



Decision and Reasons for Decision

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| Citation: | <i>Price and Rockhampton Regional Council</i> [2021] QICmr 59 (11 November 2021) |
| Application Number: | 315834 |
| Applicant: | Price |
| Respondent: | Rockhampton Regional Council |
| Decision Date: | 11 November 2021 |
| Catchwords: | ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST - documents relating to the evaluation of proposed sites for a motorsport precinct and a decision to enter into a contract of sale regarding a particular site - accountability and informed debate - reason or background for government decision - deliberative process of government - whether disclosure would, on balance, be contrary to the public interest - whether access may be refused under section 47(3)(b) and section 49 of the <i>Right to Information Act 2009</i> (Qld) |

REASONS FOR DECISION

Summary

1. The applicant applied¹ to Rockhampton Regional Council (**Council**) under the *Right to Information Act 2009* (**RTI Act**) for access to documents relating to Council's evaluation of prospective sites for a proposed motorsport precinct and Council's decision to enter into a contract of sale regarding the site at 53199 Burnett Highway (**the Site**).
2. Council located 308 pages and decided² to refuse access to 246 pages³ on the ground that disclosure would, on balance, be contrary to the public interest. The applicant sought⁴ internal review of Council's decision, which was upheld.⁵
3. The applicant applied⁶ to the Office of the Information Commissioner (**OIC**) for external review of Council's decision refusing access.

¹ Access application dated 19 October 2020.

² Decision dated 26 November 2020.

³ Comprising pages 1-140 and 143-248.

⁴ On 22 December 2020.

⁵ Internal review decision dated 4 January 2021.

⁶ On 13 January 2021.

4. During the review, the applicant accepted⁷ that access to information⁸ regarding the contract of sale for the Site could be refused.
5. For the reasons set out below, I vary Council's decision and find that access to the remaining information may be refused on the ground that its disclosure would, on balance, be contrary to the public interest.

Reviewable decision

6. The decision under review is Council's internal review decision dated 4 January 2021.

Evidence considered

7. Significant procedural steps taken during the external review are set out in the Appendix.
8. In reaching my decision, I have had regard to the submissions, evidence, legislation, and other material referred to throughout these reasons (including footnotes and Appendix).
9. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.⁹ 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.¹⁰ I have acted in this way in making this decision.¹¹ I also note the observations made by Bell J on the interaction between equivalent pieces of Victorian legislation:¹² '*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*'.¹³

Information in issue

10. Following the applicant's acceptance that access to information regarding the contract of sale for the Site may be refused, the information remaining for consideration in this review is contained within 186 pages¹⁴ (**Information in Issue**).

Issue for determination

11. The issue for determination is whether access to the Information in Issue can be refused on the ground that its disclosure would, on balance, be contrary to the public interest.

Relevant law

12. Access may be refused to information where its disclosure would, on balance, be contrary to the public interest.¹⁵ The RTI Act identifies many factors that may be relevant

⁷ Submission to OIC dated 28 July 2021.

⁸ Comprising pages 189-248.

⁹ Section 21 of the HR Act.

¹⁰ *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].

¹¹ In accordance with section 58(1) of the HR Act.

¹² *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹³ *XYZ* at [573].

¹⁴ Comprising pages 1-140 and 143-188.

¹⁵ Sections 47(3)(b) and 49 of the RTI Act. The term *public interest* refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.

to deciding the balance of the public interest¹⁶ and explains the steps that a decision-maker must take¹⁷ in deciding the public interest as follows:

- 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 of the information would, on balance, be contrary to the public interest.

Findings

Irrelevant factors

13. I have not identified, nor taken into account, any irrelevant factors in reaching my decision.

Factors favouring disclosure

14. The Information in Issue comprises the following documents relating to the properties considered for the motorsport precinct:¹⁸

- Notes relating to properties considered for Motorsports Precinct
- Regional Motor Sport Precinct - Preliminary Investigation Report
- Councillor Workshop - Motor Sport Precinct
- Synopsis - Regional Motor Sport Precinct
- Confidential Ordinary Meeting Minutes - Regional Motor Sport Precinct - Preliminary Investigation Report and attachment; and
- Motorsport Precinct site suitability risk analysis and concept evaluation.

15. In seeking an external review, the applicant stated¹⁹ that the purpose of the access application *'was to seek information on the process used, the information base and the analysis on which Council made the decision or endorsed a recommendation to evaluate the Site as the favoured site for the [motorsport] precinct and hence to enter into the conditional contract of sale with the landholder ...'*

16. During the review, the applicant further submitted:²⁰

... Council has made limited information available on the grounds on which the decision [to enter a contract of sale for the Site] was made. Including:

** no information was provided to the public on the number and location of other sites considered*

** no information was provided to the public on all the factors considered in making the decision and how those factors were weighed*

** the only information provided to the public related to an evaluation of public comments on the site once it was already selected and the broad expression of interest initially released by the Council.*

¹⁶ Schedule 4 of the RTI Act sets out the factors for deciding whether disclosing information would, on balance, be contrary to the public interest. However, this list of factors is not exhaustive. In other words, factors that are not listed may also be relevant.

¹⁷ Section 49(3) of the RTI Act.

¹⁸ As set out in the schedule to Council's original decision.

¹⁹ Application for external review dated 13 January 2021.

²⁰ Submission to OIC dated 28 July 2021.

17. Factors favouring disclosure arise where disclosure could reasonably be expected to:
 - promote open discussion of public affairs and enhance the Government's accountability;²¹ and
 - reveal the reason for a government decision and any background or contextual information that informed the decision.²²
18. Decisions by Council regarding the proposed motorsports precinct are likely to be the subject of considerable community discussion, and it is reasonable to conclude that disclosure of the Information in Issue, which is being used by Council in its decision making processes, would foster informed debate and enable the community to scrutinise any decisions made by Council.
19. While I acknowledge the applicant's submissions set out at paragraph 16 above, I note Council appears to have kept the community informed of its processes and decisions concerning the Motorsport Precinct to the extent possible when it is still deliberating upon the matter.²³ I consider that information which is already publicly available, along with information which has been released to the applicant, provides the applicant, and other members of the community, with some understanding of what information has been considered by Council in its processes relating to the motorsport precinct, thereby reducing the weight to be afforded to these factors. Accordingly, I afford these two factors favouring disclosure moderate weight.

Factors favouring nondisclosure

20. The public interest will favour nondisclosure if disclosure could reasonably be expected to prejudice a deliberative process of government (**Nondisclosure Factor**).²⁴ The RTI Act also provides that disclosing an opinion, advice or recommendation that has been obtained, prepared or recorded, or a consultation or deliberation that has taken place in the course of, or for, the deliberative processes involved in the functions of government could reasonably be expected to cause a public interest harm (**Harm Factor**).²⁵
21. Once it is established that information is deliberative process information, the Harm Factor will apply. It is then relevant to consider the nature and extent of the public interest harm that may result through disclosure.²⁶ For the Nondisclosure Factor to apply, a reasonable expectation of prejudice to the relevant deliberative process must be established. In this case, it is my view that both factors apply to the Information in Issue.
22. I am satisfied that the Information in Issue is deliberative process information as it was prepared in the course of deliberating on, and evaluating matters relating to, the motorsport precinct. I acknowledge that Council had entered into a contract of sale for the Site and has since decided not to proceed with purchasing the Site, prioritising other Council infrastructure projects over the motorsport precinct, which suggests that the

²¹ Schedule 4, part 2, item 1 of the RTI Act.

²² Schedule 4, part 2, item 11 of the RTI Act.

²³ For example, see information available on Council's website at <https://engage.rockhamptonregion.qld.gov.au/motorsport-precinct> and Council's media releases, including [https://www.rockhamptonregion.qld.gov.au/AboutCouncil/News-and-announcements/Latest-News/Consultation-opens-as-Motorsport-Precinct-Concept-Plan-unveiled?BestBetMatch=motorsport\[d13b95b2-5146-4b00-9e3e-a80c73739a64\]4f05f368-ecaa-4a93-b749-7ad6c4867c1f|en-AU](https://www.rockhamptonregion.qld.gov.au/AboutCouncil/News-and-announcements/Latest-News/Consultation-opens-as-Motorsport-Precinct-Concept-Plan-unveiled?BestBetMatch=motorsport[d13b95b2-5146-4b00-9e3e-a80c73739a64]4f05f368-ecaa-4a93-b749-7ad6c4867c1f|en-AU) and <https://www.rockhamptonregion.qld.gov.au/AboutCouncil/News-and-announcements/Latest-News/Motorsport-Precinct-on-Hold-for-Priority-Infrastructure-Projects>.

²⁴ Schedule 4, part 3, item 20 of the RTI Act.

²⁵ Schedule 4, part 4, section 4 of the RTI Act. The Harm Factor only applies until public consultation starts (schedule 4, part 4, section 4(2) of the RTI Act) and there are exceptions (schedule 4, part 4, section 4(3) of the RTI Act).

²⁶ In *Trustees of the De La Salle Brothers and Queensland Corrective Services Commission* (1996) 3 QAR 206 at [34] the Information Commissioner considered, in the context of the provision relating to deliberative process information in the repealed *Freedom of Information Act 1992* (Qld), that 'specific and tangible harm to an identifiable public interest (or interests) would result from disclosure'. I consider that this is a relevant consideration when applying the Harm Factor under the RTI Act.

deliberative process had concluded.²⁷ However, I also note Council's submission²⁸ that *'Council have not withdrawn their intention to progress the Motorsports Precinct and [the Information in Issue] could still potentially be used in future project deliberations'*. I have carefully considered the Information in Issue and Council's submissions and I am satisfied that the specific Council deliberations discussed in the Information in Issue are ongoing.

23. Schedule 4, part 4, section 4(2) of the RTI Act provides that the deliberative processes considered in the Harm Factor apply only until public consultation starts. While consultation has occurred regarding the Motorsport Precinct Concept Plan for the Site, there is no evidence to suggest that there have been any public consultations in relation to the Information in Issue. I am therefore satisfied that schedule 4, part 4, section 4(2) of the RTI Act does not apply.
24. I have also considered whether any of the exceptions to the Harm Factor, set out in Schedule 4, part 4, section 4(3) of the RTI Act, apply in this case. Schedule 4, part 4, section 4(3) of the RTI Act states that the Harm Factor does not apply for information to the extent it consists of:
 - information that appears in an agency's policy document; or
 - factual or statistical information; or
 - expert opinion or analysis (other than expert opinion or analysis commissioned in the course of, or for, the deliberative processes mentioned in subsection (1)) by a person recognised as an expert in the field of knowledge to which the opinion or analysis relates.
25. I consider that these exceptions do not apply as the Information in Issue does not comprise the types of information described in the exceptions to the Harm Factor.
26. As I am satisfied that the Information in Issue is deliberative process information, and that the exceptions to the Harm Factor do not apply, I must now consider the level of harm that is likely to result from the disclosure of the Information in Issue.
27. I am satisfied that the Information in Issue is not publicly available and its disclosure at this stage, when Council is still considering its options, could have a negative impact on any future decision making and consultation processes. The Information in Issue relates to Council's assessment of potential sites for the motorsport precinct. Council has not reached its final position on the issue of which site to proceed with and remains engaged in internal deliberations, albeit paused to prioritise other infrastructure projects.
28. In these circumstances, I consider that the disclosure of the Information in Issue prior to Council's finalisation of its deliberative process on this issue is likely to have a detrimental impact on Council's ability to continue considering its options and engage in open and frank negotiations with third parties. I am therefore satisfied that disclosure of the Information in Issue is likely to prejudice the deliberative process of Council and cause significant public interest harm in prejudicing these processes. Accordingly, I afford both the Nondisclosure Factor and Harm Factor significant weight.

²⁷ See Council's media release at <https://www.rockhamptonregion.qld.gov.au/AboutCouncil/News-and-announcements/Latest-News/Motorsport-Precinct-on-Hold-for-Priority-Infrastructure-Projects>.

²⁸ Submissions to OIC dated 17 June 2021.

Balancing the public interest

29. I consider that, in addition to the general pro-disclosure bias,²⁹ there are a number of public interest considerations favouring disclosure of the Information in Issue which, for the reasons discussed above, are deserving of moderate weight.
30. However, the Nondisclosure Factor and the Harm Factor relevant to the deliberative processes of Council carry significant weight in this case.
31. I consider that the significant weight that I have attributed to the factors favouring nondisclosure outweighs the factors favouring disclosure of the Information in Issue. Accordingly, I find that disclosure of the Information in Issue would, on balance, be contrary to the public interest and therefore, access can be refused under section 47(3)(b) of the RTI Act.

DECISION

32. I vary Council's decision by finding that access to the Information in Issue may be refused under section 47(3)(b) and section 49 of the RTI Act on the ground that its disclosure would, on balance, be contrary to the public interest.
33. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Assistant Information Commissioner Corby

Date: 11 November 2021

²⁹ Under section 44 of the RTI Act.

APPENDIX**Significant procedural steps**

| Date | Event |
|-----------------|--|
| 13 January 2021 | OIC received the applicant's application for external review. |
| 15 January 2021 | OIC notified Council and the applicant that the application for external review had been received and requested procedural documents from Council. |
| 18 January 2021 | OIC received the requested procedural documents from Council. |
| 3 March 2021 | OIC advised the applicant and Council that the application for external review had been accepted and requested a copy of the documents located from Council. |
| 9 March 2021 | OIC received a copy of the documents located from Council. |
| 9 June 2021 | OIC requested further information from Council. |
| 18 June 2021 | OIC received Council's submission dated 17 June 2021. |
| 9 July 2021 | OIC received a submission from the applicant. |
| 12 July 2021 | OIC conveyed a written preliminary view to the applicant. |
| 28 July 2021 | OIC received a submission from the applicant. |