



Decision and Reasons for Decision

Application Number: 310145

Applicant: Office of the Leader of the Opposition

Respondent: Treasury Department

Decision Date: 7 July 2010

Catchwords: RIGHT TO INFORMATION – EXEMPT INFORMATION – refusal to deal with application under section 40 of the *Right to Information Act 2009* (Qld) - whether access application is expressed to relate to all documents, or to all documents of a stated class, that contain information of a stated kind or relate to a stated subject matter – whether documents to which the application relates are comprised of exempt information

RIGHT TO INFORMATION – EXEMPT INFORMATION – CABINET INFORMATION BROUGHT INTO EXISTENCE ON OR AFTER COMMENCEMENT – whether information was brought into existence for the consideration of Cabinet under schedule 3, section 2(1)(a) of the *Right to Information Act 2009* (Qld)

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REASONS FOR DECISION

Summary

1. Having considered the parties' submissions and evidence, relevant legislation, case law and decisions, I am satisfied that the Treasury Department (**Department**) was entitled to refuse to deal with the RTI Application pursuant to section 40 of the *Right to Information Act 2009* (Qld) (**RTI Act**), on the basis that all of the documents to which the application relates are comprised of exempt information being documents brought into existence for the consideration of Cabinet under schedule 3, section 2(1)(a) of the RTI Act.

Background

2. By application dated 12 November 2009, the applicant applied to the Department for access to (**RTI Application**):

All draft versions of the "Queensland assets sale – The Myths v The Facts" flyer and material that was used to produce it.

3. In its letter dated 24 December 2009, the Department decided to refuse to deal with the RTI Application in accordance with section 40 of the RTI Act on the basis that all documents falling within the scope of the application would qualify as exempt information under section 48 of the RTI Act because they would comprise Cabinet information under schedule 3, section 2(1)(a) of the RTI Act.
4. By letter dated 12 January 2010, the applicant requested an internal review of the Department's decision.
5. In its letter dated 12 February 2010, the Department affirmed its earlier decision (**Internal Review Decision**).
6. By letter received by this Office on 15 March 2010, the applicant applied for an external review of the Internal Review Decision (**External Review Application**).

Decision under review

7. The decision under review is the Internal Review Decision (referred to at paragraph 5 above).

Steps taken in the external review process

8. By letter dated 24 March 2010, the Office informed the applicant and the Department that the External Review Application had been accepted for review.
9. By letter dated 13 April 2010, the Department provided further submissions in support of its Internal Review Decision.
10. By email dated 13 April 2010, the Department provided the Office with a copy of the Queensland Government Advertising Guidelines relevant to its submissions noted at paragraph 9 above.
11. By letter dated 27 April 2010, the Office requested a copy of the relevant Cabinet submission and decision from the Cabinet Secretariat.

12. A copy of the Cabinet documents requested above was received by this Office on 7 May 2010.
13. By letter dated 26 May 2010, I informed the applicant of my preliminary view and asked for any final submissions by 9 June 2010.
14. By letter received by this Office on 9 June 2010, the applicant indicated that he did not agree with my preliminary view.

Issues in the review

15. The applicant sought external review of the Department's decision to refuse to deal with the RTI Application under section 40 of the RTI Act on the basis that any responsive documents comprised exempt information under schedule 3, section 2(1)(a) of the RTI Act.
16. Accordingly this decision will consider whether:
 - the Department was entitled to refuse access to the RTI Application under section 40 of the RTI Act; and
 - the documents to which the RTI Application relates are comprised of exempt information pursuant to schedule 3, section 2(1)(a) of the RTI Act.

Findings

Section 40 of the RTI Act

17. Section 40 of the RTI Act provides:

40 Exempt information

(1) This section applies if—

- (a) an access application is expressed to relate to all documents, or to all documents of a stated class, that contain information of a stated kind or relate to a stated subject matter; and*
- (b) it appears to the agency or Minister that all of the documents to which the application relates are comprised of exempt information.*

(2) The agency or Minister may refuse to deal with the application without having identified any or all of the documents.

18. In effect, section 40 of the RTI Act allows an agency to refuse to deal with an application if:
 - the application requests documents of a particular class, that contain information of a stated kind or relate to a stated subject matter; and
 - the agency believes all of the documents to which the application relates are comprised of 'exempt information', as defined in section 48 of the RTI Act and described in schedule 3 of the RTI Act.

19. If an agency relies on section 40 of the RTI Act, it is not required to identify any or all of the documents. The agency is however, required, under section 54(2)(f) of the RTI Act, to set out the following in its decision:
- the provision of schedule 3 of the RTI Act under which the information in the documents sought is exempt information; and
 - the reasons for the decision classifying the documents sought as exempt information.
20. In the Internal Review Decision, the Department found that the information in issue comprised Cabinet documents which are defined as 'exempt information' under section 48 and schedule 3, section 2(1)(a) of the RTI Act.
21. Under section 48 of the RTI Act, access to a document may be refused to the extent that it comprises exempt information. Schedule 3 of the RTI Act lists types of information which Parliament considers to be exempt information on the basis that its disclosure would not be in the public interest.

Schedule 3, section 2(1)(a) of the RTI Act

22. Schedule 3, section 2(1)(a) of the RTI Act provides:

2 Cabinet information brought into existence on or after commencement

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

(a) it has been brought into existence for the consideration of Cabinet; or

...

23. The term 'consideration' is defined in schedule 3, section 5 of the RTI Act as including:

(a) discussion, deliberation, noting (with or without discussion) or decision; and

(b) consideration for any purpose, including, for example, for information or to make a decision.

24. If the documents sought by the applicant are part of a class of documents which were brought into existence for the consideration of Cabinet, and no exceptions apply, then the Department will be entitled to refuse to deal with the RTI Application under section 40 of the RTI Act.

Was the information brought into existence for the consideration of Cabinet?

25. For the purposes of the RTI Act, 'Cabinet' includes a Cabinet committee or subcommittee.¹ As previously indicated, I obtained from the Cabinet Secretariat a copy of the relevant Cabinet Budget Review Committee (CBRC) submission. The scope of the RTI Application does not include the submission itself, which in this case would, and any draft of it, comprise exempt material.
26. Material that does fall within the scope of the RTI Application was attached to the submission. This included a version of the flyer sought and material used to produce it. I have also satisfied myself that CBRC made a decision with respect to the Cabinet submission and therefore 'considered' the submission and its attachments.

¹ As defined in schedule 3, section 5 of the RTI Act

27. While schedule 3, section 2(3) of the RTI Act deems a Cabinet submission itself to comprise exclusively exempt information, without limiting subsection (1), this does not automatically mean that documents attached to the submission are automatically exempt, nor does it necessarily prove that the attachments were 'brought into existence' for the consideration of Cabinet.
28. Having viewed the attachments to the submission, I consider them to be reports of factual or statistical information. Under schedule 3, section 4(b) of the RTI Act, such attachments are only exempt if they were brought into existence for the consideration of Cabinet or for the State's budgetary processes.
29. In the case of *Hudson (OS agent for Fencray Ltd) and Department of the Premier, Economic and Trade Development*² the Information Commissioner stated (in relation to section 36(1) of the now repealed *Freedom of Information Act 1992 (Qld) (FOI Act)*):³

... a document is not exempt merely because it has been submitted to Cabinet. Inquiries must be pursued into the "genealogy" of such a document, to establish the purpose for which it was brought into existence. The time of the creation of the document is the time at which the purpose for its creation is to be ascertained. The fact that it was subsequently decided to annex to a Cabinet submission, a document that was brought into existence for a purpose other than submission to Cabinet for Cabinet consideration, will not bring the document within s.36(1)(a)...

30. The above decision considered a version of section 36(1) of the FOI Act⁴ which had similar requirements to schedule 3, section 2 of the RTI Act because it also contemplated that the relevant information was brought into existence for Cabinet consideration:

*36(1) Matter is exempt matter if -
 (a) it has been submitted, or is proposed by a Minister to be submitted, to Cabinet for its consideration and was brought into existence for the purpose of submission for consideration by Cabinet; or
 ...*

31. In my view the Information Commissioner's approach in *Hudson* as cited above is apt to apply in these circumstances. Accordingly to determine whether the relevant documents were brought into existence for the consideration of Cabinet (whether it be the sole reason, or one of many) requires a decision maker to determine the reason the information in question was created.

The Department's submissions

32. In relation to this question, the Department submits the following:
- the Asset Sales Myths Versus Facts flyer (**flyer**) was part of a wider State-wide advertising campaign which, due to its cost, was required to be endorsed by the CBRC
 - the Cabinet submission, including the flyer was considered and endorsed by the CBRC.

² (1993) 1 QAR 123 (*Hudson*).

³ At paragraph 26.

⁴ Subsequent amendments to the FOI Act withdrew the requirement that the 'matter' had to have been brought into existence for the purpose of submissions for consideration by Cabinet.

33. In support of its position, the Department provided a copy of the Queensland Government Advertising Guidelines, as produced by the Department of the Premier and Cabinet in October 2009. As the documents relevant to the Cabinet submission would have been created prior to October 2009, I sourced an earlier copy of this guideline with a commencement date of July 2008 (**Advertising Guideline**).
34. I have reviewed the Advertising Guideline and confirm:
- it requires departments to submit an advertising proposal to the Advertising Review Committee (**ARC**) for major advertising campaigns. This includes a campaign where the expenditure is estimated to be significant i.e. above \$100,000 media spend; and
 - once the ARC has approved the proposal, the ARC Secretariat will ask the department to seek Ministerial sign-off. Once approved by the Minister, the Secretariat will lodge the proposal to CBRC on the department's behalf, via a CBRC submission signed by the Premier.
35. I have satisfied myself from reading the CBRC decision that the flyer was part of a campaign that required CBRC approval from its inception.

The applicant's submissions

36. In correspondence to the Department and this Office, the applicant made submissions disputing that the information in issue was brought into existence for the consideration of Cabinet because:
- such information was brought into existence to inform the public on the purpose and justification of the government's asset sales program; and
 - the decision of Cabinet to enact the asset sales program was separate & distinct from the creation of the flyer.
37. I agree with both of these points however they do not rule out the possibility that the documents sought were also brought into existence for the consideration of Cabinet.
38. In relation to government advertising campaigns I note the following statement taken from the Advertising Guideline:⁵
- Queensland Government departments, statutory authorities and Government Owned Corporations are authorised to develop and implement communication campaigns for policies, initiatives, services and programs that fall within their responsibility.*
39. This suggests, if read alone, that departments do not need Cabinet approval for such campaigns.
40. While the information was clearly brought into existence to inform the public and government departments appear to have the authority to develop and implement communication campaigns, government departments are also required by the Cabinet Handbook requirement to obtain CBRC approval for major communication campaigns (discussed within the Advertising Guideline as 'significant expenditure' costing more than \$100,000).

⁵ At page 3.

41. The Advertising Guideline also states at page 3 that:

There are two elements to advertising: the creative development of the advertising itself and the placement (buying) of that advertising in the media.

42. I have considered whether the preparation of draft flyers and other material in fact comprised 'creative development' that may not have been brought into existence for the consideration of Cabinet and whether Cabinet approval was only required in relation to the financial implications. The Cabinet Handbook however is clear on the role of the CBRC with respect to the consideration of major communication campaigns. At 3.2.2, under the heading of "Consideration of major communication campaigns," the role of the CBRC is described as follows:

CBRC considers a number of elements of a proposed communication campaign from a whole of government perspective to ensure that each campaign:

- follows the Queensland Government's Advertising Guidelines*
- meets the requirements of the advertising Code of Conduct (Advertising Guidelines on page 15)*
- reflects relevant policy initiatives*
- undertakes whole of government consultation (where applicable)*
- is professional conceived, executed and justified*
- represents value for money*
- reflects market research on community attitudes and behaviours and*
- has a separate submission and headings are addressed in order.*

43. The role of the CBRC is greater than considering the financial implications of the campaign proposal and with this greater role, I am satisfied that the CBRC is required to consider the detail of proposed communication campaigns. With that in mind I have formed the view that, while the flyers were prepared to inform the public about the government's asset sales program, they were also brought into existence for the consideration of Cabinet. The flyer was part of an advertising campaign which was:

- estimated to cost more than \$100,000;
- submitted to the CBRC by the Premier and Acting Treasurer and Minister for Employment and Economic Development in accordance with the Advertising Guideline; and
- considered by the CBRC in accordance with the definition of 'considered' as set out in schedule 3, section 5 of the RTI Act.

44. In response to my preliminary view, the applicant made further submissions which I have summarised below:

- the requirement for the information in issue to be submitted to the CBRC or the ARC for consideration was a by-product of regulation and not the core purpose of the creation of draft documents
- the draft versions of the flyer sought were created only to inform the public and that whether a final version was required to be submitted to CBRC is not central to their creation. As CBRC is not required to consider drafts, the drafts were not created for the consideration of Cabinet. The applicant has expressed a belief

that a subsequent decision was made to annex the information in issue to the Cabinet submission which means it cannot qualify for exemption.

45. In relation to the applicant's first submission above, as previously mentioned in this decision, in order to qualify for exemption under schedule 3, section 2 of the RTI Act, there is no requirement that a document be created for the sole or core purpose of needing Cabinet consideration.⁶ Documents can be created for more than one reason. It is sufficient that consideration by Cabinet is one of the reasons the documents was created. In light of the role of CBRC as discussed above, I am satisfied that one of the reasons the flyer and other material were created was for the consideration of Cabinet. Once a decision was made to run a campaign of significant cost, CBRC had to be convinced before it could be run. I am satisfied that the process required CBRC to consider the flyer and the material that was used to produce it. It follows that while the flyer and other material were created to inform the public, they were also created for consideration by Cabinet.
46. The applicant's second submission is that as CBRC is not required to consider drafts of documents, the drafts were not created for the consideration of Cabinet.
47. Section 2(1) of the RTI Act is the provision to apply to drafts of attachments to Cabinet submissions. The question therefore is whether the drafts of the documents sought were brought into existence for the consideration of Cabinet. Apart from the applicant's assertion, I am satisfied on my examination of the CBRC submission that because the estimated costing of the advertising campaign was realised prior to the production of the flyer, the Department was bound from that point to obtain Cabinet approval. It follows that one of the reasons the draft documents were brought into existence was for the consideration of CBRC in accordance with the requirements of the Advertising Guideline and the Cabinet Handbook. Additionally, it would have been a futile exercise for the Department to have brought the documents into existence for a purpose exclusive of the consideration of Cabinet, as the advertising campaign could not have proceeded. Therefore in the absence of any information to the contrary, I am satisfied that:
 - no subsequent decision was made to annex the information in issue to the Cabinet submission
 - one of the reasons the drafts were created was for the matter to be considered by Cabinet.
48. I am of the view that the documents (a version of the flyer and material used to produce it) attached to the Cabinet submission were brought into existence for the consideration of Cabinet. All draft versions of the flyer were not attached to the CBRC submission, however as the draft versions of the flyer must also be considered to be information brought into existence for the consideration of Cabinet, I am satisfied that any draft documents of the information in issue are also exempt information under schedule 3, section 2(3)(g) of the RTI Act.
49. In light of this it appears to me that all of the documents to which the application relates are comprised of exempt information and that the agency was entitled to refuse to deal

⁶ This was recently acknowledged by Justice Buchanan in *Fisse v Secretary, Department of Treasury* [2008] FCAFC 188 at paragraph 31 (in relation to the Commonwealth equivalent of schedule 3, section 2(1)(a) of the RTI Act) who accepted the following statement made by M Paterson in *Freedom of Information and Privacy in Australia* (2005) at [8.43]: '[t]he purpose which is referred to in these provisions does not have to be the sole purpose for which the document is created'.

with the application under section 40 of the RTI Act without having identified any or all of the documents.

Do any exceptions to schedule 3, section 2(1)(a) of the RTI Act apply?

50. The only exceptions to the application of schedule 3, section 2(1)(a) of the RTI Act are found in schedule 3, section 2(2) of the RTI Act, which provides:

(2) Subsection (1) does not apply to –

*(a) information brought into existence before the commencement of this section; or
(b) information officially published by decision of Cabinet.*

51. There is no evidence before me to indicate that:

- the information in issue was brought into existence before 1 July 2009; or
- Cabinet has made any decision authorising publication of the information in issue since its submission to Cabinet on 1 October 2009.

52. Accordingly, I am satisfied that schedule 3, section 2(2) of the RTI Act does not operate as an exception to the application of schedule 3, section 2(1)(a) of the RTI Act in this instance.

No public interest

53. Although the applicant submits that release of the information in issue would be in the public interest, it is important to note that if the information in question satisfies schedule 3, section 2(1)(a) of the RTI Act, it will be exempt information. This provision does not require or allow consideration of public interest issues, meaning I cannot consider such interests in this review.

Summary

54. In summary, I am satisfied that as all the requirements of schedule 3, section 2(1)(a) of the RTI Act have been satisfied, the Department was entitled to rely on section 40 of the RTI Act to refuse the applicant access to the information in issue.

DECISION

55. I affirm the decision under review by finding that the Department was entitled to refuse to deal with the RTI Application pursuant to section 40 of the RTI Act, on the basis that the information in issue was brought into existence for the consideration of Cabinet under schedule 3, section 2(1)(a) of the RTI Act.

J Kinross
Information Commissioner

Date: 7 July 2010