



Decision and Reasons for Decision

Citation:	<i>Clermont Quarries Pty Ltd and Isaac Regional Council</i> [2022] QICmr 16 (22 March 2022)
Application Number:	316347
External Review Applicant:	Clermont Quarries Pty Ltd (ACN: 606 766 250)
Respondent:	Isaac Regional Council
Decision Date:	22 March 2022

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - DISCLOSURE DECISION - objection to disclosure of road use maintenance agreement between Council and the external review applicant (third party) - whether disclosure would prejudice business affairs - whether disclosure enhances accountability and transparency - whether third party satisfied onus under section 87(2) of the *Right to Information Act 2009* (Qld) - whether disclosure would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. An application was made¹ to Isaac Regional Council (**Council**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to a Road Maintenance Agreement (**Agreement**) between the External Review Applicant (**Clermont Quarry**) and Council. While processing the application, Council consulted with Clermont Quarry as a relevant third party under section 37 of the RTI Act. Clermont Quarry objected to disclosure of the Agreement.
2. Council decided² to grant full access to 18 pages and partial access to seven pages,³ contrary to Clermont Quarry's objections to disclosure. Clermont Quarry applied⁴ for internal review of this decision. Council did not notify Clermont Quarry of the internal review decision within the prescribed timeframe and is therefore taken to have made a decision affirming the original decision.⁵

¹ Dated 11 April 2021.

² Decision dated 3 June 2021.

³ With access deferred for the access application as required by section 37(3)(d) of the RTI Act.

⁴ Internal review application dated 1 July 2021.

⁵ Under section 83(2) of the RTI Act. Council confirmed this to Clermont Quarry by letter dated 1 September 2021.

3. Clermont Quarry then applied⁶ to the Office of the Information Commissioner (**OIC**) for external review.
4. For the reasons set out below, I affirm Council's decision to grant partial access to the Agreement.

Background

5. In 2018, Clermont Quarry submitted a development application⁷ to Council, which was approved subject to certain conditions. One condition of approval⁸ required Clermont Quarry to enter into the Agreement with Council to maintain the affected road during the operation period.
6. During the course of the review, OIC issued a preliminary view⁹ to Clermont Quarry explaining that it had not discharged the onus of demonstrating that disclosure would, on balance, be contrary to the public interest. As the decision on external review is a *disclosure decision*,¹⁰ Clermont Quarry bears the onus of establishing that a decision not to disclose the document is justified or that the Information Commissioner should give a decision adverse to the person who wishes to be given access to the document.¹¹
7. Clermont Quarry provided submissions as part of the external review application and advised OIC that it would not provide any submissions in response to the preliminary view and instead wished to proceed directly to a formal written decision.¹²
8. Significant procedural steps relating to the application are set out in the Appendix.

Reviewable decision and evidence considered

9. The decision under review is the decision Council is taken to have made on internal review, affirming its decision dated 3 June 2021 to disclose information contrary to Clermont Quarry's objection.

Evidence considered

10. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including the footnotes and the Appendix).
11. The *Human Rights Act 2019* (Qld) (**HR Act**) affords human rights to individuals in Queensland. In this case, the external review applicant is a corporation but the access applicant (who is not a participant in the review) is an individual. Kingham J in *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors*¹³ indicated that where section 58(1) of the HR Act applies, there need be no mover to raise human rights issues because that section requires the relevant public entity to properly consider engaged human rights and to not act or make a decision that is not compatible with human rights. As such, I have taken into account that the access applicant is an individual with human rights, in particular the

⁶ External review application dated 29 September 2021.

⁷ Dated 20 December 2018.

⁸ Condition 11.1.

⁹ Dated 1 November 2021.

¹⁰ Section 87(3)(a) of the RTI Act states a '*disclosure decision*' is a decision to disclose a document contrary to the views of a relevant third party obtained under section 37 of the RTI Act.

¹¹ Section 87(2) of the RTI Act.

¹² By email and confirmed in a telephone conversation, on 23 November 2021.

¹³ [2020] QLC 33 at [90].

right to seek and receive information.¹⁴ I note Bell J's observations in *XYZ v Victoria Police (General)*¹⁵ on the interaction between the Victorian analogues of Queensland's RTI Act and HR Act: '*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.*' In observing and applying the law prescribed in the RTI Act, as I have done in this case, an RTI decision-maker will be '*respecting and acting compatibly with*' applicable human rights as stated in the HR Act.¹⁶

Information in issue and issue for determination

12. The information in issue is the portions of the Agreement which Council decided to release¹⁷ contrary to Clermont Quarry's objections, that is, 18 full pages¹⁸ and parts of seven pages¹⁹ (**Information in Issue**).²⁰ The information to which Council decided to refuse access is not in issue in this review.
13. The issue for determination is whether disclosure of the Information in Issue would, on balance, be contrary to the public interest.

Relevant law

14. Under the RTI Act, a person has a right to access documents of an agency,²¹ however, this right is subject to certain limitations, including grounds for refusal of access.²² Parliament intends for the grounds of refusal to be interpreted narrowly.²³ Relevantly, access may be refused where disclosure would, on balance, be contrary to the public interest.²⁴
15. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision-maker must:²⁵
 - identify any irrelevant factors and disregard them
 - identify any 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.
16. As the decision on external review is a *disclosure decision*,²⁶ Clermont Quarry bears the onus of establishing that a decision not to disclose the document is justified or that the Information Commissioner should give a decision adverse to the person who wishes to be given access to the document.²⁷

¹⁴ Section 21(2) of the HR Act.

¹⁵ [2010] VCAT 255 (16 March 2010) (*XYZ*) at [573].

¹⁶ *XYZ* at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

¹⁷ Access to the documents subject to the third party consultation was deferred as required by section 37(3)(d) of the RTI Act.

¹⁸ Pages 1-3, 5, 6, 9-13, 16-23.

¹⁹ Pages 4, 7, 8, 14, 15, 24, 25.

²⁰ Council's original decision dated 3 June 2021 to Clermont Quarry identifies these pages for full and partial release.

²¹ Section 23(1)(a) of the RTI Act.

²² As set out in section 47 of the RTI Act.

²³ Section 47(2)(a) of the RTI Act.

²⁴ Section 47(3)(b) of the RTI Act.

²⁵ Section 49(3) of the RTI Act.

²⁶ Section 87(3)(a) of the RTI Act states a '*disclosure decision*' is a decision to disclose a document contrary to the views of a relevant third party obtained under section 37 of the RTI Act.

²⁷ Section 87(2) of the RTI Act.

Clermont Quarry's submissions

17. Clermont Quarry's lawyers submit:²⁸

The [Agreement] was required to be entered into as a condition of our client's development approval... and imposes obligations upon our client for the maintenance of [a road] during... periods, being period during which... quarry material is being hauled... along [the road]...

The proposed partial release of the [Information in Issue] would reveal details of our client's business, including operational costs associated with its road maintenance obligations... Such information is commercially sensitive and of value and the disclosure of that information to commercial competitors would be commercially and financially disadvantageous to our client.

In particular, the proposed partial release of the [Information in Issue] would divulge the specific details of our client's road maintenance obligations... from which, a commercial competitor would readily be able to ascertain the financial cost involved in our client complying with those road maintenance obligations. Such costs are operational costs of our client's business, which directly influences profit margins and the minimum price at which our client is able to sell its material.

The... markets are extremely competitive, low-margin markets, in which knowledge about a competitor's operational costs is of high value to a commercial competitor and can be used to undercut competitors in order to take market share.

The Access Application is the fourth in a series of access applications under the RTI Act that have been brought in respect of our client's operations over the last 14 months, all of which our client believes have been brought by the same commercial competitor and which appear to be part of a systematic effort to obtain commercially sensitive information about our client's operations in order to gain a competitive advantage.

Given the matters above, there is a reasonable expectation that if the [Information in Issue] is disclosed:

- 1. the commercial and financial affairs of our client will be prejudiced²⁹*
- 2. the business affairs of our client will be prejudiced,³⁰ and*
- 3. the disclosure would amount to a public interest harm.³¹*

Analysis and findings

18. The Information Commissioner is prohibited from including information that is claimed to be exempt or contrary to the public interest in an external review decision.³² As Clermont Quarry claims disclosure of the entire Agreement would, on balance, be contrary to the public interest, I am unable to refer to the specific information included in the Agreement in explaining my reasons for this decision.

Irrelevant Factors

19. To the extent that Clermont Quarry's submissions relate to any perceived or anticipated mischievous conduct by the access applicant in making this and any other access applications, the RTI Act states that this is an irrelevant factor³³ and I must disregard it when deciding whether disclosure would, on balance, be in the public interest. Clermont

²⁸ External review application dated 29 September 2021.

²⁹ Schedule 4, part 3, item 2 of the RTI Act.

³⁰ Schedule 4, part 3, item 15 of the RTI Act.

³¹ Schedule 4, part 4, section 7(1)(c) of the RTI Act.

³² Section 108(3) of the RTI Act.

³³ Schedule 4, part 1, item 3 of the RTI Act.

Quarry's assertions regarding the suspected motives of the access applicant as referenced above are irrelevant and I have not taken them, or any other irrelevant factors, into account in making my decision.

Factors Favouring Disclosure

20. Disclosure of the Information in Issue could reasonably be expected³⁴ to promote open discussion and enhance Council's accountability and transparency³⁵ in relation to the planning and maintenance decisions and inform the community about Council's operations and dealings with private entities.³⁶
21. The Agreement was entered into as a condition of Clermont Quarry's development approval, and for that reason, I also consider that disclosure of the Information in Issue would reveal contextual information relating to Council's decision to grant the development approval, and the decisions Council makes regarding the expenditure of funds in maintaining roads.³⁷
22. The road in question is an asset of Council,³⁸ for which Council would otherwise be responsible for maintaining, at the expense of ratepayers. Based on the information available, Clermont Quarry was granted development approval, on the conditions stipulated in the Agreement. As such, I consider that disclosure of the Information in Issue would inform the community about the steps Council has taken to ensure there is no unnecessary or elevated costs to ratepayers in maintaining the road.³⁹
23. Finally, I also consider the proper maintenance of public roads to be an important public safety matter. I am satisfied that disclosure of the Information in Issue could reasonably be expected to reveal some of the steps taken by Council, to ensure the safety of road users which raises a public interest factor favouring disclosure.⁴⁰

Factors Favouring Nondisclosure

24. Clermont Quarry's submissions raise public interest factors favouring nondisclosure⁴¹ which centre on the potential prejudice to its commercial interests which may occur through disclosure of the specific details of the Agreement.
25. Large parts of the Information in Issue are benign in that they comprise generic contract terms and do not disclose anything of a specifically commercial nature. I am not persuaded by Clermont Quarry's submissions that this information is commercially sensitive or valuable, nor that disclosure of *all parts* of the Agreement could reasonably be expected to prejudice the commercial, financial or business affairs as submitted.

³⁴ When assessing whether an outcome could reasonably be expected to arise, I must distinguish '*between what is merely possible ... and expectations that are reasonably based*' and for which '*real and substantial grounds exist*' as explained in *B and Brisbane North Regional Health Authority* [1994] QICmr 1 at [154]-[160] and *Williams and Queensland Police Service* [2017] QICmr 28 (4 August 2017) at [22]. Other jurisdictions have similarly interpreted the phrase 'as distinct from something that is irrational, absurd or ridiculous': See *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 Cockcroft* (1986) 10 FCR 180 at [190].

³⁵ Schedule 4, part 2, item 1 of the RTI Act.

³⁶ Schedule 4, part 2, item 3 of the RTI Act.

³⁷ Schedule 4, part 2, item 11 of the RTI Act.

³⁸ Isaac Regional Council, '*Road Register*', available at <<https://www.isaac.qld.gov.au/downloads/file/3956/roads-register>>.

³⁹ Schedule 4, part 2, item 4 of the RTI Act.

⁴⁰ Schedule 4, part 2, item 14 of the RTI Act.

⁴¹ Schedule 4, part 3, items 2 and 15 and schedule 4, part 4, section 7(1)(c) of the RTI Act.

26. I acknowledge that some aspects of the Information in Issue provide further detail regarding Clermont Quarry's obligations in relation to the road maintenance. However, there is no specific information such as the volume of materials required or the unit prices of these, the likes of which is likely to reveal the Clermont Quarry's related operational costs. Even if the total costs arising out of the Agreement *could* be calculated, I do not consider that this information could be reliably extrapolated so a competitor could use this information to calculate Clermont Quarry's margins and then undercut Clermont Quarry's pricing.
27. I am satisfied that the information in the Agreement is not so specific that it can be considered commercially sensitive, nor that disclosure would be likely to give Clermont Quarry's competitors any commercial edge in a competitive market or greatly disadvantage Clermont Quarry commercially or financially.
28. I note that Clermont Quarry bears the onus of establishing that a decision not to disclose the document is justified,⁴² and practically it is a matter for Clermont Quarry to raise any further relevant nondisclosure factors. Notwithstanding this, I have considered the external review application and other material before me, and I am unable to identify any further relevant nondisclosure or public interest harm factors⁴³ that carry weight in the circumstances of this case.

Balancing the public interest

29. I accept that the Information in Issue *relates* to Clermont Quarry's business and commercial affairs, however I am unable to ascertain how disclosure could have anything more than a very limited impact on Clermont Quarry's commercial, financial and business affairs.⁴⁴ I have accordingly afforded the relevant public interest factors little to no weight. On the other hand, I consider the factors favouring disclosure of the Agreement relating to enhancing Council's accountability and transparency⁴⁵ and revealing matters relating to public safety⁴⁶ attract significant and determinative weight. This is due to the considerable and legitimate public interest in Council's planning decisions, the decisions impacting Council's expenditure and the steps Council takes to maintain its roads to ensure the safety of all road users. On that basis, I consider disclosure of the Information in Issue would not, on balance, be contrary to the public interest.⁴⁷

DECISION

30. As the decision on external review is a *disclosure decision*,⁴⁸ Clermont Quarry bears the onus of establishing that a decision not to disclose the document is justified.⁴⁹ For the reasons set out above, I am not satisfied that Clermont Quarry has discharged the onus of establishing that a decision not to disclose the information in issue is justified.
31. Accordingly, I affirm Council's decision and find that access may be given to 18 full pages and parts of seven pages of the Agreement.

⁴² Section 87(2) of the RTI Act.

⁴³ As specified in Schedule 4 of the RTI Act.

⁴⁴ Schedule 4, part 3, items 2 and 15 and part 4, section 7(1)(c) of the RTI Act.

⁴⁵ Schedule 4, part 2, item 4 of the RTI Act.

⁴⁶ Schedule 4, part 2, item 14 of the RTI Act.

⁴⁷ Section 47(3)(b) and 49 of the RTI Act.

⁴⁸ Section 87(3)(a) of the RTI Act states a '*disclosure decision*' is a decision to disclose a document contrary to the views of a relevant third party obtained under section 37 of the RTI Act.

⁴⁹ Section 87(2) of the RTI Act.

32. I have made this decision under section 110 of the RTI Act, as a delegate of the Information Commissioner under section 145 of the RTI Act.

Shiv Martin
Assistant Information Commissioner

Date: 22 March 2022

APPENDIX

Significant procedural steps

Date	Event
29 September 2021	OIC received Clermont Quarry's application for external review. OIC requested preliminary documents from Council.
5 October 2021	OIC received the preliminary documents from Council.
11 October 2021	OIC advised Clermont Quarry and Council that the application for external review had been accepted. OIC issued a preliminary view to Clermont Quarry.
22 November 2021	Clermont Quarry requested an extension to provide submissions. OIC granted Clermont Quarry an extension to provide submissions.
23 November 2021	Clermont Quarry advised OIC that they did not intend to provide further submissions responding to OIC's preliminary view and requested a formal written decision in finalisation of the review.