



Decision and Reasons for Decision

Citation:	<i>T92 and Bundaberg Regional Council; J51 (Third Party) [2021] QICmr 33 (29 June 2021)</i>
Application Number:	315896
Applicant:	T92
Respondent:	Bundaberg Regional Council
Third Party:	J51
Decision Date:	29 June 2021
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - gross salary amount of Council CEO - privacy and personal information - accountability and transparency in expenditure of public funds - where salary range published in annual report - 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 Bundaberg Regional Council (**Council**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to:

All details relating to salary increases of the CEO Bundaberg Regional Council, including percentage of increase, authorisation for increase, recommendation for increase and authorising person or persons...

The time period/date range: 29 March 2020 - 15 December 2020.
2. Council decided² to refuse access to some of the requested information on the grounds that its disclosure would, on balance, be contrary to the public interest.
3. The applicant applied³ to the Office of the Information Commissioner (**OIC**) for external review of Council's decision.

¹ Application dated 16 December 2020. Received by Council on 17 December 2020.

² Decision dated 17 February 2021.

³ On 18 February 2021.

4. OIC consulted with the third party who objected to disclosure of the gross salary amount that appeared in the information in issue. The third party subsequently applied to participate in the review under section 89 of the RTI Act and his application was granted.
5. For the reasons explained below, I set aside Council's decision to refuse access to the information in issue. In substitution for it, I find that disclosure of the information in issue would not, on balance, be contrary to the public interest.

Background

6. In 2019, Council retained an employment consulting firm to conduct a remuneration review of the role of Chief Executive Officer (**CEO**). The firm prepared a final report for Council⁴ that contained an analysis and work value assessment of the role; evaluated comparable job market remuneration data; and recommended an employment cost range for the role.⁵
7. In November 2019, the Mayor approved an increase in the CEO's remuneration, effective as at April 2020.

Reviewable decision

8. The decision under review is Council's decision dated 17 February 2021.

Evidence considered

9. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and the Appendix).
10. Significant procedural steps relating to this review are set out in the Appendix.
11. I have had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.⁶ I consider 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.⁷ I have acted in this way in making 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:⁸ '*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.*'⁹

Information in issue

12. Some information was released to the applicant during the course of the review. The only information remaining in issue consists of references to the CEO's gross salary amount (or brief ancillary information that would enable the CEO's gross salary amount to be calculated) contained on the following five pages (hereinafter referred to as the **Information in Issue**):

⁴ Dated 22 March 2019.

⁵ The firm was consulted by OIC regarding disclosure of its report. It advised that it did not object to disclosure and did not wish to participate in the review.

⁶ Section 21 of the HR Act.

⁷ *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].

⁸ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

⁹ *XYZ* at [573].

- pages 3, 6, 8 and 10 of the remuneration review report dated 22 March 2019; and
 - page 1 of an internal memorandum dated 13 November 2019.
13. As the applicant does not seek access to the individual components of the gross salary amount, such as superannuation and allowances, this information is not in issue.
14. Council advised during the course of the review¹⁰ that it did not object to disclosure of the Information in Issue to the applicant. The third party therefore bears the practical onus of establishing that access to the Information in Issue ought to be refused.¹¹

Issue for determination

15. The issue for determination is whether disclosure of the Information in Issue would, on balance, be contrary to the public interest under the RTI Act.

Relevant law

16. Under the RTI Act, a person has a right to be given access to documents of an agency¹² subject to limitations, including grounds for refusal of access.¹³ Relevantly, access may be refused to documents where disclosure would, on balance, be contrary to the public interest.¹⁴ The RTI Act requires a decision-maker to take the following steps in deciding the public interest:¹⁵
- 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.
17. 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 relevant,¹⁶ and disregarded irrelevant factors stated in schedule 4, part 1 of the RTI Act. I have followed the steps prescribed in section 49 of the RTI Act, and also had regard to both the RTI Act's pro-disclosure bias,¹⁷ and Parliament's intention that grounds for refusing access to information be interpreted narrowly.¹⁸

¹⁰ By email received 21 May 2021.

¹¹ Section 87(2) of the RTI Act.

¹² Section 23(1)(a) of the RTI Act.

¹³ Section 47 of the RTI Act sets out the grounds on which access may be refused to information.

¹⁴ Section 47(3)(b) 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. However, 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.

¹⁵ Section 49 of the RTI Act.

¹⁶ i.e., considerations beyond the factors expressly prescribed in the lists stated in schedule 4 of the RTI Act.

¹⁷ Section 44 of the RTI Act.

¹⁸ Section 47(2)(a) of the RTI Act.

Findings

Irrelevant factors

18. The RTI Act specifically precludes a decision-maker from taking into account any reasonable expectation of *'mischievous conduct by the applicant'* as a result of disclosure of the information.¹⁹
19. The third party has questioned the applicant's motives in seeking access to the Information in Issue, contending that the information was being sought for *'nefarious political reasons and has nothing to do with legitimate public interest'*.²⁰
20. An applicant's motives in applying for access to information under the RTI Act are irrelevant and cannot be taken into account when deciding the public interest.²¹ The Information Commissioner has previously noted:

*...Speculation as to the identity of a particular access applicant, the access applicant's reasons for lodging an application, and any intended use of the information are not generally matters to be taken into account in assessing the balance of the public interest.*²²

21. As required by the RTI Act, I have not taken the third party's submissions about the applicant's motives into account in making this decision.
22. I do not consider that any other irrelevant factors arise on the facts of this case.

Factors favouring disclosure

23. In addition to the general public interest in promoting access to government-held information²³ the RTI Act specifically recognises that the public interest will favour disclosure of information where disclosure could reasonably be expected to:
 - promote open discussion of public affairs and enhance the Government's accountability;²⁴ and
 - ensure effective oversight of expenditure of public funds.²⁵
24. The above factors apply to the Information in Issue for the reasons explained below.
25. The Information in Issue is the gross salary of senior public officer holder. The Information Commissioner has found previously that there is a general public interest in seeing how taxpayers' money is spent and that the public interest is sufficient to justify

¹⁹ Schedule 4, part 1, item 3 of the RTI Act.

²⁰ Letter from the third party dated 19 May 2021.

²¹ Schedule 4, part 1, item 3 of the RTI Act.

²² *Helping Hands Network Pty Ltd and Department of Education, Training and Employment* (Unreported, Queensland Information Commissioner, 30 October 2012) at [66], citing *State of Queensland v Albiets* [1995] 1 Qd R 215 at 219 where De Jersey J observed that *'the Freedom of Information Act does not confer any discretion on the Information Commissioner, or the Supreme Court, to stop disclosure of information because of any particular motivation in the applicant'*. See also the Victorian Supreme Court decision in *Victoria Police v Marke* [2008] VSCA 218, in which Weinberg JA noted at paragraph 66 *'[the FOI Act] does not, in the normal course, contemplate that the motives of the person seeking access to a document should be scrutinised and characterised as either worthy or unworthy. These are value judgements, which are likely to be highly subjective, and have no place in a scheme that is designed to ensure the proper accountability of government.'* I consider these observations apply equally to the RTI Act. See also *Rylsey Enterprises Pty Ltd and Cassowary Coast Regional Council* [2015] QICmr 13 at [14]-[16].

²³ Implicit in, for example, the objects of the RTI Act.

²⁴ Schedule 4, part 2, item 1 of the RTI Act.

²⁵ Schedule 4, part 2, item 4 of the RTI Act.

disclosure of the gross income payable from the public purse to the holder of a public office.²⁶

26. Previous decisions of the Information Commissioner and in other jurisdictions have also established that the public interest is served by disclosing the total remuneration package of a public officer but not the amounts of the individual benefits/bonuses.²⁷ The Information Commissioner has also recognised that the public interest is even stronger in the case of senior officers who have responsibility for *'devising and/or implementing strategic and operational plans, and delivering key performance outcomes'*.²⁸
27. The third party argued that none of these decisions related to *'recent matters involving the CEOs of Councils'*.²⁹ I advised the third party³⁰ that I considered that the relevant public interest factors favouring disclosure apply to the gross salary amount paid to any public officer out of public funds, including Council CEOs, and that, as previously explained, the public interest in disclosure is even stronger in the case of senior public officers such as a Council CEO who have responsibility for delivering key outcomes to the community they serve. Although the referenced decisions may not refer specifically to a Council CEO's salary, I do not consider the relevant public interest considerations favouring disclosure are reduced for that reason.
28. In this case, Council's CEO reports to the Mayor and Council, and has overall responsibility for Council's operations. The CEO is responsible for the development and implementation of policy and executive decisions; for implementing Council's strategic and operational plans; for delivering key performance outcomes; and for managing a substantial annual budget.³¹ Given the seniority of the role and its significant responsibilities, I consider that the two public interest factors outlined at paragraph 23 carry significant weight.
29. The third party argued that general information about remuneration packages for senior officers that is required to be published by local governments in their Annual Reports is sufficient to discharge the public interest in examining how public monies are being spent on staff remuneration. Relevantly, section 201 of the *Local Government Act 2009* (Qld) (**LG Act**) provides that a local government's Annual Report must state the number of employees in senior management³² who are being paid in each band of remuneration. Each band of remuneration is an increment of \$100,000.³³
30. I referred the third party³⁴ to the decision in *Edmystone* where this issue was considered (as set out in the extract below) and indicated that I considered the same reasoning applied here:

I have considered whether the information published in the Annual Reports about senior management remuneration is sufficient to discharge the public interest factors relating to accountability, transparency and effective oversight of public funds. However, the published

²⁶ *Edmystone and Blackall-Tambo Regional Council* [2016] QICmr 12 (15 April 2016) at [37]-[43] (**Edmystone**), *Stewart and Department of Transport* (1993) 1 QAR 227 at [80] (**Stewart**), *Lower Burdekin Newspaper Company Pty Ltd and Burdekin Shire Council; Hansen; Covolo and Cross (Third Parties)* (2004) 6 QAR 328 at [26] (**Lower Burdekin**) and *Sheridan and South Burnett Regional Council; Ors* (Unreported, Queensland Information Commissioner, 23 June 2008) at [52].

²⁷ *Re National Tertiary Education Industry Union (Murdoch Branch) and Murdoch University; Ors* [2001] WAICmr 1 (2 January 2001) at [70]-[71] (**Re NTEIU**) and *Asher v Department of State & Regional Development* [2002] VCAT 609 (6 August 2002) (**Asher**). As noted, the applicant in this review does not seek access to the individual components of the CEO's gross salary amount.

²⁸ *Lower Burdekin* at [27].

²⁹ Letter dated 19 May 2021.

³⁰ Letter dated 26 May 2021.

³¹ The remuneration review report indicates that, as at the time of the review, Council's budget was \$301 million.

³² 'Senior management' is defined as consisting of the CEO and all senior executive employees of the local government.

³³ Section 201(3) of the LG Act.

³⁴ In my letter dated 26 May 2021.

information provides only a very general guide to the remuneration of senior management and does not link specific salaries to particular roles. While the publication of this information is one of Council's accountability measures, I consider the information is of such a limited nature that it does not discharge the public interest factors [favouring disclosure]. I therefore find that the weight of those factors is only marginally reduced by the information published in the Annual Reports.

31. The third party responded:³⁵

However, as I noted in my earlier correspondence, this case [Edmestone] related to a second-tier senior staff member (Works Manager), not to the CEO and you have not provided any previous cases in relation to a Local Government CEO to support your position.

I have checked the 2019/20 Annual Reports for Queensland's largest 14 Councils (under the LGA) in relation to how they report to meet the requirements of S201. In 13 of those reports, it is clear which band the CEO salary package resides in, given as you would expect that the CEO is the highest-paid employee of the Councils reflected in those tables.

Therefore, the commentary in that case relating to banding is irrelevant in the case of Council CEOs. I cannot accept that the public interest is served any further by revealing that the CEO gets paid, for example, \$475,000 as say opposed to \$430,000. I dispute the assertion that they are a "general guide", and I believe the \$100,000 bands satisfy the public interest test as you have outlined.

I also cannot understand that revealing these details of how my remuneration was determined and approved passes the 'public interest' test.

32. The third party appears to contend that there is no public interest in disclosing information about a remuneration review conducted of the CEO's role, and the outcome of that review regarding a decision taken to increase the remuneration package. I do not agree. The CEO's position is funded by ratepayers. Council and the CEO are accountable to the community they serve regarding the expenditure of those funds, and in permitting scrutiny by the community of whether the gross salary paid to the CEO represents value for money in terms of performance, and is commensurate with the role and its responsibilities.

33. I also do not accept the third party's argument that senior management remuneration information that is published in Council's Annual Report is sufficient to discharge the public interest factors relating to accountability, transparency and effective oversight of public funds. I have reviewed Council's 2020 Annual Report and note that there is only one executive in the top band of remuneration. It is therefore reasonable to assume that this entry refers to the CEO's position, and indicates that the CEO's salary at the relevant time fell somewhere within the range of \$350,000 to \$450,000. While the publication of this general guide is one of Council's statutorily mandated accountability measures, I consider that the \$100,000 banding increment is insufficient to discharge the relevant public interest factors favouring disclosure. In effect, an officer who is paid \$450,000 would fall into the same general reporting band as one being paid \$350,000. In terms of the ability to meaningfully scrutinise the salary being paid to a senior officer, a potential difference of \$100,000 is, to my mind, significant. I therefore find the weight of the relevant public interest factors is only marginally reduced by the information published in Council's Annual Report.

34. I also note that the applicant applied for access to information about increases in the CEO's salary. The information contained in the Annual Report does not give any

³⁵ Letter dated 4 June 2021.

indication of salary increases. However, information contained in the memorandum in issue does respond to this issue.

35. For the reasons set out above, I afford significant weight to the factors favouring disclosure of the Information in Issue³⁶ and do not accept the third party's submissions that these public interest factors are discharged by the publicly available information.

Factors favouring nondisclosure

36. The third party did not identify specific public interest factors contained in the RTI Act that he contended weighed in favour of nondisclosure, and sought only to argue why disclosure would not further the public interest as outlined above. For completeness, I have nonetheless considered the nondisclosure and harm factors listed in schedule 4, part 3 and part 4 of the RTI Act on the basis of the information before me.

37. The RTI Act recognises that the public interest will favour nondisclosure of information where disclosure could reasonably be expected to:

- prejudice the protection of an individual's right to privacy;³⁷ and
- cause a public interest harm if it would disclose personal information of a person, whether living or dead.³⁸

38. I accept that the Information in Issue comprises the CEO's personal information.³⁹ I also consider that information about a person's salary reflects their personal financial position and that the Information in Issue therefore attracts a level of privacy. However, balanced against that is the fact that the salary is paid out of public funds and reflects the cost to the community of having the role of CEO performed for the benefit of the public.⁴⁰

39. The Information in Issue represents the CEO's gross salary amount during the relevant period. The individual components that make up that gross salary amount are not in issue. As the Information Commissioner recognised in *Stewart*, those individual figures are of a more sensitive, personal nature.⁴¹ On this basis, I find that the public interest harm in disclosing the Information in Issue is only moderate in this case.

40. In considering the privacy which attaches to the gross salary paid to a Council CEO, I find this information is not particularly sensitive compared to, for example, an individual's medical records. Again, in recognition of the fact that the salary is publicly-funded, I afford the privacy nondisclosure factor moderate weight.

41. In addition, with respect to the application of both the privacy nondisclosure factor and personal information harm factor identified above, as noted, the range of the CEO's gross salary is already published in Council's Annual Report. Given that, I consider that disclosure of the exact amount of the gross salary will have only a minimal further impact on the CEO's right to privacy.

³⁶ Specifically, schedule 4, part 2, item 1 and item 4 of the RTI Act.

³⁷ Schedule 4, part 3, item 3 of the RTI Act.

³⁸ Schedule 4, part 4, section 6(1) of the RTI Act.

³⁹ Within the meaning of section 12 of the *Information Privacy Act 2009* (Qld). This is consistent with the Information Commissioner's conclusion in *Stewart* at [80] that information about a person's income is their 'personal affairs' as defined under the repealed *Freedom of Information Act 1992* (Qld).

⁴⁰ In *Asher*, disclosure of the total remuneration package of senior public servants was considered reasonable, despite it being considered the officer's personal affairs.

⁴¹ At [80] and *Forbes and Department of Premier and Cabinet* (1993) 6 VAR 53 at [60]-[61] (*Forbes*).

Balancing the public interest

42. The RTI Act sets out a pro-disclosure bias in deciding access to documents.⁴² In this case, the factors favouring disclosure of the Information in Issue in terms of enhancing local government transparency and accountability, and effective oversight of public funds, carry significant weight due to the seniority of the CEO role. I have marginally reduced the weight of these factors on the basis that the information published in Council's Annual Report provides a certain level of transparency concerning the salary paid to the CEO.
43. I acknowledge that disclosing the Information in Issue would reveal the CEO's personal information. However, regard must also be given to the fact that the role is that of a senior public officer paid out of public funds. I consider that the harm arising from disclosure of the CEO's personal information, and any resulting infringement of the CEO's privacy, are only moderate in this case. I find the harm and nondisclosure factors have reduced weight in circumstances where the range of the CEO's salary is published in Council's Annual Report.
44. In balancing the relevant public interest factors in this case, I agree with the assessment in *Stewart*, where the Information Commissioner accepted that the public interest in protecting a person's privacy with respect to income information must be balanced against the public interest in transparency in expenditure of public funds and that, in relation to the gross salary of a public servant, the latter public interest is deserving of greater weight.⁴³
45. On balance, I find that the factors favouring disclosure outweigh the factors favouring nondisclosure in this case. Accordingly, I find that disclosure of the Information in Issue would not, on balance, be contrary in the public interest, and therefore, access may not be refused under section 47(3)(b) of the RTI Act.

DECISION

46. I set aside the decision of Council dated 17 February 2021. In substitution for it, I find that disclosure of the information in issue would not, on balance, be contrary to the public interest. The parties bearing the formal legal and practical onus in this review have not argued that any other ground for refusing access applies, and I can identify none. Accordingly, the applicant is entitled to access the Information in Issue under the right of access conferred by section 23 of the RTI Act.
47. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

S Martin
Assistant Information Commissioner

Date: 29 June 2021

APPENDIX

Significant procedural steps

⁴² Section 44 of the RTI Act.

⁴³ *Stewart* at [80] and *Forbes* at [60]-[61] cited in *Re NTEIU* at [56].

Date	Event
18 February 2021	OIC received the application for external review.
17 March 2021	Council provided the initial documents.
30 March 2021	OIC advised the applicant and Council that the application for external review had been accepted.
9 April 2021	Council provided copies of the information in issue.
5 May 2021	OIC expressed a preliminary view to Council and the third party, and invited the third party to apply to participate in the review.
19 May 2021	OIC received correspondence from Council and from the third party.
21 May 2021	Council advised OIC that it accepted OIC's preliminary view.
26 May 2021	OIC expressed a further preliminary view to the third party.
4 June 2021	OIC received correspondence from the third party.
8 June 2021	OIC provided Council and the third party with a summary of the current status of the review.
14 June 2021	OIC directed Council to provide the applicant with access to some information in issue.
16 June 2021	OIC requested that the third party confirm whether or not he maintained an objection to disclosure and advise whether he wished to apply to become a participant in the review.
22 June 2021	OIC received correspondence from the third party indicating that he maintained his objection to disclosure and applying to become a participant in the review.