



Decision and Reasons for Decision

Citation:	<i>National Tertiary Education Union and The University of Queensland [2021] QICmr 6 (22 February 2021)</i>
Application Number:	315576
Applicant:	National Tertiary Education Union (ABN 38 579 396 344)
Respondent:	The University of Queensland
Decision Date:	22 February 2021
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - BREACH OF CONFIDENCE - documents concerning a philanthropic agreement and preceding negotiations - whether disclosure would found an action for breach of confidence - sections 47(3)(a) and 48 and schedule 3, section 8(1) of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to The University of Queensland (**UQ**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to:

The Philanthropic Agreement between the University of Queensland and the Ramsay Centre for Western Civilisation and any draft versions of the Philanthropic Agreement or predecessor documents exchanged between the University of Queensland and the Ramsay Centre.

2. Regarding ‘predecessor documents’, the applicant subsequently provided the following clarification:²

...emails etc that contained discussions about what would or wouldn't be included in the provisions of the Philanthropic Agreement (the PA). For example, the PVC may have sent the Ramsay Centre a number of clauses, proposing they be included in the PA. Or there may have been a separate document, not called the PA, which had draft provisions that might be included in the PA. So previous versions and parts thereof of things that might be finally included in the PA. This might include notes/minutes from meetings about the PA. It might include drafts of the PA or parts thereof.

3. The date range for documents requested was August 2019 to November 2019.

¹ Application dated 20 December 2019.

² Email dated 23 December 2019.

4. UQ decided³ to refuse to deal with the access application under section 40 of the RTI Act on the grounds that all of the documents to which the application related were comprised of exempt information under schedule 3, section 8(1) of the RTI Act (as disclosure would found an action for breach of confidence).
5. The applicant applied⁴ to UQ for internal review. An internal review decision was not made by UQ within the requisite timeframe and UQ's original decision was deemed to have been affirmed.⁵
6. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review.⁶ After the commencement of the review, UQ applied to OIC under section 93 of the RTI Act for further time to deal with the applicant's application, advising that, upon further consideration of the matter, it did not wish to pursue a '*class refusal*' under section 40 of the RTI Act, but instead wished to issue a considered decision to replace the deemed decision that had occurred at internal review. Given UQ's willingness to re-consider the matter and to issue a considered decision, the review was informally resolved⁷ on the basis that UQ would issue its decision by 24 July 2020. OIC closed its review file.⁸
7. UQ issued a decision dated 24 July 2020 in which it decided to grant full access to six pages, partial access to 16 pages, and to refuse access to 859 pages under schedule 3, section 8(1) of the RTI Act.
8. By application dated 20 August 2020, the applicant applied to OIC for external review of UQ's decision.
9. For the reasons given below, I am satisfied that the requested information is exempt information under schedule 3, section 8(1) of the RTI Act. I therefore affirm UQ's decision refusing access to it.

Background

10. In August 2019, UQ entered into a Memorandum of Understanding (**MoU**) with the Ramsay Centre for Western Civilisation (**Ramsay Centre**) to deliver courses on western civilisation, funded by the Ramsay Centre.
11. The Ramsay Centre was established in March 2017 and is funded through a charitable endowment by the late Mr Paul Ramsay AO, a businessman and philanthropist. It is '*dedicated to the study of Western civilisation*'.⁹
12. The MoU is published on UQ's website where it is stated that:

*...[t]he MoU sets out the framework and principles on which the parties were prepared to engage with each other to enter into the proposed arrangement in relation to the proposed Extended Major in Western Civilisation.*¹⁰

³ Decision dated 31 January 2020.

⁴ Application dated 27 February 2020.

⁵ Letter dated 27 March 2020.

⁶ Application dated 24 April 2020 and allocated OIC file reference 315354.

⁷ Under section 90 of the RTI Act.

⁸ On 10 July 2020.

⁹ <https://www.ramsaycentre.org/about-us/about-the-ramsay-centre/> (accessed 8 February 2021).

¹⁰ <https://staff.uq.edu.au/staff-updates/projects-and-initiatives/ramsay-centre-partnership/key-academic-clauses> (accessed 28 January 2021).

13. Following the signing of the MoU, UQ and the Ramsay Centre negotiated the terms of a Philanthropic Agreement (**PA**) which came into effect on 15 November 2019. The PA provides for the funding of five cohorts of students (as well as associated academic and professional staff) to study an Extended Major in Western Civilisation, commencing in 2020.¹¹
14. UQ published the key academic clauses contained in the PA on its website, but stated on its website that the PA itself would not be released '*as it contains information and provisions that are commercial in confidence*'.¹²

Reviewable decision

15. The decision under review is UQ's decision dated 24 July 2020.

Evidence considered

16. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including the footnotes and Appendix).¹³
17. Significant procedural steps relating to this review are set out in the Appendix.

Information in issue

18. The information to which UQ refused access (**Information in Issue**) comprises:
 - parts of the executed PA¹⁴
 - multiple drafts of the PA; and
 - communications between the parties concerning the proposed terms of the PA.¹⁵

Issue for determination

19. The issue for determination is whether disclosure of the Information in Issue would found an action for breach of confidence under schedule 3, section 8(1) of the RTI Act.¹⁶

Relevant law – exempt information

20. Access to a document can be refused under the RTI Act to the extent it comprises exempt information.¹⁷ Schedule 3 of the RTI Act sets out various types of exempt

¹¹ <https://hass.uq.edu.au/article/2019/11/philanthropic-agreement-reached-ramsay-centre> (accessed 28 January 2021).

¹² See footnote 10.

¹³ The application in this matter was made by a trade union. While individuals in Queensland have human rights under the *Human Rights Act 2019* (Qld) (**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 mover 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. In making this decision I have observed and respected the law prescribed in the RTI Act. Doing so is construed as '*respecting*' and '*acting compatibly with*' the rights prescribed in the HR Act (*XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111]). I have therefore satisfied the requirements of section 58(1) of the HR Act, in accordance with the following observations of Bell J about the interaction between the Victorian analogues of Queensland's RTI Act and HR Act: '*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*' (*XYZ* at [573]).

¹⁴ UQ gave access to those parts of the executed PA that reflected the information that UQ had published on its website concerning some of the terms contained in the final agreement.

¹⁵ What the applicant refers to in its access application as '*predecessor documents*'.

¹⁶ UQ gave access to the MoU (which is already published on UQ's website) with the exception of the signatures of the parties. UQ claimed that disclosure of the signatures would, on balance, be contrary to the public interest. The applicant confirmed during the review that it did not wish to pursue access to the signatures. This information is therefore not in issue in this review.

¹⁷ Sections 47(3)(a) and 48 of the RTI Act.

information – that is, information the disclosure of which Parliament considers would, on balance, be contrary to the public interest.

21. There is no discretionary component in this determination in the sense that I might grant access to the Information in Issue notwithstanding that it comprises exempt matter, on the basis of some asserted public interest consideration. To the extent that the applicant has submitted otherwise during the review, such a submission is misconceived. While an agency has a discretion under the RTI Act to grant access to exempt information,¹⁸ the Information Commissioner does not.¹⁹

Breach of confidence

22. Schedule 3, section 8(2) of the RTI Act provides that deliberative process information²⁰ is not exempt information under schedule 3, section 8(1) unless it consists of information communicated by an entity other than (relevantly) an agency or officer of an agency. It is therefore necessary to begin an assessment of a claim for confidential treatment under subsection (1) by first considering whether subsection (2) has any application.
23. To the extent that the Information in Issue contains deliberative process information, in the form of consultations or deliberations between the parties about the proposed contents of the PA, I am satisfied that such information is contained in communications between UQ and a private third party (Ramsay Centre) and is therefore not excluded from the terms of subsection (1).
24. The test for exemption under schedule 3, section 8(1) must be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, with appropriate standing to bring an action to enforce an obligation of confidence said to be owed to that plaintiff by an agency such as UQ.²¹
25. Following the decision of the Queensland Civil and Administrative Tribunal (**QCAT**) in *Ramsay Health Care Ltd v Information Commissioner & Anor*,²² it has been established that the cause of action referred to in schedule 3, section 8(1) of the RTI Act can arise in either contract or equity.

Contractual obligation of confidence

26. In *B and BNRHA*, Information Commissioner Albietz said as follows about contractual obligations of confidence:²³

In the context of s.46(1)(a) the word "confidence" must be taken to be used in its technical, legal sense, thus:

"A confidence is formed whenever one party ('the confider') imparts to another ('the confidant') private or secret matters on the express or implied understanding that the communication is for a restricted purpose." (*F Gurry "Breach of Confidence" in P Finn (Ed.) Essays in Equity; Law Book Company, 1985, p.111.*)

My references to a cause of action for breach of a contractual obligation of confidence must be understood in this sense. A contractual term requiring that certain information be kept secret will not necessarily equate to a contractual obligation of confidence: an issue may arise

¹⁸ Section 44(4) of the RTI Act.

¹⁹ Section 105(2) of the RTI Act.

²⁰ Defined in schedule 3, section 8(3) of the RTI Act.

²¹ *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (**B and BNRHA**).

²² [2019] QCATA 66 (**Ramsay**).

²³ At [45].

as to whether an action for breach of the contractual term would satisfy the description of "an action for breach of confidence" (so as to fall within the scope of s.46(1)(a) of the FOI Act). An express contractual obligation of confidence ordinarily arises in circumstances where the parties to a disclosure of confidential information wish to define clearly their respective rights and obligations with respect to the use of the confidential information, thereby enabling the parties to anticipate their obligations with certainty. A mere promise to keep certain information secret, unsupported by consideration, is incapable of amounting to a contractual obligation of confidence, and its effectiveness as a binding obligation would depend on the application of the equitable principles discussed in more detail below.

27. In QCAT's decision in *Adani Mining Pty Ltd v Office of the Information Commissioner & Ors*,²⁴ it was made clear that no public interest exception exists in respect of a contractual obligation of confidence.²⁵
28. The most recent decision of the Information Commissioner that deals with contractual obligations of confidence is *Park and Moreton Bay Regional Council & Ors*.²⁶ During this review, I referred the applicant to that decision and advised it that I considered the legal principles and findings set out in the decision were applicable to the present circumstances, such as to support a finding that the Information in Issue in this review is exempt information under schedule 3, section 8(1).²⁷ The applicant provided brief submissions in response that focused on the requirements to establish an equitable breach of confidence and associated public interest considerations.²⁸ I will discuss those submissions below. However, for the reasons I will explain, I am satisfied that the Information in Issue is subject to a binding contractual obligation of confidence. It is therefore not necessary for me to also consider or make findings about whether an equitable obligation of confidence exists, or the associated public interest arguments.

Establishment of a contractual obligation for confidentiality

The MoU

29. An MoU cannot ordinarily be regarded as a legally binding document sufficient to give rise to enforceable obligations. However, in this case, UQ and the Ramsay Centre agreed that certain clauses in the MoU would create legally binding obligations.
30. Clauses 2.1 to 2.2 of the MoU provide:

2 PURPOSE & SCOPE

- 2.1 *The purpose of this MOU is to outline some key principles that should underpin the negotiations between the Parties to agree a mutually acceptable Philanthropic Agreement and develop a cooperative relationship between the Parties. The MOU outlines what the Parties believe to be some of the conditions necessary to reach a Philanthropic Agreement. While this MOU does not bind the Ramsay Centre to fund any proposal from UQ or UQ to present any final proposal to the Ramsay Centre, it does establish some key principles that would underpin any finally agreed Philanthropic Agreement. The Philanthropic Agreement, as a separate legally binding document, would outline, as is usually the case in such agreements, the purpose of the funding, the funding levels, payment schedule and stewardship framework required to secure the funding. This MOU does not create any exclusive relationship between the Parties that would prevent the Parties from pursuing, in their own right or with any other partner, activities similar to the Activities.*

²⁴ [2020] QCATA 52 (*Adani Mining*).

²⁵ At [38]ff.

²⁶ [2020] QICmr 39 (23 July 2020) (*Park and MBRC*). Currently on appeal to QCAT.

²⁷ Letter dated 22 October 2020.

²⁸ Letter dated 5 November 2020.

- 2.2 **Except for rights and obligations arising from clauses 11 (Intellectual Property), 12 (Confidentiality), 13 (Public Statements) and 16 (Relationship of the Parties), which are intended to be legally binding, this MOU does not:**
- (a) **constitute or create, and may not be deemed to constitute or create a legally binding document;**
 - (b) **give rise to any legal relationship between the Parties; or**
 - (c) **create any enforceable rights or duties between the Parties.**

[emphasis added]

31. Clause 12 (Confidentiality), agreed by the parties to create a legally binding obligation, provides:

12 CONFIDENTIALITY

12.1 *Information exchanged between the Parties under this MOU that is by its nature confidential or is designated by a Party as being confidential ("Confidential Information"), is to be kept confidential and may only be used by the receiving Party for purposes related to this MOU.*

12.2 *For the avoidance of doubt, the Parties acknowledge and agree that this MOU (once agreed and signed) is not Confidential Information and may be disclosed (once agreed and signed) to the public.*

12.3 *A receiving Party may not disclose Confidential Information to any other person other than to the receiving Party's employees and professional advisors, except:*

- (a) *with the prior written consent of the disclosing Party;*
- (b) *where required by law, in which case the receiving Party will, where possible, notify the other Party immediately of the required disclosure; or*
- (c) *if the Confidential Information is already in the public domain other than as a result of a breach of this clause 12.*

12.4 *On termination or expiry of this MOU each Party will, or at the request of a Party at any time, the other Party will, subject to requirements at law to retain information, return, delete or destroy all Confidential Information belonging to the other Party (as directed by the other Party).*

12.5 *The obligations in this clause 12 survive expiration or termination of this MOU for 3 years.²⁹*

32. I am satisfied that the parties to the MoU intended and agreed that clause 12 would operate as a legally binding clause that requires the parties to keep confidential certain information exchanged between them under the terms of the MoU. That obligation of confidence continues to bind the parties for a period of three years following the expiry of the MoU, that is, until 31 December 2022. In terms of consideration moving in support of the clause, I note that mutual promises, as are contained in the MoU, can be sufficient to support a contract.³⁰

33. I am further satisfied that the Information in Issue, comprising communications between the parties in which they discuss the proposed terms of the PA, as well as working drafts of the PA containing the parties' comments and amendments, is information that was exchanged pursuant to the terms of the MoU and that, of its nature, would reasonably be regarded by the parties as information of a confidential nature for the purposes of clause 12.

²⁹ Clauses 1 and 4 operate to provide that the term of the MoU expires on 31 December 2019.

³⁰ *Perry v Anthony* [2016] NSWCA 56 at [26] citing *Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd* [1915] AC 847 at 855.

34. While clause 13 of the MoU makes provision for public statements to be made about the MoU and the activities to be undertaken by the parties as a result of the MoU, I am satisfied that this clause does not operate to undermine the application of clause 12 to the Information in Issue.
35. In the event that I am incorrect in finding that clause 12 of the MoU is sufficient to create a legally binding obligation of confidence, I am satisfied, for the reasons explained below, that the confidentiality clause contained in the PA applies to the information that is in issue that was exchanged between the parties prior to the execution of the PA.

The PA

36. As UQ claims that the parts of the executed PA that are in issue, including the confidentiality clause, are exempt information, I am prevented by the operation of sections 107(1) and 108(3) of the RTI Act from discussing the contents of the clause in any detail. I acknowledge that the inability of the applicant to examine the confidentiality clause contained in the PA means that it is not able to make meaningful submissions about whether or not the scope of the asserted confidentiality exists, or if it does, whether it is restricted in some material way. However, that is the effect of the relevant nondisclosure provisions in the RTI Act. This was discussed in *Park and MBRC*³¹ with reference to a similar situation arising in *BGC (Australia) Pty Ltd v Fremantle Port Authority*,³² where Heenan J of the Western Australian Supreme Court said the following in relation to equivalent provisions contained in the *Freedom of Information Act 1992* (WA):

One can readily appreciate that, as with any doubting Thomas, the appellant may not be convinced of the justification for this particular conclusion unless it sees and examines the evidence itself. However, on the basis that the confidentiality clause is itself part of the confidential information which may not be disclosed, that result is inescapable in the light of s 74(1) and (2) and s 90(1) and (3) of the Act. The legislation expressly acknowledges that it may be necessary to receive evidence and hear argument in the absence of the public and any party or representative of the party in order to preserve the confidentiality of exempt matter (s 90(2)). By this means the legislation ensures that the objective terms and effect of matter which is asserted to be exempt from disclosure because of confidentiality may be examined by an officer quite independent of the agency asserting a claim to confidentiality, namely, the Information Commissioner and, on appeal, by a Judge of this Court.

37. I also note that, while I may be prevented from disclosing the contents of the confidentiality clause contained in the PA, the confidentiality clause in the MoU has been published. I explained its operation to the applicant during external review.³³ However, in response,³⁴ the applicant did not address the MoU, but complained about its inability to access the terms of the PA confidentiality clause and questioned its operation.
38. I have examined the confidentiality clause contained in the PA.³⁵ I am satisfied that it operates to require the parties to keep certain information confidential under a contractual obligation not to disclose that information, and that the clause extends to the terms of the PA itself, as well as to information of a confidential nature exchanged before and after the execution of the PA.

³¹ At [17].

³² (2003) 28 WAR 187 at [16] (**BGC case**).

³³ Letter dated 22 October 2020.

³⁴ Dated 5 November 2020.

³⁵ Clause 4.13.

39. As noted, the parties agreed that certain key academic clauses from the PA could be published by UQ.³⁶ The disclosure of other information in certain designated circumstances is also contemplated.³⁷ However, I am not satisfied that these ‘carve outs’ in the confidentiality clause undermine its application to the Information in Issue such that UQ could no longer be considered to be bound by an enforceable obligation of confidence in respect of the contents of the PA that have not been published by agreement between the parties.
40. I am also satisfied that the confidentiality clause in the PA continues to operate at the time of making my decision, and that there was an exchange of consideration moving between the parties to the PA.

Enforceability of contractual obligations for confidentiality – applicant’s submissions

41. The applicant argues that any contractual obligation of confidence between UQ and the Ramsay Centre ought not to be enforced on public interest grounds. In its external review application, it contended that a public university should be committed to ‘*maximum transparency*’ and that there is a strong public interest in ensuring university autonomy and academic freedom and integrity.
42. During the review, I referred the applicant to QCAT’s decision in *Adani Mining* that no public interest exception exists in respect of a legally binding and enforceable contractual obligation of confidence. In its submission in response,³⁸ the applicant continued to raise public interest considerations in the context of equitable obligations of confidence:

It is also unclear whether and how the release of various predecessor documents, such notes or minutes taken from meetings in relation to the Philanthropic Agreement, would also be bound by any confidentiality provisions, and indeed whether the parties intended this to be the case.

NTEU understands that broadly, in order to found an action for a breach of equitable confidence, the information must satisfy the following tests:

- *the information must be capable of being specifically identifiable as information that is secret;*
- *the information must have the necessary quality of confidence;*
- *the information must have been communicated in such circumstances as to impart an obligation of confidence, including consideration moving between the parties to the Philanthropic Agreement so as to establish any contractual obligation; and*
- *disclosure to the applicant for access would constitute a misuse of the confidential information.*

We request that a formal decision be made which addresses these matters.

We also believe that it would be relevant for the Commission to consider whether the confidentiality provisions are worded so to extend any confidentiality obligation to the entirety of the Philanthropic Agreement (noting the University has publicly released certain clauses) as well as the range of predecessor documents which were subject to our Right to Information application.

³⁶ Presumably in recognition of UQ’s obligations as a publicly-funded body to account to the public for its activities.

³⁷ In recognition of the principle that an obligation of confidence, whether equitable or contractual, can be overridden by a statutory provision compelling disclosure of information, which includes the right of access contained in section 23 of the RTI Act: see the discussion in *B and BNRHA* at [99] – [102]. See also the discussion in *Palmer and Townsville City Council* [2019] QICmr 43 (3 October 2019).

³⁸ Dated 5 November 2020.

If it cannot be established that an obligation of confidence exists, and the Philanthropic Agreement cannot therefore be considered "exempt information" under the RTI Act, we submit that it remains in the public interest for the information to be disclosed.

The public has an interest in knowing what a publicly-funded entity considers just terms for treating with another entity. In the case of the Ramsay Centre for Western Civilisation, a tax-deductible charitable organisation, there has been considerable interest expressed by the public in knowing what concessions around fundamental tenets of the university's principles have been made, including the principles of Academic and Intellectual Freedom, and the Functions of the University as enumerated in The University of Queensland Act 1998.

It should not be open to UQ management to be able to simply write "commercial-in-confidence" on any document to avoid public scrutiny, and such an outcome in our view would be inconsistent with the Objects of the RTI Act.

43. I consider these various issues raised by the applicant were addressed during the course of the review, and are reiterated in these reasons for decision.
44. As regards the applicant's submissions concerning the requirements to found an equitable obligation of confidence, it is not necessary for me to consider this issue given that I am satisfied that the Information in Issue is the subject of a binding contractual obligation of confidence.
45. As regards public interest considerations, I do not consider that any material before me would raise an issue about the genuineness of the mutual obligation of confidence imposed upon the parties, or would suggest that the parties entered into the MoU or PA for some collateral or improper purpose inconsistent with the claim for exemption, such as to support a finding that the confidentiality obligations should not be enforced on public policy grounds.
46. I am satisfied that the Information in Issue reflects genuine arms-length negotiations between the parties, with each acting in its own interests. This is reflected in UQ's decision to publish on its website the MoU, key academic clauses contained in the PA, and other relevant information relating to its agreement with the Ramsay Centre, including information about the academic program, as well as scholarship rules and eligibility.³⁹

Findings

47. For the reasons set out above, I find that the Information in Issue is the subject of a binding contractual obligation of confidence that arises through the operation of the terms of the MoU, or the PA, or both.

Decision

48. I affirm⁴⁰ UQ's decision to refuse access by finding that the Information in Issue is exempt information under schedule 3, section 8(1) of the RTI Act.

Shiv Martin
Assistant Information Commissioner

Date: 22 February 2021

³⁹ <https://scholarships.uq.edu.au/files/2921/uq-ramsay-undergraduate-scholarship-rules.pdf> (accessed 8 February 2021).

⁴⁰ As a delegate of the Information Commissioner, under section 145 of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
20 August 2020	OIC received the application for external review.
21 August 2020	OIC requested processing documents from UQ.
27 August 2020	OIC received processing documents from UQ.
24 September 2020	OIC advised the applicant and UQ that the application for external review had been accepted and requested a copy of the Information in Issue from UQ.
9 October 2020	OIC received the Information in Issue from UQ.
22 October 2020	OIC conveyed a preliminary view to the applicant.
5 November 2020	OIC received a submission from the applicant which requested a formal decision.
24 November 2020	OIC wrote to the applicant to reiterate its preliminary view and asked the applicant to confirm whether it sought a formal decision.
9 December 2020	The applicant confirmed it sought a formal decision.