where jurisdiction is dependent upon a relation with some matter or thing, something more than a coincidental or mere connexion— something in the nature of a relevant relationship is necessary ...*<sup>15</sup>

44. Based on my review of relevant authorities and having regard to the scope of the FOI Act, I consider that a 'relevant relationship' or sufficient connection must be established between the matter in issue and the matter submitted to Executive Council— the connection must be more than merely coincidental.
45. The connection between the subject matter of the Memorandum and that of the Executive Council Minute is evident on the face of the documents— both concern the acquisition of land for the purpose of the North South Bypass Tunnel Project.
46. Additionally, the dates of the documents are also relevant to establishing a connection between the Memorandum and the matter submitted to Executive Council. The Memorandum is dated four weeks prior to the Executive Council Minute and the date upon which the Minister signed the memorandum was within a three week period of the Memorandum date. I consider that the close proximity of these dates further supports the view that the Memorandum was prepared **in relation to** a matter that was submitted, just a few weeks later, to Executive Council.

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<sup>12</sup> *Little* at paragraph 34.

<sup>13</sup> (1989) 169 CLR 356.

<sup>14</sup> Albeit in the context of a different piece of legislation.

<sup>15</sup> (1999) 169 CLR at 367.



47. Accordingly, based on my analysis of the Memorandum and the relevant surrounding circumstances, I am satisfied that those folios are sufficiently connected with the matter that was submitted to Executive Council concerning the Taking of Land Notices.
48. In summary, I am satisfied that the Memorandum (Folios 15-16):
- was prepared for the purpose of briefing the Minister for Main Roads in relation to a matter submitted to Executive Council
  - is exempt from disclosure under section 37(1)(c)(i) of the FOI Act.

### **Public interest**

49. In the Applicant's submissions to the Department dated 28 January 2008<sup>16</sup> he submitted that there is a public interest in the release of the matter in issue, as well as his *'family's interest'*.
50. In his submissions to this Office dated 14 August 2008, the Applicant raised the following matters in support of his contention that the documents in issue should be disclosed to him:
- the documents in issue are needed for legal purposes
  - by refusing him access to the documents in issue, this Office is obstructing justice under section 140 of the *Criminal Code Act 1899* (Qld).
51. The Information Commissioner has previously recognised that *'in an appropriate case there may be a public interest in a person who has suffered, or may have suffered, an actionable wrong, being permitted to obtain access to information which would assist the person to pursue any remedy which the law affords in those circumstances.'*<sup>17</sup>
52. However, although a number of provisions in the FOI Act contain a public interest balancing test, section 37(1) of the FOI Act does not. Accordingly, in applying this provision, there is **no scope** for me to take into account any public interest considerations which may support the disclosure of matter which falls within one of the categories set out in sections 37(1)(a)-(g) of the FOI Act.
53. I acknowledge the submissions made by the Applicant with respect to the public interest. However, I am unable to take them into account for the purpose of this decision for the reasons set out in paragraph 52 above.

### **Sufficiency of search**

54. The Applicant contends<sup>18</sup> that the following additional documents should have been located by the Department:

*State government document - Premier Peter Beattie - regarding NSBT - resumption of freehold properties*

*State government document - Deputy Premier Anna Bligh - infrastructure, tollway corridors, treasury reports*

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<sup>16</sup> The Applicant made these submissions to the Department after he had applied for external review. They were subsequently forwarded to this Office. Accordingly, I have treated them as his initial submissions for the purpose of this external review.

<sup>17</sup> *Willsford and Brisbane City Council* (1996) 3 QAR 368.

<sup>18</sup> In an email to this Office dated 20 January 2008.

*State government document - Minister of Transport Paul Lucas - regarding NSBT - resumption of freehold properties - approved tollway corridors - regarding Airport Link - portion of the property and value - Northern Busway - portion of the property and value*  
*State government document - Rivercity Motorways - regarding changed project - properties mentioned - Coordinator General*  
*State government document - regarding Gazette Notice No 44 approved by Governor*  
*State government document - Brisbane City Council documents leading to Gazette No 44*  
*State government document - Minister of Natural Resources - authorisation documents for Gazette No 44*  
*State government document - Parliamentary approval documents for Gazette No 44*  
*State government document - Minister of Works Department/Go Print - authorisation documents for the Gazette No 44 to be printed*  
*Correspondence - Minister for Transport Paul Lucas' office - conversation between Robert Price and Paul Kelsall - Brisbane City Council - Lord Mayor - Major Infrastructure Project Office*

55. The Applicant's submissions concerning additional documents essentially raise the issue of 'sufficiency of search'. In reviews in which sufficiency of search is raised, the following two questions are relevant:<sup>19</sup>

- are there reasonable grounds to believe that the requested documents exist and are documents of the agency as that term is defined in section 7 of the FOI Act  
and if so
- have the search efforts made by the agency to locate such documents been reasonable in all the circumstances of the review.

### **Reasonable grounds**

56. The Information Commissioner has previously indicated that:

*... it is a practical consequence of the issues to be determined in 'sufficiency of search' cases ... that applicants will ordinarily need to explain fully their grounds for believing that the respondent agency holds additional responsive documents, and to disclose any relevant documentary or other evidence which tends to support the existence of reasonable grounds for such a belief. If the information provided to me by the respondent agency supports a finding that the questions posed in paragraph 19 of Re Shepherd should be answered in favour of the agency, and I am unable, independently, to identify any further relevant avenues of search or inquiry that an agency could reasonably be required to undertake, then, in the absence of evidence to the contrary from the applicant, there will be only one course open to me - to answer the aforementioned questions in favour of the agency.<sup>20</sup>*

57. By letter dated 25 January 2008, the First Assistant Commissioner of this Office asked the Applicant to provide further information to support his contention that '*there should be more than 44 documents*'.<sup>21</sup> However, the Applicant did not provide any further submissions regarding sufficiency of search.<sup>22</sup>

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<sup>19</sup> *Shepherd and Department of Housing, Local Government and Planning* (1994) 1 QAR 464 at paragraphs 18-19. Referred to in this decision as *Shepherd*.

<sup>20</sup> *Ainsworth; Ainsworth Nominees Pty Ltd and Criminal Justice Commission; A (Third Party); B (Fourth Party)* (1999) 9 QAR 284 at paragraph 46.

<sup>21</sup> Set out in the Applicant's email dated 20 January 2008.

<sup>22</sup> I have taken the Applicant's email dated 2 February 2008 as his response.

58. In my letter to the Applicant dated 29 July 2008 in which I expressed my preliminary view, I again invited the Applicant to provide submissions with respect to sufficiency of search. In his response to that preliminary view<sup>23</sup>, the Applicant did not provide any further submissions regarding sufficiency of search.
59. Therefore, the only evidence presently before me with respect to sufficiency of search is the list of additional documents (reproduced above) which the Applicant contends should have been located by the Department. I have examined that list and consider that the majority of those documents (if they do in fact exist) are documents which would be held by other Queensland government agencies, not the Department of Main Roads. For example, documents prepared by the Minister for Natural Resources would be held by the Department of Natural Resources and documents of the Premier would be held by the Department of Premier and Cabinet and so on.
60. Based on the information before me in this review, I am satisfied that the Applicant has not established reasonable grounds to believe that further documents responding to the FOI application are in the possession or under the control of the Department. Accordingly, it is unnecessary for me to examine the adequacy of searches conducted by the Department as required pursuant to the second question posed in *Shepherd*.<sup>24</sup>

## DECISION

61. I vary the decision under review, being the Internal Review Decision, and find as follows:
- folio 1 is a copy of an official record of Executive Council and is therefore exempt from disclosure under section 37(1)(g) of the FOI Act
  - folios 3-4, 6, 9 and 10-14 comprise matter that was submitted to Executive Council and are therefore, exempt from disclosure under section 37(1)(a) of the FOI Act
  - folios 15-16 were prepared for briefing the Minister in relation to a matter submitted to Executive Council and are therefore, exempt from disclosure under section 37(1)(c)(i) of the FOI Act
  - there are no reasonable grounds to believe that additional documents responding to the FOI application are in the possession or under the control of the Department.
62. I have made this decision as a delegate of the Information Commissioner, under section 90 of the FOI Act.

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**Acting Assistant Commissioner Jefferies**

**Date: 21 August 2008**

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<sup>23</sup> Letter dated 14 August 2008.

<sup>24</sup> See paragraph 55 of this decision.