



Decision and Reasons for Decision

Citation: *Lusping Pty Ltd and Sunshine Coast Regional Council; Paul Golding (Third Party)* [2023] QICmr 16 (30 March 2023)

Application Number: 316204

Applicant: Lusping Pty Ltd (ACN 147 724 070)

Respondent: Sunshine Coast Regional Council

Third Party: Paul Golding

Decision Date: 30 March 2023

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST - request for documents regarding development approval and noncompliance investigation - accountability and transparency - business affairs, administration of justice and personal information and privacy - whether disclosure would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the *Right to Information 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - FORMS OF ACCESS - COPYRIGHT - engineering report - whether giving access to a copy of an engineering report would involve an infringement of the copyright of a person other than the State - access granted by way of inspection only - section 68(4)(c) of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The access applicant made an application¹ under the *Right to Information Act 2009* (Qld) (**RTI Act**) to Sunshine Coast Regional Council (**Council**) for a broad range of documents relating to a retirement village development. Lusping Pty Ltd (**Lusping**), the owner of the development, was consulted by Council about disclosure of certain information and objected to the release of that information. Council decided² to disclose the information contrary to Lusping's objections.

¹ Access application dated 1 February 2021.

² Decision dated 10 May 2021. Lusping then applied for internal review of Council's decision and Council affirmed its original decision on internal review on 22 June 2021.

2. Lusping applied³ to the Office of the Information Commissioner (**OIC**) for review of Council's decision. The access applicant subsequently applied to the Information Commissioner to participate in the review.
3. Following considerable correspondence between all parties on external review, some of the information the subject of Lusping's objections was released to the access applicant or excluded from the scope of issues for consideration by the access applicant.
4. The information remaining in issue on external review comprises parts of four pages of emails and a 26 page Engineering Report. For the reasons set out below, I vary Council's decision granting access to the information remaining in issue and find that:
 - access may be refused to parts of four pages of emails between Council and Lusping on the basis that disclosure would, on balance, be contrary to the public interest; and
 - access by inspection only may be granted to a copy of the Engineering Report as it is subject to the copyright interests of third parties.

Background

5. By application dated 1 February 2021, the access applicant applied to Council seeking access to certain documents relating to an extension to the Laurel Springs Retirement Village.⁴ Lusping was consulted by Council and objected to disclosure of information that Council decided may be released.
6. On review, the access applicant applied to the Information Commissioner to participate in the review under section 89(2) of the RTI Act and is now a party to the review.
7. Significant procedural steps in this external review are set out in the Appendix.

Reviewable decision

8. The decision under review is Council's internal review decision dated 22 June 2021, to disclose information contrary to Lusping's disclosure objections.

Evidence considered

9. Evidence, submissions, legislation and other material I have considered in reaching my decision are disclosed in these reasons (including footnotes and the appendix).
10. In making this decision I have had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), in particular the right of the applicant to seek and receive information.⁵ I consider that a decision-maker will, when observing and applying the RTI Act, be '*respecting and acting compatibly with*' these rights and others prescribed in the HR Act.⁶ I further consider that, having done so when reaching my decision, I have acted compatibly with and given proper consideration to relevant human rights, as required under section 58(1) of the HR Act.⁷

³ External review application dated 14 July 2021.

⁴ Other documents, not relevant to this external review were also requested in the access application.

⁵ Section 21 of the HR Act.

⁶ See *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (*XYZ*) at [573]; and *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

⁷ I note the observations by Bell J on the interaction between similar pieces of Victorian legislation in *XYZ* at [573]: '*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.*' I also note that OIC's approach to the HR Act set out in this paragraph has recently been

Remaining information in issue

11. Following correspondence exchanged between parties on external review to narrow the issues on review, the remaining information in issue comprises parts of four pages of emails (**Emails**) and a 26 page Engineering Report (**Report**).
12. The access applicant has agreed to exclude from further consideration: private telephone numbers and email addresses, of any individual; signatures; and duplicate documents;⁸ and documents not within the date range of the access application.⁹ In the access applicant's final correspondence with OIC, the access applicant identified by specific page number the emails of interest to him in addition to accessing a copy of the Report. Lusping has also agreed to the disclosure of further information on external review and accordingly that information is no longer in issue.

Issues for determination

13. The issues for me to consider are:
 - a. whether disclosure of the Emails would, on balance be contrary to the public interest and access may therefore be refused; and
 - b. whether access to a copy of the Report may be given.

Findings in relation to the Emails

Public interest analysis

14. Lusping contends that disclosure of the remaining parts of the Emails would, on balance be contrary to the public interest.¹⁰ The Emails record information provided between Lusping and Council in relation to Lusping's interactions and concerns with its contractors.

Irrelevant factors

15. In my view, no irrelevant factors arise in my consideration of the public interest factors here.

Factors favouring disclosure

16. I have considered the following public interest factors in favour of disclosure:
 - disclosure of the information could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability¹¹
 - disclosure of the information could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest¹²
 - disclosure of the information could reasonably be expected to inform the community of the Government's operations, including, in particular, the policies,

considered and endorsed by the Queensland Civil and Administrative Tribunal in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23] (noting that Judicial Member McGill saw 'no reason to differ' from our position).

⁸ By correspondence dated 24 February 2022.

⁹ By correspondence dated 20 April 2022.

¹⁰ By written submissions to OIC dated 6 January 2022, 3 March 2022, 5 May 2022, 26 September 2022, 20 January 2023, 10 February 2023 and telephone conversation with OIC on 28 March 2023.

¹¹ Schedule 4, part 2, item 1 of the RTI Act.

¹² Schedule 4, part 2, item 2 of the RTI Act.

guidelines and codes of conduct followed by the Government in its dealings with members of the community¹³

- disclosure of the information could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision¹⁴
- disclosure of the information could reasonably be expected to reveal environmental or health risks or measures relating to public health and safety;¹⁵ and
- disclosure of the information could reasonably be expected to contribute to the administration of justice for a person.¹⁶

17. The above factors have been raised by the access applicant and Council in submissions throughout the external review.¹⁷ Council submits that it is '*accountable to the public for the decisions it makes in approving decisions in relation to activities in accordance with the legislative restrictions and approvals*'.¹⁸ I also consider that Council is accountable to the public for the decisions that it makes concerning development applications and that private sector businesses working with, and seeking approvals from, Council must accept an appropriate level of scrutiny in their dealings with Council.¹⁹ This is particularly the case in these circumstances, where Council actions are critical to ensure any possible danger to safety of the community is removed.

18. Noting this, documents relevant to Council's actions and interactions between Lusping and Council have been disclosed to the access applicant and/or are available to the general public. These include: a Show Cause Notice issued under the *Planning Act 2016* (Qld); an Enforcement Notice issued under the *Building Act 1975* (Qld); and documents and communications relevant to planning and development applications and approvals, and the compliance investigations. The disclosure of this information significantly advances the public interest factors favouring disclosure outlined above.

19. On the other hand, I do not accept that disclosure of Emails would advance any of the above listed public interest factors significantly. This information is limited to the views of Lusping in relation to its interactions and anticipated legal proceedings with its contractors. Given the content of the Emails, I consider that the above noted public interest factors carry low, if any, weight in favour of disclosure.

20. I have also considered the other public interest factors in schedule 4, part 2 of the RTI Act and am satisfied that no further factors favouring disclosure apply with respect to the Emails.

Factors favouring nondisclosure

21. The Emails disclose information about the interactions between Lusping and its contractors. They refer to anticipated legal actions and a civil dispute between these parties in relation to the compliance issues that are identified in the released information. Given the content of the Emails, the context of these Emails, and the particular

¹³ Schedule 4, part 2, item 3 of the RTI Act.

¹⁴ Schedule 4, part 2, item 11 of the RTI Act.

¹⁵ Schedule 4, part 2, factor 14 of the RTI Act.

¹⁶ Schedule 4, part 2, factor 17 of the RTI Act.

¹⁷ Council written submissions to OIC dated 25 July 2022, 17 March 2023 and telephone conversation with OIC on 2 June 2022. Access applicant written submissions dated 24 February 2022, 20 April 2022, 14 June 2022, 13 March 2023 and 24 March 2023.

¹⁸ Internal review decision to external review applicant dated 22 June 2021.

¹⁹ *Campbell and North Burnett Regional Council; Melior Resources Incorporated (Third Party)* [2016] QICmr 4 (29 January 2016) at [37].

submissions made by Lusping, I am satisfied that disclosure of the Emails could reasonably be expected to:

- prejudice the private, business, professional, commercial or financial affairs of entities²⁰
- cause a public interest harm because disclosure of the information would disclose information concerning the business, commercial or financial affairs of an agency or another person and could reasonably be expected to have an adverse effect on those affairs;²¹ and
- disclosure of the information could reasonably be expected to impede the administration of justice for a person.²²

22. The words '*could reasonably be expected to*' call for a decision-maker to discriminate between what is merely possible or merely speculative, and expectations that are reasonably based.²³ I must therefore be satisfied that there is a reasonably based expectation (and not mere speculation or a mere possibility) that disclosure of the Emails could reasonably be expected to result in the harm anticipated by the above factors. Both Council²⁴ and the access applicant²⁵ essentially dispute that there is a reasonably based expectation of the connection between disclosure and the prejudice.

23. While I am constrained as to the level of detail I can relay about the contents of the Emails,²⁶ having carefully reviewed the Emails, and Council's and the access applicant's submissions, I am satisfied that disclosure may obstruct options to remedial access for Lusping, thereby impeding the administration of justice, and significant weight may be afforded to this factor favouring nondisclosure to relevant information. I also consider that the Emails disclose untested contentions and speculation relating to a civil dispute between Lusping and third parties, that if disclosed, could reasonably be expected to prejudice the reputations and accordingly the business affairs of these parties.

24. I also note that the Emails relate to the conduct of other third parties who were not consulted by Council at the time a disclosure decision was reached.

Personal information and privacy

25. The Emails identify third parties. With respect to this particular information, Council submits that:

- certain names of third parties have already been disclosed to the access applicant or would ordinarily be expected to become publicly accessible;²⁷ and
- '*Certifying engineers and professionals are performing their functions as part of the regulatory framework intended for public safety, and are subject to their own professional standards and registration with peak and/or governing bodies which*

²⁰ Schedule 4, part 3, item 2 of the RTI Act.

²¹ Schedule 4, part 4, section 7(1)(c) of the RTI Act.

²² Schedule 4, part 3, item 9 of the RTI Act.

²³ See *Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 at paragraphs [62]-[63]. See also *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at [160]. Other authorities note that the words '*require a judgement to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous to expect a disclosure of the information could have the prescribed consequences relied upon*': *Smolenski v Commissioner of Police, NSW Police* [2015] NSWCATAD 21 at [34], citing *Commissioner of Police, NSW Police Force v Camilleri (GD)* [2012] NSWADTAP 19 at [28], *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 at [61] and *Attorney-General's Department v Cockroft* (1986) 10 FCR 180 at 190.

²⁴ Council submissions dated 17 March 2023.

²⁵ Access applicant submissions dated 13 March 2023.

²⁶ Section 108 of the RTI Act.

²⁷ Submissions to OIC dated 25 July 2022.

*may investigate and penalise them for unsatisfactory conduct. Membership and registration with these bodies is normally publicly searchable on the internet.*²⁸

26. I have carefully considered Council's submission that, in effect, indicates that the personal information of those parties associated with this matter through a professional connection, is or can be available outside of this process. While I accept that that may be the case, disclosure outside of this process, while relevant to weighting, is not determinative to disclosure through a formal application process under the RTI Act. Furthermore, I consider that the harm here results from the disclosure of the third-party personal information in the specific context of the Emails relating to a civil dispute.
27. The relevant information is the personal information of other individuals who work for private sector entities involved in a dispute. Revealing personal information of third parties could reasonably be expected to prejudice the protection of their privacy.²⁹ The RTI Act also provides that disclosure of this type of information could reasonably be expected to cause a public interest harm, if the disclosure would disclose the personal information of a person, whether living or dead.³⁰ In my view these two factors favouring nondisclosure warrant significant weight.

Balancing the public interest

28. In addition to the pro-disclosure bias,³¹ I have turned my mind to the public interest factors favouring disclosure of the Emails that I have identified above. I am satisfied that these factors carry minimal weight with respect to disclosure of the particular content in the Emails. This is because the content is focussed on the civil dispute between private sector entities and information has been disclosed that demonstrates Council's actions and decision making processes.
29. In relation to the factors favouring nondisclosure, I accept Lusping's submissions in relation to the reasonable expectation of prejudice that disclosure may have on the commercial affairs of Lusping and other entities, the administration of justice for Lusping in anticipated civil legal proceedings, and I also consider that a public interest harm could reasonably be expected to result from the disclosure of personal information in the context of the Emails. I consider that each of these factors carry moderate to high weight, and outweigh any public interest factors in favour of disclosure.
30. Having balanced the public interest factors for and against disclosure, I consider that access to the Emails can be refused on the basis that disclosure would, on balance, be contrary to the public interest.³²

Findings in relation to access to a copy of the Report

Copyright

31. As Council's decision was silent as to the form of access to the Report, and the access applicant insists on a copy of the Report, while Lusping objects to disclosure of a copy but agrees to inspection, I have determined the issue of form of access.³³ The issue for me to determine is one of form of access only, given inspection access remains available to the applicant.

²⁸ Council submissions dated 17 March 2023.

²⁹ Schedule 4, part 3, item 3 of the RTI Act.

³⁰ Schedule 4, part 4, section 6 of the RTI Act.

³¹ Section 44 of the RTI Act.

³² Under sections 47(3)(b) and 49 of the RTI Act.

³³ The Information Commissioner has the power to decide any matter in relation to an access application that, under the RTI Act, could have been decided by the agency (section 105(1)(b) of the RTI Act).

32. Section 68(4)(c) of the RTI Act provides that, if giving access in the form requested by the applicant would involve an infringement of the copyright of a person other than the State, access in that form may be refused and given in another form. Accordingly, I have considered whether giving the applicant a copy would involve an infringement of copyright.³⁴
33. Section 32(1) of the *Copyright Act 1968* (Cth) (**Copyright Act**) provides that copyright subsists in an original literary, dramatic, musical or artistic work that is unpublished and of which the author was a qualified person at the time when the work was made. I am satisfied that the Report is a '*literary work*' for the purposes of the Copyright Act.³⁵ The Report was prepared in accordance with a consultancy agreement between two parties—a contractor and a consultant engaged by the contractor. As the Report was created by a professional applying their special skill and knowledge³⁶ in their fields, and does not appear to have been copied from another source, I am satisfied that the Report is an original³⁷ work for the purpose of the Copyright Act. I am also satisfied that the persons who authored the Report are likely to have been Australian citizens or residents.³⁸
34. I find that copyright subsists in the Report and it is an original literary work that is unpublished and of which the authors were qualified people at the time when the work was made.

Would providing copies infringe copyright?

35. Copyright in relation to a literary work is an exclusive right to do various acts, including reproducing the work in a material form, unless the contrary intention appears.³⁹ The company whose staff authored the Report are the owners of the copyright subsisting in the Report.⁴⁰ Section 36(1) of the Copyright Act provides that copyright is infringed when a person who is not the owner of the copyright, and does not have the licence of the owner, does in Australia, or authorises the doing in Australia of, any act comprised in the copyright. The Report clearly states that this document is to remain the property of two separate entities. There is no evidence to suggest that the copyright owners provided any formal licence or authority, or an implied licence, for Council to copy the Report for the purpose of releasing it under the RTI Act. I am also satisfied that the Report does not appear to have been otherwise published.⁴¹
36. I am satisfied that, if Council copied the Report to give to the access applicant under the RTI Act, this would constitute reproduction in a material form, which would infringe the exclusive copyright of the copyright owners. Having carefully considered the acts not constituting infringements of copyright in works, I am also satisfied none of the exceptions apply.⁴² Therefore, I find that access to the Report in the form sought by the access applicant (being provided with a copy) may be refused and instead given in another form (by way of inspection) under section 68(4)(c) of the RTI Act.

³⁴ For the application of the copyright provision, see *V11 and Brisbane City Council* [2021] QICmr 39 (6 August 2021).

³⁵ Section 10 of the Copyright Act.

³⁶ *MacMillan and Co Ltd v Cooper* (1923) 1B IPR 204 at 212-213; *Interfirm Comparison (Australia) Pty Ltd v Law Society of New South Wales* [1975] 2 NSWLR 104 at 115 and *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458 at 478-481 per French CJ, Crennan and Kiefel JJ.

³⁷ *Acohs Pty Ltd v Ucorp Pty Ltd* [2012] FCAFC 16; 201 FCR 173 at [57]; *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601 at 608-610 and Dixon J in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor & Ors* (1937) 58 CLR 479 at 511.

³⁸ Section 32(4) of the Copyright Act.

³⁹ Section 31(1)(a)(i) of the Copyright Act.

⁴⁰ Section 35(6) of the Copyright Act.

⁴¹ Section 29(1)(a) of the Copyright Act provides that a literary work shall be deemed to have been published only if reproductions of the work have been supplied to the public.

⁴² Part III, Division 3 of the Copyright Act – *Acts not constituting infringements of copyright in works*.

DECISION

37. For the reasons explained above, I vary Council's decision as I am satisfied that access can be refused to the Emails on the basis that disclosure would, on balance, be contrary to the public interest, and access may be granted to the Report by way of inspection only.
38. 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: 30 March 2023

APPENDIX

Significant procedural steps

Date	Event
14 July 2021	OIC received Lusping's external review application.
30 July 2021	OIC notified Council and Lusping it had accepted the application for external review and requested information from Council.
2 August 2021	OIC received the requested information from Council.
2 September 2021	OIC asked Council to provide copies of certain show cause and enforcement notices and received that information from Council.
25 November 2021	OIC asked the access applicant to confirm he still wished to access the deferred documents and if he consented to his identity being disclosed to Lusping. The access applicant confirmed that he still wished to access the information, and consented to the disclosure of his identity.
26 November 2021	OIC conveyed a preliminary view to Lusping, confirmed the access applicant's identity, and invited Lusping to provide submissions by 10 December 2021 to support their disclosure objection.
6 January 2022	OIC received Lusping's submissions.
16 February 2022	OIC invited Lusping to provide further submissions in support of its disclosure objections. OIC conveyed a preliminary assessment of the deferred documents to the access applicant and asked him to consider excluding certain information.
24 February 2022	OIC received the access applicant's response, which agreed to the exclusion of certain information.
3 March 2022	OIC received further submissions from Lusping.
19 April 2022	OIC conveyed a further preliminary view to Lusping and invited Lusping to provide further submissions. OIC conveyed a preliminary view to the access applicant and invited him to provide submissions.
20 April 2022	OIC received submissions from the access applicant.
5 May 2022	OIC received Lusping's further submissions.
3 June 2022	OIC conveyed a further preliminary view to Lusping and asked Lusping if it objected to inspection access being provided to the access applicant.
9 June 2022	OIC received Lusping's further submissions.
13 June 2022	OIC wrote to the access applicant to convey a further preliminary view; notify that both Council and Lusping had agreed to inspection access being provided in the interest of informal resolution; and asked the access applicant if he was willing to resolve the review on that basis.
15 June 2022	OIC responded to questions raised by the access applicant. OIC received the access applicant's notification that he would not accept inspection access as the basis for resolving the review.

Date	Event
6 July 2022	OIC conveyed a preliminary view to Council. OIC invited Lusping to provide submissions in support of its disclosure objections.
25 July 2022	OIC received Council's submissions.
26 September 2022	OIC received submissions from Lusping's representative.
19 October 2022	OIC wrote to Lusping's representative, requesting clarification of the received submissions and information concerning Lusping's disclosure objections.
21 October 2022	OIC received a further submission from Lusping's representative.
13 January 2023	OIC conveyed a further preliminary view to Lusping's representative and invited final submissions if Lusping maintained its disclosure objections.
20 January 2023	OIC received further submissions from Lusping's representative.
31 January 2023	OIC provided a summary of the information remaining in issue to Lusping's representative and requested further submissions.
10 February 2023	OIC received further submissions from Lusping.
13 February 2023	OIC provided a summary of the information remaining in issue to the access applicant and asked if was willing to resolve the review on the basis of inspection access being provided.
14 February 2023	The access applicant notified OIC that he did not wish to resolve the review and requested a formal decision.
1 March 2023	OIC conveyed preliminary views to Lusping, the access applicant and Council.
13 March 2022	OIC received the access applicant's further submissions.
17 March 2023	OIC received further submissions from Lusping and Council.
20 March 2023	OIC notified the access applicant that some information would be released in accordance with the preliminary view and asked the access applicant whether he would accept a different form of access to the Report.
21 March 2023	OIC received confirmation from the access applicant that he did not accept inspection access to the Report.
23 March 2023	OIC asked Lusping to clarify its disclosure position in respect of the Report. OIC received Council's submission regarding the form of access to the Report.
24 March 2023	OIC received the access applicant's submissions, including about the form of access to the Report. OIC wrote to Lusping to confirm the information which remained in issue and asked Lusping to confirm whether it maintained its disclosure objections to that information.
28 March 2023	Lusping provided further submissions in a telephone conversation with OIC.