



Decision and Reasons for Decision

Application Number: 310418

Review Applicant: J2P8MT

Respondent: Department of Health

Decision Date: 11 May 2012

Catchwords: **ADMINISTRATIVE LAW - RIGHT TO INFORMATION – DECISION GRANTING ACCESS – Objection to disclosing information about property sale – whether exempt from disclosure – sections 47(3)(a) and 48 of the *Right to Information Act 2009* (Qld) – 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)**

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REASONS FOR DECISION

Summary

1. As part of a hospital development project, the Department of Health, also known as Queensland Health (**QH**), had purchased a property from the review applicants. The access applicant sought access to documents relating to the hospital project (**Project Documents**) under the *Right to Information Act 2009 (RTI Act)*.¹
2. Following consultation with the review applicants,² QH refused access to some information and granted access to the remaining information on the basis that its disclosure would not, on balance, be contrary to the public interest (**Decision**).³
3. The review applicants applied to the Office of the Information Commissioner (**OIC**) for external review of the Decision, objecting to disclosure of information relating to the sale of their property.
4. During the external review, the access applicant indicated that they no longer sought access to some information in the Project Documents.⁴
5. Having considered all submissions and the relevant law, I am satisfied the information remaining in issue (**Information in Issue**) is not exempt from disclosure⁵ and that its disclosure would not, on balance, be contrary to the public interest.⁶ Accordingly the access applicant is entitled to access the Information in Issue.

Background

6. Significant procedural steps relating to the external review application are set out in the Appendix.

Reviewable decision

7. The decision under review is QH's Decision of 30 September 2010 to disclose information in the Three Attachments contrary to the views of the external review applicant.⁷

Information in issue

8. The Information in Issue comprises the Three Attachments and the Additional Information, but does not include information which QH refused access to in its access decision⁸ (including some personal information of the external review applicants) nor

¹ Access application dated 22 June 2010.

² Under section 37 of the RTI Act.

³ Decision dated 30 September 2010.

⁴ In a telephone conversation with OIC and a subsequent email dated 24 January 2012.

⁵ Under section 47(3)(a), section 48 and schedule 3 section 8 of the RTI Act.

⁶ Under section 47(3)(b), section 49, schedule 4 part 3 item 3 and schedule 4 part 4 section 6 of the RTI Act.

⁷ QH had consulted the review applicants regarding pages 7-28, that is, attachments two, three and four to a memorandum of the Project Documents (**Three Attachments**). On external review, QH indicated to OIC that, given the concerns raised by the external review applicants about disclosing information in the Three Attachments, the review applicants would likely also object to disclosure of parts of pages 1 to 6 of the Project Documents on the same basis because this information essentially replicates the relevant information in the Three Attachments. By letter dated 13 December 2011, OIC consulted the review applicants regarding some information contained in pages 1-6 of the Project Documents, the disclosure of which might reasonably be expected to be of concern to the review applicants (**Additional Information**). By letter in response dated 5 February 2012, the review applicants objected to disclosure of any information in the Project Documents.

⁸ Also dated 30 September 2010.

personal information concerning the impact of the sale on the review applicants' family.⁹

Material considered

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

Onus

10. As the decision being reviewed is a disclosure decision,¹⁰ the review applicants bear 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 applicant.¹¹

Issues in this review

11. The review applicants submit that disclosing the Information in Issue would:
- breach their agreement with the Legal Services Commission (**LSC**) and their former solicitors prohibiting them from disclosing information regarding the property sale and related issues; and
 - invade the privacy of the review applicants and their family.
12. The relevant issues in this review are whether disclosure of the Information in Issue:
- would found an action for a breach of confidence;¹² and/or
 - would, on balance, be contrary to the public interest.¹³

Is the Information in Issue exempt information?

13. No, for the reasons that follow.

Relevant law

14. Under the RTI Act, a person has a right to be given access to documents of an agency.¹⁴ However, this right is subject to other provisions of the RTI Act including the grounds on which an agency may refuse access to documents.¹⁵ Relevantly, access may be refused where information is exempt information¹⁶ or disclosure would, on balance, be contrary to the public interest.¹⁷
15. Under section 47(3)(a) of the RTI Act, access can be refused to information on the

⁹ Which the access applicant agreed in a telephone conversation with OIC and a subsequent email dated 24 January 2012 that they did not seek to access and which comprises information redacted from pages two, three and fifteen. Redacted copies of these pages have been provided to QH.

¹⁰ '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.

¹¹ Section 87(2) of the RTI Act.

¹² Therefore rendering the Information in issue 'exempt information' to which access may be refused under section 47(3)(a) of the RTI Act.

¹³ Under section 47(3)(b) of the RTI Act, and in accordance with the public interest balancing exercise set out in section 49 of the RTI Act.

¹⁴ Section 23 of the RTI Act.

¹⁵ Section 47 of the RTI Act.

¹⁶ Section 47(3)(a) of the RTI Act.

¹⁷ Section 47(3)(b) of the RTI Act.

basis that it is exempt information. Information will be exempt information if its disclosure would found an action for breach of confidence.¹⁸

16. Disclosing information will found an action for breach of confidence if five cumulative requirements are satisfied.¹⁹ Relevantly, the information must have been communicated in such circumstances as to fix the recipient – in this case, QH – with an equitable obligation of conscience not to use the confidential information in a way that is not authorised by the information's confider.²⁰

Review applicants' submissions

17. The review applicants contend that:
- in resolution of a dispute with their former solicitors, arising from the sale of the property, the review applicants agreed with the solicitors and the LSC to keep information regarding the sale of the property (**settlement agreement**) confidential; and
 - accordingly, they are obliged to keep the Information in Issue confidential and cannot consent to its disclosure, as to do so will breach the settlement agreement, thereby making them liable to the LSC and their former solicitors.

Findings

18. For the breach of confidence exemption to apply in this case the review applicants must demonstrate that they communicated the Information in Issue to QH in circumstances where both either expressly or impliedly agreed to keep that information confidential.²¹ There is no evidence before me that that was the case.
19. The review applicants' reference to their obligations under the settlement agreement is, in this context, irrelevant. This is because QH is not a party to that agreement, nor to any confidentiality obligations it may impose as between the review applicants and other third parties.
20. I understand that the review applicants may feel concerned that any disclosure of information they believe they are obliged to hold confidentially may constitute a possible breach by them of those obligations. The review applicants may be assured, however, that this not the case in the present circumstances.
21. Disclosure will not be disclosure by the review applicants in breach of any obligation of confidence, but disclosure by a government agency in satisfaction of its statutory obligations under the RTI Act.
22. I am satisfied that the Information in Issue:
- was not communicated to QH subject to any conditions of confidentiality or in circumstances where such conditions may be implied

¹⁸ Schedule 3 section 8 of the RTI Act.

¹⁹ As identified in *B and Brisbane North Regional Health Authority* [1994] 1 QAR 279 (**B**) at paragraphs 57-58; and *Callejo v Department of Immigration and Citizenship* [2010] AATA 244 at paragraphs 163-171 and 176.

²⁰ Requirement (c), *B*, paragraphs 76-102.

²¹ It must also be shown that information claimed to be confidential actually is confidential: requirement (b), *B*, paragraphs 76-102. As detailed in paragraphs 38-39, much of the Information in Issue comprises publicly available land valuation information. It is therefore arguable this information does not possess the required quality of confidence.

- was not received by QH in circumstances that import an obligation of confidence; and
- does not satisfy one of the five cumulative elements necessary to found an action for breach of confidence.

23. As disclosure would not found an action for breach of confidence, the Information in Issue is not exempt information.²²

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

24. No, for the reasons that follow.

Relevant law

25. Under the RTI Act, access to a document can be refused to the extent that its disclosure would, on balance, be contrary to the public interest.²³

26. The term '*public interest*' refers to considerations affecting the good order and functioning of the community and government affairs and for the wellbeing of citizens generally. This means that ordinarily, a public interest consideration is one which is common to all members of, or a substantial segment of, the community as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.

27. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest. It also explains the steps that a decision-maker must take in deciding the public interest. To decide whether disclosing the Information in Issue would be contrary to the public interest, I must:²⁴

- 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 disclosing the information would, on balance, be contrary to the public interest.

Findings

28. I am satisfied that disclosing the Information in Issue would not, on balance, be contrary to the public interest, for the reasons that follow.

Irrelevant factors, factors favouring disclosure and nondisclosure

29. I have examined the irrelevant factors in schedule 4 of the RTI Act and am satisfied I have not taken into account any irrelevant factors in reaching my decision.

30. There are a number of factors favouring disclosure and nondisclosure in this case. I discuss these and their relative weight below.

²² Under section 47(3)(a), section 48 and schedule 3 section 8 of the RTI Act.

²³ Section 47(3)(b) of the RTI Act.

²⁴ Section 49(3) of the RTI Act.

Factors favouring disclosure

Accountability and positive and informed debate

31. The RTI Act recognises public interest in disclosure of information where such disclosure could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability.²⁵
32. The Information in Issue includes information identifying the location and nature/condition of the property, valuation amounts, purchase price, QH's reasons and authority for acquiring the property and steps in the negotiation.
33. Disclosing the Information in Issue would reveal the matters QH considered, and the legislation and guidelines under which it operated, in negotiating the acquisition of the property. Such disclosure could reasonably be expected to:
 - increase public knowledge and understanding of processes adopted by government in acquiring land from private individuals for public purposes, using public funds; and
 - enhance QH's accountability for its decision to acquire private land with public funds.
34. I am satisfied these factors favouring disclosure arise for consideration in this case.

Reveal reasons for a decision

35. A further public interest factor favouring disclosure arises if disclosing the Information in Issue could reasonably be expected to reveal the reason for a government decision.²⁶ Disclosing the Information in Issue would do so in this case, by providing the public with information about QH's reasons for deciding to purchase the property. I am satisfied this factor arises for consideration in this case.

Factors favouring nondisclosure

Prejudice the protection of an individual's right to privacy

36. A public interest factor favouring nondisclosure arises if disclosing the Information in Issue could reasonably be expected to prejudice the protection of an individual's right to privacy.²⁷ Further, if disclosing the relevant information would disclose an individual's personal information, a public interest harm factor will arise. The extent of the harm will therefore need to be considered.²⁸
37. The Information in Issue includes some personal information of the review applicants. Disclosing such information could reasonably be expected to impact the review applicants' privacy. In this case, however, the strength of that privacy interest is substantially diminished. This is because much of the detail of the transaction is publicly available.
38. The Government's scheme for ensuring transparent dealings with land, established through the *Land Valuation Act 2010* (Qld) (**LVA**) and the *Land Title Act 1994* (Qld)

²⁵ Schedule 4 part 2 items 1 and 2 of the RTI Act.

²⁶ Schedule 4 part 2 item 11 of the RTI Act.

²⁷ Schedule 4 part 3 item 3 of the RTI Act.

²⁸ Schedule 4 part 4 section 6 of the RTI Act.

(LTA), promotes public access to property transaction information.²⁹ Payment of a small fee entitles any member of the public to obtain land dealing information such as location of the land, the names of owners and vendors, valuation amount and sale price.

39. The access applicant is aware that the property was acquired for the proposed relocation of a particular medical foundation. Internet searches of the term using the foundation's name show the address of the relocated foundation. This provides the information necessary for an LVA or LTA search. In these circumstances, I am satisfied that relevant personal information – the location and price paid for the land – is publicly available through the process established under the LVA and the LTA.
40. While the public accessibility of this information does not alter its character as personal information, its availability does significantly, if not entirely, reduce the privacy interests that would ordinarily attach to it.
41. Although aspects of the personal information are not publicly available, for example, information relating to the steps in the negotiation, the information of this type which remains in issue is essentially of a non-sensitive commercial nature, rather than personal in character, and the privacy interests are relatively low.

Balancing the public interest factors

42. In this case, I consider the factors favouring disclosure discussed above warrant considerable weight. There is a clear public interest in ensuring that agencies acquiring private property with public monies do so transparently and accountably. There is also a strong public interest in making available for scrutiny and public discussion information evidencing the reasons behind purchasing and acquisition decisions of this kind, including, importantly, the final price agreed between a public agency and a private vendor.
43. Weighing against these significant public interests is the public interest in protecting an individual's right to privacy and the public interest harm in disclosure of personal information. As explained above, much of this personal information is, however, publicly available or is primarily of a non-sensitive commercial nature, diminishing significantly, if not entirely the privacy interests these nondisclosure/harm factors are intended to protect. In these circumstances, I attribute minimal weight to the nondisclosure factor and consider that the public interest harm presumed to arise would be minimal at best. I find that the factors favouring disclosure of the Information in Issue outweigh the factor favouring nondisclosure and the public interest harm.

²⁹ Under section 181 and section 183 of the LVA, on payment of the prescribed fee, a person may obtain from the valuer-general details of the:

- identity number, area, location and description of land
- owner's name and address
- valuation date and amount; and
- other information the valuer-general considers appropriate.

Such information is available to members of the public, together with information identifying the previous sale price and vendor, as part of the Queensland Valuation And Sales data collected by the Department of Natural Resources and Mines. Similarly, under section 35 of the LTA, a person may, on payment of the prescribed fee, obtain from the registrar of titles details of instruments lodged and information kept under the LTA. Information available to members of the public under the LTA includes information identifying the previous sale price and vendor.

DECISION

44. The decision under review was made in respect of the Three Attachments. I am satisfied that.

- the Information in Issue in this review is as described in paragraph eight of this decision;
- it does not comprise exempt information under section 47(3)(a) of the RTI Act; and
- its disclosure would not, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act.

Accordingly, I vary QH's decision by finding that QH is entitled to disclose the Information in Issue.

45. I have made this decision as a delegate of the Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

Suzette Jefferies
Assistant Information Commissioner

Date: 11 May 2012

APPENDIX

Significant procedural steps

Date ³⁰	Event
22 June 2010	Access applicant applied to QH for access to information about the Hospital Project.
16 July 2010	Access applicant narrowed the scope of the access application. ³¹
7 September 2010	Access applicant further narrowed the scope of the access application. ³²
9 September 2010	QH consulted with relevant third parties and sought the review applicants' views regarding disclosure of Three Attachments
18 September 2010	Review applicants objected to disclosure of the Three Attachments.
22 September 2010	QH sought the review applicants' views on disclosure of a reduced amount of information in the Three Attachments.
22 September 2010	Review applicants objected to QH's revised disclosure proposal.
30 September 2010	QH issued its decision.
15 October 2010 ³³	Review applicants applied to OIC for external review of QH's decision.
2 November 2010	OIC notified QH and the review applicants that the application had been accepted for external review.
6 November 2010	Review applicants provided a submission to OIC.
22 August 2011	Review applicants provided a further submission to OIC.
13 December 2011	OIC sought the review applicants' views regarding disclosure of the Additional Information and conveyed a preliminary view to the review applicants. ³⁴
24 January 2012	Access applicant withdrew the access application in respect of some of the information in the Project Documents.
24 January 2012	OIC informed the review applicants of the access applicant's withdrawal of part of the access application.
5 February 2012	Review applicants objected to disclosure of the Project Documents and made submissions to OIC in response to OIC's preliminary view.

³⁰ Of correspondence or relevant communication unless otherwise stated.

³¹ Noted in QH's letter to access applicant dated 30 September 2010.

³² Noted in QH's letter to access applicant dated 30 September 2010.

³³ External review application dated 10 October 2010 received by OIC.

³⁴ Australia Post was unable to deliver the letter to the review applicants and it was returned unopened to OIC. OIC provided a copy of the letter to the review applicants on 24 January 2012 together with notification of the access applicant's withdrawal of part of the access application.