



## Decision and Reasons for Decision

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**Citation:** *Azzopardi and Department of Environment and Heritage Protection* [2017] QICmr 48 (19 September 2017)

**Application Number:** 313034

**Applicant:** Azzopardi

**Respondent:** Department of Environment and Heritage Protection

**Decision Date:** 19 September 2017

**Catchwords:** ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - personal information and privacy of other individuals - names of private residents, signatures, mobile phone numbers and family/leave information of public servants - whether disclosure would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - DELETION OF IRRELEVANT INFORMATION - whether giving access to a document would disclose information the agency reasonably considers is not relevant to the access application - whether the document has any bearing on, or is pertinent to, the terms of the access application - section 73 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - INFORMATION COMMISSIONER MAY DECIDE NOT TO REVIEW - whether sufficiency of search aspect of this review lacks substance - decision to not further deal with part of the external review application - section 94(1)(a) of the *Right to Information Act 2009* (Qld)

## REASONS FOR DECISION

### Summary

1. The applicant made an application under the *Right to Information Act 2009* (Qld) (**RTI Act**) to the Department of Environment and Heritage Protection (**Department**) for access to:<sup>1</sup>
  - *'the removal, alteration and substitution of environmental constraints,<sup>2</sup> nature conservation overlays, koala habitat/corridor protection, removal of remnant*

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<sup>1</sup> The requested information covered the time period of January 2009 to August 2016.

<sup>2</sup> By email to the Department on 7 August 2016, the applicant clarified that 'environmental constraints' means 'any documented constraints, including state mapped [sic], EHP was aware of which were designed to protect the ecology, vegetation and fauna on the CSR property'.

*vegetation from the CSR owned Wheaton Street, Narangba property, Lot 1 on SP 211050, including all communications and correspondence between the Department and Moreton Bay Regional Council (including its PSA consultants), and the Department and CSR, in connection with the above'; and*

- *'all communication and correspondence between the Department and Moreton Bay Regional Council (including its PSA Consultants) and between the Department and CSR, relating to the Narangba East Local Development Area Plan Linear Green Space Network and the Koala Offsets Policy. plus the incorporation of these into the Moreton Bay Regional Plan'.*
2. The Department located 703 pages in response to the application and decided to grant full access to 571 pages and part access to 132 pages. Information was deleted from these pages on the basis that it comprised contrary to public interest information or irrelevant information.
  3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the decision to redact this information. The applicant also requested that OIC consider the sufficiency of the Department's searches. In particular, the applicant submitted that he was concerned with the content of the documents he had received, and that he sought access to documents which showed *why* the Department decided to change its approach to development on the Wheaton Street, Narangba property (Lot 1 on SP 211050) (**Wheaton Street Property**).
  4. For the reasons set out below, I affirm the Department's decision to refuse access to the contrary to public interest information and to exclude the irrelevant information from consideration under the RTI Act. In addition, I do not consider there is any substantive basis upon which the sufficiency of search aspect of this review can be progressed, and I have decided to not further deal with this aspect of the application under section 94(1)(a) of the RTI Act because it is lacking substance.

## **Background**

5. Significant procedural steps taken by OIC in conducting the external review are set out in the appendix to these reasons.

## **Reviewable decision**

6. The decision under review is the Department's original decision dated 12 October 2016.

## **Evidence considered**

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

## **Issues for determination**

8. The issues for determination are whether the Department was entitled to:<sup>3</sup>
  - refuse access to information under section 47(3)(b) of the RTI Act on the basis that its disclosure would, on balance, be contrary to the public interest; and
  - exclude certain information from consideration under section 73 of the RTI Act on the basis that it is irrelevant to the application.

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<sup>3</sup> The Department agreed to release some additional information to the applicant on external review, and this information is not addressed in these reasons for decision.

9. I have also decided to not further deal with the sufficiency of search aspect of this review under section 94(1)(a) of the RTI Act as I consider it is lacking substance.

## Findings

### **Contrary to public interest information**

10. The contrary to public interest information appears on 106 part pages<sup>4</sup> and comprises:
- the names of private residents which appear on certain maps
  - signatures and mobile phone numbers; and
  - family/leave information of public servants.
11. The RTI Act confers a right of access to documents of an agency,<sup>5</sup> subject to limitations, including grounds for refusal of access.<sup>6</sup> Access may be refused to a document where disclosing the information would, on balance, be contrary to the public interest.<sup>7</sup> The RTI Act identifies various factors for and against disclosure that may be relevant to deciding the balance of the public interest<sup>8</sup> and explains the steps that a decision-maker must take<sup>9</sup> 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 would, on balance, be contrary to the public interest.
12. No irrelevant factors arise in the circumstances and I have not taken any into account.
13. I am satisfied that this information comprises the personal information of these individuals, even though some of the information appears in an employment context.<sup>10</sup> Accordingly, I have considered whether its disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy<sup>11</sup> and cause a public interest harm through disclosure of an individual's personal information.<sup>12</sup> I accept that the information is not highly sensitive. However, I am satisfied that these factors apply, and that releasing names of private residents, signatures and mobile telephone numbers, and family/leave arrangements of public servants is an intrusion into an individual's personal sphere. I afford both of these factors moderate weight.
14. The applicant submits that public servants engaged in the performance of public service acting in their official capacity should generally be identified except in specific hazardous circumstances and that public scrutiny enhances accountability.<sup>13</sup> The applicant's submissions are misguided. He has been granted access to information which identifies public servants, including their names and other contact details.

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<sup>4</sup> File A, pages 12, 13, 15, 18, 33-35, 107, 166, 183, 185, 230, 231-233, 237, 239, 240, 243-247, 250, 261, 265-268, 272-275, 280, 324, 326, 327, 338, 340, 342, 359, 364, 366, 367, 384, 386, 387, 395-397, 399, 401, 402, 404, 408-410, 412, 414-418, 421-423, 427, 430, 435, 436, 439, 441, 448, 449, 451, 454, 456, 476, 477, 479, 480, 488, 489, 490, 492 and 501 and File B, pages 2, 5, 13-29 and 98.

<sup>5</sup> Section 23(1)(a) of the RTI Act.

<sup>6</sup> Grounds for refusal of access are set out in section 47 of the RTI Act.

<sup>7</sup> Sections 47(3)(b) and 49 of the RTI Act.

<sup>8</sup> Schedule 4 of the RTI Act sets out the factors for deciding whether disclosing information would, on balance, be contrary to the public interest. However, these lists of factors are not exhaustive; in other words, factors that are not listed may also be relevant in a particular case.

<sup>9</sup> Section 49(3) of the RTI Act.

<sup>10</sup> 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'.

<sup>11</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>12</sup> Schedule 4, part 4, item 6 of the RTI Act.

<sup>13</sup> Email to OIC on 29 June 2017.

15. I have considered whether there are any public interest factors which favour disclosure of this information, other than the general public interest in furthering access to government-held information and the RTI Act's pro-disclosure bias.<sup>14</sup> I have been unable to identify any factors in the circumstances, and the applicant's submissions do not assist.
16. Accordingly, I am satisfied that the Department is entitled to refuse access to this information under section 47(3)(b) of the RTI Act because its disclosure would, on balance, be contrary to the public interest.

### ***Irrelevant information***

17. The irrelevant information appears on two pages and can be described as an email chain between the Department and a member of the public.<sup>15</sup>
18. Section 73 of the RTI Act provides that an agency may give access to a document subject to the deletion of information it considers is not relevant to an application. This is not a ground for refusal of access, but a mechanism to allow irrelevant information to be deleted from documents which are identified for release to an applicant. In deciding whether information is irrelevant, it is necessary to consider whether the information has any bearing upon, or is pertinent to, the terms of the application.<sup>16</sup>
19. The applicant submits that *'everyone is a member of the public at one time or other and if the communication falls under the broad scope of [the] application it is relevant and should be released'*.<sup>17</sup>
20. I have carefully considered the terms of the access application, the content of the email chain and the applicant's submissions. I am satisfied that the information has no bearing on, and is not pertinent to, the terms of the applicant's request. Accordingly, I find that the Department was entitled to exclude this information from consideration under section 73 of the RTI Act as it is irrelevant.

### ***Decision to not further deal with part of the external review application***

21. The Information Commissioner<sup>18</sup> may decide not to further deal with part of an external review application if satisfied that it is lacking substance.<sup>19</sup> The expression *'lacking substance'* is not defined in the RTI Act. However, the Information Commissioner has previously indicated that an application (or part thereof) will be lacking in substance if there is no substantive basis on which an external review can be progressed, or in other words, where an applicant is unable to establish that there is more than a remote possibility of a well-founded claim.<sup>20</sup>
22. The applicant has indicated to OIC that he would *'like to see a "sufficiency of search" implemented'* in relation to this external review.<sup>21</sup> Broadly, this submission appears to relate to the applicant's concern about *why* the Department removed *'environmental constraints'* in relation to the Wheaton Street Property, and why the Department has not

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<sup>14</sup> Section 44 of the RTI Act.

<sup>15</sup> File A, pages 156 and 157.

<sup>16</sup> *O80PCE and Department of Education and Training* (Unreported, Queensland Information Commissioner, 15 February 2010) at [52].

<sup>17</sup> Email to OIC on 29 June 2017.

<sup>18</sup> Or delegate.

<sup>19</sup> Section 94(1)(a) of the RTI Act.

<sup>20</sup> *DeVere Lawyers and Whitsunday Regional Council* (Unreported, Queensland Information Commissioner, 19 March 2009) (*DeVere*), citing *Ebber and Another v Human Rights and Equal Opportunity Commission and Others* (1995) 129 ALR 455. *DeVere* considered section 77(1)(a) of the now repealed *Freedom of Information Act 1992* (Qld), which has been replicated in section 94(1)(a) of the RTI Act.

<sup>21</sup> Email to OIC on 9 November 2016.

provided him with more information relating to this matter.<sup>22</sup> In summary, he submits that:<sup>23</sup>

- his application was straightforward as it specified the relevant constraints and related to only one property
- his concern is about the Department withholding documents that outline the reasons and circumstances which *'led it to move from a position where it was carrying out its responsibility to protect koala habitat and corridor to a position where it disregarded same [sic] to facilitate development of the Wheaton Street property'*
- an assessment of the sufficiency of the Department's searches would reveal documents that *'point to a major change of attitude; from performing its public role of protecting the environment to abrogating it'* and that searches could *'uncover documents which substantiate that the Department engaged in conflict of interest and more'*; and
- he is able to provide evidence supporting his assertions about some of the Department's actions and there should be an investigation into some of their actions.

23. In this case, the access application is framed broadly, requests documents for a period spanning more than seven years,<sup>24</sup> and is not limited to a discrete category of documents (e.g. reports or briefing notes) but rather, relates to all types of documents held by the Department.<sup>25</sup> Some aspects of the application are practically difficult to define, including the term *'environmental constraint'*, which the applicant clarified with the Department to mean *'any documented constraints, including state mapped [sic], EHP was aware of which were designed to protect the ecology, vegetation and fauna on the CSR property'*.<sup>26</sup> This definition does little to narrow the meaning of the term, given this would cover a very wide range of State planning instruments prepared under the now repealed *Sustainable Planning Act 2009* (Qld).<sup>27</sup>

24. As noted in paragraph 22 above, the applicant's general sufficiency of search concerns raised on external review appear to amount to assertions about the background to the Department removing, altering, or substituting these *'environmental constraints'* as they apply to the Wheaton Street Property, and an allegation that this occurred as a result of communication with Council and/or CSR Limited.<sup>28</sup> Addressing these concerns would require:

- identifying State planning instruments that apply in relation to the Wheaton Street Property
- analysing whether these instruments are *'designed to protect the ecology, vegetation and fauna'* on the property
- determining whether these instruments (or the application of these instruments to the Wheaton Street Property) have been removed, altered or substituted in the seven and a half years specified in the access application; and
- investigating whether the Department communicated with Council or CSR Limited in relation to any relevant removal, alteration or substitution.

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<sup>22</sup> As explained to OIC in a telephone conversation on 3 February 2017.

<sup>23</sup> Email to OIC on 29 June 2017.

<sup>24</sup> From January 2009 to August 2016.

<sup>25</sup> Specifically *'..all internal and external documents (hard copy, electronic, etc) including, but not limited to, memos, file entries, records/minutes of meetings, email, letters, recordings etc'*.

<sup>26</sup> Email to the Department on 7 August 2016.

<sup>27</sup> The *Sustainable Planning Act 2009* (Qld) was in force at the time the access application was made. It has since been repealed and replaced by the *Planning Act 2016* (Qld).

<sup>28</sup> As discussed with OIC on 3 February 2017.

25. On external review, OIC's role is to review the Department's decision on the access application, and to consider whether the Department has taken all reasonable steps to identify and locate the requested documents.<sup>29</sup> While the applicant framed his submissions as sufficiency of search concerns, I consider that in effect, this aspect of the external review application amounts to a request to conduct a detailed analysis of planning law as it applies to a particular lot, and investigate alleged Departmental conduct.
26. I accept that these issues are of significant concern to the applicant but they are not matters that I have jurisdiction to consider within the external review process. Accordingly, I do not consider there is any substantive basis upon which this aspect of the external review can be progressed. On that basis, I have decided not to further deal with this aspect of the application under section 94(1)(a) of the RTI Act because it is lacking substance.

## **DECISION**

27. For the reasons set out above, I affirm the Department's decision and:
- refuse access to 106 part pages under section 47(3)(b) of the RTI Act on the basis that disclosure would, on balance, be contrary to the public interest; and
  - exclude information appearing on two pages from consideration under section 73 of the RTI Act on the basis that this information is irrelevant to the application.
28. I have also decided to not further deal with the sufficiency of search aspect of this review under section 94(1)(a) of the RTI Act as I consider it is lacking substance.
29. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act

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**L Lynch**  
**A/Right to Information Commissioner**

**Date: 19 September 2017**

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<sup>29</sup> Section 130 of the RTI Act.

## APPENDIX

### Significant procedural steps

Date	Event
24 October 2016	OIC received the external review application. OIC notified the Department that the external review application had been received and requested procedural documents.
25 October 2016	OIC received the requested procedural documents from the Department. The applicant provided submissions to OIC.
8 November 2016	The applicant provided submissions to OIC. The Department provided a copy of the documents in issue to OIC.
9 November 2016	The applicant provided submissions to OIC.
11 November 2016	OIC notified the applicant and the Department that the external review application had been accepted. OIC asked the Department to provide a copy of its search records.
13 November 2016	The applicant provided submissions to OIC.
17 November 2016	The Department provided OIC with a copy of the requested search records.
20 January 2017	OIC asked the Department to provide further documents in issue, and these documents were provided to OIC by the Department.
31 January 2017	The Department confirmed that it released further documents to the applicant.
3 February 2017	The applicant provided submissions to OIC by phone.
14 February 2017	OIC clarified the issues for determination in the review with the applicant.
14 March 2017	OIC provided the applicant with an update on the status of the review.
2 May 2017	OIC provided the applicant with an update on the status of the review.
16 June 2017	OIC asked the Department to release additional information to the applicant and requested further submissions on a particular sufficiency of search issue. OIC conveyed a preliminary view to the applicant and invited him to provide submissions supporting his case.
20 June 2017	The Department provided submissions to OIC by phone in relation to the particular sufficiency of search issue. OIC conveyed the Department's submissions to the applicant, which resolved this issue.
23 June 2017	The Department notified OIC that it had released additional information to the applicant as agreed.
29 June 2017	The applicant provided submissions in response to OIC's preliminary view.
5 July 2017	The applicant provided further submissions in response to OIC's preliminary view.
4 September 2017	OIC provided the applicant with an update on the status of the review and notified the applicant that the next step in the matter would be a formal written decision.