



Decision and Reasons for Decision

Citation:	<i>V17 and Department of Transport and Main Roads [2021] QICmr 34 (30 June 2021)</i>
Application Number:	315784
Applicant:	V17
Respondent:	Department of Transport and Main Roads
Decision Date:	30 June 2021
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - CABINET INFORMATION - documents attached to Cabinet submission - whether information disclosure of which would reveal Cabinet consideration or prejudice confidentiality of Cabinet considerations or operations - whether exempt information to which access may be refused - sections 47(3)(a) and 48 and schedule 3, section 2(1)(b) of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Transport and Main Roads (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to:

Options Analysis for the Coomera Connector project undertaken as part of Preliminary Evaluation phase and 2015 Joint Study completed by the Department of Transport and Main Roads and Gold Coast City Council for the Coomera Connector.
2. The Department refused access to the requested 'Options Analysis'¹ and '2015 Joint Study'² (**Information in Issue**), on the ground that these documents comprised exempt information, to which access may be refused.³ The Department's decision⁴ explained both that the Information in Issue had informed the content of earlier Cabinet submissions, and that the Minister for Transport and Main Roads had requested preparation of a Cabinet submission incorporating the Information in Issue.
3. The applicant applied⁵ to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision.

¹ Dated March 2020: email from Department dated 10 June 2021.

² A 2015 document: email from Department dated 29 April 2021.

³ Sections 47(3)(a) and 48, and schedule 3, section 2(1)(b) of the RTI Act.

⁴ Dated 13 November 2020.

⁵ Application dated 11 December 2020.

4. During the review, the Department advised⁶ that the prospective submission referred to in its decision had been finalised, ie that the Information in Issue had formed part of a submission considered by Cabinet.
5. Taking all the above into account, I am satisfied that the Information in Issue comprises exempt information, as information the disclosure of which would reveal a consideration of Cabinet, or otherwise prejudice the confidentiality of Cabinet considerations or operations within the meaning of schedule 3, section 2(1)(b) of the RTI Act. I affirm the Department's decision.

Background

6. Significant procedural steps are set out in the appendix to this decision.

Reviewable decision

7. The decision under review is the Department's internal review decision dated 13 November 2020.
8. This decision is somewhat unclear in its intent. While stating that it is a decision to 'confirm' the Department's initial decision to 'refuse disclosure' of the Information in Issue, it also cites section 40 of the RTI Act,⁷ which allows an agency to refuse to deal with an application (as distinct from refusing access to information requested *in* that application), where, in short, it appears that all documents requested comprise exempt information.
9. I did initially consider that section 40 of the RTI Act was the provision on which the Department had relied in making the decision under review, ie that it was a refusal to deal with an application, rather than a refusal of access to information. Having again appraised the decision, and information conveyed to me by the Department during the review,⁸ I now consider the Department's intention was to refuse access to documents under section 47(3)(a) of the RTI Act, and have proceeded on that basis.⁹

Evidence considered

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

Application of the Human Rights Act

11. In making this decision I have had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.¹⁰ A decision maker will be 'respecting and acting compatibly with' that right and others prescribed in the HR Act when applying the law prescribed in the RTI Act.¹¹ I have acted in this way in making

⁶ Email dated 29 April 2021, in reply to OIC email query dated 27 April 2021.

⁷ As does the Department's initial decision.

⁸ Email dated 23 February 2021, advising that a 'decision was made to refuse access as exempt information (upheld on internal review).'

⁹ Which is not, ultimately, a matter of especial significance; whether refusing to deal under section 40, or refusing access under section 47(3)(a), it must still ultimately be apparent that the requirements of schedule 3, section 2(1)(b) of the RTI Act are satisfied. As explained below, I am satisfied that those requirements are met. In terms of the language of section 40, this means that the applicant's access application is therefore an access application expressed to relate to 'all documents' (ie, the Information in Issue) containing information of a stated kind or relating to a stated subject matter (the Coomera Connector), and all of which documents appear to be comprised of exempt information. A decision to refuse to deal under section 40 of the RTI Act would, in the alternative, therefore appear to be justified.

¹⁰ Section 21 of the HR Act.

¹¹ *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

this decision, in accordance with section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between equivalent pieces of Victorian legislation:¹² *'it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act'*.¹³

Information in issue

12. As noted above, the Information in Issue comprises the documents requested by the applicant: the 'Options Analysis' and '2015 Joint Study'.

Issue for determination

13. The issue for determination is whether the Information in Issue comprises exempt information to which access may be refused, as information the disclosure of which would reveal any consideration of Cabinet or would otherwise prejudice the confidentiality of Cabinet considerations or operations.

Relevant law

14. The RTI Act confers a right of access to documents of government agencies such as the Department.¹⁴ This right is subject to other provisions of the RTI Act, including grounds on which access may be refused.¹⁵ Section 47(3)(a) of the RTI Act permits an agency to refuse access to documents to the extent they comprise exempt information.¹⁶
15. Types of exempt information are stated in schedule 3 to the RTI Act. Parliament has provided that one such type of exempt information is information meeting the requirements of schedule 3, section 2(1) of the RTI Act. Schedule 3, section 2 of the RTI Act relevantly provides:

2 Cabinet information brought into existence on or after commencement

- (1) Information is exempt information for 10 years after its relevant date if—
...
(b) its disclosure would reveal any consideration of Cabinet or would otherwise prejudice the confidentiality of Cabinet considerations or operations ...
- (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.
- (3) Without limiting subsection (1), the following documents are taken to be documents comprised exclusively of exempt information under subsection (1)—
(a) Cabinet submissions ...

¹² *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹³ XYZ at [573].

¹⁴ Section 23 of the RTI Act.

¹⁵ Section 47 of the RTI Act. These grounds are to be interpreted narrowly: section 47(2)(a) of the RTI Act, a requirement I have borne in mind in making my decision, together with Parliament's intention that the Act be administered with a pro-disclosure bias (section 44 of the RTI Act).

¹⁶ As defined in section 48 of the RTI Act.

- ...
- (4) *A report of factual or statistical information attached to a document mentioned in subsection (3) is exempt information under subsection (1) only if—*
- (a) *its disclosure would have an effect mentioned in subsection (1)(b) ...*
- ...
- (5) *In this section—*
- ...
consideration includes—
- (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.*
- relevant date**, for information, means—
- (a) *for information considered by Cabinet—the date the information was most recently considered by Cabinet; or*
- (b) *for other information—the date the information was brought into existence.*

Findings

16. As noted, the decision under review explains that the Information in Issue informed Cabinet submissions pre-dating that decision. By email dated 29 April 2021, the Department further advised that the Information in Issue was attached to a submission considered by Cabinet earlier this year.¹⁷
17. While I note the applicant's dissatisfaction with his dealings with the Department,¹⁸ I have no reason to go behind or gainsay either the finding of fact made in the decision under review, or the Department's 29 April 2021 advice. I accept both.
18. Cabinet submissions are conclusively presumed to comprise exempt information, to which access may be refused: schedule 3, section 2(3)(a) of the RTI Act, cited above.
19. *Attachments* to such submissions, however – where those attachments comprise 'report[s] of factual or statistical information' – will qualify for exemption only where their disclosure would give rise to the consequences stated in schedule 3, section 2(1)(b) of the RTI Act: schedule 3, section 2(4) of the RTI Act.¹⁹
20. The applicant submits that it may be inferred that the Information in Issue comprises reports of 'factual or statistical' information, within the meaning of schedule 3, section 2(4). I am prepared to accept that submission, and thus draw the necessary inference.
21. Having regard to all relevant circumstances, I am, however, also of the view that disclosure of the Information in Issue '*would have an effect mentioned in subsection*

¹⁷ On a date stated in that email (alongside other particulars such as submission and decision number). In accordance with schedule 3, section 2(5), the 'relevant date' for the Information in Issue is, therefore, either that 2021 date, or the date the Information in Issue was brought into existence: 2015 for the 'Joint Study' and 2020 for the 'Options Analysis' – each, in either case, well within the 10 year time limit stated in the opening clause of schedule 3, section 2(1)(b) of the RTI Act (see footnotes 1 and 2).

¹⁸ See particularly email submissions dated 24 March 2021.

¹⁹ Also cited above, paragraph 15.

(1)(b)’: that disclosure would reveal a consideration of Cabinet or otherwise prejudice the confidentiality of Cabinet considerations or operations.

22. The Information in Issue comprise documents that have informed earlier Cabinet submissions. More tellingly, however, is the fact that those documents have now actually been attached to a submission put before and considered by Cabinet. In these circumstances, it seems to me that their disclosure would reveal a consideration of Cabinet, by revealing information that has been considered by Cabinet.
23. Additionally and/or alternatively, disclosure of the Information in Issue would have similar – if not identical – consequences to those the Federal Court accepted would ‘*breach the necessary confidentiality of the Cabinet process*’²⁰ – by permitting, at the least, ‘*reliable inferences to be drawn*’ about the ‘*subject matter of discussions by Cabinet*’,²¹ thereby undermining or prejudicing the confidentiality of Cabinet considerations or operations.
24. I consider that the Information in Issue meets the requirements of schedule 3, section 2(1)(b) of the RTI Act. Neither of the of the exceptions stated in schedule 3, section 2 appearing to have any application in this case,²² that information therefore comprises exempt information within the meaning of sections 47(3)(a) and 48 of the RTI Act, to which access may be refused.

Applicant’s submissions

25. I conveyed the substance of the reasoning at paragraphs 16-24 to the applicant by letters dated 11 March 2021, and, particularly, 7 May 2021.
26. In reply, the applicant resisted any finding that access may be refused to the Information in Issue under schedule 3, section 2(1)(b) of the RTI Act. In submissions dated 20 May 2021, the applicant, having set out the definition of ‘consideration’ in schedule 3, section 2(5)(b), argued:

...the relevant aspect of this clause is not ‘consideration’ but whether disclosure of the document/s would ‘reveal’ what was considered by Cabinet. As previously explained, it is my opinion that, disclosure of the document/s would not reveal what Cabinet considered as it would be unclear what information contained within the document/s were presented or discussed by Cabinet. To reveal this would require knowing the contents of the document/s as listed in schedule 3 Section (2)(3). I have not requested this.

Disclosure of the document/s would only reveal what the Department of Transport & Main Roads have considered in planning for the delivery of transport infrastructure. What was ultimately presented to Cabinet and considered by them would not be known.

...

...I find it highly unlikely that a reasonable person would, upon reading the contents of the requested document/s would be able to determine what was considered by Cabinet beyond what is already known (ie the decision made to progress the project), let alone create a situation whereby the confidentiality of Cabinet considerations becomes prejudiced. The document/s have not been produced for the benefit of establishing the parameters or economic considerations or negotiations with third parties, nor would they substantially

²⁰ *Spencer v Commonwealth of Australia (No 3)* [2012] FCA 637, [24], Emmett J (**Spencer**). The Court in *Spencer* upheld a claim of public interest immunity justifying non-disclosure of various Cabinet-related documents, including documents, which, as with the Information in Issue, had been circulated within Cabinet. *Spencer* was subsequently upheld on appeal by the Full Court of the Federal Court (*Spencer v Commonwealth of Australia* [2012] FCAFC 169), and as it is concerned with the avoidance of consequences substantially similar to those against which schedule 3, section 2(1)(b) of the RTI Act is directed, can be usefully applied in interpreting the latter.

²¹ As above.

²² That is, the 2015 and 2020-dated Information in Issue having neither been brought into existence before the 2009 commencement of schedule 3, section 2, nor officially published by decision of Cabinet (a matter touched on further below).

contain information of a sensitive nature. It is also possible for any recommendations contained within the requested document/s to be redacted so as to limit the possibility of forming a connection between them and any Cabinet submission.

I note the Internal Reviewer for this RTI Request referred to North Queensland Conservation Council Inc and Queensland Treasury [2016] QICmr 21. In the judgment, the Commission outlined that determining whether the confidentiality of the Cabinet considerations or operations would be prejudiced is largely dependent on the particular nature of the information in question, the circumstances relating to the creation of the information and the other information available to the decision maker, under the RTI Act. (noting QICmr 21 related to information of a substantially different nature and connectivity to Cabinet information than the information in question in this instance)

Thus, it is important to note the nature of the document/s requested in this instance. The document/s are standard planning documents as established by the Department of Transport & Main Roads' OnQ Project Management Framework. They are created for the benefit of planning for the delivery of transport infrastructure. They inform the department on how to proceed. There are literally hundreds of these reports produced each year by the department. Almost all of them, I presume, are not viewed as Cabinet information. It is also publicly known in this instance what decision has been made.

27. Insofar as the above submissions query what was '*ultimately presented*' to Cabinet, I have noted above the Department's advice that the Information in Issue was attached to a submission considered by Cabinet. The requested documents, then – the Information in Issue – formed part of what was considered by Cabinet. It is not possible, therefore, to '*limit the possibility of forming a connection between them and any Cabinet submission*': those documents were attached to and thus an integral component of a Cabinet submission.
28. To the extent the above submissions go on to query the extent to which Cabinet '*considered*' the Information in Issue, the concept of '*consideration*' is drawn both broadly and non-exhaustively in schedule 3, section 2(5)(b) of the RTI Act. I am comfortable inferring that material presented to Cabinet, by way of formal submission, has been subject to consideration within the meaning of that provision.
29. In any event, even if this inference was misplaced, '*consideration*' is not necessary to attract exemption under the final words of schedule 3, section 2(1)(b): '*otherwise prejudice the confidentiality of Cabinet...operations*'. Unconditional disclosure²³ of information put before Cabinet would, in my view, prejudice the confidentiality of the Cabinet '*course*', '*process*' or '*transaction*'²⁴ – the meeting or operation – at which that information was presented, and of which it formed a part.
30. As for the applicant's reliance on the OIC decision in *North Queensland Conservation Council Inc and Queensland Treasury*,²⁵ as the applicant himself notes, pertinent aspects of that decision concerned documents qualitatively different to those in issue in this review – relevantly, '*emails, correspondence and other internal records created and/or considered by Treasury staff in assessing the economic viability*' of certain projects²⁶ – what might, on my reading of *North Queensland*, be broadly termed internal '*preparatory*

²³ As Judicial Member McGill SC recently observed '*... the effect of the... [Information Privacy Act 2009 (Qld)] is that, once information has been disclosed, it comes under the control of the person to whom it has been disclosed. There is no provision of that Act which contemplates any restriction or limitation on the use which that person can make of that information, including by way of further dissemination.*' *FLK v Information Commissioner* [2021] QCATA 46, [17]. These comments are equally applicable to access obtained via the cognate mechanisms of the RTI Act.

²⁴ Adopting relevant aspects of the ordinary dictionary definition of the word '*operation*', it being undefined within the RTI Act: Macquarie Dictionary, 7th Edition.

²⁵ [2016] QICmr 21 (*North Queensland*).

²⁶ As above, at [22].

*materials*²⁷ used in developing Cabinet submissions. The delegate in that case, having regard to matters fairly summarised by the applicant in his submissions as excerpted above, was satisfied that disclosure of such materials met the test for exemption stated in schedule 3, section 2(1)(b) of the RTI Act.

31. The Information in Issue in this review is, as the applicant notes, of a '*substantially different nature and connectivity*'. In contrast to internal preparatory materials of the kind considered in *North Queensland*, it is *directly* connected to Cabinet operations, having not only informed Cabinet submissions, but formed part of an actual Cabinet submission, by way of attachment.
32. Given this, the qualitative nature of the Information in Issue as '*planning documents*' – the importance of which the applicant stresses in the paragraph following his citation of *North Queensland* – is significant *only* to the extent it disqualifies those documents from attracting the automatic presumption of exemption otherwise afforded Cabinet submissions by schedule 3, section 1(3)(a) of the RTI Act.
33. Once that disqualification is accepted, however, it appears to me that it is neither important nor necessary to have any further regard to the nature of the Information in Issue. All that matters from that point is whether disclosure of that information – regardless of its characterisation – would have one of the effects stated in schedule 3, section 2(1)(b) of the RTI Act. For reasons explained above, I am satisfied that it would.
34. The applicant also:
 - questions whether the Information in Issue has been examined or '*reviewed against*' the Cabinet submission to which the former was annexed,
 - submits that Cabinet decisions concerning the subject matter of his application – the proposed Coomera Connector – have been publicised; and
 - notes that:-
 - *[i]n requesting the document/s, I was unaware they supposedly formed part of a Cabinet submission. Thus, unless the requested document/s makes mention of the need to present certain information to Cabinet for their consideration (whose parts could be redacted if disclosed), I cannot see how disclosure would reveal a Cabinet consideration or prejudice it.*
35. Addressing the first of the points above, in view of the Department's advice referred to at paragraph 16 (which, as noted, I accept), I have not considered it necessary to examine or review the Information in Issue in this case.²⁸ This advice establishes a factual foundation sufficient to allow me to draw the inferences necessary to conclude that disclosure of the information in issue would have one of the effects stated in schedule 3, section 2(1)(b) of the RTI Act.²⁹
36. As for the publication of Cabinet decisions, it is the case that the exemption prescribed in schedule 3, section 2(1) does not apply to information officially published by decision of Cabinet: schedule 3, section 2(2)(a). There is nothing before me, however, to suggest that the Information in Issue has been officially published by decision of Cabinet, so as to enliven this exception. Relevant documents and the submission to which they form attachments, as far as I am aware, confidential.

²⁷ Borrowing Emmett J's characterisation of '*documents ... created within government departments and instrumentalities for the purpose of preparing a submission to Cabinet*': *Spencer*, [27].

²⁸ Noting that as a delegate of the Information Commissioner, I am not bound by the rules of evidence and may inform myself on any matter in any way I consider appropriate: section 95(1)(c) of the RTI Act.

²⁹ Thereby discharging the onus imposed on the Department by section 87 of the RTI Act of establishing that the decision under review was justified, or that I should give a decision adverse to the applicant.

37. Turning to the last of the three arguments set out in paragraph 34, I acknowledge the applicant's statement that he was 'unaware' of the status of the Information in Issue at the time he made his application; the incorporation of these documents into a Cabinet submission and subsequent lodging of that submission with Cabinet occurred, as explained above, after the applicant made his RTI access application. I am, however, required to have regard to relevant facts and circumstances as they stand at the date of my decision³⁰ – those facts including the fact that the Information in Issue has been before Cabinet.
38. Finally, for completeness I should note that in his 24 March 2021 submissions, the applicant referred to the 'Solomon Report',³¹ and specifically his understanding of concerns therein raised as to the breadth of the Cabinet exemption contained in the repealed *Freedom of Information Act 1992* (Qld) (**FOI Act**): ie, that Ministers '*could take documents into the Cabinet room for no purpose other than to guard against disclosure under the FOI Act*', which situation – or '*abuse*' – the applicant understood had '*been remedied by the RTI Act*'.
39. In conducting an external review under the RTI Act, my role is to apply the law in force as enacted by Parliament. While it is the case that the Cabinet exemption provisions contained in that Act differ in some respects from those in the former FOI Act,³² they will nevertheless apply to exempt from disclosure information the release of which would reveal a consideration of Cabinet or otherwise prejudice the confidentiality of Cabinet considerations or operations. As reasoned above, I consider those requirements met in this case.
40. These 24 March 2021 submissions also canvassed public interest concerns. I am precluded from taking public interest considerations into account in assessing whether information comprises exempt information. This is because Parliament has conclusively determined that disclosure of information comprising exempt information would be contrary to the public interest.³³

DECISION

41. I affirm the decision under review, under section 110 of the RTI Act.
42. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Louisa Lynch
Right to Information Commissioner

Date: 30 June 2021

³⁰ *Palmer and Townsville City Council* [2019] QICmr 43, [21]-[41].

³¹ *le, The Right to Information: Reviewing Queensland's Freedom of Information Act*, FOI Independent Review Panel, June 2008.

³² The latter having operated to exempt from disclosure information, relevantly, submitted to Cabinet, which in a case such as this would have obviated the need for reasoning and discussion of the kind set out at 21-23 above. See section 36(1)(a) of the FOI Act.

³³ Section 48(2) of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
11 December 2020	OIC received the applicant's application for external review.
15 December 2020	OIC requested procedural documents from the Department.
17 December 2020	The Department supplied requested documents.
22 January 2021	OIC wrote to each of the applicant and the Department, advising that the former's application for external review had been accepted.
17 February 2021	OIC requested clarification from the Department as to whether the Information in Issue was in existence at the time of receipt of the access application.
23 February 2021	The Department advised that the Information in Issue existed as at the date of receipt of the access application, and a decision was made to refuse access.
11 March 2021	OIC wrote to the applicant, conveying a preliminary view.
24 March 2021	The applicant provided submissions in reply to OIC's 11 March 2021 preliminary view.
27 April 2021	OIC wrote to the Department, requesting advice as to the status of the Cabinet process involving the Information in Issue.
29 April 2021	The Department replied to OIC, advising that the Information in Issue had been attached to a Cabinet submission considered by Cabinet.
7 May 2021	OIC wrote to the applicant, conveying a further preliminary view.
20 May 2021	The applicant provided submissions in reply to OIC's 7 May 2021 preliminary view.
10 June 2021	OIC requested and received advice from the Department as to the date of part of the Information in Issue.