



Decision and Reasons for Decision

Application Number: 310716

Applicant: CH32GI

Respondent: Department of Justice and Attorney-General

Third Parties: Funeral Company 1
Funeral Company 2
Funeral Company 3
Funeral Company 4
Funeral Company 5
Funeral Company 6
Funeral Company 7

Decision Date: 22 November 2012

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - APPLICATION FOR ACCESS TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - application for company names, boundary reference numbers and pricing information set out in successful tender contracts for the conveyance and burial of human remains - whether the information comprises exempt information - whether disclosure of the information would found an action for breach of confidence - schedule 3 section 8 of the *Right to Information Act 2009* (Qld) - whether access may be refused under sections 47(3)(a) and 48 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION APPLICATION FOR ACCESS TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - information submitted by private sector companies in tendering for government work - whether access to tender pricing information may be refused on the basis that disclosure would, on balance, be contrary to the public interest - weight to be attributed to government accountability and prejudice to business affairs - whether access may be refused under sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Justice and Attorney-General (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for information relating to contracts awarded as a result of a tender process for the conveyance of human remains and burial or cremation of deceased persons, particularly pricing details set out in the contracts.
2. The Department decided to refuse access to the information under section 47(3)(f) of the RTI Act on the basis that it could be accessed on the Queensland Government eTender website and was therefore, publicly available under section 53 of the RTI Act.
3. The applicant applied to have the Department's decision externally reviewed by the Office of the Information Commissioner (**OIC**). On external review OIC identified that the particular documents containing the information sought by the applicant were not available on the eTender website.¹ The Department accepted this and did not object to the release of the information but suggested OIC consider consulting the successful tenderers.
4. In considering disclosure of the tender information under the RTI Act, OIC consulted with relevant successful tenderers. Of the 26 successful tenderers consulted through the course of the external review, seven of the successful tenderers maintained their objection to disclosure of their tender information on the basis that (i) the information comprises exempt information and/or (ii) disclosure would, on balance, be contrary to the public interest primarily citing prejudice to their competitive commercial affairs.
5. For the reasons set out below, the Department's decision to refuse access to the information under section 47(3)(f) of the RTI Act is set aside. The relevant information does not comprise exempt information. Its disclosure would not found an equitable action for breach of confidence nor would its disclosure, on balance, be contrary to public interest. Therefore, access to the information may not be refused on those grounds under the RTI Act.

Background

6. The Department, through the Office of the State Coroner,² arranges the burial or cremation of deceased people in circumstances where the deceased person's assets cannot cover the cost of their funeral and their relatives and friends cannot arrange or pay for their funeral (burials assistance).³ The Department is also responsible for transporting human remains in certain circumstances (conveyance of human remains).⁴ The Department contracts with funeral directors to perform these services on its behalf and in the interests of public health.⁵
7. The Department, on behalf of the Queensland Government, ran a tender process for the provision of these services and awarded a number of contracts to funeral directors

¹ Access may only be refused under sections 47(3)(f) and 53 of the RTI Act where the applicant can reasonably access the **document** under another Act or arrangements made by an agency. On the basis that the documents sought by the applicant (i.e. the contract documents) cannot be accessed on the eTender website and only some of the information contained in the documents is publicly available, the Department accepted that access could not be refused on that ground.

² The Office of the State Coroner is part of the portfolio of the Attorney-General and Minister for Justice. For the purpose of the RTI Act, the *agency* which deals with requests for information held by the Office of the State Coroner is the Department of Justice and Attorney-General as this is the administrative unit administered by the Attorney-General and Minister for Justice. See <http://www.qld.gov.au/about/how-government-works/structure-changes/assets/administrative-arrangements-order-no-4-2012.pdf>.

³ Sections 3 and 4 of the *Burials Assistance Act 1965* (Qld).

⁴ Section 18 of the *Coroners Act 2003* (Qld).

⁵ See http://www.courts.qld.gov.au/data/assets/pdf_file/0008/84581/m-osc-burials-assistance.pdf.

throughout Queensland. These contracts are referred to in this decision as the Deeds of Agreement for the Conveyance of Human Remains under the *Coroners Act 2003* (Qld) and Burial or Cremation of Deceased Persons under the *Burials Assistance Act 1965* (Qld) (**Contracts**).

8. In view of the Department's submission that it had no objection to the release of the information, OIC invited the successful tenderers whose information was covered by the narrowed terms of the request,⁶ to participate in the external review⁷ and to provide submissions supporting their case if they objected to disclosure of their tender information under the RTI Act. In the course of the external review, seven successful tenderers (**Third Parties**) continued to participate and provided submissions in support of their objections to disclosure of their tender information under the RTI Act.⁸
9. On external review, the Third Parties provided extensive submissions objecting to disclosure of the relevant information. I have carefully considered all of the submissions provided by the Third Parties however many of the issues raised were unrelated to the grounds on which access may be refused under the RTI Act and did not fit within either the exemption provisions or the public interest test factors to be considered. To the extent any of these submissions were unrelated to the issues for determination in this review, I have not addressed them in these reasons.
10. I have also considered certain information the Third Parties provided to the Department during the tender process. The invitation to tender highlighted the operation of the RTI Act and invited tenderers to identify any objections to disclosure of their submission (**Response Form**).⁹ One of the Third Parties indicated on its Response Form that it objected on the basis that it considered its pricing information is commercially valuable and confidential. Another Third Party objected on the basis that its pricing information is commercially valuable. The remaining Third Parties did not indicate any objection to disclosure of their tender submission in their Response Form.¹⁰ The relevance of these responses is addressed below.
11. Significant procedural steps relating to the application and external review are set out in the Appendix A to these reasons.

Reviewable decision

12. The decision under review is the Department's decision dated 12 July 2011 to refuse access to the requested information under section 47(3)(f) of the RTI Act on the basis that other access to the information is available through the Queensland Government eTender website.

Evidence considered

13. Evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and Appendix A and B).

⁶ On external review, the applicant narrowed the scope of the access application to the pricing information, in schedule B of the Contracts, where the one off transportation fee is under a certain dollar amount.

⁷ Section 89 of the RTI Act.

⁸ A number of tenderers did not apply to participate in the review, or did apply to participate but as the review progressed, did not maintain their objections to disclosure. As a result, any information relating to those tenderers is not dealt with in this decision and may be released by the Department accordingly.

⁹ Response Form 6.1 "*Offeror Authorisation and Certification*" which listed four grounds for objection that could be nominated: trade secret, commercial value, results of research and/or confidential nature.

¹⁰ In these reasons for decision, I have considered the responses given by the relevant third parties in their Response Forms as they relate to the relevant grounds for refusal of access considered below.

Information in issue

14. The information in issue in this review (**Information in Issue**):
- is contained within the Contracts of the seven successful tenderers who have maintained objections to disclosure; and
 - specifically comprises the (i) company names (ii) boundary reference numbers and (ii) pricing information at schedule B of the Contracts.¹¹
15. As noted in paragraph 4 above, only seven successful tenderers applied to OIC to participate in the external review on the basis that they objected to disclosure of the Information in Issue concerning their tenders. These successful tenderers are the Third Parties on external review. The remaining successful tenderers did not object to disclosure of their tender information and therefore, they are not listed as third parties to this review and their tender information does not form part of the Information in Issue.

Issues for determination

16. As noted above, the Department does not object to the Information in Issue being released under the RTI Act. Accordingly, in this review, the issues to be determined concern the objections raised by the Third Parties.
17. The Third Parties object to disclosure of the Information in Issue on the basis that:
- the Information in Issue comprises exempt information¹² as its disclosure:
 - would found an action for breach of confidence;¹³ and/or
 - could reasonably be expected to disclose investment incentive scheme information;¹⁴ and/or
 - disclosure would, on balance, be contrary to the public interest (primarily because competitors could undercut the current successful tenderers in future tender processes).¹⁵

Does the Information in Issue comprise exempt information?

18. No, for the reasons that follow.

Breach of confidence

Relevant law

19. Under the RTI Act, an individual has a right to be given access to a document of an agency.¹⁶ The right of access is subject to some limitations, including the grounds on which access to information may be refused.¹⁷ An agency may refuse access to a

¹¹ The scope of the access application was narrowed to include the pricing information, in schedule B of the Contracts, where the one off transportation fee is under a certain dollar amount.

¹² Sections 47(3)(a) and 48 of the RTI Act.

¹³ Schedule 3 section 8 of the RTI Act.

¹⁴ Schedule 3 section 11 of the RTI Act.

¹⁵ Sections 47(3)(b) and 49 of the RTI Act.

¹⁶ Section 44(1) of the RTI Act provides that access should be given to a document unless giving access would, on balance, be contrary to the public interest. This is referred to as the *pro-disclosure bias* in deciding access to documents.

¹⁷ Section 47(2) of the RTI Act provides that these grounds are to be interpreted narrowly and an agency may give access to a document even if a ground on which access may be refused applies.

document comprising exempt information.¹⁸ Parliament considers disclosure of exempt information would, on balance, be contrary to the public interest.¹⁹

20. One category of exempt information is where disclosure would found an action for breach of confidence.²⁰ This exemption requires consideration of whether an equitable obligation of confidence exists. The following requirements must be established to give rise to an equitable obligation of confidence:
- a) information must be capable of being specifically identifiable as information that is secret, rather than generally available
 - b) information must have the necessary quality of confidence
 - c) circumstances of the communication must create an equitable obligation of confidence
 - d) disclosure to the applicant for access must constitute an unauthorised use of the confidential information;²¹ and
 - e) disclosure must cause detriment to the plaintiff.²²

Findings

21. I will consider each requirement and the relevant submissions in turn.
22. As noted at paragraph 10 above, in the Response Form, only one Third Party objected to disclosure of the tender submission on the basis that it contains information of a confidential nature. However on external review, a number of the Third Parties²³ provided submissions on this issue which can be summarised as follows:
- the Information in Issue is commercial in confidence and concerns financial information that is confidential in nature
 - in conducting the tender process, the Department represented to the tendering parties that the tender process would be confidential; and
 - the tenderers submitted their tenders on the clear understanding that the information was confidential in nature and was communicated in confidence.

a) Information specifically identifiable

23. The first requirement of the test for the breach of confidence exemption requires that it is possible to identify with specificity, and not merely in general terms, the information in question.²⁴ The Information in Issue comprises the company names, boundary reference numbers and pricing information and is clearly identifiable. I am therefore satisfied that requirement a) is met.

¹⁸ Section 47(3)(a) of the RTI Act. The categories of exempt information are set out in schedule 3 of the RTI Act.

¹⁹ Section 48 of the RTI Act.

²⁰ Schedule 3, section 8(1) of the RTI Act.

²¹ *TSO08G and Department of Health* [2011] QICmr 46 at paragraph 13.

²² *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39 per Mason J at 51. This requirement has been questioned by two State appellate court decisions *NP Generations Pty Ltd v Fenely* (2001) 80 SASR 151, per Debelle J at 580 and *National Roads and Motorists Association Ltd v Geeson* (2001) 40 ACSR 1. However, the judgment of Mason J in *Commonwealth of Australia v John Fairfax & Sons Ltd* is that of a single judge of the High Court and is therefore binding on the Information Commissioner. See also *B and Brisbane North Regional Health Authority* [1994] QICmr 1 (**B and BNRHA**) at paragraph 109.

²³ Funeral Company 1's submissions to OIC dated 15 December 2011 and 16 August 2012, Funeral Companies 3 and 7's submission to OIC dated 16 December 2011, Funeral Company 5's submission to OIC dated 7 December 2011 and Funeral Company 6's submission to OIC dated 16 December 2011 and 16 August 2012.

²⁴ *B and BNRHA* at paragraphs 60-63.

b) Necessary quality of confidence

24. The second requirement of this test makes it clear that an equitable obligation of confidence will only protect information with the necessary quality of confidence. It will not extend to information that is generally known, useless or trivial.²⁵
25. The name of the successful tenderer and boundary reference number is information that is publicly available on the eTender website and therefore, this information does not satisfy requirement b). I accept however that the pricing information is not generally known. I am therefore satisfied that requirement b) is met in relation to pricing information.

c) Circumstances of communication

26. All the relevant circumstances in which the information was received must be considered to determine whether the party who received the information is bound with an obligation of confidence. The relevant circumstances to consider include, but are not limited to:
- nature of the relationship between the parties
 - nature and sensitivity of the information
 - the purpose(s) for which the information was communicated
 - nature and extent of any detriment to the interests of the information-supplier that would follow from an unauthorised disclosure of the information; and
 - circumstances relating to the information's communication.
27. To determine whether the Information in Issue was communicated in confidence, I have considered the relevant terms of the Contracts between the tenderers and the Department,²⁶ particularly:
- that one of the Third Parties objected in the Response Form to disclosure of their tender submissions under the RTI Act on the basis that it was confidential
 - that the other Third Parties did not object in the Response Form on this basis
 - that the Department does not consider the tender submissions were received in confidence
 - the definition of "confidential information" in clause 1 of the Contracts
 - clause 14 of the Contracts which relates to confidentiality; and
 - clause 26.11 of the Contracts which relates to the RTI Act and disclosure.
28. The definition of confidential information in clause 1 of the Contracts is limited to information the State supplies to the contractors but does not, in my view, extend to information the contractors supplied to the State. Similarly, clause 14 of the Contracts imposes obligations of confidence on the contractors but not on the State. In other words, while contractors are contractually bound to keep information confidential, the State has given no such undertaking to treat the Information in Issue confidentially.
29. I note also that the Contracts specifically refer to the possibility that information related to the Contracts is potentially subject to disclosure to third parties²⁷ and that the State cannot guarantee that any information provided by the contractor will be protected from disclosure under the RTI Act.²⁸ For these reasons, I am not satisfied that the Contracts provide evidence that the Information in Issue was communicated in confidence.

²⁵ *B and BNRHA* at paragraph 43.

²⁶ The relevant clauses are set out in Appendix B to these reasons.

²⁷ Clause 26.11(c).

²⁸ Clause 26.11(d). The form stated that the Department "... can give no guarantee to the Offeror that the information will be protected from disclosure under the *Right to Information Act 2009* (Qld)".

30. It is also relevant that the Department has agreed to disclose the Information in Issue and does not claim that there is an obligation of confidence. A staff member of the Office of the State Coroner contacted OIC during the external review and indicated that the contractors considered the Information in Issue was confidential and the Office of the State Coroner agreed with this. OIC invited the Department to specifically address this issue in a submission. However the Department formally advised OIC that it did not wish to make submissions on this issue. As a result, the Department did not contend in this review that disclosing the Information in Issue would found an action for breach of confidence. It is also noted that the basis for the Department's decision to refuse access to the Information in Issue was that the information is already publicly available on the eTender website. This gives support to the conclusion that the Department did not consider the Information in Issue was provided with the expectation it would be kept confidential.
31. Funeral Company 2²⁹ and Funeral Company 6³⁰ objected to clause 26.11(d) of the Contracts being relied on in relation to the findings on this issue. I consider clause 26.11 of the Contracts is relevant to requirement c) of the test set out in paragraph 20 above. This clause supports the contention that the tender was not received in confidence.³¹
32. In the Response Form, Funeral Company 4 objected to disclosure of its tender submission on the basis that it was confidential. However Funeral Company 4 did not make submissions on the breach of confidence exemption on external review. While I consider Funeral Company 4's objection in the Response Form goes some way to satisfying requirement c), the Department does not consider the information was communicated in confidence and therefore I am satisfied that an equitable obligation of confidence is not established in this case.
33. For the reasons set out above, I consider that requirement c) is not met.
34. The test for breach of confidence requires that all elements of the test be established. If one element is not made out, it is not possible to bring an equitable action for breach of confidence and disclosure of the information will not be exempt under schedule 3, section 8 of the RTI Act. Accordingly, I consider that the requirements for establishing that disclosure of the Information in Issue would found an action for breach of confidence are not established in the circumstances of this case. I find that the Information in Issue is not exempt on this basis.

Investment incentive scheme information

Relevant law

35. Schedule 3 section 11(1) of the RTI Act provides that information is exempt for the relevant period if its disclosure could reasonably be expected to disclose information about:
- a particular incentive given to, or arranged for, a relevant person under a contract in relation to an investment incentive scheme; or
 - an incentive sought by, or proposed for, a relevant person whether or not an incentive was, in fact, given to, or arranged for, the relevant person under an investment incentive scheme.

²⁹ Submission to OIC dated 17 August 2012.

³⁰ Submission to OIC dated 16 August 2012.

³¹ I accept that at some stage in the tender process there is an expectation by the tenderer and an obligation on the Department to keep certain information confidential. However, the expectation and obligation based on the terms of the Contracts, the State Purchasing Policy and common usage does not continue to extend to successful tenderers of government contracts.

36. The RTI Act defines *incentive* as including any of the following (a) an amount that is a refund of all or part of an amount paid as a tax, fee or charge (b) another amount, whether as a lump sum or by installments or (c) a benefit that is not an amount mentioned in paragraph (a) or (b).³²
37. *Investment incentive scheme* is defined as a written scheme that (a) promotes projects by giving incentives and (b) includes processes for assessing an application under the scheme and (c) is administered by the department.³³

Findings

38. Funeral Company 1 made submissions on the application of this exemption that I have considered but do not believe need to be detailed in this decision.³⁴
39. I am not satisfied that the Information in Issue meets the requirements of this exemption. The Information in Issue relates to a contract with the Department for the provision of services relating to the conveyance of human remains and burial or cremation of deceased persons. It does not fall within the definition of an investment incentive scheme. The Department pays the contractors for the provision of these services and these payments do not fall within the definition of an incentive. I do not consider that the purpose of this provision was to provide a ground for refusing access to the type of information in issue in this review.
40. For the reasons set out above, I find that the requirements for establishing that disclosure of the Information in Issue could reasonably be expected to disclose information about an investment incentive scheme are not established in this case and therefore the Information in Issue is not exempt on this basis.

Would disclosure of the Information in Issue, on balance, be contrary to public interest?

41. No, for the reasons that follow.

Relevant law

42. A ground for refusing access is where disclosure would, on balance, be contrary to the public interest.³⁵ The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest³⁶ and explains the steps that a decision-maker must take³⁷ in deciding the public interest as follows:

- identify any irrelevant factors and disregard them
- identify relevant public interest factors favouring disclosure and nondisclosure
- balance the relevant factors favouring disclosure and nondisclosure; and
- decide whether disclosure of the information in issue would, on balance, be contrary to the public interest.

³² Schedule 3, section 11(2) of the RTI Act.

³³ Schedule 3, section 11(2) of the RTI Act.

³⁴ Submission to OIC dated 16 August 2012.

³⁵ Section 47(3)(b) and 49 of the RTI Act. The term *public interest* refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.

³⁶ Schedule 4 of the RTI Act sets out factors for deciding whether disclosing information would, on balance, be contrary to the public interest. However, this list of factors is not exhaustive. In other words, factors that are not listed may also be relevant.

³⁷ Section 49(3) of the RTI Act.

Findings

43. The Third Parties made extensive submissions to OIC. Where OIC was able to identify that the submissions related to a relevant public interest factor, the submissions are addressed below.

Irrelevant factors

44. The Third Parties have expressed concern about the identity and motivations of the applicant. An applicant is not required to provide reasons for requesting information under the RTI Act nor to indicate what they intend to do with the information. I am satisfied that the identity of the applicant is irrelevant to determining whether access to information can be granted under the RTI Act in the circumstances of this case. To the extent that any of the submissions relate to this issue, I have not taken them into account in making this decision.
45. That disclosure of information could reasonably be expected to result in mischievous conduct by the applicant is an irrelevant factor³⁸ in deciding whether disclosure of the Information in Issue would, on balance, be contrary to the public interest. To the extent that any of the submissions relate to this issue, I have disregarded them in making this decision.
46. No other irrelevant factors arise in this case.

Relevant factors favouring disclosure

Open discussion, accountability and oversight of public fund expenditure

47. Government is accountable to the public regarding the decisions it makes to award tenders for the performance of work that is to be paid for from public funds. Tenderers for government services are not accountable to the public for the prices they tender. Rather, it is a consequence of the pricing information being in the possession of a government agency that a person has a right to obtain access to it under the RTI Act (subject to certain limitations).
48. Government agencies must be able to demonstrate that tender processes have been carried out fairly and equitably, and that the successful tenderers were the best candidates, in terms of efficiency, effectiveness and economy in the delivery of services to be paid for from public funds.³⁹ This is consistent with the Queensland Government State Procurement Policy⁴⁰ which requires that agencies publish basic details of all awarded contracts over a certain amount on the eTender website.⁴¹
49. As the Information in Issue relates to the payment of public funds to private sector organisations to perform government services prescribed by legislation, I consider that disclosure could reasonably be expected to promote open discussion of public affairs, enhance the Government's accountability⁴² and ensure effective oversight of expenditure of public funds.⁴³ I am satisfied that these public interest factors carry significant weight in favour of disclosure.

³⁸ Schedule 4, part 1, item 3 of the RTI Act.

³⁹ *Wanless Wastecorp and Caboolture Shire Council; JJ Richards & Sons Pty Ltd (Third party)* (2003) 6 QAR 242 (**Wanless**) at paragraph 145.

⁴⁰ <http://www.hpw.qld.gov.au/SiteCollectionDocuments/StateProcurementPolicy2010.pdf>.

⁴¹ State Procurement Policy; Department of Public Works, Queensland Government, September 2010 at page 9 also provides: "Agencies must ensure that processes and procedures are in place to ensure the integrity of the procurement decision making process. All stages of the procurement decision making process from planning to award, should be defensible and documented".

⁴² Schedule 4, part 2, item 1 of the RTI Act.

⁴³ Schedule 4, part 2, item 4 of the RTI Act.

50. Funeral Company 1 submitted⁴⁴ that funeral companies tender at a very competitive level and, as a result, the Department is saving money and the Information in Issue does not need to be disclosed for reasons of government accountability. It is only in disclosing the Information in Issue that the public is able to inform itself as to whether the tender was at a competitive level and whether the Department effectively expended public money. For this reason, I do not accept the submission that if the price offered by a successful tenderer is competitive there is no reason to disclose it for the purpose of government accountability.

Reasons and background information for a government decision

51. The Contracts were awarded to the seven successful tenderers by the Queensland Government, through the Department. The pricing information represents one of the terms on which the Department decided to contract with the successful tenderers. I am therefore satisfied that disclosure would reveal background or contextual information that informed the decision to award the Contracts to particular tenderers and that this factor favours disclosure.⁴⁵
52. Funeral Company 2 submitted⁴⁶ that disclosing the Information in Issue on its own would not further this public interest factor as it would not reveal all of the information considered in deciding to award the Contract. Funeral Company 1 submitted⁴⁷ that this public interest factor would be satisfied by disclosing the procedure the Department followed in awarding the tenders rather than the pricing information. While I accept that disclosing other information about the tender process may also promote this public interest factor, the applicant is not seeking such additional information and therefore, it is not relevant to consider the impact of its disclosure. The information which is the subject of this decision and is of concern to the Third Parties is the pricing information. As the pricing information represents only one of the terms on which the Department decided to enter into the Contracts with the tenderers, I consider this factor carries only moderate weight in favour of disclosure. However I am satisfied that this weight is not reduced by the submissions made by the Third Parties.

Relevant factors favouring nondisclosure

Adverse effect on business affairs or prejudice to future supply of information

53. The RTI Act recognises that:
- a factor favouring nondisclosure (**Prejudice Factor**) will arise in circumstances where disclosure of the Information in Issue could reasonably be expected to prejudice the business affairs of entities;⁴⁸ and
 - disclosure could reasonably be expected to cause a public interest harm (**Harm Factor**) if disclosing the Information in Issue:⁴⁹
 - would disclose information concerning the business affairs of an agency or another person; and
 - could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of this type to government.
54. I accept in general terms that the pricing information (i) concerns the business affairs of the Third Parties and (ii) has a degree of commercial sensitivity for suppliers of goods and services operating in a competitive market. However I also consider that the

⁴⁴ Submission to OIC dated 16 August 2012.

⁴⁵ Schedule 4, part 2, item 11 of the RTI Act.

⁴⁶ Submission to OIC dated 17 August 2012.

⁴⁷ Submission to OIC dated 16 August 2012.

⁴⁸ Schedule 4, part 3, item 2 of the RTI Act.

⁴⁹ Schedule 4, part 4, item 7(1)(c) of the RTI Act.

- degree of commercial sensitivity will vary from case to case according to a number of key factors. These key factors include: the nature and detail of the pricing information; whether it is current or merely historical; the nature and custom of the particular market; and a variety of other circumstances which may affect its sensitivity in any particular case.⁵⁰
55. Funeral Company 1 submitted⁵¹ that the following factors in this case demonstrate the pricing information has a high degree of sensitivity: all competitors understand the nature of the tenders; the pricing is current and not historical; the nature of the local market is easily researched and companies derive a large percentage of their income from the government contracts.
56. Although the Information in Issue in this case contains pricing for a substantial number of items, each price is a global figure and represents the total price tendered for each item. It does not provide detailed descriptions of the components of the prices tendered or disclose the company's profit margins or costs or reveal what percentage of income the company derives from performing the contract. As a result, I consider the degree of commercial sensitivity the pricing information has in this case is low.⁵²
57. The primary concern of the Third Parties is that disclosing the pricing information could prejudice their business affairs by allowing competitors to undercut them by offering a lower price in future tender processes.⁵³ The submissions on this issue can be summarised as follows:
- disclosing the pricing information would give competitors an unfair advantage in the next tender process as it would reveal (i) the range of prices that have been tendered by competitors in the past and which is not likely to vary much in future tender processes and (ii) the prices the Department is willing to accept
 - this would lead to competitors attempting to undercut each other in future tender processes
 - knowing that a competitor is aware of the current pricing information would put tenderers under pressure to reduce the prices in any future tender process; and
 - the successful tenderers will not be awarded the contract in future tender processes if they are undercut by competitors which would be detrimental to the commercial and financial affairs of all funeral companies.
58. Tenderers have previously raised concerns with the Information Commissioner about being undercut by competitors in future tender processes. In *McPhillimy and Treasury Department; Gold Coast Motor Events Co (Third Party)*⁵⁴ (**McPhillimy**) the Information Commissioner relevantly explained:⁵⁵

“... provided the market for the supply of security services to the Grand Prix event remains a competitive market, in which security firms do not know the details of their competitors' forthcoming tenders (i.e., provided there is no collusion in the market), one firm cannot with any certainty predict the behaviour of its competitors who have

⁵⁰ *Sexton Trading Co Pty and Department of Health; TK Crow Furnishings Pty Ltd (Third Party)* (1995) 3 QAR 132 (**Sexton**) at paragraph 16.

⁵¹ Submission to OIC dated 16 August 2012.

⁵² In *Sexton*, the Information Commissioner decided that the total price at which a supplier is prepared to offer particular items would be considered less sensitive than details of the supplier's pricing structure, that is, detailed descriptions of the component elements of a tender price or detailed descriptions of the manner in which tender prices were calculated (which would disclose a company's margins, costs and approach to tendering). See also *Dalrymple Shire Council and Department of Main Roads* (1998) 4 QAR 474 (**Dalrymple**) at paragraph 39.

⁵³ Australian Funeral Directors Association (**AFDA**) submission to OIC on behalf of Funeral Companies 3 and 7 dated 16 December 2011, Funeral Company 5's submissions to OIC dated 7 December 2011 and 7 August 2012, Funeral Company 4's submission to OIC dated 12 September 2012, Funeral Company 6's submissions to OIC dated 16 December 2011 and 16 August 2012, Funeral Company 2's submissions to OIC dated 9 December 2011 and 17 August 2012 and Funeral Company 1's submissions to OIC dated 15 December 2011 and 16 August 2012.

⁵⁴ (1996) 3 QAR 287.

⁵⁵ At paragraph 26.

knowledge even of a previous year's tender prices. ... One firm cannot exclude the possibility that one or more competitors may be prepared to cut profit margins drastically and attempt to significantly undercut the previous year's range of tender prices in a bid to win such a high profile contract".

59. The fact that the Third Parties are concerned about being undercut by competitors suggests they consider that the funeral industry, and particularly the market for the conveyance of human remains and the burial or cremation of deceased persons, is competitive. I accept that undercutting is an issue which is of concern for those tendering within the industry, however, as explained in *McPhillimy*, this is a reasonable possibility in any tender process and, in my view, disclosing the Information in Issue under the RTI Act could not reasonably be expected to make that more likely to occur.
60. A number of the Third Parties also submitted⁵⁶ that disclosing the Information in Issue will lead competitors to undercut each other in future tender processes and, in order to provide the services to the Department at such a low price, the contractors would have to cut costs in other areas by reducing service standards. Funeral providers are not obliged to tender for government contracts. If they decide they cannot afford to carry out the work at the requisite service level then it is a matter for the entity to review its decision to put forward a tender. For these reasons, I do not accept the contention that disclosing the Information in Issue could reasonably be expected to result in a reduction in service standards and a poorer quality of service to the public and I do not consider these submissions give rise to a relevant factor favouring nondisclosure of the Information in Issue.
61. Funeral Company 2 submitted⁵⁷ that improper behaviour by funeral companies representing the Department may occur if the Information in Issue is disclosed. I am not convinced that disclosing the Information in Issue would result in improper behaviour by funeral companies. Government is accountable for the way in which it (and those acting on its behalf) transport and deal with human remains. It is also accountable for its regulation of certain aspects of the funeral industry. If it is the case that disclosing the Information in Issue could lead to improper behaviour, the government is able to regulate certain practices in the industry. I do not consider this submission gives rise to a relevant factor favouring nondisclosure of the Information in Issue.
62. For the reasons set out above, I do not accept that disclosing the Information in Issue could reasonably be expected to prejudice the business affairs of the Third Parties due to the potential for undercutting tender prices. While I accept that the pricing information has a degree of commercial sensitivity for companies operating in a competitive market, in this case I consider the degree of sensitivity is low. Therefore I afford low weight to the Prejudice Factor in relation to the pricing information.
63. In applying the Harm Factor, I have also considered whether disclosing the Information in Issue could reasonably be expected to prejudice the future supply of this type of information to government.⁵⁸ The relevant submissions by the Third Parties⁵⁹ include:
 - disclosing the pricing information would severely jeopardise future relations between the Department and all funeral companies and tenderers will rethink their approach in future tender processes with the Department; and

⁵⁶ Funeral Company 5's submission to OIC dated 7 December 2011, Funeral Company 2's submission to OIC dated 9 December 2011, Funeral Company 1's submission to OIC dated 16 August 2012 and Funeral Company 6's submission to OIC dated 16 August 2012.

⁵⁷ Submissions to OIC dated 9 December 2011 and 17 August 2012.

⁵⁸ As noted above, this is an element of the factor in schedule 4, part 4, section 7(1)(c) of the RTI Act.

⁵⁹ Funeral Company 1's submission to OIC dated 16 August 2012, Funeral Company 6's submission to OIC dated 16 December 2011 and Funeral Companies 3 and 7's submission to OIC dated 16 December 2011.

- the confidence and goodwill established by the contracted funeral directors would be void if the pricing information is disclosed and there would be hesitation and trepidation in tendering for future Government contracts.

64. In *Sexton*, the Information Commissioner noted that:⁶⁰

“Where persons must disclose certain information if they wish to obtain some benefit from the Government, or they would otherwise be disadvantaged by withholding information, then ordinarily disclosure could not reasonably be expected to prejudice the future supply of such information ... Pursuant to the State Purchasing Policy and guidelines, prices submitted by a successful tenderer are ordinarily disclosed, and there is no shortage of suppliers willing to tender for government contracts on that basis.”

65. Tenderers are required to disclose pricing information to the Department if they wish to obtain government contracts and it is not reasonable to expect that tenderers will withhold this information in future if the Information in Issue is disclosed under the RTI Act. For these reasons, I find that the Harm Factor does not apply to the Information in Issue in this review.

Prejudice trade secrets

66. The Third Parties submitted⁶¹ that disclosing the Information in Issue could reasonably be expected to prejudice trade secrets.⁶² However, none of the Third Parties objected, in the Response Forms, to their tender submission being released on the basis that it contains trade secrets.

67. A trade secret is a formula, pattern, device or compilation of information which gives an advantage over competitors who do not know or use it.⁶³ The relevant question is whether pricing information can be properly characterised as a trade secret.⁶⁴ In my view it cannot. Pricing information may be an important factor when assessing tenders but this does not mean that the pricing information is a trade secret. I also accept that the Third Parties do not widely disseminate the pricing information and acknowledge that they consider it should not be revealed to competitors. However, the pricing information, on its own, does not reveal how a company operates nor would it reveal a formula, pattern, device or compilation of information which gives an advantage over competitors. In my view, these arguments do not give rise to a factor favouring nondisclosure of the Information in Issue.

68. Funeral Company 5⁶⁵ and Funeral Company 2⁶⁶ submitted that the Information in Issue is their intellectual property. The Third Parties have not explained the basis for this submission. I am not satisfied that the prices tendered in a tender process can be characterised as the Third Parties’ intellectual property. I therefore find that these

⁶⁰ At paragraph 14. See also *Dalrymple* at paragraph 28.

⁶¹ Funeral Company 2’s submission to OIC dated 9 December 2011, Funeral Company 5’s submissions to OIC dated 7 December 2011 and 7 August 2012, Funeral Company 6’s submission to OIC dated 16 December 2011 and Funeral Company 1’s submission to OIC dated 16 August 2012.

⁶² Schedule 4, part 3, item 15 of the RTI Act and schedule 4, part 4, item 7(1)(a) of the RTI Act.

⁶³ The Information Commissioner considered the meaning of *trade secrets* in the context of the now repealed *Freedom of Information Act 1992* (Qld) in *Wanless* at paragraphs 33 – 43, *Cannon and Australian Quality Egg Farms Ltd* (1994) 1 QAR 491 (**Cannon**) at paragraphs 42 – 49 citing the American *Restatement of the Law of Torts* (1939, Volume 4 para 757) which was referred to by Gowan J in *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37. See also *BHP Coal Pty Ltd & Ors and Department of Employment, Economic Development and Innovation; Cherwell Creek Coal Pty Ltd (Third Party)* [2011] QICmr 22 (22 June 2011) at paragraphs 73 – 79 referring to *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 108 ALR 163, Davies, Wilcox and Einfeld JJ at page 172, and *Cannon* at paragraphs 42-49.

⁶⁴ Information such as how the company provided its services, details of contacts, quotes from customers and procedures adopted is not in issue in this review. In *Macrossan & Amiet Solicitors and Queensland Health* [2002] QICmr 4 at 75 the Information Commissioner explained that the question of whether certain information is properly characterised as a trade secret is essentially a question of fact.

⁶⁵ Submission to OIC dated 7 December 2011.

⁶⁶ Submission to OIC dated 9 December 2011.

submissions do not establish the factor favouring nondisclosure relating to trade secrets.

Destroying commercial value

69. As noted above, in the Response Form only Funeral Companies 1 and 4 objected to disclosure of their tender submission on the basis that it contains information of commercial value. However on external review, a number of the Third Parties submitted that the Information in Issue has a commercial value which could reasonably be expected to be destroyed or diminished by its disclosure.⁶⁷
70. Information has a commercial value if:⁶⁸
- it is valuable for the purposes of carrying on the commercial activity in which that agency or other person is engaged (i.e. because it is important or essential to the profitability or viability of a continuing business operation, or a pending "one-off" commercial transaction); or
 - a genuine arms-length buyer is prepared to pay to obtain that information from that agency or person, such that the market value of the information would be destroyed or diminished if it could be obtained from a government agency which has possession of it.
71. Relevantly, the information must have a commercial value at the time that the decision is made as information which was once valuable may become aged or out-of-date such that it has no remaining commercial value.⁶⁹ If it is established that the information has a commercial value, it is then necessary to establish that disclosing it could reasonably be expected to destroy or diminish its value.
72. In summary, the relevant Third Party submissions⁷⁰ are that the Information in Issue has a commercial value to the successful tenderers as it reveals the prices they might offer in future tender processes and revealing it would destroy this value.
73. Given the nature of the Information in Issue, I do not consider that a genuine arms-length buyer would be prepared to pay to obtain the Information in Issue nor that it is important or essential to the profitability or viability of a continuing business operation. I have addressed these submissions above to the extent they relate to concerns about being undercut by competitors in future tender processes and any impact this could have on continuing business operations. I am not satisfied that this argument is supported on the available evidence and it does not give rise to a factor favouring nondisclosure of the Information in Issue.

Confidential information

74. I have considered whether disclosing the Information in Issue could reasonably be expected to:
- cause a public interest harm as the information consists of information of a confidential nature that was communicated in confidence and its disclosure could reasonably be expected to prejudice the future supply of information of this type;⁷¹ and

⁶⁷ Schedule 4, part 4, item 7(1)(b) of the RTI Act.

⁶⁸ *Wanless* at paragraphs 44 – 48 and *Cannon* at paragraphs 51 – 60.

⁶⁹ *Wanless* at paragraph 47.

⁷⁰ Funeral Company 6's submission to OIC dated 16 December 2011, Funeral Company 1's submission to OIC dated 16 August 2012, Funeral Company 4's submission to OIC dated 12 September 2012, Funeral Company 2's submission to OIC dated 9 December 2011 and Funeral Company 5's submission to OIC dated 7 December 2011.

⁷¹ Schedule 4, part 4, item 8 of the RTI Act.

- prejudice an agency's ability to obtain confidential information.⁷²

75. For these factors to apply, it is first necessary to be satisfied that the information is confidential. For the reasons set out above at paragraphs 23 to 34 in relation to the breach of confidence exemption, I find that the Information in Issue is not confidential. In any event, and for the reasons set out above at paragraphs 63 to 65 I find that disclosing the Information in Issue could not reasonably be expected to prejudice the future supply of information of this type or prejudice an agency's ability to obtain confidential information. For these reasons, I find that these factors do not apply to the Information in Issue.

Personal information and privacy

76. The RTI Act gives rise to a number of factors favouring nondisclosure which relate generally to the protection of personal information and privacy.⁷³ The Third Parties provided a range of submissions relating to these issues which can be summarised as follows:

- funeral accounts are private and information related to funeral accounts can only be accessed by eligible family members or authorised government departments⁷⁴
- the successful tenderers were required to sign Deeds of Privacy as a result of obtaining the contracts;⁷⁵ and
- as the funeral companies are run by individuals, disclosing the Information in Issue would reveal financial and income details of these individuals.⁷⁶

77. As noted above, the Information in Issue is limited to the names of the successful tenderers, boundary reference numbers and pricing information. The Information in Issue does not relate to nor identify (i) individuals who are deceased (ii) individuals using the Third Parties' services or particular funeral accounts or (iii) financial and income details of individuals who run the companies.

78. It was also submitted⁷⁷ that if funeral companies who perform services for the Department are publicly identified, people would assume that all funerals conducted by that company are paupers' funerals which in turn would damage the companies' reputation and cause embarrassment for mourners. As noted above, the name of the successful tenderer and boundary reference number is information that is publicly available on the eTender website. As the funeral companies performing work for government are publicly identified, I am unable to identify the basis for this submission. Furthermore, I am unable to identify how disclosure of the Information in Issue could reasonably be expected to have any impact on the family of deceased people using the Third Parties' services or how the use of the services would cause embarrassment.

79. For the reasons set out above, I am not satisfied that these factors apply to the Information in Issue.

⁷² Schedule 4, part 3, item 16 of the RTI Act.

⁷³ Schedule 4, part 3, items 3 and 5 and schedule 4, part 4, item 6 of the RTI Act. *Personal information* is defined in section 12 of the *Information Privacy Act 2009* (Qld) as information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

⁷⁴ Funeral Company 1's submission to OIC dated 16 August 2012.

⁷⁵ Funeral Companies 3 and 7's submission to OIC dated 16 December 2011.

⁷⁶ Funeral Company 1's submission to OIC dated 16 August 2012 and Funeral Company 6's submission to OIC dated 16 August 2012.

⁷⁷ Funeral Company 5's submission to OIC dated 7 December 2011 and Funeral Company 2's submissions to OIC dated 9 December 2011 and 17 August 2012.

Balancing the relevant public interest factors

80. As set out above, the starting point in considering whether information should be disclosed under the RTI Act is the general position in favour of disclosure. In this case, there are a number of other factors favouring disclosure of the Information in Issue in that it could reasonably be expected to:
- (i) promote open discussion of public affairs
 - (ii) enhance the Government's accountability
 - (iii) ensure effective oversight of expenditure of public funds; and
 - (iv) reveal the reason for a government decision and any background or contextual information that informed the decision.
81. Given that the Information in Issue appears in the context of a tender process which relates to services provided by private companies on behalf of the government, factors (i) (ii) and (iii) above carry significant weight. Factor (iv) carries moderate weight as it represents only one of the terms on which the Department decided to enter into the Contracts.
82. Balanced against the disclosure factors is the public interest in avoiding prejudice to the Third Parties' business affairs by disclosing pricing information. I accept in general terms that pricing information has a degree of commercial sensitivity for companies operating in a competitive market. However, the degree of sensitivity attaching to the pricing information in this case is low. In addition, the contention that disclosing the Information in Issue under the RTI Act would result in competitors undercutting tenderers by offering a lower price in future tender processes is not substantiated on the information available to OIC. For these reasons, the Prejudice Factor is afforded low weight.
83. For the reasons set out above, the factors favouring disclosure of the Information in Issue outweigh the factors favouring nondisclosure and therefore, disclosure of the Information in Issue would not, on balance, be contrary to public interest.

DECISION

84. For the reasons set out above, I set aside the decision to refuse access to information under section 47(3)(f) of the RTI Act. In substitution, I find that access to the Information in Issue may not be refused under:
- section 47(3)(a) of the RTI Act as it does not comprise exempt information under section 48 and schedule 3, section 8 or 11 of the RTI Act; and
 - section 47(3)(b) of the RTI Act as disclosure would not, on balance, be contrary to public interest under section 49 of the RTI Act.
85. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Clare Smith
Right to Information Commissioner

Date: 22 November 2012

APPENDIX A**Significant procedural steps**

Date	Event
9 June 2011	The Department received the access application under the RTI Act.
12 July 2011	The Department decided to refuse access to the requested information under sections 47(3)(f) and 53 of the RTI Act.
29 July 2011	OIC received the applicant's external review application and asked the Department to provide a number of procedural documents by 3 August 2011.
1 August 2011	OIC received the requested procedural documents from the Department.
4 August 2011	OIC telephoned the applicant to confirm receipt of the external review application and provide an update on the status of the external review. The applicant narrowed the scope of the access application.
5 August 2011	OIC advised the applicant and the Department the external review application had been accepted for review. OIC asked the Department to provide a copy of the information to which it had refused access and invited it to provide submissions supporting its case by 19 August 2011.
25 August 2011	OIC received the information to which the Department refused access.
7 September 2011	OIC provided the applicant with an update on the status of the external review.
27 October 2011	OIC provided the applicant with an update on the status of the external review.
15 November 2011	OIC provided the applicant with an update on the status of the external review and confirmed the revised scope of the access application. OIC conveyed a preliminary view to the Department and invited the Department to provide submissions supporting its case by 29 November 2011 if it did not accept the preliminary view.
25 November 2011	The Department advised OIC that it accepted the preliminary view and agreed to release the Information in Issue under the RTI Act.
28 November 2011	OIC provided the applicant with an update on the status of the external review.
29 November 2011	OIC clarified the scope of the access application with the Department.
30 November 2011	In accordance with section 97(4) of the RTI Act, OIC notified the relevant successful tenderers of the likely release of the Information in Issue and invited the successful tenderers to provide submissions supporting their case by 16 December 2011 if they objected to disclosure of the Information in Issue under the RTI Act.
1 December 2011	Funeral Companies 2, 5 and 6 notified OIC by telephone that they objected to release of the Information in Issue and provided submissions supporting their cases.
2 December 2011	Three successful tenderers notified OIC by telephone that they objected to release of the Information in Issue and provided submissions supporting their cases. The Department contacted OIC to convey the Office of the State Coroner's concerns about disclosure of the Information in Issue under the RTI Act.
5 December 2011	Funeral Company 1 and another successful tenderer notified OIC by telephone that they objected to release of the Information in Issue under the RTI Act and provided submissions supporting their cases.
6 December 2011	OIC received a written objection from a successful tenderer.
7 December 2011	A staff member for the Office of the State Coroner telephoned OIC directly to raise concerns about release of the Information in Issue under the RTI Act. OIC confirmed with the Department that it agreed to release the Information in Issue under the RTI Act. OIC provided the applicant with an update on the status of the external review. OIC received a written objection from Funeral Company 5.

Date	Event
8 December 2011	Funeral Company 4 requested an extension of time until 31 January 2012 to provide a written objection.
9 December 2011	<p>OIC notified Funeral Company 4 that it had been granted an extension of time until 16 December 2011 to provide a written objection.</p> <p>OIC received a written objection from a successful tenderer.</p>
12 December 2011	OIC received written objections from Funeral Company 4 and another two successful tenderers.
13 December 2011	OIC received a written objection from Funeral Company 2.
14 December 2011	OIC received a written objection from a successful tenderer.
15 December 2011	OIC received written objections from Funeral Company 1 and two other successful tenderers. One successful tenderer notified OIC that it did not object to disclosure of the Information in Issue under the RTI Act.
16 December 2011	AFDA and the Queensland Funeral Directors Association (QFDA) contacted OIC to express concern about disclosure of the Information in Issue under the RTI Act on behalf of its members. OIC received a written objection from a successful tenderer.
19 December 2011	OIC received a written objection from Funeral Company 6.
16 January 2012	Funeral Company 5 telephoned OIC to seek an update on the status of the external review.
10 February 2012	Funeral Company 4 contacted OIC to seek an update on the status of the external review.
14 February 2012	OIC provided Funeral Company 4 with an update on the status of the external review.
21 February 2012	Funeral Company 5 telephoned OIC to seek an update on the status of the external review.
23 February 2012	QFDA contacted OIC to seek an update on the status of the external review.
28 February 2012	OIC provided QFDA with an update on the status of the external review.
9 March 2012	OIC provided the applicant with an update on the status of the external review. The applicant expressed concern about being identified as the applicant in this review.
12 March 2012	OIC asked the applicant to provide further information supporting their concerns about being identified as the applicant in this review.
20 March 2012	AFDA contacted OIC to seek an update on the status of the external review.
23 March 2012	OIC provided AFDA with an update on the status of the external review.
26 March 2012	OIC received the requested information from the access applicant.
14 May 2012	OIC provided the Department with an update on the status of the external review.
22 May 2012	OIC provided the applicant with an update on the status of the external review.
6 June 2012	The applicant contacted OIC for an update on the status of the external review.
18 June 2012	OIC provided the Department with an update on the status of the review.
25 June 2012	OIC asked AFDA and QFDA to (i) identify which successful tenderers they represent and (ii) provide written evidence of their authority to act on their behalf by 2 July 2012.
2 July 2012	AFDA notified OIC that it represents Funeral Companies 1, 3, 4 and another funeral company (which was not contacted by OIC). QFDA did not provide any response to OIC.
3 July 2012	AFDA notified OIC that it also represents Funeral Company 7.
5 July 2012	OIC confirmed with AFDA that it represents Funeral Companies 3 and 7. OIC explained that Funeral Companies 1 and 4 were legally represented in this external review and that OIC did not contact the other funeral company.

Date	Event
1 August 2012	OIC received correspondence from a funeral company (who OIC did not contact) seeking access to the name of the access applicant under the RTI Act.
2 August 2012	<p>OIC notified the funeral company that (i) OIC would not reveal the name of the access applicant and (ii) requests for information cannot be made to OIC under the RTI Act.</p> <p>OIC conveyed a preliminary view to the successful tenderers who objected to disclosure of the Information in Issue under the RTI Act and invited them to participate in the external review and provide submissions supporting their case by 17 August 2012 if they did not accept the preliminary view.</p> <p>OIC provided the Department with an update on the status of the external review and invited it to provide any final submissions on the issue of confidentiality to OIC by 17 August 2012.</p> <p>OIC provided the applicant with an update on the status of the external review.</p>
3 August 2012	One of the successful tenderers advised OIC that it did not object to disclosure of the Information in Issue under the RTI Act.
6 August 2012	One of the successful tenderers advised OIC that it did not object to disclosure of the Information in Issue under the RTI Act.
7 August 2012	Funeral Company 5 objected to disclosure of the Information in Issue under the RTI Act and provided submissions in response to the preliminary view. Funeral Company 5 also requested information about the next steps in the review.
8 August 2012	Funeral Company 4 requested an extension of time until 21 September 2012 to provide submissions in response to the preliminary view.
9 August 2012	<p>OIC notified Funeral Company 4 that it had been granted an extension of time until 14 September 2012 to provide submissions in response to the preliminary view.</p> <p>OIC provided Funeral Company 5 with information about the next steps in the review.</p>
16 August 2012	<p>Funeral Companies 1 and 6 objected to disclosure of the Information in Issue under the RTI Act and provided submissions in response to the preliminary view.</p> <p>Funeral Company 5 contacted OIC to ask about the identity of the access applicant.</p>
17 August 2012	<p>Funeral Company 2 objected to disclosure of the Information in Issue under the RTI Act and provided submissions in response to the preliminary view.</p> <p>A successful tenderer requested an extension of time to provide submissions in response to the preliminary view. OIC granted the successful tenderer an extension of time until 24 August 2012 to provide the submissions.</p>
20 August 2012	OIC provided the Department with an update on the status of the external review. The Department confirmed that did not wish to provide any further submissions.
21 August 2012	AFDA did not provide submissions in response to the preliminary view but requested the name of the access applicant and raised a number of procedural issues.
22 August 2012	OIC responded to the procedural issues raised by AFDA.
23 August 2012	<p>AFDA advised OIC that Funeral Companies 3 and 7 did not accept the preliminary view but did not provide submissions supporting their case. AFDA raised a number of other procedural issues.</p> <p>OIC responded to AFDA about the procedural issues.</p> <p>A successful tenderer requested a further extension of time to provide submissions in response to the preliminary view. OIC granted the successful tenderer a further extension of time until 7 September 2012.</p>
6 September 2012	OIC contacted the successful tenderers who did not respond to the consultation letter in November 2011 to (i) confirm that they did not object to disclosure of the Information in Issue under the RTI Act and (ii) notify them that OIC would

Date	Event
	<p>proceed to ask the Department to release the relevant information under the RTI Act.</p> <p>OIC contacted the successful tenderers who did not respond to the preliminary view to (i) confirm that they did not object to disclosure of the Information in Issue under the RTI Act and (ii) notify them that OIC would proceed to ask the Department to release the relevant information under the RTI Act.</p> <p>A successful tenderer contacted OIC in response to the letter but did not provide submissions supporting their case.</p>
7 September 2012	A successful tenderer contacted OIC in response to the letter but did not provide submissions supporting their case.
12 September 2012	Funeral Company 4 objected to disclosure of the Information in Issue under the RTI Act and provided submissions in response to the preliminary view.
13 September 2012	<p>OIC contacted another successful tenderer who did not respond to the preliminary view to (i) confirm that they did not object to disclosure of the Information in Issue under the RTI Act and (ii) notify them that OIC would proceed to ask the Department to release the relevant information under the RTI Act.</p> <p>The successful tenderer requested the name of the access applicant but did not provide submissions supporting its case.</p>
14 September 2012	OIC notified the successful tenderer that (i) OIC would not reveal the name of the access applicant and (ii) requests for information cannot be made to OIC under the RTI Act.
17 September 2012	<p>A successful tenderer contacted OIC by telephone and requested the name of the access applicant but did not provide submissions supporting their case.</p> <p>A successful tenderer contacted OIC in writing and requested the name of the access applicant but did not provide submissions supporting their case.</p>
19 September 2012	OIC notified the successful tenderer that (i) OIC would not reveal the name of the access applicant and (ii) requests for information cannot be made to OIC under the RTI Act.
24 October 2012	OIC provided the applicant with an update on the status of the external review.

APPENDIX B

Relevant provisions of the Contracts

AGREED TERMS:

1. DEFINITIONS & INTERPRETATION

1.1 In this Contract the following definitions apply:

...

“**Confidential Information**” means information of, or supplied by, the State that:

- (a) is by its nature confidential;
- (b) is designated as confidential; or
- (c) the Contractor knows or ought to know is confidential;

and includes information:

- (d) about the terms and conditions of the Contract;
- (e) concerning the internal management and structure, personnel, processes and policies, commercial operations, financial arrangements or affairs of the State Government;
- (f) that is of actual or potential commercial value to the State; or
- (g) relating to the clients or Successful Offerors of the State;

but does not include information that:

- (h) was already in the possession of the Contractor and not subject to an obligation of confidentiality,
- (i) is lawfully received from a third party or independently developed by the Contractor; or
- (j) is public knowledge other than through a breach of an obligation of confidentiality;

14. CONFIDENTIALITY

14.1 The Contractor must not, and must ensure that its officers, employees, agents and sub-contractors do not, use or disclose any Confidential Information without the State’s consent, other than in accordance with this Clause 14.

14.2 The Contractor may disclose Confidential Information:

- (a) to its officers, employees, agents and sub-contractors to the extent necessary for the performance of this Contract, provided that the Contractor:
 - (i) makes such persons aware that the information is confidential; and
 - (ii) if specified in item 18 of Schedule A or directed by the State during the Contract Term, obtains from such persons a confidentiality undertaking in a form acceptable to the State;
- (b) where required by law; or
- (c) where this Contract requires disclosure to a third party.

14.3 The Contractor must keep all Confidential Information in a secure location so that no unauthorised person is able to gain access to it.

14.4 Upon receipt of a written request by the State either during the Contract Term or upon termination or expiration of this Contract, the Contractor must deliver to the State any Records in the Contractor's power, possession or control.

14.5 Subject to clause 14.4, the Contractor may:

- (a) return any Record to the State upon the completion of this Contract; or
- (b) destroy any copy (but not the original) of a Record held in its file in accordance with usual business practice and any applicable legislative requirements.

15. PRIVACY AND PERSONAL INFORMATION

15.1 This Clause 15 applies if:

- (a) the Contractor will in any way deal with Personal Information for the State; or
- (b) the provision of the Services under this Contract will involve –
 - (i) the transfer of Personal Information to the State; or
 - (ii) the provision of services to a third party for the State.

15.2 (a) The Contractor acknowledges that it is a bound contracted service provider for the purposes of the *Information Privacy Act 2009*.

- (b) The Contractor must:
 - (i) if the State is an “agency” within the meaning of the *Information Privacy Act 2009*, comply with Parts 1 and 3 of Chapter 2 of that Act in relation to the discharge of its obligations under this Contract, as if the Contractor was the State;
 - (ii) not use Personal Information other than for the purposes of the performance of the Services, unless required or authorised by law;
 - (iii) not disclose Personal Information without the consent of the State, unless required or authorised by law;
 - (iv) not transfer Personal Information outside of Australia without the consent of the State;
 - (v) ensure that access to Personal Information is restricted to those of its employees and officers who require access in order to perform their duties under this Contract;
 - (vi) ensure that its officers and employees do not access, use or disclose Personal Information other than in the performance of their duties under this Contract;
 - (vii) ensure that its sub-contractors who have access to Personal Information comply with obligations the same as those imposed on the Contractor under this clause;
 - (viii) fully co-operate with the State to enable the State to respond to applications for access to, or amendment of, a document containing an individual's Personal Information and to privacy complaints; and
 - (ix) comply with such other privacy and security measures as the State reasonably advises the contractor in writing from time to time.

- 15.3 On request by the State, the Contractor must obtain from its employees, officers or sub-contractors engaged for the purposes of this Contract, an executed deed of privacy in a form acceptable to the State.
- 15.4 The Contractor must immediately notify the State on becoming aware of any breach of clause 15.1

26. GENERAL PROVISIONS

...

26.11 Right to Information and Disclosure

- (a) The *Right to Information Act 2009* (RTI Act) provides members of the public with a legally enforceable right to access documents held by Queensland Government Agencies.
- (b) The RTI Act requires that documents be disclosed upon request, unless the documents are exempt or, on balance, disclosure is contrary to the public interest.
- (c) Information relating to this Contract is potentially subject to disclosure to third parties.
- (d) If disclosure under the RTI Act or general disclosure of information provided by the State in connection with this Contract, would be of substantial concern to the Contractor, because it would disclose trade secrets, information of commercial value, the purposes or results of research or other information of a confidential nature, this should be indicated by the Contractor. The State cannot guarantee that any information provided by the Contractor will be protected from disclosure under the RTI Act.
- (e) Despite any other provision of this Contract, the State is entitled to publish on the Queensland Government Chief Procurement Office website: www.qgcpcpo.qld.gov.au under 'eTender system for Government Successful Offerors' or by any other means, the following details:
 - (i) the name and address of the State;
 - (ii) a description of the Services;
 - (ii) commencement date of the Contract or award date;
 - (iii) Contract value;
 - (iv) name and address of the Contractor; and
 - (v) procurement method used.