Office of the Information Commissioner
Queensland

Decision and Reasons for Decision

Citation:	***Park and Moreton Bay Regional Council & Ors*** **[2020] QICmr 39 (23 July 2020)**
Application Number:	**314941**
Applicant:	**Park**
Respondent:	**Moreton Bay Regional Council**
Third Party:	**Orora Limited (ACN 004 275 165)**
Fourth Party:	**University of the Sunshine Coast**
Decision Date:	**23 July 2020**
Catchwords:	**ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - BREACH OF CONFIDENCE - documents concerning the purchase and redevelopment of a former paper mill site - whether disclosure would found an action for breach of confidence - section 47(3)(a) and section 48 and schedule 3, section 8(1) of the *Right to Information Act 2009* (Qld)**

REASONS FOR DECISION

Summary

1. The applicant applied[1] to Moreton Bay Regional Council (**MBRC**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to various agreements in connection with MBRC's purchase of 'The Mill' site at Petrie from Orora Limited (**Orora**), and the subsequent development of the site as a campus of the University of the Sunshine Coast (**USC**).

2. MBRC consulted with Orora and USC under section 37 of the RTI Act. Each objected to disclosure of the documents that concerned them. Council decided[2] to refuse access to the documents on the basis that they comprised exempt information under section 48 and schedule 3, section 8(1) of the RTI Act (information the disclosure of which would found an action for breach of confidence), and that their disclosure would, on balance, be contrary to the public interest under section 49 of the RTI Act.

[1] 6 August 2019.
[2] 14 October 2019.

3. The applicant applied[3] to the Office of the Information Commissioner (**OIC**) for external review of MBRC's decision.

4. 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 MBRC's decision refusing access to it.

Background

5. In 2013, Regional Development Australia and MBRC commissioned a study to review the viability of establishing a tertiary education facility within the Moreton Bay Region. In July 2015, following a period of negotiation, MBRC entered into a contract with Orora to purchase a 460 hectare site located within the Brisbane suburbs of Petrie, Kallangur and Lawnton for the primary purpose of developing a tertiary education precinct.[4] The site formerly housed the Amcor Paper Mill from 1957 until its closure in 2013. In November 2015, following a tender process, MBRC announced that it had entered into an agreement with USC to build a USC campus on the site. In conjunction with the State government, a Priority Development Area (**PDA**)[5] was declared on 2 September 2016 to facilitate the development of the USC campus and related infrastructure. The campus' foundation facilities opened to students at the beginning of 2020. Remediation and development of the remainder of the site is continuing.

6. Significant procedural steps relating to the external review are set out in the Appendix.

Reviewable decision

7. The decision under review is MBRC's decision dated 14 October 2019.

Evidence considered

8. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including the footnotes and Appendix).

9. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**),[6] particularly the right to seek and receive information as embodied in section 21 of that Act. I consider that in observing and applying the law prescribed in the RTI Act, an RTI decision-maker will be *'respecting and acting compatibly with'* this right and others prescribed in the HR Act,[7] and that I have done so in making this decision, as required under section 58(1) of the HR Act. In this regard, I note Bell J's observations on 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.'*[8]

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[3] On the 18 October 2019, which was received by OIC on 23 October 2019.
[4] The redevelopment of the site is stated to also include new health, retail, commercial and residential developments and community infrastructure: <https://www.dsdmip.qld.gov.au/economic-development-qld/priority-development-areas/the-mill-at-moreton-bay.html> (accessed 2 July 2020).
[5] PDAs are parcels of land identified for development to deliver 'significant benefits to the community'. The Minister for Economic Development Queensland may declare a PDA under the *Economic Development Act 2012* (Qld). When a PDA is declared, Economic Development Queensland works with local government and other stakeholders to plan, assess and guide development within the PDA. This includes the preparation of a development scheme: <https://www.dsdmip.qld.gov.au/economic-development-qld/priority-development-areas-and-projects.html> (accessed 2 July 2020).
[6] Which came into force on 1 January 2020.
[7] *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].
[8] *XYZ* at [573].

Information in issue

10. The information in issue (**the Agreements**) comprises the following agreements between MBRC and Orora:

    a) Contract of Sale – 20 July 2015
    b) Priority Area Deed – 6 April 2017
    c) Deed of Extension of Decommissioning Date – 4 May 2018
    d) Deed of Variation of Contact for Sale and Extension Deed – 11 July 2019,

    and the following agreement between MBRC and USC:

    e) Development Agreement – 4 July 2018.

Issues for determination

11. The issue for determination is whether disclosure of the Agreements would found an action for breach of confidence under schedule 3, section 8(1) of the RTI Act. There is no discretionary component in this determination in the sense that I might grant access to the Agreements notwithstanding that they contain exempt matter, on the basis of some asserted public interest consideration or other factor arising in the circumstances of this case. To the extent that the applicant has submitted otherwise during the review, such submission is misconceived. While an agency has a discretion under the RTI Act to grant access to exempt information,[9] the Information Commissioner does not.[10]

12. While MBRC, Orora and USC also claim that disclosure of the Agreements would, on balance, be contrary to the public interest,[11] it is not necessary for me to deal with that ground of refusal in this decision, given my findings about the application of the exemption contained in schedule 3, section 8(1).[12]

Relevant law – exempt information

13. The RTI Act gives a right of access to documents of government agencies.[13] This right is subject to other provisions of the RTI Act, including grounds on which access may be refused. Access may be refused to information to the extent the information comprises 'exempt information'.[14]

Breach of confidence

14. The test for exemption under schedule 3, section 8(1) of the RTI Act must be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, with appropriate standing to bring an action to enforce an obligation of confidence said to be owed to that plaintiff by an agency such as MBRC.[15]

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[9] Section 44(4) of the RTI Act.
[10] Section 105(2) of the RTI Act.
[11] A separate ground for refusing access to information: sections 47(3)(b) and 49 of the RTI Act.
[12] See *7CLV4M and Department of Communities* (Unreported, Queensland Information Commissioner, 21 December 2011) at [20], where the Assistant Information Commissioner explained that when considering non-disclosure, the logical first step is to consider whether the information comprises exempt information and, only if it does not, is it necessary to complete the steps set out in section 49 of the RTI Act to decide whether disclosing particular information is contrary to the public interest. This approach was referred to with approval on appeal to the Queensland Civil and Administrative Tribunal: *BL v Office of the Information Commissioner, Department of Communities* [2012] QCATA 149 at [15]-[16].
[13] Section 23(1)(a) of the RTI Act.
[14] Sections 47(3)(a) and 48 of the RTI Act.
[15] *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (***B and BNRHA***).

15. Following the decision of the Queensland Civil and Administrative Tribunal (**QCAT**) in *Ramsay Health Care v Office of the Information Commissioner & Anor*,[16] 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

16. Concerning contractual obligations of confidence, in *B and BNRHA*, Information Commissioner Albietz said:

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

Establishment of contractual obligation for confidentiality

17. Because MBRC and the third parties claim that the Agreements, including the confidentiality clauses contained in them, 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 clauses in any detail. I acknowledge that the inability of the applicant to examine the confidentiality clauses means that he 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. In *BGC (Australia) Pty Ltd v Fremantle Port Authority*,[17] Heenan J of the Western Australian Supreme Court said the following in relation to similar provisions contained in the *Freedom of Information Act 1992* (WA) (***WA FOI Act***):

> *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*

[16] [2019] QCATA 66 (***Ramsay***).
[17] (2003) 28 WAR 187 at [16] (***BGC case***).

> *claim to confidentiality, namely, the Information Commissioner and, on appeal, by a Judge of this Court. That this scrutiny and examination, in order to protect the confidentiality of the material if the claim is justified, must be conducted without disclosure to the applicant, its counsel or solicitors is one example of these rare instances in which a party to litigation is deprived of full access to all material documents. However, this is not an isolated exception, and policy considerations which have prompted its acceptance, have been recognised in other areas of the law such as the power of a court to inspect documents in respect of which a claim for legal professional privilege has been made, or to scrutinise material relied upon for the issue of a search warrant, or to inspect documents for which a claim of public interest immunity has been asserted, without disclosing them to the party seeking inspection – see* Sankey v Whitlam *(1978) 142 CLR 1 at 46, 110. None of these examples constitutes any denial of natural justice because, if the claim for privilege, confidentiality or public interest immunity is justifiably made, the party seeking to inspect the documents has no right of any kind to do so. Justice is achieved and the law applied in these situations by an examination of the documents by an independent officer or court acting on settled principles.*

18. I have examined the Agreements in issue and the relevant provisions as to confidentiality contained in them. I am satisfied that Agreements a), c), d) and e) each contain a confidentiality clause requiring the parties to keep certain designated information confidential under a contractual obligation not to disclose that information, and that each clause extends to the terms of the agreement itself.[18] Agreement b) does not contain a separate confidentiality clause, but is, itself, 'confidential information' for the purposes of Agreement a).[19]

19. While the obligations of confidence created in respect of the Agreements provide for disclosure in certain designated circumstances,[20] none of those circumstances have arisen in the present case. A number of the Agreements make provision for public statements about specified matters to be made with the agreement of both parties.[21] However, I am not satisfied that these 'carve outs' in the confidentiality clauses, undermine the operation of the confidentiality clauses such that MBRC could no longer be considered to be bound by an enforceable obligation of confidence in respect of the contents of the Agreements.

20. I am also satisfied that the clauses continue to operate at the time of making my decision, and that there was an exchange of consideration moving between the parties to the Agreements.

Enforceability of contractual obligations for confidentiality

21. Given that he has not been able to examine the Agreements or make submissions about the construction and effect of the confidentiality clauses, the applicant's case for disclosure of the Agreements has focused, in effect, on the argument that any contractual obligation of confidence between the parties ought not to be enforced on public interest grounds.[22]

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[18] Clause 50.1 of the Contract of Sale and of the Deed of Variation of the Contract of Sale and Extension Deed; clause 16 of the Deed of Extension of Decommissioning Date; and clause 14 of the Development Agreement.
[19] Clause 3.2 of the Priority Area Deed.
[20] 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).
[21] Presumably in recognition of the duty of MBRC as a government agency to account to the public for its activities. These various public statements and other information in the public domain about the project were compiled by MBRC at the request of the OIC and communicated to the applicant under cover of OIC's email dated 6 May 2020.
[22] The applicant's submissions contained in his external review application, as well as in his emails of 30 January 2020 and 24 May 2020.

22. The public interest arguments advanced by the applicant in his external review application were as follows:

> *… My interests are solely in causing MBRC and USC to be open and transparent and to properly account to the public for their decisions and for their spending of public money. …*
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> *Which precise private, business, professional etc affairs are reasonably expected to be prejudiced? In what way? How could this be prejudicial to the public interest? How could it possibly be in the public interest to keep secret from the public any knowledge of the commercial and financial affairs of publicly owned entities?*
>
> *There is documented evidence in respect of the site being contaminated to an unacceptable level with PCBs and there is less substantiated information of asbestos, dioxins and other contaminants. This is concerning given that USC proposes to accept students in three months' time. There is some indication that de-contamination is not progressing to plan and may not reach acceptable targets and reports that the previous owner [who it is understood had responsibility for de-contamination] has now handed the work over to MBRC. I regret that this information is so vague but that is the nature of disclosure by MBRC. In the interests of public health every effort must be made to inform the public of the situation, both in terms of health and in terms of costs and responsibility. Access to these documents will clarify many of the unknowns.*

23. In an email sent to OIC on 30 January 2020, the applicant submitted:

> *It has been the practice of MBRC, in my opinion, to classify documents as Confidential, and to hold an excessive number of non-public meetings, not because of the content but in order to maintain the cloak of secrecy and to conceal information from ratepayers. This has occurred with the land purchase and with the agreement with the Sunshine Coast University [USC]; but more recently the contamination status of the land has also been concealed because of its potentially distressing nature. It is a clear responsibility in the public interest to make known the potential health dangers at the site but information about the possible hazards have been concealed.*

24. In his submission dated 24 May 2020, the applicant continued to focus his arguments for disclosure of the Agreements on public interest considerations:

> *Although the assessment of my appeal will be made in terms of the RTI Act, I ask that broader principles that underpin our democracy be also considered. Governments do not exist in their own right, separate from or isolated from the people they represent. Nor do they spend their own money; they spend money belonging to those same people that they represent, and then only for the purposes that the people approve. In principle, governments should have no secrets from the people that they represent. Governments exist to carry out the will of the people. It is thus a fundamental principle of democratic government that the people can satisfy themselves that their will is being carried out and that their money is not being wasted. The RTI Act 2009 emphasises that government information is a public resource and that openness enhances the accountability of governments. The primary objective of the act is to give a RIGHT of access to information in a government's possession or under the government's control unless, on balance, it is contrary to the public interest to give access. The onus of proof is completely upon those denying access to show that the public interest is more clearly served by withholding information.*
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> *…*
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> *Everything that a council does, all of its decisions and all of its expenditures must be made in the public interest; and it is in the public interest for the public to know all of the details. There are exceptions of course: personnel matters and details of court cases are obvious exceptions. However the public is always entitled to enquire about corruption, mismanagement, inefficiency and other irregularities. As a public agency, owned and funded by the public, a university is also obliged to act in the public interest and to be open,*

> *transparent and accountable.*
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> *Although there is a public interest that confidences should be respected, preserved and protected by law; nevertheless that public interest may be outweighed by some other countervailing public interest that favours disclosure. I am of the opinion that the legal and moral requirements for local governments and publicly owned and funded universities to be open, transparent and accountable outweighs any other consideration. I am also of the opinion that in its refusal Council does not adequately explore this requirement but instead focuses heavily on reasons to deny release of the documents.*
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> ***…***
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> *By focussing exclusively upon the RTI Act; this appeal has been bogged down in technicalities and legalities. The risk is that such a focus may cause us to overlook the basic and fundamental principles of democratic government: openness, transparency and accountability. I appeal to the OIC to view this matter from a much broader perspective. It is difficult to comprehend that a democratically elected organisation, elected by the ratepayers of Moreton Bay; funded by the ratepayers of Moreton Bay, constituted to do the will of the ratepayers of Moreton Bay and to be accountable to the Ratepayers of Moreton Bay can, at the same time, have secrets from the ratepayers of Moreton Bay.*

25. The paragraph immediately above as extracted from the applicant's submissions demonstrates a fundamental misunderstanding about this external review and the role of the Information Commissioner. My jurisdiction in considering the applicant's application for external review is limited solely to the provisions of the RTI Act: I have no power to *'view this matter from a much broader perspective'*. If the information in issue meets the requirements for exemption under schedule 3 of the RTI Act, I have no power to order its disclosure, no matter how strongly an applicant believes its disclosure is in the public interest.

26. Late in the course of this external review, QCAT issued its decision in *Adani Mining Pty Ltd v Office of the Information Commissioner & Ors*.[23] While in its decision in *Ramsay*, QCAT did not specifically address the issue of whether or not public interest considerations could be taken into account when considering the application of schedule 3, section 8(1) to contractual obligations of confidence imposed upon a government agency, the decision in *Adani Mining* found that they could not. In that decision, Member McGill SC discussed the relevant authorities and expressed the view that, apart from the possibility of disclosure arising from the nature of 'responsible government',[24] there is no public interest exception in respect of a contractual obligation of confidence:

> *The third error of law argued by the appellant was that, if contractual confidentiality did exist, public interest considerations were still relevant in determining whether that confidentiality would be enforced. Given her approach otherwise, this point was, understandably, dealt with very briefly by the first respondent. The appellant submitted that public interest considerations were not relevant in a case of contractual confidentiality, and that the passages in the decisions relied on by the first respondent were in error, or had been taken out of context. The earliest of these was* Hughes Aircraft Systems International v Airservices Australia *(1997) 76 FCR 151. The case was one arising out of a tender process, where it was held that there was a process contract between the parties, which included the imposition of an obligation as to confidentiality. That obligation was held to have been breached when the CEO of the defendant statutory corporation disclosed confidential information to the relevant minister, there being no statutory entitlement in the minister to obtain such information in that way. At p 246 Finn J said:*

[23] [2020] QCATA 52 (***Adani Mining***).
[24] As per the discussion by Finn J of the Federal Court in *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151.

> Parties who contract with government agencies must, in matters of confidentiality, be taken to have done so subject to such lawful rights of access to information in the agency's hands as our laws and system of government confer on others.

His Honour was there speaking about the possibility of disclosure arising from the nature of responsible government, as was made clear by the context of the statement. He was not laying down a principle about the relationship of contractual confidentiality and a statutory entitlement to information under something like the Act. To the extent that this passage was relied on as authority for the proposition that a public interest exception exists in respect of a contractual obligation of confidence, as in Seeney and Department of State Development; Berri Ltd (Third party) *(2004) 6 QAR 354, [199], I consider that such reliance was unjustified.*

The operation of the Act must depend on the terms of the Act itself. Section 48(2) provides that Parliament has decided that disclosure of information in the cases identified in Schedule 3 would, on balance, be contrary to the public interest. If, as I consider is the case, contractual confidentiality falls within Schedule 3, it is subject to the judgment of Parliament as to where the balance of the public interest lies. The proposition that it must be shown, in a particular case, that the balance of the public interest is in favour of disclosure in a case falling within Schedule 3 would involve adopting an interpretation which overrode the judgment of Parliament. If a particular category within Schedule 3 has a public interest element in the test anyway, that is a different matter, but the structure of s 48 is in my opinion clearly inconsistent with the existence of an implied requirement of a balance of public interest in favour of disclosure in respect of a case otherwise covered by Schedule 3.

So if, outside the context of the Act, a situation in Schedule 3 would not have an element of public interest in disclosure, one is not to be implied by that context. The analysis in Crown Resorts Ltd v Zantran Pty Ltd (supra) *shows that the enforceability in equity of a term of a contract providing for confidentiality is subject only to equitable defences applying to the enforceability in equity of a contractual term generally. So if a term is contrary to public policy, as providing for something to be done which is illegal, it will not be enforced.* Zantran *decided that there is no public interest in the efficient conduct of litigation which justifies the refusal to enforce a contractual obligation of confidentiality. This shows that rights of contract of this nature are not lightly to be disregarded in equity. The appellant also submitted that there is authority against the proposition that there is a "public interest" defence in a case of contractual confidentiality. It referred to* Corrs Pavey Whiting & Byrne v Collector of Customs *(1987) 14 FCR 434, 456, where Gummow J said that the principle that equity would not regard information as having the necessary element of confidentiality in certain circumstances where disclosure was in the public interest did not apply where there was a contractual protection of confidence. That decision has since been followed and applied.*

In these circumstances I do not consider that the first respondent was correct in stating the law when she said that public interest considerations apply in respect of contractual obligations of confidence, at least to the extent that there was a special public policy exception to contractual confidentiality in the context of the Act. In my opinion, there is no such exception. In these circumstances, it is unnecessary for me to address the argument advanced by the appellant, that the first respondent erred in elevating the public interest to be the determinative factor, in this context, where that approach had not been adopted by the first respondent.

I should mention as well that, if there is a public interest defence to a cause of action for breach of contractual confidence, it would arise as a matter of defence, not as an element of the cause of action. But it has been said that, in applying such a provision from Schedule 3, the availability of any defence is to be disregarded. On this basis, the existence of any such defence to the enforcement in equity of contractual confidence would be irrelevant.

[Footnotes omitted]

27. I referred the applicant to this decision and advised him that I was bound to follow it, with the effect that his arguments about public interest considerations favouring disclosure of the Agreements could not be taken into account when considering contractual obligations of confidence. However, the applicant rejected the assertion that QCAT's decision applied to the present circumstances because it dealt with disclosure of a 'Term Sheet', which is not a contract.[25] The applicant's submission in this regard is misconceived. The decision in *Adani Mining* in fact has stronger application in the present circumstances because the information in issue here comprises formal and binding agreements about specified subject matter that contain express confidentiality clauses, rather than the Term Sheet which was not binding as a contract in respect of its subject matter (but about which QCAT decided there may have been a contract).

28. The circumstances in this review are very similar to those that arose in the *BGC case*. The document in issue there comprised a contract for the sale of land by BHP Billiton Ltd (a private entity)to the Fremantle Port Authority (a government agency). Access to the contract of sale was refused on the basis that it was subject to a contractual obligation of confidence arising from its terms. In arguing for disclosure, the appellant submitted that the contract was unenforceable because it was *'inconsistent with the general obligation of any agency to give access to documents established by s 10(1) of the* [WA FOI Act] *and that it is contrary to public policy to enforce a contractual term which may be included and relied upon simply to assert a freedom from the obligation of disclosure otherwise imposed by law.'*[26] The appellant further submitted that a public body cannot enter into any contract inconsistent with the due discharge of its duties.

29. The Court responded to the appellant's arguments as follows:[27]

> *In my view, the starting point, for dealing with these submissions, is to identify the nature of the right of access to documents held by agencies which the* Freedom of Information Act *of Western Australia establishes. Section 10(1) provides that the right of access is subject to, and in accordance with, the Act. While the legislation and the obvious policy of access to government documents is undoubtedly a guide to the interpretation of the legislation, it is equally plain that the Parliament expressly provided that certain documents or classes of documents were to be exempt from public access: compare* Victorian Public Service Board v Wright *(1986) 160 CLR 145 and Searle Australia Pty Ltd v Public Interest Advocacy Centre (1992) 36 FCR 111. Where, as in the present case, there is an express provision for certain documents which impose obligations of confidentiality to be exempt, there is no possibility of accepting an unqualified proposition that any means of imposing a confidential obligation on an agency not to disclose a document is necessarily inconsistent with the purposes of the legislation and is, for that reason, unenforceable.*
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> *These authorities, however, support a proposition that where parties improperly assert, or attempt to create, an obligation of confidentiality in order to prevent disclosure of information or documents, not otherwise confidential, in order to avoid the provisions of the Act which, otherwise, would result in the documents or material being publicly accessible, that may well constitute an improper attempt to avoid public disclosure and to frustrate the public interest as expressed in this legislation. Such a situation would appear to be analogous to those contracts which, while not illegal as formed, become illegal as performed and hence unenforceable. If it is the intention of the parties to the contract to engage in conduct, or to achieve a purpose which is illegal or which has as its object the frustration or evasion of a statutory obligation such a contract, or the offending provision, will be unenforceable. But it will need to be established that the parties made the contract with the intention of engaging in unlawful conduct, or of avoiding or frustrating a statutory provision. This will require the person asserting that proposition to establish it by requisite*

[25] Applicant's email dated 24 May 2020.
[26] At [26].
[27] At [32] - [34].

> *proof because the normal inference should be that the parties intended to act lawfully:* Meehan v Jones *(1982) 149 CLR 571.*
>
> *It is, of course, theoretically possible that the parties to these contractual provisions may have included the terms providing for confidentiality and non-disclosure of the material for improper purposes, without any genuine belief that the material was confidential, or in order to avoid public access which otherwise was potentially available by recourse to the* Freedom of Information Act*. But there is no evidence to demonstrate, or even to suggest, that such an intention existed or that there was any impropriety in the obligation of confidentiality which was imposed by the contractual provisions. That is not to say that this must necessarily, or always be so, rather it is the only conclusion which should be drawn in the absence of evidence to the contrary, where the onus of establishing some improper or collateral purpose rests, as it does in this case, on the appellant.*

30. This decision supports the view expressed in *Adani Mining* to the effect that, in enacting schedule 3 to the RTI Act, Parliament has already decided that disclosure of information in the cases identified in schedule 3 would, on balance, be contrary to the public interest. The proposition advanced by the applicant which is, in effect, that it must be shown, in a particular case, that the balance of the public interest is in favour of disclosure in a case falling within schedule 3, would involve adopting an interpretation which overrides the judgment of Parliament.

31. Following the observations in the *BGC case* set out above, I note for the sake of completeness that there is no material before me that would raise an issue about the genuineness of the obligation of confidentiality imposed by the Agreements, or that would suggest that the parties entered into the Agreements for some collateral or improper purpose inconsistent with the claim for exemption.

32. In terms of the Agreements between Orora (a private entity) and MBRC regarding the sale, purchase and remediation of the Petrie Mill site, there is nothing before me to suggest that these negotiations were other than genuine commercial negotiations conducted at arm's length between a vendor and a purchaser each acting in its own interests and that, as a result of a mutual consensus, the negotiations resulted in an agreement for the exchange of information under which Orora insisted that the information disclosed be kept confidential.[28]

33. As regards the relationship between USC and MBRC, I acknowledge that both are public entities, and that USC itself is an agency for the purposes of the RTI Act. However, the Agreement between these parties was entered into following a competitive tender process whereby potential education providers were required to submit proposed plans for a new university. I accept that the provision of tertiary educational services is a competitive field. I also note that one of USC's functions is to *'exploit commercially, for the university's benefit, a facility or resource of the university'*.[29] USC submitted that the negotiation and finalisation of the Agreement reflected extended and intense negotiation between USC and MBRC, with certain commercial decisions and concessions made, and that its disclosure to current or prospective education partners would place USC at a competitive disadvantage. In these circumstances, and accepting USC's function to exploit commercial opportunities in providing its educational services, I am satisfied that the Agreement reflects genuine arms-length negotiations of a commercial nature between the parties, with each acting in its own interests.

34. Lastly, in his email dated 30 May 2020 the applicant urged me to consider the relevance of the recent decision of the High Court of Australia to release correspondence between

[28] Applying the *BGC* case at [42] – [44].
[29] Section 5(h) of the *University of the Sunshine Coast Act 1998* (Qld).

the Queen and the Governor-General during the three years prior to the dismissal of the Whitlam government in 1975. The decision in question is *Hocking v Director-General of the National Archives of Australia*.[30] It deals with the application of specific provisions of the *Archives Act 1983* (Cth) and, particularly, the construction and application of the definition of 'Commonwealth record'. It has no application to the RTI Act nor any relevance to the issues under consideration in this review.

35. In summary, I acknowledge the arguments and submissions that the applicant has made about the public interest in disclosure of the Agreements and his strong and genuinely-held belief that it is in the public interest for MBRC to make a full disclosure of the Agreements to the community it represents and on whose behalf it entered into the Agreements. However, for the reasons explained above, if I am satisfied that information meets the requirements for exemption under schedule 3, section 8(1), there is no basis upon which public interest considerations can be taken into account.

DECISION

36. I affirm MBRC's decision to refuse access by finding that the Agreements are exempt information under schedule 3, section 8(1) of the RTI Act.

37. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Louisa Lynch
Right to Information Commissioner

Date: 23 July 2020

[30] [2020] HCA 19.

APPENDIX

Significant procedural steps

Date	Event
23 October 2019	OIC received the application for external review.
25 October 2019	OIC emailed the applicant acknowledging receipt of his external review application. OIC emailed MBRC requesting preliminary information.
30 October 2019	MBRC provided preliminary information.
19 November 2019	OIC emailed the applicant to advise that the external review application had been accepted. OIC emailed MBRC requesting copies of the documents in issue.
28 November 2019	MBRC provided copies of the documents in issue.
5 December 2019	OIC provided the applicant with an update.
29 January 2020	OIC provided the applicant with an Information Sheet.
29 January 2020	OIC requested further information from MBRC.
12 February 2020	MBRC provided additional information to OIC.
19 February 2020	OIC invited MBRC to provide a submission.
20 February 2020	OIC invited Orora to provide a submission.
24 February 2020	OIC invited USC to provide a submission.
13 March 2020	OIC received Orora's submission.
31 March 2020	OIC received USC's submission.
16 April 2020	OIC communicated a preliminary view to the applicant.
1 May 2020	OIC received MBRC's submission.
6 May 2020	OIC communicated a preliminary view to the applicant.
8 May 2020	OIC provided the applicant with a copy of a QCAT decision.
24 May 2020	OIC received a submission from the applicant.
30 May 2020	OIC received a submission from the applicant.