



7 July 2015

Department of
Justice and Attorney-General

Mr Alex McKean
240 Reesville Road
REESVILLE QLD 4552

By email to – mckean@scbar.com.au

Dear Mr McKean

Right to Information access application - Notice of internal review decision under section 83 of the *Right to Information Act 2009*

I refer to your internal review application under the *Right to Information Act 2009* (RTI Act), received on 9 June 2015 about the decision dated 5 June 2015 made by Ms Anne Edwards. I confirm you are seeking an internal review of Ms Edwards' decision in response to your application for access to documents under the RTI Act relating to the following documents.

Subject matter of the documents the applicant is seeking:-

- (1) The Court of Disputed Returns (the CDR);
- (2) The constitution of the CDR;
- (3) The roster for selecting the Justice who would sit as the CDR;
- (4) Any change, or proposal to change, the roster, or the roster system;
- (5) Any proposal that the Chief Justice sit as the CDR himself, or select who would sit as the CDR;
- (6) Any communication, or attempted communication, with any Justice on the roster about their role, or anticipated role, sitting as the CDR;
- (7) The position of the Senior Judge Administrator;
- (8) Any proposal to remove, or attempt to remove, the Senior Judge Administrator;
- (9) Any action taken to remove, or attempt to remove the Senior Judge Administrator.

I interpret your application as an application for access to the documents including those part documents to which access has been previously refused by Ms Edwards and I have confined my consideration to those documents.

Authority

Under section of the RTI Act I am authorised to determine this application. As required by section 80(3) of the RTI Act, I am not the person who dealt with the original application, and I am not less senior than the original decision maker.

This is my decision and reasons for decision in the internal review.

Evidence and other material on which the internal review decision is based

The evidence and other material on which the internal review decision is based comprises:

- (1) Your application for access to documents, dated 31 March 2015;
- (2) The initial decision made by Ms Edwards;
- (3) The documents considered by Ms Edwards in making her decision; and
- (4) Your application for internal review dated 9 June 2015 and the lengthy submissions (23 pages) in that application;
- (5) A letter from the then Chief Justice dated 30 June 2015, in which he identified his interest as a person concerned with the internal review, for the purposes of s.37 read with s.80 of the RTI Act.

You had sought access to documents held by the Department of Justice and Attorney-General (DJAG) in an application received on 31 March 2015 concerning documents about the Queensland Supreme Court, and in particular about matters concerning the Chief Justice and other judges which have attracted considerable publicity in recent times.

An initial decision was made by Ms Edwards, the effect of which is as follows:-

- 75 pages full access;
- 12 pages partial access;
- 92 pages access refused.

The Notice of a considered decision made under s.45 of the RTI Act provided reasons for the release or otherwise of the documents.

A schedule of these documents is appended.

Decision

I have decided to refuse access to the documents (and partial documents) the subject of your application for internal review for the reasons expressed in this decision letter and as outlined in the attached schedule of documents. In making this decision I am in agreement with the initial decision made by Ms Edwards, although for reasons which differ from hers in some respects, and which respond to the matters you have raised in your submissions included in your application for internal review. I have made this decision on the date contained on this document.

Findings on material questions of fact, and reasons for decision.

In giving my reasons for decision I will deal with the submissions you have made, in approximately the same order as appears in your submissions, which in turn approximates to the order of the reasons for decision of Ms Edwards.

Documents in relation to the judicial functions of a court

The key to most aspects of the internal review, is the application of item 1 of part 2 of schedule 2 of the RTI Act to the documents. The heading to that part is 'Entities to which this Act does not apply in relation to a particular function' which is referenced in the RTI Act, s.17 as defining 'an entity to which this Act does not apply' as follows:-

an entity mentioned in schedule 2, part 2 in relation to the function mentioned in that part.

(added emphasis)

The combined effect of s.14 and s.23 of the RTI Act is that the right of access conferred by the RTI Act does not apply to an entity in relation to a particular function listed in schedule 2

part 2. Item 1 as the key item in schedule 2 part 2, means the Act does not apply to a court as follows:-

a court, or the holder of a judicial office or other office connected with a court, in relation to the court's judicial functions.

(added emphasis)

Ms Edwards considered that item 1 applied so that the following categories of documents were documents to which the RTI Act did not apply:-

- Documents related to the appointment to the CDR;
- Documents related to the position of Senior Judge Administrator (SJA).

The focus of your submissions on item 1 is on the breadth of interpretation given by Ms Edwards to the phrase 'in relation to' appearing in item 1 of schedule 2, part 2. You submit that the phrase should be construed as narrowly as possible because of the 'pro-disclosure bias' contained in s.44(1) of the RTI Act. Section 44(1) is in the following terms:-

44. Pro-disclosure bias in deciding access to documents

(1) It is the Parliament's intention that if an access application is made to an agency or Minister for a document, the agency or Minister should decide to give access to the document unless giving access would, on balance, be contrary to the public interest.

Of critical importance is that s.44 is about the approach of a decision maker to giving access to documents which do fall within the scope of the RTI Act. The effect of schedule 2, part 2 is to provide determination of documents to which the RTI Act simply does not apply depending on the entity and function concerned. Therefore, a decision maker does not get to s.44 considerations if the RTI Act does not apply because of the initial question posed by schedule 2, part 2. In other words, the pro-disclosure bias contained in s.44 has no application when considering if schedule 2, part 2 has any application.

Furthermore, the courts have held that the words 'in relation to' is an expression of wide meaning – see *Foord v Whiddett* (1985) 6 FCR 475.¹

Although the RTI Act has a clear purpose to allow access to 'government' information² it is also a clear purpose of the RTI Act to exclude application of the Act to the courts, or the holder of a judicial office 'in relation to' the court's judicial functions. This is not surprising, given the separation of power between the judicial arm of government on the one hand, and the legislative and executive arms of government on the other, which is a fundamental tenet of the Commonwealth *Constitution*.

I therefore conclude that there is no good reason to construe the words 'in relation to' in schedule 2, part 2 in anything other than the broad meaning of those words as consistently applied by the courts.

I am supported in this approach by the legislative history of the RTI Act. The predecessor to the RTI Act, the *Freedom of Information Act 1992* (the FOI Act) until it was amended in 2005 made provision, in s.11(1)(e) about non-application of that Act to 'the judicial functions' of a court or the holder of a judicial office. However, the expression 'in relation to' did not appear in the provisions until the 2005 amendment. Arguably the addition of the broad words 'in

¹ See also the meaning of the word 'relate' – *Pioneer Concrete v BCC* (1983) 44 LGRA 346 at 355-356 (High Court of Australia) and the similar expression 'with respect to' – *Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 186 and *New South Wales v The Commonwealth* (1990) 169 CLR 482 at 498

² See the Preamble to the Act, and s.3 of the Act

relation to' about the judicial functions of a court, in schedule 2, part 2 of the RTI Act demonstrates the intention of Parliament that the exclusion in the RTI Act of the judicial functions of a court was intended to extend not just to things at the core of 'the judicial functions of a court' but also to a range of ancillary matters connected with the judicial functions of a court.

For all these reasons, I consider that I am justified in taking a broad approach to the meaning of the words 'in relation to' in item 1 of schedule 2, part 2 of the RTI Act.

The *Tasmanian Breweries* decision

In your submissions³ you rightly say that the legal principle for which the *Tasmanian Breweries* case is cited⁴ in the initial decision does not appear anywhere in that judgment. However, the legal principle quoted in referring to the *Tasmanian Breweries* case is an accurate representation of the law.⁵ The *Tasmanian Breweries* case is also a case that considered the meaning of 'judicial functions' and the case is at least consistent with the principle cited. I therefore think that there is no merit in the point made by you that the direct quote attributed in the initial decision to the *Tasmanian Breweries* case does not appear in the exact words as quoted.

Before leaving this question, I also add the following observations for further reference in this decision:

- The term 'function' of a court should not be equated with the expression 'judicial power' (of the Commonwealth) as has been applied by the High Court in its interpretation of Chapter III ('The Judicature') of the *Constitution*. Perhaps the main reason for this is that Chapter III uses the expression 'judicial power', but the focus of schedule 2, part 2 of the RTI Act is a different term: 'judicial function'.

The Information Commissioner has held that the functions of a coroner when exercising their functions as a coroner concern a 'judicial function' for the purposes of the FOI Act. In *Devine and Department of Justice*⁶ the Information Commissioner found that emails by the police to a coroner, in his role as coroner were documents to which s.11(1)(e) of the FOI Act applied.

The decision in *Devine* recognises as a factor in favour of a judicial function, that the documents were prepared for a specific case. The Information Commissioner also recognised that documents concerning specific proceedings before a court or tribunal was a factor in favour of the documents concerning a 'judicial function' in *Wilkie and Queensland Industrial Relations Commission*.⁷

Two factors of relevance to the present case emerge from that decision:

- (a) That documents concern a specific case, rather than more general administrative work, appears to be a factor in favour of the documents concerning a 'judicial function'; and

³ At paragraph (19)

⁴ On page 2 of the initial decision

⁵ The stated principle is consistent with the recent decision of the Queensland Court of Appeal in *Owen v Menzies & Ors* [2012] QCA 170 as summarised and extracted in the Office of the Information Commissioner annotations to the RTI Act on s.17 of the RTI Act.

⁶ S.54/99, 31 March 2000

⁷ Decision no. 2/2006, at [33]

- (b) The fact that matters occur outside a court setting does not remove documents from the realm of 'judicial function' especially if aimed at preparation for the hearing of a particular case.
- The Information Commissioner has recognised the meaning of 'judicial function' in terms similar to the quote in the initial decision attributed to *Tasmanian Breweries*, in *Wilkie and Queensland Industrial Relations Commission* by referring to the High Court decision in *R v Gallagher; Ex parte Aberdare Collieries Pty Ltd* (1963) 37 ALJR 40 at 43, that judicial power consists of:-

The giving of decisions in the nature of adjudications upon disputes as to rights or obligations arising from the operation of the law upon past events or conduct.

These observations support the initial decision in its approach to find that documents which concern the appointment of a judge to constitute the CDR for the apprehended referral of the Ferny Grove election outcome fall within the meaning of documents relating to the judicial functions of a court or judicial officer.

Proposed exercise of power by the Chief Justice under the Electoral Act 1992 relating to the CDR for the seat of Ferny Grove

You essentially make two submissions about why documents concerning exercise of the powers of the Chief Justice to appoint a judge to constitute the CDR under the *Electoral Act* concerning the seat of Ferny Grove, do not amount to a judicial function:

- (a) It cannot be said with confidence that the CDR might be called upon to determine an application about Ferny Grove⁸ so that the Chief Justice was not making decisions about appointing a particular judge in a particular matter;⁹
- (b) Even if the Chief Justice had been acting in relation to a particular matter, that given the decision of the Information Commissioner in *Cannon v Magistrates Court (Queensland)*¹⁰ the decisions made by the Chief Justice would be about administrative rather than judicial functions.

Section 137(3) of the *Electoral Act* provides that the Chief Justice may be the single judge to constitute the CDR or appoint another Supreme Court judge to constitute that Court. This is clearly a function that only the Chief Justice may perform.

Having inspected the documents which concern this category of documents, I find as a matter of fact that the documents indeed did relate to an apprehended referral for the seat of Ferny Grove. In the end there was no such referral and no such hearing of the CDR. However there clearly was an apprehended referral, anticipated to take place at specific times, which caused the Chief Justice, the SJA and Justice Boddice to engage in correspondence and a meeting about the subject.

The effect of Cannon v Magistrates Court (Queensland) (2004) 6 QAR 340

You rely on the decision in *Cannon* to submit that the documents decided in the initial decision to concern the judicial functions of a court should not be excluded from application of the RTI Act.¹¹ I have read your submissions carefully.

⁸ See paragraphs (48) and (49)

⁹ (52)

¹⁰ (2004) 6 QAR 340

¹¹ Paragraphs (25) – (60)

The facts of *Cannon* are important. The Information Commissioner found that correspondence between the then Chief Magistrate and Cannon's former wife about a complaint made by the wife concerning the conduct of another Magistrate did not fall within the scope of then s.11(1)(e) of the FOI Act.

I agree with the observation made by you¹² that the Information Commissioner considered that the relevant question in applying s.11(1)(e) was 'whether the letters in issue were brought into existence by the court, or by the Chief Magistrate, in performing the judicial functions of the court, or of the Chief Magistrate'.¹³ The Information Commissioner decided that the documents had not been brought into existence because of that reason: instead, they had been brought into existence and received by the court from 'outside the court', in that case by Ms Cannon.

That is a significant point of distinction meaning that *Cannon* should not apply to the facts of the present case. It is clear that the documents in this case were generated within the court, and for the purposes of a judicial function of the Supreme Court, or the Chief Justice, concerning appointment of a judge to, and the listing arrangements of a case reasonably apprehended to require hearing in the near future. Further, I note that s.11(1)(e) was in its original form at the time *Cannon* was decided and arguably the extent of the exclusion in item 1 of part 2 of schedule 2 of the RTI Act is wider.

I am satisfied that documents concerning a judge to constitute the CDR for the seat of Ferny Grove are documents that relate to the judicial functions of a court under item 1 of schedule 2, part 2, and that the RTI Act does not apply to them.

Documents related to the position of Senior Judge Administrator

Only judges (the SJA and Chief Justice) could exercise the powers in the *Supreme Court of Queensland Act 1991* referred to in the initial decision. The documents concern the application of those powers in a particular instance; that is, the extent to which the SJA would continue exercising the powers that apply to that office.

Applying the broad words 'the holder of a judicial office in relation to the court's judicial functions', it appears to me that documents which are about whether the SJA would continue to exercise the power of judicial administration of the court fall within the broad scope of those words.

Apprehended conflict in exercise of powers about the SJA

Each of the four points made by you about this aspect are made against an apprehension that the initial decision was that there was a conflict between the exercise of the powers of the SJA, and the powers of the Chief Justice, each under the *Supreme Court of Queensland Act* and that this conflict therefore led to a judicial function being performed, in resolving the conflict. With respect, I do not read the initial decision¹⁴ as having that import. The point being made in the initial decision is that the exercise of each set of statutory powers may only be exercised by the relevant judge and that power was integral to the role of the judges concerned.

I am satisfied that documents concerning whether the SJA would continue to exercise the powers that apply to that office relate to the judicial functions of a court under item 1 of schedule 2, part 2, and that the RTI Act does not apply to them.

¹² At paragraph (30) of your submissions

¹³ At [27] of *Cannon*

¹⁴ The relevant reasoning is in the second to last paragraph on page 3.

Public interest factors

In case I am wrong that the majority of the documents the subject of the internal review application are documents to which the RTI Act does not apply because of item 1, schedule 2, part 2, I will consider, on an alternate basis whether access should or should not be given to the documents because of the public interest balancing test required by s.49 of the RTI Act, even though for the purposes of this decision, it is not necessary that I do so. This consideration is also relevant for a small number of documents which contain the personal information of the then Chief Justice and other members of the judiciary.

In this consideration I have not taken into account any irrelevant factors set out in schedule 4, part 1 of the RTI Act although I will address your submissions that the judiciary is included in the term "Government" in item 1, schedule 4, part 1. Section 49 of the RTI Act requires me to give access to a document unless disclosure would, on balance be contrary to the public interest.

I have identified factors in favour of disclosure of the documents and those against giving access to the documents. I agree with the identification of factors addressed in the initial decision, but as this decision will show, I have identified another factor weighing against disclosure of the 'recorded conversation' with the Chief Justice, and that is the confidentiality of the conversation from the perspective of the Chief Justice. As described in the following reasons ultimately, I have concluded that the balance of the public interest is against giving access to the documents.

Whether the judiciary / courts is part of the 'government'

You have submitted that 'courts' or the 'judiciary' fall within the meaning of 'the government' for the purposes of the RTI Act, meaning that the main public interest ground relied on in the initial decision against giving access, of reducing public confidence in the judiciary must fail because item 1 of schedule 4, part 1 provides that a factor irrelevant to deciding the public interest is that disclosure of the information:-

... could reasonably be expected to cause embarrassment to the Government or to cause a loss of confidence in the Government.

(added emphasis)

It is true that the term 'government' is defined in the Dictionary (schedule 6) of the RTI Act to include 'an agency and a Minister'. As I have decided above, the meaning of 'agency' in s.14(2) excludes an entity to which the Act does not apply, in this case, if specific documents relate to the judicial functions of a court.

The initial decision considered that this factor was irrelevant to deciding the public interest because that provision was interpreted as excluding the judicial arm of government.¹⁵ Ms Edwards took the view that although the Dictionary to the RTI Act defines 'government' as including an agency and a Minister, it did not appear to her to include a judicial officer, or a court.

In my opinion, there are public interest factors which apply to courts which do not apply to the other arms of government. However, there is a basis for a belief that item 1 of schedule 4, part 4 does not apply to the judicial arm of government that is not revealed in the initial decision. That is, although the expression 'government' (with a lower case 'g') as defined in the RTI Act will include a court other than in the exercise of its judicial functions, the expression used in item 1 is 'the Government' with the important point being the capital letter 'G'. The expression 'the Government' (with a capital 'G') is used in describing the public

¹⁵ See page 4

interest factors in schedule 4, in other places.¹⁶ The only other occasion when the expression 'the Government' (with a capital 'G') is used in the Act is in paragraph 2 of the preamble to the Act which says that:-

The Government is proposing a new approach to access to information.

The term 'the Government' (with a capital 'G') is not separately defined in the Dictionary to the Act. Explanatory Notes to the Bill which became the RTI Act also do not explain the reason for the difference. However, the Explanatory Notes also use the term 'the Government' with a capital letter G in addition to 'government'.¹⁷ What use of 'the Government' used in the Act and the Explanatory Notes have in common, is that the expression appears to mean a particular government, rather than the concept of 'government' in general. For example, paragraph 2 of the preamble as extracted above can only mean 'the Government' which introduced the RTI Act, rather than 'government' as a concept. The same meaning also explains use of 'the Government', in the main, in the Explanatory Notes.¹⁸ This use also explains the use of 'the Government' in item 1 of schedule 4, part 1, meaning embarrassment to the Government of the day, or a particular Government.

Continuing this line of reasoning, the expression 'government' (with a lower case 'g') appears to be a reference to those organs which govern society, as a concept. That would explain use of the expression 'government' in schedule 4, in the context of an entity which governs society.¹⁹ If that is the case, then it would be right to exclude the judiciary as an arm of government from the meaning of 'the Government' in item 1 of schedule 4, part 1.

The difference in the terms cannot be dismissed as a mere drafting error. Punctuation in an Act is part of the Act²⁰ and must therefore be given meaning.

In my decision this means that the initial decision was correct to decide as not applicable the factor in item 1 of schedule 4, part 1. That means that loss of confidence in the judiciary is available as a public interest consideration for the purposes of s.49.

Schedule 4 does not contain a specific reference to a public interest in avoiding loss of confidence in the judiciary. However, item 8 of schedule 4, part 3 is a factor favouring non-disclosure in the public interest, that:-

Disclosure of the information could reasonably be expected to impede the administration of justice generally...

I would also add that s.49 of the RTI Act, in referring to the public interest factors in schedule 4, does not purport to do so in an exhaustive way for the following reasons:

- Section 49(2) says that s.49 sets out 'factors' (note: not 'the factors') the Parliament considers appropriate for deciding whether disclosure would on balance be contrary to the public interest;
- Similarly, the process of identifying and weighing the public interest set out in s.49(3) requires the decision maker to identify 'any factor favouring non-disclosure that applies in relation to ...including [note: not 'limited to'] any factor mentioned in schedule 4, part (3) or (4)'.

¹⁶ See part 2, items 1, and 3

¹⁷ See the Explanatory Notes, pages 1, 2, 3, 4, 6 as examples

¹⁸ See for example page 1 which refers to 'the Government response to the Solomon Report' which can only refer to 'the Government' at that time.

¹⁹ See for example item 11 of part 2 and item 20 of part 3, dealing with a 'deliberative process of government'.

²⁰ See s.14(5) of the *Acts Interpretation Act 1954*.

I find that the public interest factor of damage to public confidence in the judiciary is a valid public interest factor able to be applied under s.49 of the RTI Act, and it should be given significant weight in deciding the effect of the public interest balancing test, to the extent that it is necessary for me to do so.

An individual's right to privacy

Item 3 of schedule 4, part 3, being a factor favouring non-disclosure in the public interest, is as follows:-

3 Disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy.

I have read your submissions about the concept of 'privacy' and note your reference to two decisions of the Information Commissioner on the privacy aspect relating to the conversation; namely *McCabe and Moreton Regional Council*²¹ and *Hardy and Department of Health*.²²

You rely on *McCabe* for a finding that there is 'generally no expectation of privacy when conducting a business which is aimed at providing services to the public'.²³ The facts of *McCabe* does not seem entirely applicable to the present case as there is little loss of individual privacy by disclosing photographs of a business premises. But that hardly seems applicable to the circumstances of the recorded conversation with the Chief Justice which took place in his chambers.

You rely on *Hardy* for a finding by the Information Commissioner drawing a distinction between information in a person's 'personal sphere' and 'routine work information'. The Information Commissioner referred to the latter as 'information that is solely and wholly related to the routine day to day duties and responsibilities of a public service officer'.²⁴ That distinction may be accepted.

However, I do not accept that the conversation between the Chief Justice and the other two judges was about or concerning 'routine work information'. An example where information concerning the work of 'government employees' was refused access was the Information Commissioner's decision in *Tol and The University of Queensland*.²⁵ Relevant paragraphs of that decision are as follows:

Although the personal information appears in a workplace context it comprises the individual's opinions feelings and responses in comments the applicant has made about the quality of their research and professionalism. I consider such information is not related wholly to the routine day-to-day work activities of these individuals and is not their routine personal work information. It is therefore relevant to consider the extent of the harm that could result from disclosing the personal information of other individuals under the IP Act.

*The information in issue is sensitive and personal in nature. I consider its disclosure under the IP Act would be a significant intrusion into the privacy of these individuals and the extent of the public interest harm that could be anticipated from disclosure is significant.*²⁶

²¹ [2013] QIC 29

²² [2011] QIC 28

²³ Your submissions at paragraph (88) referring to [26] of *McCabe*

²⁴ [26] of *Hardy*

²⁵ [2015] QIC 4

²⁶ [23] and [24]

In my opinion, those paragraphs are applicable to the conversation between the Chief Justice and the other two judges.

The effect of media reports of the contents of the recorded conversation between the Chief Justice and two judges

I find the fact that the contents of the recorded conversation has already been widely reported in the media should not properly reduce the weight to be given to the argument that it was a private conversation and should not be disclosed on that basis.

I do not know the circumstances in which the information about the conversation was provided to the media outlet/s who published the relevant details. As far as I am aware, there has been no official authorisation for release of the details that have been made public. Further, the fact of the apparent partial release of some details of the conversation does not negate the circumstances and personal evidence of the privacy of the conversation as attributed to the Chief Justice in your submissions and which are uncontested by any other evidence.

I have also given consideration to the effect of the *Invasion of Privacy Act 1971*. It is not an offence under that Act for a person to use a 'listening device' to overhear, record, monitor or listen to a 'private conversation' where the person using the listening device is a party to the private conversation.²⁷ However, the *Invasion of Privacy Act 1971* in s.45 provides some limits on the publication to others of such a recording.

For the purposes of the RTI Act, in my view, these provisions are relevant to my assessment of the public interest in disclosure of the recording of the conversation and there is a public interest against release consistent with the policy purpose of s.45. Schedule 4, part 3 lists as a factor favouring non-disclosure in the public interest, item 22 which is as follows:-

22 Disclosure of the information is prohibited by an Act.

Further public interest argument against disclosure - confidentiality

The evidence in the form of the comments by the Chief Justice in the interview with *The Australian* contained in your submissions²⁸ raises an issue about whether the confidentiality of the recorded conversation as a discrete public interest factor on which the recorded conversation should not be released. The extract of the Chief Justice's comments about the conversation in your submissions reflects his view that the conversation was 'in-confidence' and the recording was done without his knowledge.

The RTI Act recognises information communicated in confidence as a basis to refuse to release the information in two ways:-

- (1) On the basis that the information is 'exempt information' as described in s.48 of the Act read with item 8 of schedule 3; and
- (2) Disclosure of the information could reasonably be expected to cause a public interest harm in the circumstances described in item 8, schedule 4, part 4.

The key to the application of item 8 of schedule 3 is that disclosure of the matter would found an action for breach of confidence.

²⁷ See s.43(1) read with s.43(2)(a)

²⁸ At paragraph (140)

The Information Commissioner has described the following five cumulative elements as needing to be established for a breach of confidence to be demonstrated:-²⁹

- (1) The information in issue must be capable of being specifically identifiable as information that is secret;
- (2) The information must have the necessary quality of confidence;
- (3) The information must have been communicated in such circumstances as to import an obligation of confidence;
- (4) Disclosure to the applicant for access would constitute an unauthorised use of the confidential information;
- (5) Disclosure would be likely to cause detriment to the confider of the confidential information.

It appears to me that many, if not all of those factors would be satisfied on application to the conversation.

Even if not all of the elements of a cause of action for breach of confidence can be sustained, I am satisfied that the public interest factor in item 8 of schedule 4, part 4 can be sustained. The text of item 8 is as follows:-

- (1) *Disclosure of the information could reasonably be expected to cause a public interest harm if -*
 - (a) *the information consists of information of a confidential nature that was communicated in confidence; and*
 - (b) *disclosure of the information could reasonably be expected to prejudice the future supply of information of this type.*

On the facts of this case, at least according to the evidence in the form of the views of the Chief Justice, the conversation was an 'in-confidence' conversation. There is no evidence to the contrary. There is a good argument for contending that whatever remains of the conversation that has not been the subject of the media statements remains information of a confidential nature. Furthermore, any disclosure which has taken place, is as I have noted above, something that occurred without official authorisation or the consent of the Chief Justice.

As to the second factor, I think it is also reasonable to find that if the full text of the conversation was to be revealed, then that would prejudice the future supply of information of that type, in the sense of judges apparently in conflict over a particular point not communicating frankly about the conflict.

Conclusion on weighing on public interest factors

Weighing all the public interest factors both for and against disclosure as identified in the initial decision, and as analysed in this internal review decision, I am not persuaded that the public interest in disclosure outweighs the public interest in non-disclosure. I therefore refuse access to the documents (and part documents) for the reasons as outlined in this decision letter and as per the attached schedule of documents.

²⁹ *Kalinga Woolloowin Residents Association Inc and Department of Employment, Economic Development and Innovation; City North Infrastructure Pty Ltd (3rd party) 19/12/2011 at paragraph [28]*

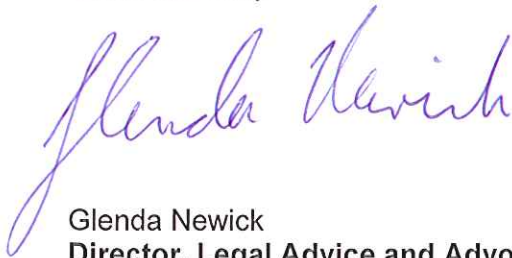
Entitlement to external review

You are entitled to seek an external review under the RTI Act if you disagree with this internal review decision. Schedule 6 of the RTI Act defines what a reviewable decision is. Your application for an external review must be lodged with the Information Commissioner in writing within 20 business days from the date of this letter. Applications for an external review should be addressed to:

Office of the Information Commissioner
PO Box 10143
Adelaide Street
BRISBANE QLD 4000
Phone: 3405 1111

For further enquiries please contact this office on telephone number (07) 3239 0116 quoting reference number **151341**.

Yours sincerely



Glenda Newick
Director, Legal Advice and Advocacy
Department of Justice and Attorney-General

Attachment

- Schedule of documents – Internal review

Schedule of documents – Internal review

File 01

Page#	Document description	Release notation
1	Email 3 Dec	Released
2	Meeting minutes 3 Dec	Released
3	Meeting minutes 3 Dec	Released
4	Meeting minutes 3 Dec	Refuse - out of scope
5	Note 26 Nov	Released
6	Judges on Boards and Tribunals	Released
7	Email 3 Dec	Released
8	Email 9 Feb	Released
9	Email 11 Feb	Released
10	Email 11 Feb	Released
11	Email 11 Feb	Released
12	Meeting minutes 10 Feb	Part Released - Sch.2/2(1), s.49(1)
13	Meeting minutes 10 Feb	Part Released - Sch.2/2(1), s.49(1)
14	Email 11 Feb	Released
15	Email 11 Feb	Refuse - Sch.2/2(1), s.49(1)
16	Email 11 Feb	Released
17	Email 11 Feb	Released
18	Email 18 Feb	Released
19	Email attachment	Refuse – s.49(1) Part page excluded Sch.2/2(1)
20	Email 18 Feb	Released
21	Email 18 Feb	Released
22	Email 18 Feb	Released
23	Meeting minutes 19 Feb	Refuse – s.49(1) Part page excluded Sch.2/2(1)
24	Meeting minutes 19 Feb	Refuse – s.49(1) Part page excluded Sch.2/2(1)
25	Meeting minutes 19 Feb	Refuse – s.49(1)
26	Email 20 Feb	Released
27	Email 20 Feb	Released
28	Email 23 Feb	Released
29	Memo 23 Feb	Refuse – Sch.4/3/3, s.49(1)
30	Meeting notes 30 March	Refuse – Sch.2/2(1), s.49(1)
31	Meeting notes 30 March	Refuse – Sch.2/2(1), s.49(1)
32	File note 18 Feb	Refuse – Sch.2/2(1), s.49(1)
33	File note 18 Feb	Refuse – Sch.2/2(1), s.49(1)
34	File note 18 Feb	Refuse – Sch.2/2(1), s.49(1)
35	File note 18 Feb	Refuse – Sch.2/2(1), s.49(1)
36	File note 18 Feb	Refuse – Sch.2/2(1), s.49(1)

37	Email 3 Dec	Released
38	Judges on Boards and Tribunals	Released
39	Memo 11 Feb	Refuse - Sch.2/2(1), s.49(1)
40	Memo 12 Feb	Refuse - Sch.2/2(1), s.49(1)
41	Memo 12 Feb	Refuse - Sch.2/2(1), s.49(1)
42	Memo 13 Feb	Refuse – Sch.2/2(1), s.49(1)
43	Memo 13 Feb	Refuse - Sch.2/2(1), s.49(1)
44	Memo 13 Feb	Part Released - Sch.2/2(1) , s.49(1)
45	Memo 13 Feb	Refuse – Sch.2/2(1), s.49(1)
46	Memo 16 Feb	Refuse - Sch.2/2(1), s.49(1)
47	Memo 16 Feb	Refuse – Sch.2/2(1), s.49(1)
48	Memo 16 Feb	Refuse – Sch.2/2(1), s.49(1)
49	Memo 17 Feb	Refuse - Sch.2/2(1), s.49(1)
50	Memo 17 Feb	Refuse - Sch.2/2(1), s.49(1)
51	Memo attachments	Refuse - Sch.2/2(1), s.49(1)
52	Memo attachments	Refuse - Sch.2/2(1), s.49(1)
53	Memo attachments	Refuse - Sch.2/2(1), s.49(1)
54	Memo attachments	Refuse - Sch.2/2(1), s.49(1)
55	Memo attachments	Refuse - Sch.2/2(1), s.49(1)
56	Memo attachments	Refuse -Sch.2/2(1), s.49(1)
57	Email 19 Feb	Released
58	Email 19 Feb	Released
59	Undated note	Refuse - s.49(1) Part page excluded Sch.2/2(1)
60	Memo 20 Feb	Refuse - s.49(1)
61	Memo 20 Feb	Refuse - s.49(1), Part Sch.2/2(1)
62	Memo 23 Feb	Refuse - s.49(1)
63	Email 13 Feb	Released
64	Memo 13 Feb	Refuse - copy
65	Email 23 Feb	Released

File 02

Page#	Document description	Release notation
1	Email 10 Feb	Released
2	Email 10 Feb	Released
3	Memo 10 Feb	Refuse – Sch.2/2(1), s.49(1)
4	Email 11 Feb	Released
5	Memo 12 Feb	Refuse – Sch.2/2(1), s.49(1)
6	Memo 12 Feb	Refuse – Sch.2/2(1), s.49(1)
7	Email 18 Feb	Part Released– Sch.4/3/3
8	Email 18 Feb	Released

9	Email 18 Feb	Part Released– Sch.4/3/3
10	Email 19 Feb	Released
11	Email 19 Feb	Released
12	Email 19 Feb	Released
13	Email 19 Feb	Released
14	Email 19 Feb	Released
15	Email 19 Feb	Released
16	Email 20 Feb	Released
17	Memo 20 Feb	Refuse – Sch.2/2(1), s.49(1)
18	Memo 20 Feb	Refuse – Sch.2/2(1), s.49(1)
19	Email 24 Feb	Released
20	Email 25 Feb	Released
21	Email 25 Feb	Released
22	Undated email	Refuse – s.49(1)
23	Memo 23 March	Refuse – s.49(1) Part page excluded Sch.2/2(1)
24	Memo 23 March	Refuse – s.49(1)
25	Memo 17 Feb	Refuse – s.49(1) Part page excluded Sch.2/2(1)

File 03

Page#	Document description	Release notation
1	Revised agenda	Released
2	Revised agenda	Released
3	Meeting minutes - 3 Dec	Released
4	Meeting minutes – 3 Dec	Refuse – out of scope
5	Meeting minutes – 3 Dec	Refuse – out of scope
6	Media article	Released
7	Media article	Released
8	Media article	Released
9	Media article	Released
10	Media article	Released
11	Note	Released
12	Memo 10 Feb	Refuse – Sch.2/2(1), s.49(1)
13	Email 10 Feb	Refuse – Sch.2/2(1), s.49(1)
14	Memo 11 Feb	Refuse – Sch.2/2(1), s.49(1)
15	Memo 12 Feb	Refuse – Sch.2/2(1), s.49(1)
16	Memo 12 Feb	Refuse – Sch.2/2(1), s.49(1)
17	Memo 13 Feb	Released
18	Memo 13 Feb	Released
19	Memo 13 Feb	Released
20	Meeting notes 12 Feb	Refuse – Sch.2/2(1), s.49(1)

21	Meeting notes 12 Feb	Refuse – Sch.2/2(1), s.49(1)
22	Meeting notes 12 Feb	Refuse – Sch.2/2(1), s.49(1)
23	Meeting notes 12 Feb	Refuse – Sch.2/2(1), s.49(1)
24	Meeting notes 12 Feb	Refuse – Sch.2/2(1), s.49(1)
25	Email 13 Feb	Released
26	Memo 13 Feb	Refuse - copy
27	Email 13 Feb	Released
28	Email 18 Feb	Part Released– Sch.2/2(1), s.49(1)
29	Email 18 Feb	Part Released– Sch.4/3/3
30	Email 18 Feb	Released
31	Email 18 Feb	Released
32	Email 18 Feb	Released
33	Email 18 Feb	Released
34	Email 18 Feb	Released
35	Email 18 Feb	Released
36	Meeting minutes 19 Feb	Refuse – Sch.2/2(1), s.49(1)
37	Meeting minutes 19 Feb	Refuse – Sch.2/2(1), s.49(1)
38	Meeting minutes 19 Feb	Refuse – Sch.2/2(1), s.49(1)
39	Meeting minutes 19 Feb	Refuse – Sch.2/2(1), s.49(1)
40	Meeting minutes 19 Feb	Refuse – Sch.2/2(1), s.49(1)
41	Meeting minutes 19 Feb	Refuse – Sch.2/2(1), s.49(1)
42	Meeting minutes 19 Feb	Refuse – Sch.2/2(1), s.49(1)
43	Meeting minutes 19 Feb	Refuse – Sch.2/2(1), s.49(1)
44	Meeting minutes 19 Feb	Refuse – Sch.2/2(1), s.49(1)
45	Meeting minutes 19 Feb	Refuse – Sch.2/2(1), s.49(1)
46	Meeting minutes 19 Feb	Refuse – Sch.2/2(1), s.49(1)
47	Meeting minutes 19 Feb	Refuse – Sch.2/2(1), s.49(1)
48	Email 19 Feb	Part Released - Sch.2/2(1), s.49(1)
49	Email 24 Feb	Released
50	Email 24 Feb	Released
51	Note 25 March	Refuse - s.49(1), Sch.4/3(3)
52	Diary note 26 March	Refuse - Sch.2/2(1), s.49(1)
53	Diary note 26 March	Refuse - Sch.2/2(1), s.49(1)
54	Memo 31 March	Refuse - s.49(1) Part page excluded - Sch.2/2(1)
55	Memo 31 March	Refuse - s.49(1)
56	Email 10 Feb	Part Released - Sch.2/2(1)
57	Email 10 Feb	Released
58	Memo 4 Feb	Released
59	Attachment	Released
60	Email 2 Feb	Released
61	Judges on Boards and Tribunals	Released
62	Memo 10 Feb	Refuse - Sch.2/2(1), s.49(1)
63	Memo 10 Feb	Refuse - Sch.2/2(1), s.49(1)
64	Memo 10 Feb	Refuse - Sch.2/2(1), s.49(1)

65	Email 11 Feb	Released
66	Email 11 Feb	Part Released - Sch.2/2(1), s.49(1)
67	Email 11 Feb	Part Released - Sch.2/2(1), s.49(1)
68	Memo 12 Feb	Refuse - Sch.2/2(1)
69	Memo 13 Feb	Refuse - Sch.2/2(1), s.49(1)
70	Memo 13 Feb	Released
71	Memo 13 Feb	Refuse - Sch.2/2(1), s.49(1)
72	Memo 13 Feb	Part Released - Sch.2/2(1), s.49(1)
73	Memo 13 Feb	Refuse - Sch.2/2(1), s.49(1)
74	Memo 16 Feb	Refuse - Sch.2/2(1), s.49(1)
75	Memo 16 Feb	Refuse - Sch.2/2(1), s.49(1)
76	Memo 16 Feb	Refuse - Sch.2/2(1), s.49(1)
77	Memo 17 Feb	Refuse - Sch.2/2(1), s.49(1)
78	Memo 17 Feb	Refuse - Sch.2/2(1), s.49(1)
79	Email 18 Feb	Released
80	Memo 13 Feb	Refuse - Sch.2/2(1)
81	Email 13 Feb	Released
82	Email 19 Feb	Released
83	Email 19 Feb	Released
84	Email 20 Feb	Released
85	Email 23 Feb	Released

File 04

Page #	Documents description	Release notation
1	Audio recorded meeting	Refuse - Sch.2/2(1), Sch.4/3/3, s.49(1)

File 05

Page #	Documents description	Release notation
1	Letter 25 March	Refuse - Sch.4/3/3, s.49(1)
2	Letter 25 March	Refuse - Sch.4/3/3, s.49(1) Part page excluded - Sch.2/2(1)
3	Letter 25 March	Refuse -Sch.4/3/3, s.49(1)