



## Decision and Reasons for Decision

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<b>Citation:</b>	<b><i>Beilby and Brisbane City Council [2015] QICmr 1 (14 January 2015)</i></b>
<b>Application Number:</b>	<b>311884</b>
<b>Applicant:</b>	<b>Beilby</b>
<b>Respondent:</b>	<b>Brisbane City Council</b>
<b>Decision Date:</b>	<b>14 January 2015</b>
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - cost estimate information - future drainage infrastructure and works - whether disclosure would prejudice Council's deliberative processes - whether access to cost estimate information may be refused on the basis that disclosure would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the <i>Right to Information Act 2009 (Qld)</i></b>

### REASONS FOR DECISION

#### Summary

1. The applicant applied to Brisbane City Council (**Council**) under the *Right to Information Act 2009 (Qld)* (**RTI Act**) for access to information about the tender process and construction of the Milton Backflow Prevention Device; Council's Western Creek drainage investigations; and the applicant's correspondence with Council on this topic.
2. Council located 799 pages of information and decided to:
  - release 174 full pages; and
  - refuse access to parts of 37 pages and 588 full pages on the basis that some information was exempt<sup>1</sup> and disclosure of the remainder would, on balance, be contrary to the public interest, citing prejudice to (i) Council's deliberative processes<sup>2</sup> and (ii) the business affairs of third parties.<sup>3</sup>
3. Following negotiation with the parties on external review, Council agreed to release an additional 353 full pages and parts of 37 pages of information to the applicant, and the applicant accepted the removal of information from certain documents. As a result, the

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<sup>1</sup> Sections 47(3)(a) and 48, and schedule 3, section 8 of the RTI Act.

<sup>2</sup> Sections 47(3)(b) and 49, and schedule 4, part 4, section 4 of the RTI Act.

<sup>3</sup> Sections 47(3)(b) and 49, and schedule 4, part 4, section 7 of the RTI Act.

information remaining for consideration in this external review decision is parts of 10 pages and 9 full pages (**Information in Issue**).<sup>4</sup>

4. For the reasons set out below, I affirm Council's decision to refuse access to the Information in Issue and find that disclosure of the Information in Issue would, on balance, be contrary to the public interest under sections 47(3)(b) and 49 of the RTI Act.

### Background

5. Significant procedural steps relating to the application and external review are set out in the Appendix to this decision.

### Reviewable Decision

6. The decision under review is Council's decision dated 19 December 2013.<sup>5</sup>

### Issue for Determination

7. The issue for determination in this review is whether the disclosure of the Information in Issue would, on balance, be contrary to the public interest.<sup>6</sup>

### Information in Issue

8. The Information in Issue in this review is contained within the following three documents (**Beck Street documents**):
  - i. *Beck Street Stormwater Drainage Modelling and Flood Mitigation Assessment Concept Design Report* dated 28 September 2012, prepared by Aurecon Australia Pty Ltd (**Aurecon**)
  - ii. *Beck Street Stormwater Drainage Modelling and Flood Mitigation Assessment Options Analysis Phase Report* dated 28 September 2012, prepared by Aurecon; and
  - iii. *Beck Street Flood Mitigation Report on Options and Benefits* dated January 2011, prepared by Water Management City Design, Brisbane City Council.
9. The Information in Issue comprises parts of 10 pages and 9 full pages in the Beck Street documents relating to costs estimates and associated information for several possible options to address flood mitigation in Beck Street.

### Evidence considered

10. Evidence, submissions, legislation and other material considered in reaching this decision are disclosed in these reasons (including footnotes and Appendix).

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<sup>4</sup> 390 additional pages (353 full pages and parts of 37 pages) were released to the applicant by Council during the external review and the applicant accepted OIC's preliminary views, conveyed during telephone conversations on 5, 23 and 24 December 2014 and no longer pursues access to information about unsuccessful tenderers. See the Appendix for further information about the external review process.

<sup>5</sup> Council issued what it purported to be an 'interim' decision. Under the RTI Act, there is no provision dealing with a decision being issued in part. This decision meets the requirements under section 54(1)(a) of the RTI Act and is therefore the decision under review.

<sup>6</sup> Sections 47(3)(b) and 49 of the RTI Act.

## Relevant law

11. Under the RTI Act, a person has a right to be given access to documents held by a Queensland government agency.<sup>7</sup> This right is however, subject to limitations including grounds on which access to information may be refused.<sup>8</sup> One ground for refusing access is where disclosure would, on balance, be contrary to the public interest.<sup>9</sup>
12. 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.<sup>10</sup>
13. The RTI Act lists factors which may be relevant to deciding the balance of the public interest<sup>11</sup> and sets out the following steps<sup>12</sup> for a decision-maker to take in deciding where the public interest lies in relation to disclosure of information:
  - identify any irrelevant factors and disregard them
  - identify relevant public interest factors favouring disclosure and nondisclosure
  - balance the relevant factors favouring disclosure and nondisclosure; and
  - decide whether disclosure would, on balance, be contrary to the public interest.

## Findings

14. For the reasons set out below, I am satisfied that disclosing the Information in Issue would, on balance, be contrary to the public interest.<sup>13</sup>

## Irrelevant Factors

15. I have examined the irrelevant factors in schedule 4, part 1 of the RTI Act and consider that none arise in the circumstances of this case.

## Factors favouring disclosure

16. It will be in the public interest to disclose information where disclosure could reasonably be expected to enhance government's accountability and/or reveal the reason for a government decision.<sup>14</sup> If disclosing information could reasonably be expected to contribute to positive and informed debate on matters of serious interest, this will also be a public interest factor in favour of disclosure.<sup>15</sup>

## Accountability

17. The applicant considers that disclosure of the Information in Issue is in the public interest as it will facilitate '*an increased transparency of government*'.<sup>16</sup>

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<sup>7</sup> Section 23 of the RTI Act.

<sup>8</sup> As set out in section 47 of the RTI Act.

<sup>9</sup> Section 47(3)(b) of the RTI Act.

<sup>10</sup> For example, where disclosure of the information could reasonably be expected to contribute to the administration of justice for a person (schedule 4, part 2, item 17 of the RTI Act).

<sup>11</sup> In schedule 4 of the RTI Act. This is not an exhaustive list and therefore, other factors not listed in the schedule may be relevant in a particular case.

<sup>12</sup> In section 49(3) of the RTI Act.

<sup>13</sup> Sections 47(3)(b) and 49 of the RTI Act.

<sup>14</sup> Schedule 4, part 2, item 1 of the RTI Act.

<sup>15</sup> Schedule 4, part 2, item 2 of the RTI Act.

<sup>16</sup> External review application dated 20 January 2013 [page 3].

18. The applicant's submissions outline correspondence he has exchanged with Council about rectification of the stormwater system of the Western Creek catchment and submits '*All efforts to get a detailed response since 2008 has been sidestepped by all parties involved ... One of the key reasons I do wish to seek these documents is to gain an insight into how seriously the Brisbane City Council is taking the issue of the lack of capacity of the stormwater system of the Western Creek catchment.*'<sup>17</sup>
19. For some time now,<sup>18</sup> Council has carried out investigations and commissioned expert reports about the drainage system of the Western Creek catchment and much of this information has been made publicly available by Council.<sup>19</sup>
20. The Beck Street documents total 325 pages, of which Council has released 306 full pages and parts of 10 pages. Thus, a large amount of information has already been released to the applicant which provides insight into Council's investigations into, and current options for, stormwater drainage/flood mitigation in Beck Street. The information not disclosed is confined to costs estimates and associated information and, although this information has not been disclosed, I consider that Council has discharged much of its obligations of accountability and transparency with regard to the Beck Street documents through the disclosures already made.
21. For the above reasons, I find that the significant weight ordinarily attributable to this factor favouring disclosure is reduced in the circumstances of this review and I apportion low weight to the factor.

#### **Positive and informed debate**

22. The public interest will favour disclosure of information where it contributes to positive and informed debate on important issues or matters of serious interest.<sup>20</sup>
23. Whilst I accept that drainage within the Western Creek catchment area is an important issue and/or matter of serious interest, particularly for the residents of the area, it is evident from the material before me in this review that Council is in an initial scoping phase of this part of its Western Creek catchment activities and is yet to make a decision on the options/recommendations before it.<sup>21</sup> Council's submission to OIC dated 30 April 2014 indicates that once Council has made decisions about how to proceed with the Beck Street aspect of the Western Creek catchment issues and has selected its preferred options, there will be a consultation phase with the community.
24. While disclosure of the Information in Issue may assist in informed debate, I consider that the information already released about drainage options in the Western Creek catchment, including Beck Street, provides the community with sufficient information about the matter. This in addition to the intended consultation phase go a long way to discharging the public interest in ensuring informed positive debate.
25. For the above reasons, I find that the significant weight ordinarily attributable to this factor favouring disclosure is reduced in the circumstances of this review and I apportion low weight to the factor.

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<sup>17</sup> External review application dated 20 January 2013 [page 3].

<sup>18</sup> For example, dating as far back as 1998, Brisbane City Council prepared a report titled 'Western Creek Milton, relief drainage investigation'

<sup>19</sup> See, for example:

<https://pdonline.brisbane.qld.gov.au/masterviewUI/modules/ApplicationMaster/default.aspx?page=wrapper&key=A003707950> a <http://www.brisbane.qld.gov.au/environment-waste/water/backflow>

<sup>20</sup> Schedule 4, part 2, item 2 of the RTI Act.

<sup>21</sup> As per submissions made by Council to OIC on 30 April 2014 and 3 December 2014.

## Public safety

26. The applicant submits<sup>22</sup> that there is an *'ever present danger presented by this storm water system'* and therefore that disclosure of the Information in Issue could reasonably be expected to reveal measures relating to public safety.<sup>23</sup>
27. There is evidence in the material before me and in publicly available information that Council is aware of this issue and has taken steps towards being informed of all available options to address the drainage issues within the Western Creek catchment area and, in particular, Beck Street.
28. Public safety issues are of concern to the community because of the nature of their potential impact (ie. direct effect on citizens' health and wellbeing). In this case, as discussed at paragraphs 19-20 above, the significant amount of information already released and publicly available shows the investigations and thus reveals the measures taken by Council in relation to public safety. Additionally, I consider that, as the nature of the Information in Issue is costs estimates and associated information, it has little value in an assessment of measures taken in relation to public safety.
29. Given the large amount of information released to the applicant, the information publicly available and the nature of the Information in Issue, I attribute low weight to this public interest factor in favour of disclosure.

## Factors favouring nondisclosure

### Deliberative process

30. The RTI Act recognises that there is a public interest in protecting information where disclosure could reasonably be expected to:
  - (i) cause a public interest harm through disclosure of an opinion, advice or recommendation that has been obtained, prepared or recorded or a consultation or deliberation that has taken place, in the course of, or for, the deliberative processes involved in the functions of government (**Harm Factor**)<sup>24</sup>; and/or
  - (ii) prejudice a deliberative process of government (**Prejudice Factor**).<sup>25</sup>
31. Deliberative processes involved in the functions of government have been defined as *'...thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action'*.<sup>26</sup>
32. The Harm Factor will not apply:
  - where the deliberative processes include public consultation and the public consultation has commenced;<sup>27</sup> or

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<sup>22</sup> External review application dated 20 January 2013 [page 3].

<sup>23</sup> Schedule 4, part 2, item 14 of the RTI Act.

<sup>24</sup> Schedule 4, part 4, item 4 of the RTI Act. The interpretative note to this section gives the following example of the type of information covered by this section: *'a document prepared to inform a decision by an agency about potential road routes, where disclosure of all potential routes, including those that are subsequently rejected, could have a negative impact on property values or cause community concern'*. This public interest 'harm factor' is similar to the previous exemption in section 41(1) of the repealed *Freedom of Information Act 1992* (Qld) (**FOI Act**).

<sup>25</sup> Schedule 4, part 3, item 20 of the RTI Act.

<sup>26</sup> *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 (**Eccleston**) at paragraphs 28-30 citing with approval the definition given in *Re Waterford and Department of Treasury* (No.2) (1984) 5 ALD 588 at 606.

<sup>27</sup> Schedule 4, part 4, section 4(2) of the RTI Act.

- to the extent information consists of expert opinion or analysis (other than expert opinion or analysis commissioned in the course of, or for, the deliberative processes<sup>28</sup>) by a person recognised as an expert in the field of knowledge<sup>29</sup> to which the opinion or analysis relates.<sup>30</sup>
33. Council submitted that disclosing the Information in Issue would reveal deliberative process information in relation to *'future drainage works and projects and the formulation of its budget, including the anticipated timing of any such works and projects'* and would prejudice those processes as a final decision has not been made.<sup>31</sup>
34. While I accept that the Information in Issue comprises expert opinion and/or analysis and was prepared by an expert in the relevant field,<sup>32</sup> I am satisfied that it was commissioned by Council for the purpose of its deliberative processes relating to flood mitigation in Beck Street and that therefore, the relevant exception to the Harm Factor does not apply.
35. Currently, the Beck Street documents provide Council with a number of options to mitigate loss caused by large volumes of water in the area. As discussed in paragraph 23 above, Council has provided submissions to OIC which have informed OIC that this will be a lengthy project and it has not yet reached the decision stage, and therefore none of the options or recommendations have been released for public consultation.<sup>33</sup>
36. For the reasons set out in paragraphs 34-35 above, I am satisfied that disclosing the Information in Issue would disclose deliberative process information relating to the Beck Street flood mitigation options and that therefore, the Harm Factor applies. Accordingly, I must now consider the extent of the public interest harm that could reasonably be expected to be caused to the relevant deliberative processes through disclosure.
37. The Information Commissioner has previously recognised that there is a public interest in government being able to:
- make informed decisions in the course of carrying out its functions and in doing so, to have access to the widest possible range of information and advice without fear of interference; and
  - maintain the confidentiality of their deliberative process in some circumstances, particularly where those deliberative processes relate to ongoing negotiations.<sup>34</sup>
38. On the basis that Council's deliberations in relation to flood mitigation in Beck Street have not advanced beyond the investigations stage<sup>35</sup> and given Council's advice to the

<sup>28</sup> Mentioned in schedule 4, part 4, section 4(1) of the RTI Act.

<sup>29</sup> In *Cairns Port Authority and Department of Lands* (1994) 1 QAR 663 the Information Commissioner decided that for the purpose of the equivalent section 41(2)(c) of the repealed FOI Act, a person may be considered an expert in their relevant field if that person would be accepted by a court as qualified to give expert opinion evidence. In that case, the Information Commissioner also recognised at [49] that a person's seniority and experience will have a bearing on whether they would be an expert.

<sup>30</sup> Schedule 4, part 4, section 4(3)(c) of the RTI Act.

<sup>31</sup> Council's submissions to OIC dated 3 December 2014.

<sup>32</sup> The reports comprising the Information in Issue were prepared by Aurecon. According to its website, Aurecon *'provides engineering, management and specialist technical services for public and private sector clients globally... A key specialisation is waterways and drainage - urban drainage systems, river and creek networks, hydrologic analysis, flood management, habitats'* see <http://www.aurecongroup.com/en/markets/water.aspx>. On the basis of this information, I am satisfied that the Information in Issue was prepared by an expert in the relevant field of knowledge.

<sup>33</sup> Council's submissions dated 17 January 2014, 30 April 2014 and 3 December 2014.

<sup>34</sup> *Metcalfe* at paragraph 47 in the context of considering the equivalent exemption in section 41(1) of the repealed FOI Act. In that case, the Information Commissioner found that disclosure of a Council report regarding potential landfill sites was exempt as it would prejudice Council's deliberative processes. In considering relevant public interest factors, the Information Commissioner found that the prejudice to Council's pre-decisional thinking carried significant weight in favour of nondisclosure.

<sup>35</sup> As per Council's submissions to OIC dated 30 April 2014 and 3 December 2014.

applicant that '*drainage works are prioritised citywide based on a cost-benefit analysis*' and that '*the proposed drainage scheme is not anticipated to be commenced within the next 10 years*'<sup>36</sup> I am satisfied that disclosing the Information in Issue could reasonably be expected to cause a moderate level of harm to Council's deliberative processes as it would limit Council's ability to proceed with its deliberations without interference. For these reasons I also consider that disclosure of the Information in Issue at this stage of Council's deliberations could reasonably be expected to prejudice Council's deliberative processes relating to drainage and stormwater management. In the circumstances, I consider the Prejudice Factor also carries moderate weight in favour of nondisclosure.

### **Balancing the relevant public interest factors**

39. I consider the public interest factors in favour of disclosure of the Information in Issue, namely, enhancing Council's accountability in relation to stormwater management and the public safety aspects of such and informed and positive public debate, carry low weight.
40. Balanced against the factors favouring disclosure are the Harm Factor and the Prejudice Factor in favour of nondisclosure. These factors carry moderate weight.
41. In the circumstances of this case, I find that the factors favouring nondisclosure outweigh the factors favouring disclosure and that therefore, disclosure of the Information in Issue would, on balance, be contrary to the public interest.

### **DECISION**

42. For the reasons set out above, I affirm Council's decision to refuse access to the Information in Issue and find that disclosure of the Information in Issue would, on balance, be contrary to the public interest under sections 47(3)(b) and 49 of the RTI Act.
43. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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**Assistant Information Commissioner Corby**

**Date: 14 January 2015**

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<sup>36</sup> Letter from Brisbane City Council Mayor to applicant, dated 11 December 2013.

**APPENDIX**  
**Significant procedural steps**

Date	Event
6 November 2013	The applicant made an access application to Council.
19 December 2013	<p>Council issued what it purported to be an 'interim' decision. Under the RTA Act, there is no provision dealing with a decision being issued in part. This decision meets the requirements under section 54(1)(a) of the RTI Act therefore this is the decision under review.</p> <p>Note - on 17 January 2014, Council issued what it purported to be the second part of its decision. Additional documents were released by Council with this letter.</p>
6 January 2014	The applicant emailed Council with further information about the scope of his access application.
20 January 2014	OIC received the applicant's application for external review.
21 January 2014	OIC requested Council provide a copy of the procedural documents and by return email, Council sent the requested information.
29 January 2014	OIC informed Council and the applicant that the external review application had been accepted and requested Council provide OIC a copy of the Documents in Issue.
5 February 2014	OIC received a copy of some of the Documents in Issue (the Beck Street documents).
April 2014	Various communication with the Council and the applicant about the scope of the review and the Documents in Issue in this review.
14 May 2014	OIC received a copy of the remainder of the Documents in Issue from Council.
13 June 2014	OIC requested further information from Council about the status of the Beck Street stormwater drainage plans.
21 July 2014	OIC conveyed to the applicant a preliminary view via telephone that additional documents could be released; that OIC would be writing to Council to request submissions on this view and that OIC was still forming a view on the Beck Street documents.
15 September 2014	OIC provided Council and the applicant with an update on the status of the review.
16 October 2014	<p>OIC conveyed a preliminary view to Council that disclosing some of the Documents in Issue would not, on balance, be contrary to the public interest. OIC invited Council to provide submissions in response by 31 October 2014 if it did not accept the preliminary view.</p> <p>OIC provided the applicant with an update on the status of the review.</p>
28 October 2014	<p>Council wrote to OIC seeking an extension of time to 19 November 2014 to respond to OIC's preliminary view.</p> <p>OIC wrote to Council to give consent to the requested extension.</p>
31 October 2014	OIC wrote to two third parties seeking their views about the disclosure of information under section 37 of the RTI Act.
11 November 2014	OIC received advice from one third party that they consented to the release of the information to the applicant by way of inspection only.
17 November 2014	<p>OIC received advice from the other third party that it consented to disclose all information other than employee names and photographs.</p> <p>OIC informed the applicant of the outcome of the third party consultations and the applicant agreed to resolve the issues about these documents in accordance with the third parties' conditional consent to disclosure.</p>



19 November 2014	Council wrote to OIC informing OIC that it accepted OIC's preliminary view with respect to some of the Documents in Issue however would take some more time to consider its position regarding the remaining Documents in Issue.
1 December 2014	OIC wrote to two third parties seeking their views about the disclosure of information under section 37 of the RTI Act.
2 December 2014	Council released additional information to the applicant.
3 December 2014	Council provided OIC with its response to the outstanding Documents in Issue and advised that it withdrew its objections to the disclosure of the remaining Documents in Issue, with the exception of the Information in Issue which is the subject of this decision.
4 December 2014	OIC received advice from one third party that it had no objection to the disclosure of the information.
10 December 2014	OIC requested Council release additional information to the applicant.
12 December 2014	Council released further information to the applicant.
23 December 2014	OIC received advice from the other third party that it had no objection to the disclosure of the information. Council released further information to the applicant.
24 December 2014	The applicant informed OIC that he sought access to the Information in Issue only.