



Decision and Reasons for Decision

Citation:	<i>Frecklington, MP and Department of Transport and Main Roads [2020] QICmr 54 (22 September 2020)</i>
Application Number:	315312
Applicant:	Mrs Deborah Frecklington MP, Leader of the Opposition
Respondent:	Department of Transport and Main Roads
Decision Date:	22 September 2020
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST - consultant's advice - deliberative process information - accountability and transparency - whether disclosure would prejudice deliberative process of government - whether disclosure would on balance be contrary to the public interest - sections 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Department of Transport and Main Roads (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to '[t]he commercial advice from Ernst and Young in relation to the Mooloolaba Spit Development Opportunity.'
2. The Department decided² to refuse access to the requested document (the '**Advice**'), on the grounds disclosure would, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act.
3. The applicant applied³ to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision.
4. Having reviewed the Department's decision, the Advice, and participant submissions, I am satisfied disclosure of the Advice would, on balance, be contrary to the public interest. I affirm the Department's decision.

Background

5. Significant procedural steps in the review are set out in the Appendix.

¹ Application dated 6 February 2020.

² Internal review decision dated 6 April 2020.

³ By application dated 6 April 2020, under section 85 of the RTI Act.

Reviewable decision

6. The decision under review is the Department's internal review decision dated 6 April 2020.

Evidence considered

7. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and the Appendix).
8. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information as embodied in section 21 of that Act. I consider that, in observing and applying the law prescribed in the RTI Act, an RTI decision-maker will be '*respecting and acting compatibly with*' this right and others prescribed in the HR Act,⁴ and that I have done so in making this decision, as required under section 58(1) of the HR Act. In this regard, I note Bell J's observations on the interaction between the Victorian analogues of Queensland's RTI Act and HR Act: '*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*'.⁵

Information in issue

9. The information in issue is the 202-page Advice.

Issue for determination

10. The issue for determination is whether disclosure of the Advice would, on balance, be contrary to the public interest.

Relevant law

11. The RTI Act gives people a right to access documents of government agencies such as the Department.⁶ This right is subject to other provisions of the RTI Act, including grounds on which access may be refused.⁷ One of these grounds is where disclosure of information would, on balance, be contrary to the public interest.⁸
12. The RTI Act requires a decision-maker to take the following steps in deciding the public interest:⁹
- identify any irrelevant factors and disregard them
 - identify relevant public interest factors favouring disclosure and nondisclosure of relevant information
 - balance the relevant factors favouring disclosure and nondisclosure; and
 - decide whether disclosure of the information would, on balance, be contrary to the public interest.
13. Schedule 4 to the RTI Act contains non-exhaustive lists of irrelevant factors, and factors favouring disclosure and nondisclosure. I have had regard to the entirety of schedule 4 in reaching this decision, considered whether any other public interest considerations may be

⁴ *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].

⁵ *XYZ*, at [573].

⁶ Section 23 of the RTI Act.

⁷ Section 47 of the RTI Act.

⁸ Sections 47(3)(b) and 49 of the RTI Act. The term 'public interest' refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that, in general, 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, although there are some recognised public interest considerations that may apply for the benefit of an individual: Chris Wheeler, 'The Public Interest: We Know It's Important, But Do We Know What It Means' (2006)

⁴⁸ *AIAL Forum* 12, 14.

⁹ Section 49 of the RTI Act.

relevant,¹⁰ and disregarded irrelevant factors stated in schedule 4, part 1 of the RTI Act. I have also kept in mind the RTI Act's pro-disclosure bias,¹¹ and Parliament's intention that grounds for refusing access to information be interpreted narrowly.¹²

Findings

Factors favouring disclosure

14. The Department identified two factors favouring disclosure, ie, that disclosure of the Advice could reasonably be expected to:¹³
 - promote open discussion of public affairs and enhance the Government's accountability;¹⁴ and
 - reveal the reason for a government decision and any background or contextual information that informed the decision.¹⁵
15. The Department also recognised the RTI Act's pro-disclosure bias.
16. I agree that the first factor listed above applies, and I recognise the general public interest in promoting access to government-held information as reflected, for example, in the RTI Act's pro-disclosure bias.
17. I am not, however, persuaded that the factor listed at the second dot point of paragraph 14 applies in this case. This is because no decision has, as I understand, been made in relation to the final form of any Mooloolaba Spit development, and disclosure of the Advice could not therefore reasonably be expected to reveal the reason for that decision.
18. On the other hand, I consider that disclosure of the Advice, concerning as it does possible development of public lands, could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest, enlivening the pro-disclosure factor stated in schedule 4, part 2, item 2 of the RTI Act. I have taken this latter factor into account in balancing the public interest.

Factors favouring nondisclosure

19. The Department decided that disclosure of the Advice:
 - could reasonably be expected to prejudice a deliberative process of government (**DP Prejudice Factor**);¹⁶ and
 - would give rise to a public interest harm, by disclosing an opinion, advice or recommendation that has been obtained, prepared or recorded or a consultation or deliberation that has taken place, in the course of, or for, the deliberative processes involved in the functions of government (**DP Harm Factor**).¹⁷

¹⁰ Ie, considerations not expressly prescribed in the lists stated in Schedule 4 of the RTI Act.

¹¹ Section 44 of the RTI Act.

¹² Section 47(2)(a) of the RTI Act.

¹³ The phrase 'could reasonably be expected to' calls for a decision-maker to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (eg merely speculative/conjectural 'expectations') and expectations which are reasonably based, ie, expectations for the occurrence of which real and substantial grounds exist: *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at [155] to [160]. A reasonable expectation is one that is reasonably based, and not irrational, absurd or ridiculous: *Sheridan and South Burnett Regional Council and Others* (Unreported, Queensland Information Commissioner, 9 April 2009) at [189]-[193], referring to *Attorney-General v Cockcroft* (1986) 64 ALR 97.

¹⁴ Schedule 4, part 2, item 1 of the RTI Act.

¹⁵ Schedule 4, part 2, item 11 of the RTI Act.

¹⁶ Schedule 4, part 3, item 20 of the RTI Act.

¹⁷ Schedule 4, part 4, section 4 of the RTI Act. '...[T]he deliberative processes involved in the functions of government are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action': *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 (**Eccleston**).

20. While making no submissions on external review,¹⁸ the applicant did contest the application of the DP Prejudice Factor in submissions accompanying the applicant's application for internal review.¹⁹

I note your decision states: "The department is currently considering potential redevelopment of the site, and if it decides to progress it will be through an open market tender process and be based on commercial principles and negotiation. This will ensure the state receives a 'value-for-money' outcome."

This is consistent with other government proposals and appears to be in-keeping with existing Queensland Government policy. However, given the policy already exists, and this report is the information to allow a decision about whether to proceed for one specific proposal pursuant to existing policy, I submit that there is no deliberative process as yet that could be prejudiced by the release of the document.

21. This submission, particularly the statement that the Advice is '*...information to allow a decision about whether to proceed,*' appears to implicitly acknowledge that a current deliberative process exists, which may stand to be prejudiced by disclosure of the Advice. Putting oneself into a position to allow a '*decision about whether to proceed*' to be made is the very essence of a deliberative process.
22. In any event, OIC obtained submissions²⁰ from the Department on the point, to the effect that:
- the Advice provides independent advice regarding the commercial viability of a redevelopment of public lands at Mooloolaba Spit
 - a determination on the direction for this project is still to be made
 - the Department plans to undertake community consultation in due course, and the outcome of the consultation process will determine the recommendations for the next stage in any development process
 - the Advice contains commercially sensitive information which the Department will use to guide its decision making and evaluation of any future private sector redevelopment proposals, if the Government chooses to progress with a redevelopment opportunity
 - releasing the Advice would compromise any future competitive tender process, as it would provide the industry (developers) with information regarding the Department's expectations; and
 - disclosure of the Advice would compromise the State's ability to negotiate the best commercial outcome in a competitive environment, as developers would have access to information the State may use to frame any future negotiations.
23. The applicant has not contested the Department's submissions,²¹ which I both accept, and consider provide information sufficient to establish each of the DP Prejudice and DP Harm Factors. I accept that there is a 'live' or continuing deliberative process in train relevant to future development of public lands at the Mooloolaba Spit,²² rendering the process one '*involved in the functions of government*'.²³ A key element or component of that overarching process may well comprise structuring, conducting and evaluating the outcomes of the competitive tender exercise mooted in the Department's submissions, and making a final decision at the conclusion of that process.²⁴ I am also satisfied that:

¹⁸ The applicant was twice invited by OIC to make submissions: see letter dated 6 August 2020 and email dated 20 August 2020. Apart from requesting a decision (email dated 6 August 2020), no submissions were received.

¹⁹ Dated 10 March 2020.

²⁰ Dated 29 May 2020.

²¹ Which were conveyed to the applicant by letter from OIC dated 6 August 2020.

²² A matter confirmed by the Department in advice to OIC on 22 September 2020.

²³ And/or '*of government*', in the words of the DP Prejudice Factor.

²⁴ Should it eventuate.

- the Advice comprises an opinion, advice or recommendation obtained, prepared or recorded in the course of, or for, the relevant deliberative process, such that its disclosure would give rise to a public interest harm in accordance with the DP Harm Factor;²⁵ and/or
 - disclosure of advice, modelling and recommendation of the kind contained in the Advice would arm prospective tenderers with insight into the Department's minimum acceptable development parameters, weakening the latter's position in any future negotiations and potentially constraining the options open to it.
24. Disclosure in these latter circumstances could, therefore, reasonably be expected to prejudice the deliberative process involved in determining any final form of development.²⁶

Balancing the public interest

25. Considerations favouring disclosure as set out in paragraphs 16 and 18 are undoubtedly important and deserving of substantial weight. There is a general public interest in promoting access to government-held information, and a strong public interest in both enhancing government accountability and transparency, and in making available to the public information allowing the community to participate fully in discussion and debate concerning potential development of the kind addressed in the Advice.
26. These considerations are, however, in my view displaced by the clear public interest in ensuring that the Department can freely contemplate advice concerning options for the future of public lands, in circumstances where premature disclosure of that advice could reasonably be expected to circumscribe the Department's capacity to properly explore and pursue at least one of those options, ie a competitive tender process, for the purposes of potential redevelopment. I afford the factors favouring nondisclosure identified in paragraphs 23 and 24 significant weight, and prefer them to those favouring disclosure.
27. Weighing competing public interests against one another, I am satisfied that disclosure of the Advice would, on balance, be contrary to the public interest. Access may therefore be refused.

DECISION

28. I affirm the Department's decision to refuse access to the Advice, on the ground disclosure of the Advice would, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act.
29. I have made this decision under section 110(1)(a) of the RTI Act, as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Louisa Lynch
Right to Information Commissioner

Date: 22 September 2020

²⁵ Which may apply, irrespective of whether there is a current deliberative process or not. Schedule 4, part 4, section 4(3)(b) of the RTI Act does exclude 'factual or statistical information' from the ambit of the DP Harm Factor. However, to the extent any information contained in the Advice may be regarded as factual or statistical, it comprises, in my view, an integral part of the deliberative content and purpose of the Advice, such that it consists of deliberative process information: *Dreyfus and Secretary Attorney-General's Department (Freedom of Information)* [2015] AATA 962 [18]. See also *Eccleston*, at [30].

²⁶ Which, as noted, gives rise to the separate DP Prejudice Factor and which factor is not qualified in the same manner as the DP Harm Factor, and may therefore apply to any information, including factual or statistical information.

APPENDIX**Significant procedural steps**

Date	Event
6 April 2020	OIC received the external review application.
9 April 2020	OIC notified the applicant and the Department that the external review application had been received, and requested procedural documents from the Department.
16 April 2020	The Department provided OIC with procedural documents.
15 May 2020	OIC notified the applicant and the Department that the external review application had been accepted, and requested the information in issue from the Department, with accompanying submissions.
29 May 2020	The Department provided submissions to OIC.
5 June 2020	The Department provided the Advice in issue to OIC.
6 August 2020	OIC conveyed a written preliminary view to the applicant and invited submissions in reply. The applicant requested a decision.
20 August 2020	OIC invited submissions from the applicant.
22 September 2020	The Department confirmed the deliberative process relevant to the Advice was ongoing.