



## Decision and Reasons for Decision

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**Application Numbers:** 310914 and 310957

**Applicant:** Helping Hands Network Pty Ltd

**Respondent:** Department of Education, Training and Employment

**Decision Date:** 30 October 2012

**Catchwords:** ADMINISTRATIVE LAW - RIGHT TO INFORMATION – DECISION GRANTING ACCESS – objection to disclosure of applicant's tender documents – whether exempt from disclosure – sections 47(3)(a) and 48 of the *Right to Information Act 2009* (Qld)

RIGHT TO INFORMATION – DECISION GRANTING ACCESS – objection to disclosure of report into applicant's operations – 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)

## REASONS FOR DECISION

### Summary

1. Helping Hands Network Pty Ltd (**HH**) is a provider of outside school hours care services. HH successfully tendered to provide such services to Mansfield State School and Golden Beach State School, each of which is administered by the Department.
2. Two unsuccessful tenderers (**Access Applicants**)<sup>1</sup> applied separately to the Department of Education, Training and Employment (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to HH's tender submissions relevant to the school in which tender process the particular Access Applicant had been unsuccessful.<sup>2</sup>
3. The Department consulted with HH under section 37 of the RTI Act, seeking its views as to possible disclosure of the tender documents to the Access Applicants. HH objected to disclosure of the documents.
4. Despite this objection, the Department nevertheless decided<sup>3</sup> to release parts of each tender submission to the relevant Access Applicant.
5. HH applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision to disclose parts of each tender submission.

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<sup>1</sup> Neither of which has lodged written submissions nor formally applied to participate in these external reviews.

<sup>2</sup> That is, one Access Applicant had been unsuccessful in the Mansfield process, and therefore sought access to HH's Mansfield tender submission; the second had been unsuccessful in the Golden Beach process, and sought access to that submission.

<sup>3</sup> By way of a deemed internal review decision dated 16 December 2011 on the access application concerning the Mansfield tender process, and an internal review decision dated 23 January 2012 on the Golden Beach process.

6. For the reasons set out below, there are grounds on which to refuse access to parts of each tender submission beyond that information to which the Department decided to refuse access. There are, however, no grounds on which to refuse access to other parts. Access to certain parts of the Golden Beach submission, however, should be given by way of a reasonably opportunity to inspect.

## Background

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

## Reviewable decision

8. The decisions under review are:
  - in review no. 310914, the Department's decision deemed to have been made on 16 December 2011,<sup>4</sup> affirming an initial decision dated 7 October 2011 to release parts of the 48-page Mansfield tender submission, and
  - in review no. 310957, the Department's internal review decision dated 23 January 2012, to release parts of the 160-page Golden Beach tender submission.

## Evidence considered

9. Evidence, submissions, legislation and other material I have considered in reaching my decision are as disclosed in these reasons (including footnotes and appendix).

## Information in issue

10. The specific information to which the Department decided to grant the Access Applicants access was as follows:
  - review no. 310914: all of pages 1, 3-6, 9, 11-13, 16-17, 19 and 21-35, and parts of pages 2, 7, 10, 14, 18 and 20 of the Mansfield State School tender submission,<sup>5</sup>
  - review no. 310957: all of pages 1, 3-7, 11, 13-16, 18-19, 21-22, 24, 26-38 and 51-160, and parts of pages 2, 8-10, 12, 17, 20, 23 and 25 of the Golden Beach tender submission.<sup>6</sup>
11. The Department during the course of these external reviews accepted<sup>7</sup> my preliminary view<sup>8</sup> that some of the information which it had decided to release comprised exempt information or information the disclosure of which would be contrary to the public interest,<sup>9</sup> to which access may be refused.<sup>10</sup>

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<sup>4</sup> Under section 83(2) of the RTI Act.

<sup>5</sup> The Department refused access to all of pages 8, 15 and 36-48.

<sup>6</sup> The Department refused access to all of pages 39-50. Neither Access Applicant applied for review of the Department's decisions to refuse access to information. Accordingly, information to which access was refused is not the subject of review.

<sup>7</sup> See Departmental letter dated 20 June 2012 and enclosed copy of each tender submission, on which relevant information was marked.

<sup>8</sup> Conveyed via letter dated 6 June 2012. I also wrote to each of the Access Applicants on this date setting out the preliminary view summarised in this paragraph and inviting submissions in the event either objected to my preliminary view. While the Access Applicant relevant to review no. 310914 did telephone an OIC officer on 7 June 2012 to affirm, in general terms, continuing interest in obtaining information and to raise concerns with the relevant tender process, neither indicated objection to my preliminary view nor lodged any written submissions. In accordance with the terms of my letters to each, I have proceeded on the basis each accepts that preliminary view.

<sup>9</sup> As regards personal information in the form of signatures appearing on pages 3, 30 and 31 of the Golden Beach submission the subject of review no. 310957, under section 49 and section 47(3)(b) of the RTI Act.

<sup>10</sup> In review no. 310914, segments of information on pages 9, 10, 18, 20, 22-24 and 31; in review no. 310957, information on pages 3, 8, 12, 15, 23, 25, 27-31, 35 and 51. As noted, neither Access Applicant sought to contest my preliminary view in this regard. In any event I am satisfied relevant information comprises exempt information, for the reasons explained at paragraphs 31-41 below.

12. HH, meanwhile, has withdrawn its objections to disclosure of various other segments of information.<sup>11</sup> None of this information or that referred to in the preceding paragraph remains in issue in either review.
13. The information in issue in these reviews is therefore all pages or parts of pages described in paragraph 10, less those segments identified in paragraphs 11 and 12.
14. OIC has prepared a copy of each tender submission with information in issue appropriately marked, to be forwarded to the participants under cover of these reasons.

### **Issues in reviews**

15. HH contends that the information in issue comprises exempt information under section 48 of the RTI Act, to which access may be refused under section 47(3)(a) of the Act, as information the disclosure of which would found an action for a breach of confidence.<sup>12</sup>
16. HH also contends that disclosure of the information would, on balance, be contrary to the public interest in accordance with section 49 of the RTI Act, and that access may therefore be refused to the information in issue under section 47(3)(b) of the RTI Act.

### **Relevant law**

#### ***Onus***

17. As the decisions being reviewed are disclosure decisions,<sup>13</sup> HH bears the onus of establishing that a decision to not disclose the information in issue is justified or that the Information Commissioner should give a decision adverse to the Access Applicants.<sup>14</sup>

#### ***Right to access information***

18. The RTI Act confers on persons a right to be given access to documents of an agency. This right is subject to other provisions of the RTI Act, including grounds on which access may be refused. Relevantly, access may be refused to exempt information<sup>15</sup> and information the disclosure of which would, on balance, be contrary to the public interest.<sup>16</sup>

#### ***Requirements for breach of confidence exemption***

19. Information will be exempt if its disclosure would found an action for breach of confidence.<sup>17</sup> The words of the breach of confidence section refer to an action based in equity for breach of an equitable obligation of confidence.<sup>18</sup>

<sup>11</sup> Relevantly, information specified in its letter to OIC dated 8 August 2012.

<sup>12</sup> Schedule 3, section 8 of the RTI Act.

<sup>13</sup> 'Disclosure decision' is defined in section 87(3) of the RTI Act as a decision to disclose a document or information contrary to the views of a relevant third party obtained under section 37 of the RTI Act.

<sup>14</sup> Section 87(2) of the RTI Act.

<sup>15</sup> Sections 47(3)(a) and 48 of the RTI Act.

<sup>16</sup> Sections 47(3)(b) and 49 of the RTI Act.

<sup>17</sup> Schedule 3, section 8 of the RTI Act.

<sup>18</sup> And not an action for breach of a contractual obligation of confidence, a cause of action which is properly characterised as an action for a breach of contract, not confidence: *Callejo and Department of Immigration and Citizenship* [2010] AATA 244 (*Callejo*) at paragraphs 163-166 and *TSO08G and Department of Health* (Unreported, Queensland Information Commissioner, 13 December 2011). HH in its external review application in review no. 310957 took issue with *Callejo* insofar as it confined the breach of confidence exemption to equitable, and not contractual, obligations of confidence. OIC's acceptance of *Callejo* – and the narrower interpretation of the breach of confidence exemption that flows from it – was explained to HH in my letter dated 6 June 2012; HH has not sought to further agitate or contest this issue.

20. The following must be established to give rise to an equitable obligation of confidence:<sup>19</sup>
- 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, ie, the information must not be trivial or useless information, and it must have a degree of secrecy sufficient for it to be the subject of an obligation of conscience;
  - c) circumstances of the communication must create an equitable obligation of confidence; and
  - d) disclosure to the applicant for access must constitute an unauthorised use of the confidential information
  - e) disclosure would result in detriment to the plaintiff (that is, HH).

## Analysis and Findings

### *Entire tender submissions*

21. HH initially claimed that the entirety of each tender submission was subject to an equitable obligation of confidence, on the basis, essentially, that disclosure of same would reveal the '*layout and presentation*' of the submissions, which was '*relative to [HH's] competitive advantage*'.<sup>20</sup>
22. In my preliminary view letter dated 6 June 2012, I advised HH that I did not accept this contention. While HH did not accept this preliminary view,<sup>21</sup> it has as noted subsequently withdrawn its objections to disclosure of parts of the tender submissions,<sup>22</sup> a position obviously inconsistent with a global claim of confidence. I think it open to conclude, therefore, that HH has impliedly abandoned this blanket claim.
23. In any event, for the sake of completeness, I record my finding that I am not satisfied the entirety of each submission can be said to possess the necessary quality of confidence as demanded by criterion (b) of the cumulative requirements set out above.
24. I accept that in appropriate circumstances even information that is in the public domain – as parts of each tender submission clearly are – may be the subject of an obligation of confidence.<sup>23</sup> I do not, however, consider that this is such a case.
25. The core of each submission comprises a series of Departmentally-prescribed 'forms' into which the Department required tenderers to compile information. These 'forms' were obviously not produced as the result of any innovative enterprise or method on the part of HH, but were completed by HH in accordance with mandatory Departmental requirements. There can be no claim the layout or presentation of information of this kind is novel or unique to HH.
26. It may be that, as HH submits,<sup>24</sup> tenderers retained some discretion as to additional information to be attached to tender submissions, and the formatting of such attachments. Establishing novelty or innovation as regards these optional attachments,

<sup>19</sup> See *B and Brisbane North Regional Health Authority* [1994] 1 QAR 279 (**B and BNRHA**) at paragraphs 57-58; and *Callejo*, at paragraphs 163-171 and 176.

<sup>20</sup> External review applications dated 16 January 2012 and 20 February 2012.

<sup>21</sup> Submissions dated 22 June 2012.

<sup>22</sup> Submissions dated 8 August 2012.

<sup>23</sup> A submission raised by HH in its submissions dated 22 June 2012, citing *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 at 215.

<sup>24</sup> Submissions dated 22 June 2012.

however, would not be sufficient to sustain a global claim of confidence over the entirety of the submissions, for the reason the core body of the submissions simply follows, as explained in the preceding paragraphs, an obligatory layout and structure.

27. In any event, I am not satisfied that HH has demonstrated the layout and formatting of the attachments to each of the tender submissions in issue is possessed of a particular novelty or innovation of a sensitive or secret nature capable of forming the subject of an equitable obligation of confidence.
28. The relevant parts of each submission in my view simply present information (much of which, as I have discussed further below, is in the public domain, required by legislation to be made publicly available, or otherwise generic information) in accordance with relatively standard and/or trivial<sup>25</sup> layout and formatting methods – certain of which are readily observable on HH's own website.<sup>26</sup>
29. In these circumstances, I am not satisfied the layout and/or formatting of the entirety of the tender submissions can be said to be possessed of sufficient sensitivity or secrecy so as to form the subject of a binding obligation of confidence.
30. Accordingly, I do not consider the entirety of the tender submissions satisfy the requirements for exemption as specified above. I will now consider whether specific segments of information as contained in those submissions might so qualify.

#### ***Additional exempt information***

31. There are a number of segments in each tender submission the Department decided to disclose, but which in my view satisfy the requirements for exemption set out in paragraph 20.
32. This 'Additional Exempt Information' is specifically identifiable<sup>27</sup> (comprising parts of the relevant tender submissions), is not trivial or useless and is confidential as against the Access Applicants.<sup>28</sup>
33. I am also satisfied that this Additional Exempt Information was communicated in circumstances so as to give rise to an equitable obligation of confidence binding the Department not to disclose the information.<sup>29</sup> Clause 24.1 of the 'Conditions of Offer' applying to the relevant tender processes states:<sup>30</sup>

*The Customer [ie, the Department] will regard all information submitted by any offeror (except the name of the successful offeror) as confidential and will take all reasonable steps to safeguard the confidentiality of that information.*

34. The Department through this clause undertook to treat relevant information confidentially. HH was entitled to rely on that undertaking, and in my view communicated the additional exempt information on the understanding extended by the Department that it would be kept confidential.
35. I am satisfied therefore that the Refused Information was communicated to the Department in circumstances which give rise to an equitable obligation of confidence.

<sup>25</sup> Such as the use of certain devices and formatting techniques, the detail of which I am constrained from describing in these reasons but which are described in numbered paragraphs 2 and 3 of HH's submissions dated 22 June 2012.

<sup>26</sup> <http://helpinghandsnetwork.com.au/>, accessed 24 October 2012.

<sup>27</sup> Therefore satisfying requirement (a).

<sup>28</sup> Inasmuch as the Access Applicants are not aware of the information, or of the fact HH has relied upon it in its tender submissions, thus satisfying requirement (b).

<sup>29</sup> Requirement (c).

<sup>30</sup> As set out in the Department's decisions.

36. I am also satisfied that, as HH objects to disclosure of the Refused Information, its release would constitute an unauthorised use of the information,<sup>31</sup> and that such release would cause detriment to HH.<sup>32</sup>
37. I conveyed the above reasoning to the Department by way of my preliminary view letter dated 6 June 2012. In reply,<sup>33</sup> the Department argued that relevant<sup>34</sup> segments of information did not comprise exempt information, as they did not, in general terms, possess the necessary quality or confidence and/or their disclosure would not occasion HH detriment.
38. I do not accept these submissions. There are various other segments of information discussed further below that I agree are indeed in the public domain, or are otherwise so generic, innocuous or generally-known that they cannot properly form the subject of an equitable obligation of confidence.
39. The specific segments I am considering here, however – which include the identities of referees and the substance of their testimonials, HH's approach to complaints management,<sup>35</sup> and its staff attributes and fee structure – are not so far as I can ascertain publicly available or known to the Access Applicants,<sup>36</sup> nor in my view so trivial or obvious that they cannot be subject to protection.<sup>37</sup>
40. I am also satisfied that, as noted above, disclosure of this information would cause HH detriment, the requirement of which is, as canvassed in note 32, readily satisfied in the case of a non-government participant such as HH.
41. I am satisfied that the five requirements necessary to establish the breach of confidence exemption have been met as regards the Additional Exempt Information. Access may therefore be refused to this information on the basis it comprises exempt information.

## Remaining Information

42. Having dealt with the Additional Exempt Information, I must now consider the balance of the tender submissions remaining in issue; that is, those specific segments of information in each submission to which the Department decided to grant access, but to the disclosure of which HH continues to object. I will refer to this information as the 'Remaining Information'.

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<sup>31</sup> Requirement (d).

<sup>32</sup> Requirement (e). The requirement of detriment can be easily established by a non-government plaintiff such as HH: *B and BNRHA*, at paragraph 111. The detriment suffered by the plaintiff need not be of a financial nature and may include embarrassment, loss of privacy, or fear, or an indirect detriment, for example, disclosure of the confidential information may injure some relation or friend.

<sup>33</sup> Dated 20 June 2012.

<sup>34</sup> The Department did accept that some information it had decided to disclose in fact comprised exempt information; as canvassed in paragraph 11, that information is no longer in issue in this review.

<sup>35</sup> Which HH advised in submissions dated 8 August 2012 comprises information going beyond that it may be required to make generally available under relevant statutory obligations, a position the Department has not sought to contradict and I am prepared to accept.

<sup>36</sup> The Department contended that the identity of schools to which HH supplies care services is information publicly available, including information published to HH's own website. While I accept this is generally correct, the identities of schools and principals prepared to give HH references and testimonials are not, so far as I can determine, public knowledge. The Department also asserted that HH's use of tenderers and testimonials is not itself a unique approach. That may well be correct; there is nothing before me to suggest, however, that the identity of specific referees and substance of their testimonials is not itself information that is confidential or secret as against the Access Applicants. I should also note that the Department submitted some of this school information would be known to one of the Access Applicants; there is nothing before me to suggest that this is the case; as noted in note 28, I am satisfied HH's use of or reliance on this information is confidential as against the Access Applicants.

<sup>37</sup> Noting that information need only be 'significant' to attract the protection of an equitable obligation of confidence and not necessarily, say, commercially valuable: *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* [1984] 156 CLR 414.

43. I am not satisfied there are any grounds on which access to this Remaining Information may be refused.
44. Firstly, I am not satisfied disclosure of any of this Remaining Information would found an action for a breach of confidence so as to render the information exempt. This is because I do not consider any of it satisfies the second cumulative requirement of secrecy noted above.
45. While I am constrained from setting out in detail information claimed to be exempt,<sup>38</sup> I am satisfied that a considerable proportion of this Remaining Information is openly available either on HH's website, or in relevant school literature and websites.<sup>39</sup>
46. Other information – such as the fact HH is not a government owned entity<sup>40</sup> – is clearly not a matter of secrecy and is publicly deducible. Information of this kind – which is essentially in the public domain – cannot form the subject of an equitable obligation of confidence.
47. Much of balance of the Remaining Information merely consists of relatively obvious and innocuous formatting techniques,<sup>41</sup> restatements of industry 'common knowledge' (such as statutory child care fee subsidy rates), or broad 'motherhood' statements of general principle and intent – for example, relatively generic assertions of corporate philosophy and expressions of commitment to the delivery of service of the kind commonly found in corporate promotional literature. I am not satisfied information of this kind is possessed of sufficient utility or gravity for it to be the subject of an equitable obligation of confidence.
48. In general terms then, I am not satisfied the Remaining Information possesses the required quality of confidence, as it is either in the public domain, or otherwise too obvious or trivial to attract the protection of an equitable obligation of confidence.
49. There is a portion of the Remaining Information – a section of the Golden Beach submission (the submission in issue in review no. 310957) – which requires a slightly more considered analysis. The relevant section comprises an annexure to this tender submission consisting of HH's 'policies and procedures' manual (**Manual**).<sup>42</sup>
50. On an initial review, I formed the preliminary view<sup>43</sup> the Manual satisfied the requirements for the breach of confidence exemption. The Department did not accept this preliminary view,<sup>44</sup> and drew my attention to regulation 171(2) of the *Education and Care Services National Regulations 2011* (NSW)<sup>45</sup> (**National Regulations**), which provides:

**171 Policies and procedures to be kept available**

...

- (2) *The approved provider of an education and care service must ensure that copies of the current policies and procedures required under regulation 168 and, in the case of a family day care service, regulation 169 are available for inspection at the education and care service premises at all times that the*

<sup>38</sup> Section 108 of the RTI Act.

<sup>39</sup> Including, for example, information as to HH's personnel and fee rates.

<sup>40</sup> Recorded in the declarations as to competitive neutrality forming part of each tender submission.

<sup>41</sup> Such as the use, for example, of tables of content and bolded text.

<sup>42</sup> Specifically, Attachment 8 to the Golden Beach submission, numbered as pages 52-160. In the interests of efficiency, OIC has only reproduced the first page (page 52) of this Manual on the CD of information in issue accompanying these reasons; the entire document (ie, to page 160) is, however, in issue.

<sup>43</sup> Conveyed to the Department by letter dated 6 June 2012.

<sup>44</sup> Departmental submissions dated 20 June 2012.

<sup>45</sup> Enacted under sections 301 and 302 of the *Education and Care Services National Law Act 2010* (Vic), all of which apply in Queensland: *Education and Care Services National Law (Queensland) Act 2011*, section 4.

*service is educating and caring for children or otherwise on request.*

*Penalty: \$1000.*

51. In light of those submissions, I subsequently advised<sup>46</sup> HH of a further preliminary view that as regulation 171(2) appeared to require HH to make the Manual<sup>47</sup> available for inspection, the document could not be said to possess the necessary quality of confidence required to establish the breach of confidence exemption.
52. HH contested this preliminary view, relevantly submitting<sup>48</sup> that it

*...strongly opposes provision and disclosure of any such information to a competitor or to the public. Although the policies and procedures are available for inspection, the policies and procedures are only available for inspection to the authorised Departmental staff and the registered families. The policies and procedures are not available to the general public.*

*In order to access documentation, registered families are required to ask the co-ordinator of the service, who keep the policies and procedures securely in the office. The co-ordinator is not permitted and will not allow the document to be removed from the office or to be copied.*

*Regulation 171(2) of the [Regulations] does not authorise the public to access the policies and procedures...*

53. I do not accept these submissions. It may well be the practice of HH to only provide access in the limited fashion described in its submissions. I do not, however, consider such practice aligns with the obligation imposed by regulation 171(2). It is my view that, properly construed, the regulation confers a general right of inspection on any individual to inspect the Manual, and not a right limited to a particular class of persons or otherwise qualified in the manner as argued by HH.

54. As I advised HH by letter dated 10 September 2012, my view in this regard is reinforced by:

- advice obtained from the relevant regulatory authority, the Australian Children's Education and Care Quality Authority (**ACECQA**), an officer of which informed an OIC staff member<sup>49</sup> that ACECQA interprets the regulation as conferring a general right of inspection, and
- ACECQA's 'Guide to the National Law and National Regulations', which expressly encourages child care operators to publish policies and procedures documents such as the Manual online: 'It would be appropriate for the service's policies and procedures to be available online as well as at the premises'.<sup>50</sup>

55. Accordingly, I am satisfied regulation 171(2) of the National Regulations confers a general right of inspection, and not, as HH contends, a right limited to a specific class of persons.

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<sup>46</sup> By letter dated 18 July 2012.

<sup>47</sup> Which, as I advised HH in my 18 July 2012 letter, I understand comprises the 'policies and procedures' referred to in regulation 171(2), ie, the document it is required to produce and keep under the Regulations. HH has not sought to contradict my understanding in this regard.

<sup>48</sup> Submissions dated 8 August 2012. HH also contended that it had 'incurred a considerable expense in developing the policies and procedures', which is not a consideration relevant to determining whether or not HH is required by law to make that information publicly available.

<sup>49</sup> Via telephone on 6 September 2012.

<sup>50</sup> At p. 104. The relevant guidelines are available at [http://acecqa.gov.au/storage/2%20-%20Guide%20to%20the%20Education%20and%20Care%20Services%20National%20Law%20and%20National%20Regulations%20\(updated%209.11\).pdf](http://acecqa.gov.au/storage/2%20-%20Guide%20to%20the%20Education%20and%20Care%20Services%20National%20Law%20and%20National%20Regulations%20(updated%209.11).pdf) (accessed 6 September 2012).



56. As a document required to be made available to the public, the Manual cannot therefore be said to possess the necessary quality of confidence fundamental to establishing an equitable obligation of confidence. The Manual thus does not comprise exempt information to which access may be refused.

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

57. Nor do I consider that disclosure of any of this Remaining Information would, on balance, be contrary to the public interest.
58. Sections 47(3)(b) and 49 of the RTI Act provide that access may be refused to a document where its disclosure would be contrary to the public interest. Section 49 of the RTI Act describes the procedure to be followed in identifying whether information is contrary to the public interest to release.
59. The RTI Act lists factors which may be relevant to deciding the balance of the public interest and sets out the following steps to decide where the public interest lies in relation to the disclosure of information:
- 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.
60. I have not taken irrelevant factors into account.

### **Factors favouring disclosure**

61. The Department identified<sup>51</sup> the following public interest factors favouring disclosure:
- promote open discussion of public affairs and enhance Government accountability,<sup>52</sup>
  - contribute to positive and informed debate on important issues or matters of serious interest,<sup>53</sup>
  - inform the community of the Government's operations,<sup>54</sup>
  - allow or assist inquiry into possible deficiencies in agency or official conduct or administration,<sup>55</sup>
  - reveal reasons for Government decisions and background or contextual information informing same,<sup>56</sup> and
  - ensure effective oversight of public funds.<sup>57</sup>
62. As I advised HH in my preliminary view letter dated 6 June 2012, I am satisfied disclosure of the Remaining Information could reasonably be expected to advance these public interest factors.

<sup>51</sup> In review no. 310914, the initial decision dated 7 October 2011 (affirmed by decision deemed to have been made under section 82 of the RTI Act). In review no. 310957, the decision under review.

<sup>52</sup> Schedule 4, part 2, item 1 of the RTI Act.

<sup>53</sup> Schedule 4, part 2, item 2.

<sup>54</sup> Schedule 4, part 2, item 3.

<sup>55</sup> Schedule 4, part 2, item 5. I should note there is no suggestion of 'deficiencies' or any impropriety whatsoever in the conduct of either tender process; the relevant factor however only requires that disclosure of relevant information could reasonably be expected to permit or aid inquiry into 'possible' conduct of this kind, including, arguably, as, to whether or not same may have occurred. By revealing the primary information upon which decisions to let publicly funded contracts were based, I consider disclosure could reasonably be expected to allow or assist any such inquiry. In any event, I am satisfied the balance of the factors cited by the Department clearly apply, and as discussed in paragraph 78, are of sufficient weight to warrant disclosure of the information in issue.

<sup>56</sup> Schedule 4, part 2, item 11.

<sup>57</sup> Schedule 4, part 2, item 4.

63. Disclosure of this information will reveal information on which the Department relied in selecting HH to provide care services, allow the Access Applicants and the community generally to better assess the merits of aspects of HH's submissions as against the conditions of offer and selection criteria, and permit the public to better evaluate the Department's decisions to award publicly-funded contracts to HH. In doing so, disclosure will assist to ensure Departmental tender processes of this kind are conducted transparently, and that the Department is accountable for its contracting decisions.
64. These are considerations bearing significant weight in this case, given the Department's policy governing School Age Care Services contains an express preference for selection of both P&C and not-for-profit care providers in preference to commercial operators.<sup>58</sup>
65. HH in its application for external review disputed the application of the 'prodisclosure' factors set out in paragraph 61. It did not, however, specifically press these claims following my 6 June 2012 preliminary view to the contrary, instead submitting that it was:
- ...not satisfied with the Commissioner's reasoning relating to the public interest argument, especially in the circumstances where a competitor is requesting the tender information. Our client is of the opinion that, if public interest served, then scoring sheets evidencing how the department grades the tenders, could be released.*<sup>59</sup>
66. As I advised HH in my preliminary view letter,<sup>60</sup> an access applicant's motives for seeking access to information are irrelevant to a consideration as to whether access should be granted to requested information.<sup>61</sup> Speculation as to the identity of a particular access applicant,<sup>62</sup> the access applicant's reasons for lodging an application, and any intended use of the information are not generally matters to be taken into account in assessing the balance of the public interest.
67. Nor, in this regard, is the fact that the public interest may also or additionally be served by release of other information such as scoring sheets. The RTI Act confers a legally enforceable right of access to government-held information,<sup>63</sup> subject only to limited exceptions. Unless, relevantly, a recognised ground for refusal of access to requested information can be established, access must be granted. That an access applicant or the public interest generally may also be satisfied by release of alternative or additional information is not a legitimate basis for refusing access.
68. I am satisfied the factors noted above apply so as to favour disclosure of the Remaining Information.

<sup>58</sup> In formulating my preliminary view I had regard to Policy SCM-PR-016, 'Outside School Hours Care Services: Before and After School and Vacation Care', clause 5. <http://education.qld.gov.au/strategic/eppr/schools/scmpr016/> (accessed 21 May 2012). I understand this policy to be in substantially similar form as it applied at the date of each tender process, and HH has not sought to suggest otherwise. The policy has since the date of my preliminary view undergone further update, and the relevant version may now be accessed at: <http://ppr.det.qld.gov.au/education/management/Pages/Outside-School-Hours-Care-and-Vacation-Care.aspx> (accessed 22 October 2012).

<sup>59</sup> Submissions dated 22 June 2012.

<sup>60</sup> That is, my letter dated 6 June 2012.

<sup>61</sup> See *State of Queensland v Albietz, Information Commissioner (Qld) and Anor* (1996) 1 Qd R 215, where De Jersey J observed that 'the Freedom of Information Act does not confer any discretion on the Information Commissioner, or the Supreme Court, to stop disclosure of information because of any particular motivation in the applicant' (at 219). See also the Victorian Supreme Court decision in *Victoria Police v Marke* [2008] VSCA 218, in which Weinberg JA noted (at para 66) '[the FOI Act] does not, in the normal course, contemplate that the motives of the person seeking access to a document should be scrutinised and characterised as either worthy or unworthy. These are value judgements, which are likely to be highly subjective, and have no place in a scheme that is designed to ensure the proper accountability of government.' I consider these observations apply equally to the RTI Act.

<sup>62</sup> Only one the identity of which appears to have been disclosed to Applicant by the Department.

<sup>63</sup> Section 23 of the RTI Act.

## Factors favouring nondisclosure

69. Conversely, I am not satisfied that the nondisclosure or public interest harm factors raised by HH<sup>64</sup> in support of its objections to disclosure apply in the circumstances of this case.<sup>65</sup>
70. HH's submissions in this regard are largely premised on assertions similar to those canvassed at paragraphs 21: that the '*formatting and layout of the documents is [HH's] confidential information which gives [HH] a competitive advantage over other competitors*',<sup>66</sup> and that the way in which the tender submissions are '*organised and presented*' comprises a '*trade secret*' which would be prejudiced by disclosure.<sup>67</sup>
71. As noted above, HH has during the course of this review withdrawn its objection to disclosure of parts of each tender submission, which essentially compromises any claim the tender submissions are commercially sensitive in entirety.
72. In any event, for reasons similar to those discussed above, I do not accept HH's global claims as to the confidentiality or commercial sensitivity of the 'formatting and layout' of the tender submissions. I am not satisfied that HH has demonstrated any inherent commercial value or sensitivity in the overall structure of the tender submissions, and, as noted above, can identify no particular innovation in the manner in which the formatting of each tender submission – core aspects of which, as noted above, generally adhere to the requirements enunciated in the Department's Conditions of Offer and/or deploy formatting techniques which are plainly observable on HH's website.
73. As regards the specific information comprising the Remaining Information, I am similarly unable to identify how disclosure of information that is either publicly available or consists of broad 'motherhood' statements could reasonably be expected to cause relevant prejudices. It is not in my view reasonable to expect, for example, that disclosure of information identical to that published on HH's website<sup>68</sup> could reasonably be expected to cause HH competitive harm.<sup>69</sup>
74. Further, it is not apparent how the Remaining Information could be said to possess an intrinsic commercial value<sup>70</sup> that would be diminished by disclosure (and noting that the unquantified expense HH asserts it incurred in having the tender submissions produced does not of itself imbue the Remaining Information with any commercial value).<sup>71</sup> Nor can I identify any genuine arms-length buyer<sup>72</sup> who would be prepared to pay for access to publicly available or otherwise generic information.

<sup>64</sup> Relevantly, schedule 4, part 3 items 2, 15 and 16 and schedule 4, part 4, items 7(1) (b), (c) and 8 of the RTI Act.

<sup>65</sup> Insofar as particular factors cited are relevant: there is some information appearing in the Additional Exempt Information which HH in its applications for external review argued comprised personal information - the identities of referees and certain other personnel appearing on pages 9 and 31 of the Mansfield submission and 11 and 35 of the Golden Beach submission. As discussed above, I am satisfied this information comprises exempt information to which access may be refused. Thus the personal information/privacy harm/nondisclosure factors raised by HH do not therefore need to be considered.

<sup>66</sup> Submissions dated 22 June 2012.

<sup>67</sup> Review no. 310914 external review application dated 16 January 2012, for example.

<sup>68</sup> Noting again that I am constrained by section 108 of the RTI Act from disclosing information claimed to be exempt or contrary to public interest information – it is sufficient for the purposes of these reasons to note publicly-accessible information of this kind concerns key personnel.

<sup>69</sup> The adverse effect required by schedule 4, part 4, item 7(1)(c) of the RTI Act: *Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 (**Cannon**), at paragraphs 82 – 84, and the related business affairs nondisclosure factors raised by HH. The comments in *Cannon* were made in the context of section 45(1)(c) of the FOI Act but are applicable to this harm factor and the related business affairs nondisclosure factors contained in schedule 4, part 3 item 2 and 15 of the RTI Act: see also *Kalinga and BCC*, at paragraph 89. I should note HH has not sought to claim any specific Remaining Information comprises a 'trade secret', and there appears to be nothing on the face of any of that information comprising a '*formula, pattern or device or compilation of information*' ordinarily held to be characteristic of trade secrets: *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37, Gowans J at 46 referring to the American Restatement of the Law of Torts (1939, Volume 4 para 757).

<sup>70</sup> Within the meaning of that phrase as used in the RTI Act as explained in *Cannon*, at paragraphs 51-60 – and noting that each tender submission relates to tender processes concluded some time ago.

<sup>71</sup> *Cannon*, at paragraph 52.

75. HH also contends that disclosure could reasonably be expected to prejudice future supply of information.<sup>73</sup> I do not, however, consider it reasonable to expect that disclosure of the Remaining Information would result in a substantial number of child care providers refraining from providing similar information in the future.<sup>74</sup>
76. It is not in my view reasonable to expect that child care providers seeking the benefit of Departmental contracts – contracts which would appear to comprise a substantial source of the industry's business – would omit relevant information and thus intentionally disadvantage themselves in the competition for such contracts, simply because information akin to the Remaining Information may become subject to public disclosure under the RTI Act.
77. In these circumstances, I am not satisfied disclosure of the information in issue could reasonably be expected to prejudice the future supply of like information nor the Department's ability to obtain confidential information.

### Balancing the public interest

78. Even if any or all of the factors relied upon by HH could be said to apply to the Remaining Information, it is my view that the public interest in this case would, on balance, favour disclosure. As noted above, disclosure of the Remaining Information will enhance the transparency of the Department's tender processes by revealing information taken into account in deciding to select HH, and the accountability of the Department for those decisions. As the Information Commissioner has previously stated:<sup>75</sup>

*Tenderers are not accountable to the public for the contents of their tenders... However, government agencies and local government authorities are accountable to the public regarding the decisions they make to award contracts for the performance of services to be undertaken for the benefit of the public (or a particular segment of the public) and which are to be paid for from funds raised by imposts on the public. **Private sector businesses who wish to contract with government to perform services for the public have to accept an appropriate level of scrutiny of their dealings with government, and of their performance in terms of service delivery to the public, as something which goes with the territory.***

(My emphasis.)

79. HH enjoys the benefit of Departmental contracts funded with public monies. In these circumstances, I consider it in the public interest to allow the community access to information on which HH relied to secure those contracts.
80. Accordingly, I find that disclosure of the Remaining Information would not, on balance, be contrary to the public interest.

<sup>72</sup> The second possible interpretation of the phrase 'commercial value' as used in this provision: *Cannon*, as above.

<sup>73</sup> A requirement of the harm factor contained in schedule 4, part 4 item 8, and the essence in this context of the nondisclosure factor contained in schedule 4, part 3, item 16. It should also be noted that both of these factors can only apply to information that is itself confidential, and not information in the public domain (such as, for example, personnel information and fee rates contained in the tender submissions, each of which are available on HH's or relevant school websites).

<sup>74</sup> See *B and BNRHA*, at paragraph 161, where the Information Commissioner relevantly stated that '[w]here ... persons must disclose 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. In my opinion, the test is not to be applied by reference to whether the particular [supplier] whose ... information is being considered for disclosure, could reasonably be expected to refuse to supply such information in the future, but by reference to whether disclosure could reasonably be expected to prejudice future supply of such information from a substantial number of the sources available or likely to be available to an agency. See also *Wanless Wastecorp Pty Ltd and Caboolture Shire Council (Wanless)*; *JJ Richards & Sons Pty Ltd (Third Party)* (2003) 6 QAR 242 at paragraphs 92-98.

<sup>75</sup> *Wanless*, at paragraph 145.

## Form of access and copyright

81. While I have found that HH has not established any grounds on which access to the Remaining Information may be refused, I do consider that the relevant Access Applicant's<sup>76</sup> access to part of this information – specifically, the Manual – should not be given in the form requested by the relevant Access Applicant, but instead given by way of a reasonable opportunity to inspect. This is because in my view providing the Access Applicant access to the Manual in the form requested<sup>77</sup> would involve an infringement of HH's copyright.
82. As noted in paragraph 52, HH has stated that it imposes strict controls over access to and reproduction of the Manual. While I have found that the National Regulations require HH to make this document available to the public, I am also cognisant of the fact that the particular right of access contained in the National Regulations is a right of inspection only.
83. In these circumstances, I consider HH's concerns can and should fairly be read as giving rise to an assertion of copyright over the Manual.
84. Section 68(4) of the RTI Act allows an agency to refuse access to a document if granting same in the form requested by an applicant would, relevantly, infringe the copyright of a person other than the State.<sup>78</sup>
85. The uncontested submissions<sup>79</sup> of HH are that it developed the Manual for use in conducting its child care operations. On the basis of both this and my review of document itself, I am prepared to find the Manual is an original work eligible for copyright protection under section 32 of the *Copyright Act 1968* (Cth), ownership of which is held by HH.<sup>80</sup>
86. Accordingly, I am satisfied providing the relevant Access Applicant access by way of provision of a copy of the Manual would infringe HH's copyright.<sup>81</sup>
87. Access to the Manual in the form requested by that Access Applicant should therefore be refused under section 68(4) of the RTI Act, and given instead by way of a reasonable opportunity to inspect the Manual<sup>82</sup> only.
88. I should note that HH wrote to me<sup>83</sup> late in the review process advising that it would be amenable to access being granted to the Manual by way of inspection (although not withdrawing its objections to disclosure, thus necessitating the findings detailed above). In that letter, however, HH stipulated a number of conditions it sought to have imposed on such inspection.
89. The fact that the RTI Act permits an agency to refuse access in a requested form and instead grant it in a form that would not involve an infringement of copyright appears, in my view, to implicitly empower an agency to impose appropriate conditions on such

<sup>76</sup> The Access Applicant whose access application is the ultimate basis of review no. 310957.

<sup>77</sup> The access application relevant to review no. 310957 and dated 29 September 2011 requests access by way of a copy.

<sup>78</sup> Additionally, section 105(1)(b) of the RTI Act allows me to decide any matter in relation to an access application that could have been decided by the Department.

<sup>79</sup> By letters dated 10 September 2012 I advised both the relevant Access Applicant and the Department of my preliminary view on the issue of form of access as discussed in these paragraphs 81-87; neither entity contested that preliminary view.

<sup>80</sup> Which is manifestly an entity other than the State.

<sup>81</sup> Relevantly, HH's exclusive right to reproduce the manual in a material form: section 31(1) of the *Copyright Act 1968* (Cth). Reproduction without HH's authority or licence (such as for the purposes of providing access under the RTI Act) comprises an infringement of this right of reproduction: section 36 of the *Copyright Act 1968* (Cth).

<sup>82</sup> Under section 68(1)(a) of the RTI Act, a form of access which of itself I consider would not involve infringement of relevant copyright.

<sup>83</sup> By letter dated 21 September 2012.

alternative form of access – for example, by ensuring any inspection is adequately supervised so as to prevent copying or reproduction of a relevant document.

90. This is, however, a practical matter in my view best left to the discretion of the particular agency – albeit possibly in consultation with a copyright holder in the position of HH – and not an issue in relation to which I consider it appropriate to make any findings.<sup>84</sup>
91. Having said that, I should note that as I have decided that there are no grounds under the RTI Act on which access to the Manual may be refused, the Access Applicant is entitled to exercise the statutory right of access contained in the RTI Act unfettered by any conditions other than those strictly necessary to ensure that such access would not infringe HH's copyright.
92. Such precautionary conditions would not include a condition that the relevant Access Applicant sign, as HH has requested, a confidentiality agreement prior to inspection. A condition of this kind would not serve to protect the rights inherent in HH's copyright (secrecy not being among the relevant 'bundle of rights' prescribed in the *Copyright Act 1968* (Cth)). It would, however, run entirely contrary to the generally unconditional right of access contained in section 23 of the RTI Act, which provides for no restrictions on the use to which information accessed under it may be put. Accordingly there is no basis on which a condition of this kind might be imposed.
93. I should also note that, in considering what conditions may be appropriate to impose on an inspection so as to avoid infringement of third party copyright, an agency in the Department's position must also be mindful that the 'inspection' form of access prescribed in section 68(1)(a) requires provision of a 'reasonable opportunity' to inspect. Agencies must therefore ensure that any conditions are not so onerous or unreasonable so as to preclude such 'reasonable opportunity'.

## DECISION

94. I vary the decisions under review, by finding:
- in each of review nos. 310914 and 310957, the Additional Exempt Information comprises exempt information to which access may be refused under section 47(3)(a) of the RTI Act,
  - in each of review nos. 310914 and 310957, there are no grounds on which access to the Remaining Information may be refused, and accordingly each Access Applicant is entitled to access this information as it pertains to their access application, however
  - in review no. 310957, access to the Manual in the form requested by the relevant Access Applicant should be refused, and given by way of inspection under section 68(1)(a) of the RTI Act.

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Jenny Mead  
**Acting Right to Information Commissioner**

**Date: 30 October 2012**

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<sup>84</sup> If indeed I even possess jurisdiction to do so.

**APPENDIX****Significant procedural steps in external review 310914**

<b>Date</b>	<b>Event</b>
8 August 2011	Access Applicant applied to the Department for access to tender documents submitted by HH in response to the Department's tender for Outside School Hours Care at Mansfield State School.
8 September 2011	The Department consulted with HH to seek its views on the proposed disclosure of documents.
14 September 2011	The Department received a response from HH objecting to the disclosure of their tender documents ( <b>Information in Issue</b> ).
7 October 2011	The Department issued its initial decision to the Access Applicant and HH, deciding to disclose some of the information in issue contrary to the views of HH.
26 October 2011	HH sought internal review of the Department's initial decision.
16 December 2011	The Department issued a notice of a deemed decision to HH affirming its initial decision.
16 January 2012	HH applied to the Office of the Information Commissioner ( <b>OIC</b> ) for external review of the Department's deemed decision.
31 January 2012	OIC informed HH that their application had been accepted for external review.
6 June 2012	OIC issued a preliminary view to HH, Department and Access Applicant that access to some segments of information in issue may be refused on the basis they comprise exempt information, however there was no ground for refusing access to the remaining information.
7 June 2012	Access Applicant telephoned OIC to clarify preliminary view letter dated 6 June 2012; Access Applicant was advised to lodge written submissions by due date (20 June 2012) and invited to apply to participate in external review.
20 June 2012	OIC received submissions from the Department in response to the preliminary view.
20 June 2012	OIC granted HH an extension of time until 22 June 2012 to provide submissions in response to the preliminary view.
22 June 2012	OIC received submissions from HH in response to the preliminary view.
18 July 2012	OIC issued a further preliminary to HH that various segments of information identified in the original preliminary view as comprising exempt information did not qualify for exemption and there was therefore no ground for refusing access to this information.
1 August 2012	OIC granted HH an extension of time until 8 August 2012 to provide submissions in response to the further preliminary view.
8 August 2012	OIC received submissions from HH in response to the further preliminary view.

**Significant procedural steps in external review 310957**

<b>Date</b>	<b>Event</b>
29 September 2011	Access Applicant applied to the Department for access to tender documents submitted by HH in response to the Department's tender for Outside School Hours Care at Golden Beach State School.
25 October 2012	The Department consulted with HH to seek its views on the proposed disclosure of documents.
4 November 2011	The Department received a response from HH objecting to the disclosure of their tender documents ( <b>Information in Issue</b> ).
18 November 2011	The Department issued its initial decision to the Access Applicant and HH, deciding to disclose some of the information in issue contrary to the views of HH.
21 December 2011	HH sought internal review of the Department's initial decision.
23 January 2012	The Department issued its internal review decision to HH.
20 February 2012	HH applied to the Office of the Information Commissioner ( <b>OIC</b> ) for external review of the Department's internal review decision.
1 March 2012	OIC informed HH that their application had been accepted for external review.
6 June 2012	OIC issued a preliminary view to HH, Department and Access Applicant that access to some segments of information in issue may be refused on the basis they comprise exempt information, however there were no grounds for refusing access to the remaining information.
20 June 2012	OIC received submissions from the Department in response to the preliminary view.
20 June 2012	OIC granted HH an extension of time until 22 June 2012 to provide submissions in response to the preliminary view.
22 June 2012	OIC received submissions from HH in response to the preliminary view.
18 July 2012	OIC issued a further preliminary view to HH that various segments of information identified in the original preliminary view as comprising exempt information did not qualify for exemption and there were no grounds for refusing access to the remaining information.
1 August 2012	OIC granted HH an extension of time until 8 August 2012 to provide submissions in response to the further preliminary view.
8 August 2012	OIC received submissions from HH in response to the further preliminary view.
10 September 2012	OIC wrote to Applicant, Department and Access Applicant setting out a preliminary view access to part of information in issue in the review should be by way of inspection only.
21 September 2012	Applicant advised OIC it was prepared to accept access by way of inspection to part of information in issue subject to certain specified conditions.