



Decision and Reasons for Decision

Citation:	<i>Hart MP and Department of Transport and Main Roads [2022] QICmr 28 (25 May 2022)</i>
Application Number:	316456
Applicant:	Mr Michael Hart MP
Respondent:	Department of Transport and Main Roads
Decision Date:	25 May 2022
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - CABINET INFORMATION - email relating to Cabinet meeting - whether information disclosure of which would reveal Cabinet consideration or prejudice confidentiality of Cabinet considerations or operations - whether exempt information to which access may be refused - sections 47(3)(a) and 48 and schedule 3, section 2(1)(b) of the <i>Right to Information Act 2009 (Qld)</i>

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Department of Transport and Main Roads (**Department**) under the *Right to Information Act 2009 (Qld)* (**RTI Act**) for access to:

...policy implementation directions sent to the Transport Department from the Minister for Transport and/or Minister for Procurement regarding Best Practice Industrial Conditions (BPIC's) to be included in contract conditions for Gold Coast Light Rail stage 3 and any feedback on the policy from the Department of Transport to either Minister.
2. The Department identified 82 pages. The Department decided² to refuse access to all 82 pages, on the ground they comprised exempt information under schedule 3, section 2(1)(b) of the RTI Act: information the disclosure of which would reveal any consideration of Cabinet or otherwise prejudice the confidentiality of Cabinet considerations or operations.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision. During the review, the Department and the applicant each accepted OIC's preliminary views to the effect that some information may be released, while access to other information may be refused, on the ground decided by the Department. As a consequence, a one-page email remains in issue, to which the applicant continues to seek access.
4. For reasons explained below, access to that page may be refused. It comprises exempt information under schedule 3, section 2(1)(b) of the RTI Act. I affirm the Department's decision.

¹ Application dated 5 May 2021.

² Decision dated 30 November 2021.

Background

5. Significant procedural steps are set out in the Appendix to this decision.

Reviewable decision

6. The decision under review is the Department's decision dated 30 November 2021.

Evidence considered

7. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and Appendix).

8. In making this decision I have had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.³ 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,⁴ 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*'.⁵

Information in issue

9. The information in issue is a one-page email.

Issue for determination

10. The issue for determination is whether the Department may refuse access to the page in issue, on the ground it comprises exempt information under schedule 3, section 2(1)(b) of the RTI Act.

Relevant law

11. The RTI Act confers a right of access to documents of government agencies such as the Department.⁶ This right is subject to other provisions of the RTI Act, including grounds on which access may be refused.⁷ Section 47(3)(a) of the RTI Act permits an agency to refuse access to documents to the extent they comprise exempt information.⁸

12. Types of exempt information are stated in schedule 3 to the RTI Act. Parliament has provided that one such type of exempt information is information meeting the requirements of schedule 3, section 2(1) of the RTI Act. Schedule 3, section 2(1) of the RTI Act relevantly provides:

2 Cabinet information brought into existence on or after commencement

(1) Information is exempt information for 10 years after its relevant date if—

...

³ As embodied in section 21(2) of the HR Act.

⁴ *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].

⁵ *XYZ* at [573].

⁶ Section 23 of the RTI Act.

⁷ Section 47 of the RTI Act. These grounds are to be interpreted narrowly: section 47(2)(a) of the RTI Act, a requirement I have borne in mind in making my decision, together with Parliament's intention that the Act be administered with a pro-disclosure bias (section 44 of the RTI Act).

⁸ As defined in section 48 of the RTI Act.

- (b) *its disclosure would reveal any consideration of Cabinet or would otherwise prejudice the confidentiality of Cabinet considerations or operations ...*
- (2) *Subsection (1) does not apply to—*
 - (a) *information brought into existence before the commencement of this section; or*
 - (b) *information officially published by decision of Cabinet.*

...
- (5) *In this section—*

...

consideration includes—

 - (a) *discussion, deliberation, noting (with or without discussion) or decision; and*
 - (b) *consideration for any purpose, including, for example, for information or to make a decision.*

relevant date, for information, means—

 - (a) *for information considered by Cabinet—the date the information was most recently considered by Cabinet; or*
 - (b) *for other information—the date the information was brought into existence.*

Discussion

13. The email in issue was sent on the same day as a certain Cabinet Budget Review Committee (CBRC)⁹ meeting. From the time of sending, and its contents, I infer that the email was sent in the hours following that meeting. Its contents relate to that meeting. As a matter of fact, I am satisfied that disclosure of this page would reveal¹⁰ a consideration of Cabinet or otherwise prejudice the confidentiality of Cabinet considerations or operations.¹¹
14. Disclosure of the page in issue would, in my view, have consequences analogous to those the Federal Court accepted would '*breach the necessary confidentiality of the Cabinet process*,'¹² by permitting, at the least, '*reliable inferences to be drawn*' about the '*subject matter of discussions by Cabinet*.'¹³ I consider that this would undermine or prejudice the confidentiality of Cabinet considerations or operations.
15. The information in issue otherwise satisfies the requirements for exemption under schedule 3, section 2(1) of the RTI Act, being within 10 years of its 'relevant date'¹⁴ and not, to my knowledge, having been officially published by decision of Cabinet.¹⁵

⁹ Committees of Cabinet are included within the meaning of Cabinet – see schedule 3, section 2(5) of the RTI Act. I have had access to and reviewed the submission presented to CBRC at the relevant meeting and to which the information in issue relates, and CBRC's decision on that submission.

¹⁰ '*To make known; disclose; divulge*': Macquarie Dictionary, 7th Edition (the word being undefined in the RTI Act).

¹¹ Also undefined in the RTI Act. The dictionary definition includes '*course*', '*process*' or '*transaction*': Macquarie Dictionary, 7th Edition.

¹² *Spencer v Commonwealth of Australia (No 3)* [2012] FCA 637 at [24] per Emmett J (**Spencer**). The Court in *Spencer* upheld a claim of public interest immunity justifying non-disclosure of various Cabinet-related documents, including documents, which, as with the Information in Issue, had been circulated within Cabinet. *Spencer* was subsequently upheld on appeal by the Full Court of the Federal Court (*Spencer v Commonwealth of Australia* [2012] FCAFC 169), and as it is concerned with the avoidance of consequences substantially similar to those against which schedule 3, section 2(1)(b) of the RTI Act is directed, can be usefully applied in interpreting this provision.

¹³ As above.

¹⁴ Schedule 3, section 2(5) of the RTI Act.

¹⁵ Schedule 3, section 2(2)(b) of the RTI Act.

16. Access to that information may therefore be refused.¹⁶

Applicant's submissions

17. I conveyed the above reasoning to the applicant by letter dated 22 April 2022. In reply, the applicant relevantly submitted¹⁷ as follows:

I fail to see how feedback from the Department regarding the implementation drawbacks of a cabinet decision AFTER it has been made would be exempt and I ask you to review the documents with this in mind. The precedent such a decision would make would be widely felt and something I would need to raise in Parliament because it would lead to most RTI's being denied as everything could be linked back to an original cabinet decision.

18. As I advised the applicant in subsequent emails, the email in issue does not comprise 'feedback' from the Department, but a communication from the Office of the Minister for Transport and Main Roads;¹⁸ and, regardless, whether documents created after a Cabinet meeting comprise Cabinet exempt information under schedule 3, section 2(1)(b) of the RTI Act will be a question of fact and degree, to be assessed on a case by case basis and having regard to all relevant circumstances.¹⁹

19. It is perhaps also worth noting that, as I further advised the applicant,²⁰ OIC deals with many applications for external review in any given year that involve documents ultimately referable to a Cabinet decision or decisions, but which matters do not involve or give rise to Cabinet exemption claims.

20. In any event, I am obliged to '*...take the Act as it stands... [and] not embark on political questions about the scope of the Act*'.²¹ In this case, having reviewed the document in issue, and considered relevant matters such as the timing of its creation and its contents, I am satisfied that its disclosure would reveal a consideration of Cabinet, or otherwise prejudice the confidentiality of Cabinet considerations or operations. Accordingly, I am satisfied that the information in issue comprises exempt information to which access may be refused, under sections 47(3)(a) and 48, and schedule 3, section 2(1)(b) of the RTI Act.

Decision

21. I affirm the decision under review.

22. I have made this decision under section 110 of the RTI Act, as a delegate of the Information Commissioner, under section 145 of the RTI Act.

A Rickard

Acting Right to Information Commissioner

Date: 25 May 2022

¹⁶ Section 47(3)(a) of the RTI Act.

¹⁷ Submissions dated 26 April 2022.

¹⁸ Email dated 4 May 2022.

¹⁹ Email dated 27 April 2022.

²⁰ As above.

²¹ *Webb v Information Commissioner* [2021] QCATA 116 at [16] (McGill J).

APPENDIX**Significant procedural steps**

Date	Event
1 December 2021	OIC received the applicant's application for external review. OIC requested preliminary documents from the Department.
10 December 2021	OIC received requested preliminary documents from the Department.
21 December 2021	OIC notified the applicant and Department that the external review application had been accepted. OIC requested the information in issue from the Department.
17 January 2022	OIC received the information in issue from the Department.
24 March 2022	OIC conveyed a preliminary view to the Department.
16 April 2022	The Department replied to OIC's preliminary view, agreeing to release some information.
22 April 2022	OIC requested that the Department release relevant information. OIC conveyed a preliminary view to the applicant that access to some information may be refused.
26 April 2022	The applicant replied to OIC's preliminary view, generally accepting that view but requesting access to the information in issue.
27 April 2022	OIC reiterated to the applicant the preliminary view that access to the information in issue may be refused.
29 April 2022	The applicant requested a formal written decision.