



## Decision and Reasons for Decision

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<b>Citation:</b>	<b><i>Frecklington, MP and Public Service Commission [2020] QICmr 6 (11 February 2020)</i></b>
<b>Application Number:</b>	<b>314829</b>
<b>Applicant:</b>	<b>Mrs Deb Frecklington MP, Leader of the Opposition</b>
<b>Respondent:</b>	<b>Public Service Commission</b>
<b>Decision Date:</b>	<b>11 February 2020</b>
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - EXECUTIVE COUNCIL INFORMATION - recruitment and selection report - whether information brought into existence for briefing or use of Governor, Minister or chief executive in relation to information submitted to Executive Council - whether exempt information to which access may be refused - sections 47(3)(a) and 48 and schedule 3, section 3(1)(c) of the <i>Right to Information Act 2009 (Qld)</i></b>

### REASONS FOR DECISION

#### Summary

1. The applicant applied to the Public Service Commission (**PSC**) under the *Right to Information Act 2009 (Qld)* (**RTI Act**) for access to the '*Recruitment and Selection Report for the Under Treasurer's role. . . relevant to the current UT.*'
2. PSC refused access<sup>1</sup> to the requested document (**Report**), on the grounds it comprised exempt information,<sup>2</sup> as Executive Council information.<sup>3</sup>
3. PSC's decision was justified.<sup>4</sup> The Report comprises exempt information, to which access may be refused.

#### Background

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

#### Reviewable decision

5. The decision under review is the internal review decision dated 10 September 2019.

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<sup>1</sup> Via decision of the Department of Premier and Cabinet (**Department**), under delegation from PSC.

<sup>2</sup> Sections 47(3)(a) and 48 of the RTI Act.

<sup>3</sup> Schedule 3, section 3(1)(c) of the RTI Act.

<sup>4</sup> PSC has the onus of establishing that the decision to refuse access was justified or that the information commissioner should give a decision adverse to the applicant: section 87 of the RTI Act.

## Evidence considered

6. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including the footnotes and Appendix).
7. I have also had regard to the *Human Rights Act 2019* (Qld),<sup>5</sup> 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,<sup>6</sup> 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.*'<sup>7</sup>

## Information in issue

8. The information in issue comprises the Report.

## Issue for determination

9. The issue for determination in this review is whether the Report comprises exempt information under schedule 3, section 3(1)(c) of the RTI Act, to which access may be refused under section 47(3)(a) of the RTI Act.

## Relevant law

10. The primary object of the RTI Act is to give a right of access to information in the government's possession or under the government's control unless, on balance, it is contrary to the public interest to give the access.<sup>8</sup> The Act is to be applied and interpreted to further this primary object.<sup>9</sup>
11. Section 23 of the RTI Act gives effect to the Act's primary object, by conferring a right to be given access to documents. This right is subject to other provisions of the RTI Act,<sup>10</sup> including grounds on which access may be refused.<sup>11</sup> These grounds relevantly allow an agency to refuse access to information, to the extent it comprises exempt information.<sup>12</sup>
12. Types of exempt information are set out in schedule 3 of the RTI Act. For the purposes of this decision, the type stated in schedule 3, section 3(1)(c) is relevant:

(1) *Information is exempt information if—*

...

(c) *it was brought into existence for briefing, or the use of, the Governor, a Minister or a chief executive in relation to information—*

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<sup>5</sup> HR Act - which came into force on 1 January 2020.

<sup>6</sup> *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 [11].

<sup>7</sup> XYZ, [573].

<sup>8</sup> Section 3(1) of the RTI Act.

<sup>9</sup> Section 3(2) of the RTI Act.

<sup>10</sup> Section 23(1) of the RTI Act.

<sup>11</sup> Section 47 of the RTI Act. The grounds are to be interpreted narrowly (section 47(2)(a) of the RTI Act), and the Act is to be interpreted with a pro-disclosure bias (section 44 of the RTI Act).

<sup>12</sup> Section 47(3)(a) and 48 of the RTI Act.

- (i) submitted to Executive Council; or
- (ii) that is proposed, or has at any time been proposed, to be submitted to Executive Council by a Minister ...

13. Schedule 3, section 3(2) of the RTI Act qualifies the above exemption, by providing that schedule 3, section 3(1) 'does not apply to information officially published by decision of the Governor in Council.'
14. Further, schedule 3, section 3(4) of the RTI Act provides that a '**chief executive means a chief executive of a unit of the public sector**' and defines the concept of 'submit' inclusively:

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

## Findings

15. To qualify for exemption under schedule 3, section 3(1)(c) of the RTI Act, information must:
- have been brought into existence for the dominant purpose<sup>13</sup> of briefing, or the use of, the Governor, a Minister or a chief executive;
  - in relation to<sup>14</sup> information submitted to Executive Council.
16. These are matters of fact, to be assessed objectively.<sup>15</sup>
17. Having made such an assessment, I am satisfied that the Report meets the above requirements.
18. The process for appointment of the Under Treasurer and applicable statutory provisions are set out in the decision under review.<sup>16</sup> For present purposes, it is sufficient to note that such an appointment is ultimately a matter for the Governor in Council, acting on the advice of the Executive Council.<sup>17</sup>
19. I have reviewed the Report, together with an associated Executive Council minute (**Minute**) concerning the appointment of the Under Treasurer. The Report informs the Minute, and I consider that the dominant – if not sole – reason the Report was brought into existence was for briefing, or the use of, the Governor, a Minister or a chief executive in relation to information the Minute establishes was submitted to Executive Council.

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<sup>13</sup> *Kelsall and Department of Main Roads* (Unreported, Queensland Information Commissioner, 21 August 2008), [39] (**Kelsall**), citing *Little; Cantoni and Department of Natural Resources* (1996) 3 QAR 170 (**Little**). While these decisions were made under the repealed *Freedom of Information Act 1992* (Qld) (**FOI Act**), the relevant exemption provision (section 37(1)(c) of the FOI Act) was substantially similar to schedule 3, section 3(1)(c) of the RTI Act, and in my view the Information Commissioner's reasoning – particularly that in *Little* concerning adoption of a dominant purpose test (at [32]-[34]) – is applicable to the RTI Act. The 'dominant purpose' in this context is the 'ruling, prevailing, most influential': *Little*, [34]. I note that the decision under review relied on each decision, while the applicant relied on *Kelsall* in submissions dated 24 January 2020.

<sup>14</sup> I.e, the information must have a relevant relationship with information submitted to Executive Council: *Kelsall*, [43]-[44], citing *O'Grady v Northern Queensland Company Ltd* (1989) 169 CLR 356 at paragraph 367.

<sup>15</sup> *Kelsall*, [40].

<sup>16</sup> See page 3, referring to section 92 of the *Public Service Act 2008* (Qld) concerning appointments of chief executives, and noting relevant gazettal particulars.

<sup>17</sup> The role of and relationship between these bodies is concisely described in a 'Queensland Parliament Factsheet', *Governor In Council and Executive Council in Queensland*, available at [https://www.parliament.qld.gov.au/documents/explore/education/factsheets/Factsheet\\_4.2\\_ExecutiveCouncil.pdf](https://www.parliament.qld.gov.au/documents/explore/education/factsheets/Factsheet_4.2_ExecutiveCouncil.pdf) (accessed 11 January 2020). Pertinently, the Factsheet notes that '*the Executive Council is established by Section 48 of the Constitution of Queensland 2001. The term 'Governor in Council' is defined as meaning 'the Governor acting with the advice of the Executive Council' by virtue of Section 27 of the Constitution of Queensland 2001.*

20. There is nothing before me to suggest that the Report has been officially published by decision of the Executive Council, and thus the exception contained in schedule 3, section 3(2) does not apply.
21. The Report therefore comprises exempt information within the meaning of schedule 3, section 3(1)(c) of the RTI Act, to which access may be refused under section 47(3)(a) of the RTI Act.

### ***Applicant's submissions***

22. I conveyed the gist of the above reasoning to the applicant by letter dated 21 January 2020. The applicant did not accept that reasoning, submitting that:<sup>18</sup>

*... the selection report should be a properly considered as a tool for recording evidence, not a communication to provide information to the Executive Council.*

*...the dominant purpose of the selection report is to record the decision making process by the selection panel to determine the candidate who is chosen for appointment. The selection report is the tool by which the matrix of experience, qualifications and variable traits is assessed and various candidates are ranked and proof of the weighting is recorded. The selection report also provides evidence of the selection panel's views and reflections of the interviews.*

23. On the first point, the scope of the exemption prescribed in schedule 3, section 3(1)(c) of the RTI Act extends beyond '*communication[s] to provide information to the Executive Council*',<sup>19</sup> but is drawn more broadly to encompass information brought into existence for briefing or use by prescribed persons, in relation to Executive Council information. As explained above, I am satisfied that the Report comprises information coming within the scope of this exemption.
24. As to the balance of the above submission, I am satisfied that the Report was, as I have found above, brought into existence for one or more of the qualifying purposes stated in schedule 3, section 3(1)(c) of the RTI Act. Purposes such as those nominated by the applicant – recording selection panel determinations and evaluations – are complementary, subsidiary or secondary to these prevailing qualifying purposes.
25. In this context, that the Report may record or evidence '*views and reflections*' is not determinative of the question as to whether it attracts exemption under schedule 3, section 3(1)(c) of the RTI Act; what is material is the purpose for which such matters were recorded or '*brought into existence*'. I am, to repeat, satisfied that this purpose was one or more of those required to establish exemption.
26. The applicant further submitted that '*the decision to appoint the current Under Treasurer has been made public. The exemption in subsection (2) applies. There is no confidentiality of the EC decision making process to protect by exempting this report.*'<sup>20</sup>
27. The operation of the exception stated in schedule 3, section 3(2) of the RTI Act is addressed in paragraph 20 above. To recap, it does not apply.
28. As for '*confidentiality*', there is nothing before me to suggest that the Report is anything other than confidential as against the applicant. In any event, this is not a requirement that needs to be met in order to establish exemption under schedule 3, section 3(1)(c) of the RTI Act.

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<sup>18</sup> Submissions dated 24 January 2020.

<sup>19</sup> Which, assuming such communications were in documentary form, would likely qualify for exemption under schedule 3, section 3(a) or (b) of the RTI Act.

<sup>20</sup> Submissions dated 24 January 2020.

29. Finally, the applicant submits that:<sup>21</sup>

*...there is an overwhelming public interest in ensuring the appointment of the head of Queensland Treasury occurred in a proper and fair process free from political interference. This is arguably one of two of the most senior positions of government, appointed by the government of the day. To prevent proper scrutiny of the appointment process would be very damaging to our democracy as it would severely undermine faith in our public institution.*

30. Establishing that information is exempt information precludes consideration of public interest matters. This is because Parliament has prescribed that if information is exempt information, it considers that the information's disclosure would, on balance, be contrary to the public interest.<sup>22</sup>

## **DECISION**

31. I affirm the decision under review. The Report comprises exempt information, to which access may be refused under section 47(3)(a) and section 48 of the RTI Act.

32. 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.

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**Louisa Lynch**  
**Right to Information Commissioner**

**Date: 11 February 2020**

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<sup>21</sup> Submissions dated 24 January 2020.

<sup>22</sup> Section 48(2) of the RTI Act. While agencies have a discretion to release exempt information (section 48(3) of the RTI Act), OIC does not: section 105(2) of the RTI Act.

## APPENDIX

### Significant procedural steps

Date	Event
10 September 2019	OIC received the application for external review.
13 September 2019	OIC requested procedural documents from the Department (on behalf of PSC).
16 September 2019	The Department supplied the requested documents.
27 September 2019	OIC advised the applicant and the Department that the application for external review had been accepted. OIC requested that the Department supply a copy of the Report in issue.
15 October 2019	The Department provided a copy of the Report.
20 November 2019	OIC requested that the Department provide a copy of an Executive Council Minute ( <b>Minute</b> ).
18 December 2019	The Department provided a copy of the Minute.
21 January 2020	OIC communicated a preliminary view to the applicant.
24 January 2020	The applicant provided submissions in reply to OIC's preliminary view.