



Decision and Reasons for Decision

Application Number: 310430

Applicant: 15ZPBD

Respondent: Department of Justice and Attorney-General

Decision Date: 11 January 2012

Catchwords: **RIGHT TO INFORMATION – APPLICATION FOR ACCESS TO INFORMATION - REFUSAL OF ACCESS – applicant sought information about gaming machine statistics from the Department of Employment, Economic Development and Innovation – third party objected to disclosure of information – whether the information comprised exempt information – section 47(3)(a) and 48 of the *Right to Information Act 2009* (Qld) – whether disclosure of the information would, on balance be contrary to the public interest – section 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)**

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REASONS FOR DECISION

Summary

1. The access applicant sought access¹ from the Department of Employment, Economic Development and Innovation (**Department**)² under the *Right to Information Act 2009* (Qld) (**RTI Act**) to certain information concerning the profit, taxes and turnover of gaming machines in Queensland hotels, clubs and casinos, including:³
...
 5. *Total combined profit, taxes and turnover in the 2007, 2008 and 2009 calendar years of the top 10 clubs as a group for gaming machine profit and the names and locations in order of profit of those top 10 clubs.*
2. The Department identified one page responsive to this part of the access application (the **Relevant Document**).
3. After consultation with relevant parties, the Department decided⁴ to grant full access to the Relevant Document as it neither comprises exempt information, nor would its disclosure, on balance, be contrary to the public interest.
4. The applicant sought internal review of this decision⁵ and the Department affirmed its original decision on internal review.⁶
5. The applicant then applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's internal review decision.⁷
6. Having considered all submissions and information before me, I am satisfied that the Relevant Document does not comprise exempt information, nor would its disclosure, on balance, be contrary to the public interest.

Reviewable decision

7. The decision under review is the Department's internal review decision dated 22 September 2010.

Information sought

8. The Relevant Document comprises three lists of the ten most profitable club gaming machine venues in Queensland for 2007, 2008 and 2009. The venues are ranked in order of profitability and are identified by venue name and address. Each list also contains three figures comprising the aggregate dollar amounts of turnover, metered win and tax across the top ten venues.

Issues in this review

9. The applicant does not accept OIC's preliminary view⁸ that the Relevant Document does not comprise exempt information and its disclosure would not, on balance, be contrary to the public interest and has provided submissions in support of its case.⁹
10. Therefore, the issues for determination are whether:
 - the Relevant Document comprises exempt information; and
 - disclosure of the Relevant Document would, on balance, be contrary to the public interest.

Significant procedural steps

11. Significant procedural steps relating to the application and external review are set out in the Appendix.

Evidence relied upon

12. In reaching this decision, I have taken the following into account:
 - the access application and supporting material
 - the Department's consultation letter to the applicant¹⁰ and the applicant's response¹¹ objecting to disclosure of the Relevant Document
 - the Department's original decision to the access applicant¹² and its notice of decision to the applicant as a relevant third party¹³
 - the applicant's applications for review and supporting material
 - submissions provided by the applicant
 - file notes of telephone conversations between OIC staff and representatives of the applicant and Department officers
 - the Relevant Document
 - the Queensland Gaming Commission Annual Reports for 2007/2008 and 2008/2009¹⁴ and other information publicly available on the Office of Liquor and Gaming Regulation (**OLGR**) website¹⁵
 - the applicant's annual reports for 2009/2010 and 2010/2011, published on the applicant's website
 - relevant provisions of the RTI Act, the *Information Privacy Act 2009* (Qld) (**IP Act**) and the *Gaming Machine Act 1991* (Qld) (**GM Act**)
 - previous decisions of the Information Commissioner of Queensland and other relevant case law as identified in this decision.

The law

Onus on external review

13. Section 87(2) of the RTI Act provides that on external review, if the reviewable decision is a '*disclosure decision*',¹⁶ the participant in the external review who opposes the disclosure decision has the onus of establishing that a decision not to disclose the information is justified or that the Information Commissioner should give a decision adverse to the access applicant.

Right to access information

14. Under section 23 of the RTI Act, a person has a right to be given access to documents of an agency. However, this right is subject to a number of exclusions and limitations, including grounds for refusal of access. These grounds are contained in section 47 of the RTI Act.
15. Sections 47(3)(a) and 48 of the RTI Act provide that access may be refused to a document to the extent that it comprises '*exempt information*'. Schedule 3 sets out the types of information which the Parliament has considered to be '*exempt information*' as its disclosure would, on balance, be contrary to public interest.
16. Sections 47(3)(b) and 49 of the RTI Act provide a ground for refusal of access where disclosure of information would, on balance, be contrary to the public interest. In determining whether disclosure of the information sought would, on balance, be contrary to the public interest I must:¹⁷
- identify and disregard irrelevant factors
 - identify factors favouring disclosure of the information in the public interest
 - identify factors favouring nondisclosure of the information in the public interest
 - balance the relevant factors favouring disclosure and nondisclosure
 - decide whether disclosure of the information would, on balance, be contrary to public interest.
17. I will examine in turn whether the Relevant Document comprises exempt information and/or whether its disclosure would, on balance, be contrary to the public interest.

Findings

Whether the Relevant Document comprises exempt information

18. The applicant submits that the Relevant Document comprises exempt information, the disclosure of which could reasonably be expected to endanger a person's life or physical safety¹⁸ or the security of a building, structure or vehicle.¹⁹
19. For information to qualify for exemption on these grounds, it must be established that disclosure '*could reasonably be expected to*' result in the anticipated outcome. The term '*could reasonably be expected to*' requires the relevant expectation be reasonably based; that it is neither irrational, absurd or ridiculous,²⁰ nor merely a possibility.²¹ It is not necessary for me '*to be satisfied upon a balance of probabilities*' that disclosing the document will produce the anticipated result.²² Whether the expected consequence is reasonable requires an objective examination of the relevant evidence.²³ Importantly, the expectation must arise as a result of disclosure, rather than in other circumstances.²⁴

20. In relation to the effect that disclosure of the Relevant Document could have on law enforcement and public safety, the applicant makes submissions including that:
- disclosure would increase the likelihood of the club being targeted for criminal activity as it would reveal:
 - the high profitability of the club
 - the estimated amount of cash held at the club
 - estimated gaming turnover figures; and
 - information of interest to criminals and “outside persons” regarding the club’s activities
 - the nature and profile of the club already render it a target for criminal activity and the club has been the subject of various criminal operations
 - there is a “fundamental difference” between knowing that a venue has a high cash turnover and being able to make reasonably accurate estimates of that actual turnover
 - disclosure could pose a risk to staff, patrons, passers-by and nearby residents and the security of the club.
21. I note the Department’s view²⁵ that disclosure of the Relevant Document would not increase the risk of theft at the club.
22. With respect to the applicant’s submission that disclosure of the Relevant Document would result in an increased likelihood of criminal activity which could reasonably be expected to endanger a person’s life or physical safety or the security of a building, structure or vehicle, I am not satisfied on the evidence before me that such an expectation is reasonably based given that:
- information which is currently publicly available reveals:
 - that the club is “highly profitable” and fell within the top ten most profitable club gaming venues for 2008 and 2009²⁶
 - that the club is one of only ten club gaming venues in Queensland with the maximum number of 280 electronic gaming machines (**EGMs**),²⁷ the average number of EGMs among club gaming venues being 45²⁸
 - the club’s estimated gaming turnover for the years 2008, 2009, 2010 and 2011²⁹
 - the only information in the Relevant Document that is not currently publicly available is the top ten most profitable club gaming venues for 2007, aggregate figures and ranking of venues within the top ten
 - the club’s actual or estimated turnover (most significantly for 2007 which is the only relevant year not mentioned in the club’s annual reports) is not reasonably ascertainable from information set out in the Relevant Document
 - the Relevant Document does not contain any information that could reveal the estimated amount of cash held at the club; and
 - the information in the Relevant Document is three to five years old and does not reflect the current rankings or aggregate figures of the clubs
 - as submitted by the applicant, the nature of club already renders it a target for criminal activity.
23. After carefully considering all of the relevant information before me including gaming information which is currently publicly available, I am satisfied that:

- there is insufficient evidence before me to conclude that disclosure of the Relevant Document could reasonably be expected to increase the likelihood of criminal activity at the club; and
- the Relevant Document does **not** comprise exempt information under the RTI Act, the disclosure of which could reasonably be expected to endanger a person's life or physical safety³⁰ or the security of a building, structure or vehicle.³¹

Whether the Relevant Document comprises information, the disclosure of which would, on balance, be contrary to the public interest

24. The applicant submits that OIC's preliminary view³² demonstrates a misunderstanding and misapplication of the public interest test outlined in section 47(3)(b) of the RTI Act. In short, the applicant submits that, *"the decision maker here... is restricted in considering the public interest to the matters specifically enumerated in Schedule 4 [of the RTI Act]"*.
25. I note that the wording of the legislation makes it clear that the public interest factors outlined in schedule 4 of the RTI Act are not a finite list and I refer specifically to the various subsections of section 49(3) of the RTI Act which require consideration of public interest factors, *'including any factor mentioned in schedule 4...'*
26. On this basis, I am satisfied that a proper assessment of public interest regarding disclosure of the Relevant Document is not confined to the consideration of public interest factors set out in schedule 4 of the RTI Act.

Irrelevant factors

27. The applicant raises concerns about the purpose of the access application and the use to which the information contained in the Relevant Document may be put should it be disclosed.
28. Specifically, the applicant submits that:³³
 - the access applicant does not suggest that the information will be used to further openness in government; and
 - the purpose of the access application appears to be *"to create an occasion of publicity, by... using the RTI process in order to give the information ultimately disclosed an appearance of being more authoritative or as being more deserving of public attention because it was sourced from Government and obtained under an RTI process"*.
29. In the circumstances of this review and after careful consideration of these submissions, I am satisfied that these considerations which concern the purpose and intent of the access application are irrelevant to a proper assessment of public interest factors. No other irrelevant factors arise on the information before me.

Factors favouring disclosure of information in the public interest

30. On the information before me, I am satisfied that the public interest factors favouring disclosure of the Relevant Document include that disclosure of information relating to gaming statistics could reasonably be expected to:

- promote open discussion of public affairs and enhance the Government's accountability³⁴
- contribute to positive and informed debate on important issues or matters of serious interest³⁵
- reveal whether OLGR is effectively satisfying its responsibility for '*maintaining the integrity and probity of the gambling industry in Queensland and ensuring that, on balance, the state and the community benefit from gambling*';³⁶ and
- promote OLGR's "vision" as '*a proactive and responsive regulatory agency*'.³⁷

Factors favouring nondisclosure of information in the public interest

31. On the information before me, I am satisfied that the public interest factors favouring nondisclosure of the Relevant Document raised by the applicant include that disclosure of this information:
- could reasonably be expected to prejudice security, law enforcement or public safety of the club
 - could reasonably be expected to pose a threat to the health, safety and security of the club's staff, patrons, passers-by and nearby residents as well as the club itself
 - would disclose information concerning the business, professional, commercial or financial affairs of a person and could reasonably be expected to have an adverse effect on those affairs
 - could reasonably be expected to prejudice the private, business, professional, commercial or financial affairs of the applicant
 - could reasonably be expected to prejudice trade secrets, business affairs or research of an agency or person; and
 - would attract attention and scrutiny from competitors and could therefore have an adverse effect on the club's "*success and uniqueness*".

Balancing factors favouring disclosure and nondisclosure in the public interest

32. I am mindful of the importance of promoting open discussion of public affairs and the accountability of government³⁸ and contributing to positive and informed debate on important issues or matters of serious interest.³⁹
33. The applicant submits that disclosure of the Relevant Document would not serve the public interest because:
- the Relevant Document concerns the affairs of a corporation with no connection to government
 - no aspect of the information could have any possible relevance to the functions of government
 - the applicant was compelled to provide relevant information to the Department to satisfy its compliance obligations under the GM Act, however, the information was not provided on the understanding that it would be available under the RTI Act⁴⁰
 - no nexus exists between the Relevant Document and government accountability or the advancement of discussion of public affairs; and
 - disclosure could not contribute to debate on important issues or matters of serious interest, when "*those issues and matters must be "capable of touching upon governmental functions and affairs"*".⁴¹

34. With respect to the applicant's submission that the information set out in the Relevant Document has no relevance to the functions of government, I note the object of the GM Act states that:⁴²

1A Object

- (1) *The object of this Act is to ensure that, on balance, the State and the community as a whole benefit from gaming machine gambling.*
- (2) *The balance is achieved by allowing gaming machine gambling subject to a system of regulation and control designed to protect players and the community through—*
 - (a) *ensuring the integrity and fairness of games; and*
 - (b) *ensuring the probity of those involved in the conduct of gaming machine gambling; and*
 - (c) *minimising the potential for harm from gaming machine gambling*

35. I also note the applicant's acknowledgment that information which has been incorporated into the Relevant Document was provided to the Department in accordance with the applicant's compliance obligations under the GM Act.

36. On the basis of the matters set out above, I am satisfied that the information has a strong connection to matters of serious interest and concern to the community which Parliament has sought to address partially through the operation of the GM Act.

37. I also note the Department's submissions⁴³ including that:

- the Relevant Document does not detail individual turnover, metered win and tax for each club in the list, rather their position within the group
- there is a strong public interest in members of the public being informed on gaming machine statistics held by government, especially given the recent release of the Australian Government's 2010 Productivity Commission Report into Gambling⁴⁴
- OLGR is responsible for maintaining the integrity and probity of the gambling industry in Queensland and ensuring that, on balance, the state and the community benefit from gambling⁴⁵
- NSW OLGR has information relating to NSW licensed premises and gaming machines currently available for purchase via website; and
- while the information comprises business affairs, it is very similar in nature to information publicly available on both the OLGR website and the club's own website and therefore no adverse effect would result from disclosure.

38. In short, the Department submits that disclosure of the information set out in the Relevant Document could reasonably be expected to:

- promote open discussion of public affairs and enhance the Government's accountability
- contribute to informed debate on important issues or matters of serious interest
- inform the community of the Government's operations; and
- provide effective oversight of public funds.

39. After carefully considering all of the information which is currently before me, I am satisfied that:

- the disclosure of statistics such as those set out in the Relevant Document could reasonably be expected to promote open discussion of public affairs, enhance Government accountability⁴⁶ and contribute to positive and informed debate on matters of serious interest
 - disclosure will allow for increased scrutiny of OLGR
 - there is no discordance between the RTI Act and GM Act; and
 - these factors favouring disclosure of the Relevant Document should be afforded significant weight in the circumstances of this review.
40. As to the public interest factors favouring nondisclosure based on prejudice to security, law enforcement and public safety,⁴⁷ I repeat and rely upon the reasons set out in paragraphs 22-23 of this decision and find that these public interest factors should be afforded little or no weight in the circumstances of this review.
41. With respect to the public interest factors favouring nondisclosure based on the effect disclosure could reasonably be expected to have on the business, professional, commercial or financial affairs of the applicant,⁴⁸ I note that:
- the Relevant Document is now several years old and does not detail individual turnover, metered win and tax for each club on the list⁴⁹
 - the club's success is already a matter of public knowledge given the information which is currently publicly available on both the OLGR and club's websites
 - while the information does reveal that the club is among the ten most profitable club gaming venues in Queensland for the relevant periods, this information is already publicly available for two of the relevant three years
 - while disclosure of the Relevant Document would additionally reveal the club's ranking within the top ten most profitable venues for the third year and the aggregate figures relevant to all ten venues for each year, there is no evidence before me which supports the applicant's submission that disclosure of this additional information could reasonably be expected to have the adverse impact claimed; and
 - the Relevant Document does not reveal information concerning the club's "intellectual property", research or trade secrets.
42. On the basis of the matters set out above, I am satisfied that these factors favouring nondisclosure of the Relevant Document should be afforded little or no weight in the circumstances of this review.
43. I note the applicant's submission that gaming turnover has a significant impact upon and close relationship with individual incomes of persons involved with the club and therefore, disclosure of the Relevant Document:
- would disclose personal information of individuals
 - could breach the privacy of individuals; and
 - could reasonably be expected to prejudice the private, business, professional, commercial or financial affairs of the applicant.
44. With respect to this submission, I note that section 12 of the IP Act defines '*personal information*' for the purposes of the IP and RTI Acts and requires that an individual's identity be apparent or reasonably ascertainable from the relevant information for it to comprise '*personal information*'.
45. Based on the content of the Relevant Document and the matters set out above, I am satisfied that:

- disclosure of the Relevant Document:
 - would not disclose personal information of individuals
 - would not breach the privacy of individuals
 - could not reasonably be expected to prejudice the private, business, professional, commercial or financial affairs of an individual; and
- these factors favouring nondisclosure of the Relevant Document should be afforded no weight in the circumstances of this review.

46. On balance and taking into account all of the matters set out above, I am satisfied that:

- the public interest factors favouring disclosure of the Relevant Document outweigh the public interest factors favouring nondisclosure; and
- disclosure of the Relevant Document would not, on balance, be contrary to the public interest.

DECISION

47. I affirm the Department's decision to grant access to the Relevant Document in accordance with the right of access conferred by section 23 of the RTI Act and find that the Relevant Document:

- does not comprise exempt information under section 47(3)(a) of the RTI Act; and
- would not, on balance, be contrary to the public interest to be disclosed under section 47(3)(b) of the RTI Act.

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

Jenny Mead
Right to Information Commissioner

Date: 11 January 2012

APPENDIX**Significant procedural steps**

Date	Event
12 May 2010	Access applicant sought access to information about profit, taxes and turnover of gaming machines in Queensland hotels, clubs and casinos
11 June 2010	Department sought the applicant's views on disclosure of the Relevant Document
25 June 2010	The applicant objected to disclosure of the Relevant Document
1 July 2010	Department decided to grant access in full to three pages of information identified as relevant to the application, including the Relevant Document because disclosure would not, on balance, be contrary to the public interest
21 July 2010	Department advised the applicant of its decision to grant access to relevant information including the Relevant Document because disclosure would not, on balance, be contrary to the public interest
23 August 2010	Applicant applied to Department for internal review of its decision to grant access to the Relevant Document
22 September 2010	On internal review, the Department affirmed its decision that disclosure of the Relevant Document would not, on balance, be contrary to the public interest.
25 October 2010	Applicant applied to OIC for external review of Department's internal review decision
5 November 2010	Information Commissioner decided to exercise the discretion to extend the timeframe in which an applicant can apply for external review under section 88(1)(d) of the RTI Act
10 January 2011	In a telephone conversation between OIC staff and representatives of applicant, OIC conveyed its preliminary view that the applicant had not discharged its onus under section 87(2) of the RTI Act and that disclosure of the Relevant Document would not, on balance, be contrary to the public interest. Representatives of the applicant made oral submissions
19 October 2011	By correspondence, OIC conveyed its preliminary view that the Relevant Document does not comprise exempt information; and that its disclosure would not, on balance, be contrary to the public interest
24 October 2011	By correspondence, the applicant's representatives sought an extension of time in which to provide its response to the OIC's preliminary view
25 October 2011	By correspondence, the applicant's representatives submitted that the applicant did not accept OIC's preliminary view and confirmed its request for an extension of time in which to provide its submissions in response to the OIC's preliminary view
3 November 2011	By correspondence, the applicant's representatives provided submissions in support of the applicant's objection to OIC's preliminary view

¹ By application dated 7 May and validated on 12 May 2010.

² Machinery of government changes in February 2011 transferred relevant responsibility for the Office of Liquor and Gaming Regulation from the Department of Employment, Economic Development and Innovation (**DEEDI**) to the Department of Justice and Attorney-General (**DJAG**). Accordingly, existing RTI applications and reviews involving certain applications made to DEEDI before the machinery of government changes are to be managed by DJAG, including this external review. For ease of reference, I will simply refer to 'the Department'.

³ According to the revised scope of the access application, confirmed in the Department's decision dated 1 July 2010.

⁴ By decision dated 1 July 2010.

⁵ By letter dated 23 August 2010.

⁶ See internal review decision dated 22 September 2010.

⁷ By external review application dated 25 October 2010 and received by OIC on 26 October 2010.

⁸ Conveyed by telephone on 10 January 2011 and by letter to the applicant dated 19 October 2011.

⁹ By telephone conversation on 10 January 2011 and by correspondence dated 3 November 2011.

¹⁰ Dated 11 June 2010.

¹¹ Dated 25 June 2010.

¹² Dated 1 July 2010.

¹³ Dated 21 July 2010.

¹⁴

available at
<http://www.olgr.qld.gov.au/resources/gamDocs/QldGamingAnnualReport2008.pdf> and
<http://www.olgr.qld.gov.au/resources/gamDocs/QldGamingCommAR200809.pdf> respectively.

¹⁵ <http://www.olgr.qld.gov.au/>.

¹⁶ 'Disclosure decision' is defined in section 87(3)(a) of the RTI Act as a decision to disclose a document or information contrary to the views of a relevant third party obtained under section 37 of the RTI Act.

¹⁷ Section 49(3) of the RTI Act.

¹⁸ Sections 47(3)(a), 48 and schedule 3, sections 10(1)(c) of the RTI Act.

¹⁹ Sections 47(3)(a), 48 and schedule 3, sections 10(1)(h) of the RTI Act.

²⁰ *Attorney-General v Cockcroft* (1986) 64 ALR 97 at 106.

²¹ *Murphy and Treasury Department* (1995) 2 QAR 744.

²² *Sheridan and South Burnett Regional Council (and Others)* (Unreported, Queensland Information Commissioner, 9 April 2009).

²³ *Murphy and Treasury Department* (1995) 2 QAR 744 at paragraphs 45-47.

²⁴ *Murphy and Treasury Department* (1995) 2 QAR 744 at paragraph 54.

²⁵ At page 4 of the Department's notice of decision to the applicant, dated 21 July 2010.

²⁶ See the Queensland Gaming Commission Annual Reports 2007-2008 and 2008-2009, available at:

<http://www.olgr.qld.gov.au/resources/gamDocs/QldGamingAnnualReport2008.pdf> and
<http://www.olgr.qld.gov.au/resources/gamDocs/QldGamingCommAR200809.pdf> respectively.

²⁷ See OLGR statistics available at:

<http://www.olgr.qld.gov.au/resources/index.php/gamingstatistics/search/sites-all/>

²⁸ See OLGR statistics available at:

<http://www.olgr.qld.gov.au/resources/index.php/gamingstatistics/search/stats-egm-clubs/DEC%202011/65d5c252b3d2fb01c5cdf21e055cf81d>.

²⁹ I refer to the club's annual reports for 2009/2010 and 2010/2011 available on its website.

³⁰ Sections 47(3)(a), 48 and schedule 3, sections 10(1)(c) of the RTI Act.

³¹ Sections 47(3)(a), 48 and schedule 3, sections 10(1)(h) of the RTI Act.

³² Dated 19 October 2011.

³³ See submissions dated 3 November 2011.

³⁴ Schedule 4, part 2, item 1 of the RTI Act.

³⁵ Schedule 4, part 2, item 2 of the RTI Act.

³⁶ As set out on the OLGR website at:

<http://www.olgr.qld.gov.au/aboutUs/organisation/index.shtml>.

³⁷ See OLGR website at: <http://www.olgr.qld.gov.au/aboutUs/organisation/priorities/index.shtml>

³⁸ Schedule 4, part 2, item 1 of the RTI Act.

³⁹ Schedule 4, part 2, item 2 of the RTI Act.

⁴⁰ I note in respect of this submission that the applicant makes no claim that the information was provided to the Department subject to a mutual understanding of confidentiality.

⁴¹ At 13(a) of the applicant's submissions dated 3 November 2011..

⁴² Section 1A of the GM Act.

⁴³ See Department's notice of decision to the applicant, dated 21 July 2010 and its internal review decision dated 22 September 2010.

⁴⁴ Relevantly, I note the applicant's view that the material already in the public domain strikes a balance between competing interests of the access applicant and the applicant. In other words, disclosure of the Relevant Document is not necessary to further the public interest.

⁴⁵ I also note the applicant's view that the RTI Act creates discordance with the GM Act and second guesses the Queensland Gaming Commission as the independent government body vested with relevant functions in relation to gaming information.

⁴⁶ Schedule 4, part 2, item 1 of the RTI Act.

⁴⁷ Including threats posed to the health, safety and security of relevant staff, patrons, passers-by and nearby residents as well as to the applicant.

⁴⁸ Including prejudice to trade secrets or research, and attention and scrutiny from competitors which the applicant submits could have an adverse effect on the club's "*success and uniqueness*".

⁴⁹ As stated by the Department.