



Decision and Reasons for Decision

Citation:	<i>Balzary and Redland City Council; Tidbold (Third Party)</i> [2017] QICmr 41 (1 September 2017)
Application Number:	312998
Applicant:	Balzary
Respondent:	Redland City Council
Third Party:	Tidbold
Decision Date:	1 September 2017
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - CONTRARY TO PUBLIC INTEREST INFORMATION - personal opinions expressed to Council within the context of a development application - personal information and privacy - whether disclosure would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to Redland City Council (**Council**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to information about a development application made by the third party to Council in 2015.¹
2. Council located more than 500 pages, and most were either released to the applicant, or otherwise available for the applicant to access via Council's website.² Council also decided to refuse access to certain information on the basis that it was exempt, or that its disclosure would, on balance, be contrary to the public interest.³
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of Council's decision.⁴ During the review, the applicant narrowed the scope of the information for OIC to consider,⁵ and following negotiations between OIC, Council

¹ Access application dated 19 August 2016, received by Council on 22 August 2016.

² Council released 230 pages and refused access to five part pages and 317 full pages, with access to the majority of the fully refused pages being available through Council's website.

³ Access to 14 full pages and one part page was refused on the basis that disclosure would found an action for breach of confidence: section 47(3)(a), section 48 and schedule 3, section 8 of the RTI Act. Access to four part pages was refused on the basis that disclosure would, on balance, be contrary to the public interest: section 47(3)(b) and section 49 of the RTI Act.

⁴ Application dated 7 October 2016.

⁵ In particular, the applicant only sought access to 14 full pages and one part page to which Council refused access on the basis that disclosure would found an action for breach of confidence, and within these pages, the applicant did not seek access to certain personal information.

and the third party, further information⁶ was released to the applicant. As a result, only six part pages remain in issue in the review.

4. The information remaining in issue appears within emails sent by the third party to Council (**Third Party Information**) in the context of the development application made by the third party's family business. The third party objected to disclosure of the information and I have accepted the substance of those objections in finding that the information falls within the third party's personal sphere. In considering where the balance of the public interest lies in this case, I have found that considerations of personal information and privacy are determinative in favour of nondisclosure.
5. For the reasons set out below, I vary Council's decision and find that access to the Third Party Information may be refused because disclosure would, on balance, be contrary to the public interest.⁷

Background

6. Significant procedural steps relating to the application and the external review are set out in the Appendix.
7. The relevant development application was for a material change of use in relation to a property in Victoria Point (**Development Application**). The application was to change the use of premises from a residential dwelling to a commercial office. Council decided to approve the proposed development on 1 August 2016.⁸ The access applicant lives in the area and objects to the development on a number of grounds.⁹
8. Council refused access to the pages containing the Third Party Information on the basis that they were exempt as disclosure would found an action for breach of confidence.¹⁰ On external review, OIC conveyed a view to Council that the breach of confidence exemption did not apply.¹¹ Council accepted that view and did not advance an alternative ground for refusal of access. However, following third party consultation, OIC formed the view that access may be refused to some of the information (i.e. the Third Party Information) on the basis that its disclosure would, on balance be contrary to the public interest.¹²

Reviewable decision

9. The decision under review is Council's decision dated 22 September 2016.

Evidence considered

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

⁶ As well as four additional pages located by Council during the course of the external review.

⁷ Under sections 47(3)(b) and 49 of the RTI Act.

⁸ By decision notice dated 9 August 2016.

⁹ The applicant objected to the Development Application by letter to Council dated 22 January 2016.

¹⁰ Under section 47(3)(a), section 48 and schedule 3, section 8 of the RTI Act.

¹¹ In telephone conversations between Council and OIC on 6 December 2016 and 1 March 2017.

¹² Confirmed by email from OIC to Council on 1 March 2017.

Information in issue

11. The Third Party Information appears on six pages of emails identified by Council as pages 1 to 3 (duplicated on pages 372 to 373) and page 9.
12. I am restricted from describing the precise content of the redacted portions of the emails.¹³ Generally speaking, the information consists of the opinions, concerns and observations expressed by the third party to Council within the context of the Development Application. These opinions and observations set out concerns about the effect of Council's actions/decisions on the third party and his family business, and some relate to other businesses and individuals in the local area.

Issue for determination

13. As set out in paragraph 8 above, Council no longer submits that the Third Party Information is exempt due to breach of confidence. That issue is therefore, not examined in these reasons for decision. Instead, and in view of the third party's disclosure objections, the issue for determination is whether access to the Third Party Information may be refused on the basis that disclosure is, on balance, contrary to the public interest.¹⁴ OIC may proceed on this basis because external review by the Information Commissioner¹⁵ is merits review.¹⁶ Accordingly, I may decide any matter in relation to an access application that could have been decided by Council, under the RTI Act.¹⁷

Relevant law

14. The RTI Act is administered with a pro-disclosure bias, meaning that an agency should decide to give access to information, unless giving access would, on balance, be contrary to the public interest.¹⁸
15. 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.
16. The RTI Act identifies various factors that may be relevant to deciding the balance of the public interest¹⁹ and explains the steps that a decision-maker must take²⁰ 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 in issue would, on balance, be contrary to the public interest.

¹³ By section 108(3) of the RTI Act.

¹⁴ Under sections 47(3)(b) and 49 of the RTI Act.

¹⁵ Or delegate.

¹⁶ An administrative reconsideration of a case which can be described as '*stepping into the shoes*' of the primary decision-maker to determine what is the correct and preferable decision.

¹⁷ Section 105(1)(b) of the RTI Act.

¹⁸ Section 44(1) of the RTI Act.

¹⁹ 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.

²⁰ Section 49(3) of the RTI Act.

Findings

Irrelevant factors

17. During the review, the third party questioned the access applicant's motivations for seeking access to the information.²¹ Under the RTI Act, I am not able to consider the general motivations of the applicant in seeking the documents.²² Accordingly, I have not taken these concerns into account in reaching my decision.

Factors favouring disclosure

18. I acknowledge that there is a general public interest in advancing access to government-held information, and this is reflected in the pro-disclosure bias which the RTI Act adopts.²³ I also consider that, to a certain extent, disclosing the Third Party Information could reasonably be expected to:
- promote open discussion of public affairs and enhance Council's accountability²⁴
 - inform the community of Council's operations;²⁵ and
 - reveal the background and contextual information that informed Council's decision on the Development Application.²⁶
19. I accept that there is a public interest in enhancing Council's accountability and transparency in relation to development approval processes by showing the information that was before Council in relation to the Development Application, and allowing the community to consider the background and context to Council's decision in relation to the Development Application. I note there has been some community concern²⁷ regarding the Development Application in this case and that it has been approved by Council. This generally increases the weight to be attributed to the above factors.²⁸
20. However, on the other hand, the nature of the Third Party Information is such that disclosure would not advance these factors in any meaningful way, particularly given the significant amount of information that has already been released to the applicant, or is publicly available on Council's website. Given the nature of the Third Party Information (an individual's opinions, observations and concerns), I am satisfied that it would do little to further inform the applicant of Council's processes in relation to the Development Application or the information relied upon by Council in its decision-making.
21. The applicant submitted to OIC²⁹ that the Third Party Information is required to determine '*the level of influence such opinions had on the planning officers associated with the approval and to what extent it influenced the approval process*'. The applicant contends that if the Third Party Information was relied upon by Council or influenced Council to

²¹ Submissions to OIC by telephone on 16 December 2016 and by email on 21 December 2016.

²² Except where these motivations otherwise give rise to relevant factors. In *State of Qld v Albiez* [1996] 1 Qd R 215, de Jersey J noted at 222 '*... the Freedom of Information Act does not confer any discretion on the Information Commissioner, or the Supreme Court, to stop disclosure of information because of any particular motivation in the applicant*'. I consider that this statement also applies to the RTI Act.

²³ As explained at paragraph 14 above.

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

²⁵ Schedule 4, part 2, item 3 of the RTI Act.

²⁶ Schedule 4, part 2, item 11 of the RTI Act.

²⁷ Council's website show that three objections were received in relation to the Development Application.

²⁸ *Johnston and Brisbane City Council* (Unreported, Queensland Information Commissioner, 6 December 2013) (*Johnston*) at [22] to [28]. In this decision, the Information Commissioner held that the level of community concern regarding certain road upgrade information impacted on the weight to be attributed to certain factors favouring disclosure. However, I note that while there is some community concern about the Development Application in this case, particularly on the part of the access applicant, this is not to the same magnitude as the potential community concern arising from a proposed road upgrade (including changes to existing road routes) that was the subject of the information in issue in *Johnston*.

²⁹ By email to OIC dated 30 June 2017.

approve the Development Application, then this would constitute wrongdoing by Council, and contravene planning legislation. The applicant also contends that the Third Party Information may contain inaccuracies. In view of these submissions, I have considered whether disclosing the Third Party Information could reasonably be expected to:

- allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official;³⁰
- reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct;³¹ and
- reveal that the information was incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant.³²

22. I find that the first two public interest factors set out above would not be advanced by release of the Third Party Information. The information is comprised of the third party's opinions, observations and concerns, and does not provide any insight into Council's conduct, including the factors that influenced its decision-making process in relation to the Development Application. In summary, disclosing an opinion that has been provided to an agency by an individual (even if this opinion contains irrelevant considerations) does not demonstrate that the agency has been influenced or relied upon this opinion as the applicant contends. In contrast, the information that has already been released to the applicant (or that is publicly available) reveals significant details about the matters relied upon by Council in making its decision on the Development Application. Accordingly, I do not accept that disclosure could reasonably be expected to allow or assist any inquiry into any deficiency in the conduct of Council or a Council official, or reveal or substantiate that Council or its officials have engaged in misconduct or negligent, improper or unlawful conduct, and these factors are therefore, not relevant.
23. In relation to the third factor set out above, I note that opinion is, by its very nature, an individual's own particular version of events and their impression of matters. This inherent subjectivity does not however mean that the resulting account or opinion is necessarily incorrect, misleading or unfairly subjective.³³ To the extent that the information contains the names of businesses for comparison purposes, I acknowledge that disclosure may, to a limited extent, allow the applicant to determine the factual correctness of observations made in relation to traffic flow to these businesses, and the availability of commercial space in the area. However, the relevant information related to these matters relied upon by Council in the Development Application process is publicly available, and determining the factual accuracy of these observations does not reflect in any meaningful way on Council, or its actions/decisions. For this reason, I consider this factor—to the limited extent that it applies—carries low weight.
24. Finally, the applicant raised concerns with OIC³⁴ about work that has occurred on the relevant lot after approval of the Development Application, and submitted that the release of the Third Party Information is '*vital so that [he] can consider all options available to...[him to]...have this project halted...*'. Given these submissions, I have considered whether disclosing the Third Party Information could reasonably be expected to contribute to the administration of justice generally, including procedural fairness, or for a person.³⁵ Previous decisions of the Information Commissioner have examined the

³⁰ Schedule 4, part 2, item 5 of the RTI Act.

³¹ Schedule 4, part 2, item 6 of the RTI Act.

³² Schedule 4, part 2, item 12 of the RTI Act.

³³ *Marshall and Department of Police* (Unreported, Queensland Information Commissioner, 25 February 2011) at [15]-[20]; *Brodsky and Gympie Regional Council* [2014] QICmr 17 (2 May 2014) at [32] (**Brodsky**).

³⁴ By email to OIC dated 30 June 2017.

³⁵ Schedule 4, part 2, items 16 and item 17.

requirements for these factors apply.³⁶ In the circumstances of this case, I consider it is unnecessary to specify these requirements here, except to say that for the factors to apply, disclosing the information must assist the applicant to pursue the remedy, or to evaluate whether a remedy is available or worth pursuing. Having considered the Third Party Information, for the same reasons as outlined at paragraph 22 above, I do not consider that disclosure would assist the applicant to pursue a remedy or to evaluate whether a remedy is available in relation to development on the relevant lot. Accordingly, I do not consider that these factors favouring disclosure apply.

Factors favouring nondisclosure

25. The RTI Act recognises that disclosure of personal information gives rise to a factor favouring nondisclosure.³⁷ As noted in paragraph 12, the Third Party Information contains the third party's opinions and observations about other businesses and individuals in the area, and sets out concerns about the effect of Council's actions/decisions on him and his family business.

26. 'Personal information' is defined by section 12 of the *Information Privacy Act 2009* (Qld) (IP Act) as:³⁸

...information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

27. Given this definition, I am satisfied that a person's opinion expressed to a local authority constitutes their personal information.³⁹ Accordingly, I am satisfied that this nondisclosure factor applies to the Third Party Information and below, I have considered the level of harm which I consider would result from its disclosure, in attributing weight to this factor.

28. In the circumstances of this case, a further factor favouring nondisclosure is also raised with respect to the protection of an individual's right to privacy.⁴⁰ The concept of 'privacy' is not defined in either the IP Act or the RTI Act. It can, however, essentially be viewed as the right of an individual to preserve their 'personal sphere' free from interference from others.⁴¹ Given the nature of the Third Party Information, I am satisfied that disclosure would interfere with the third party's personal sphere, and that this factor favouring nondisclosure therefore applies.

29. In determining the weight to be attributed to the nondisclosure factors, and the level of public interest harm, I note that the Information Commissioner has previously found that a person raising concerns with an agency is a central aspect of their 'personal sphere'.⁴² While I acknowledge the information appears in correspondence concerning the third party's business and Development Application, I am satisfied that the particular content of the Third Party Information has a strong connection to the third party's personal and family sphere which should be afforded a level of protection from disclosure under the RTI Act. I find that there would be a moderate level of public interest harm arising from

³⁶ *Willsford and Brisbane City Council* (Unreported, Queensland Information Commissioner, 27 August 1996), cited in relation to the RTI Act in *Tomkins and Rockhampton Regional Council* [2016] QICmr 3 (22 January 2016) at [21].

³⁷ Schedule 4, part 4, section 6 of the RTI Act.

³⁸ This definition is adopted by schedule 6 of the RTI Act.

³⁹ This was also confirmed in *Brodsky*.

⁴⁰ Schedule 4, part 3, item 3 of the RTI Act.

⁴¹ Paraphrasing the Australian Law Reform Commission's definition of the concept in 'For your information: Australian Privacy Law and Practice' Australian Law Reform Commission Report No. 108 released 12 August 2008, at paragraph 1.56.

⁴² *OP5BNI and Department of National Parks, Recreation, Sport and Racing* (Unreported, Queensland Information Commissioner, 12 September 2013) at [45].

disclosure and that moderate weight should be afforded to protecting the third party's privacy.

30. A small amount of the Third Party Information comprises the names of other businesses in the area for reasons of subjective comparison, e.g. traffic flow/volume. While I accept that this is not information of the most sensitive nature, I do consider that to a certain extent, the information could reasonably be expected to prejudice or have an adverse effect on these businesses' affairs.⁴³ Some reputational impact could reasonably be expected to flow to the businesses if they were identified in connection with subjective (and arguably negative) opinions concerning matters including traffic volume. Accordingly, I afford this factor limited weight.

Balancing the relevant public interest factors

31. I am satisfied that in this case, the public interest in protecting the privacy of the third party and safeguarding his personal information carries slightly more weight than the public interest in promoting access to government-held information and the relevant factors concerning Council's accountability and transparency. The weight of those disclosure factors is significantly reduced in this case due to the substantial volume of information that has already been made available to the applicant. Further, the particularly personal nature of the Third Party Information is such that disclosure would not enhance Council's transparency and accountability in any meaningful way.
32. On balance, I find that disclosure of the Third Party Information would be contrary to the public interest and that therefore, access to it may be refused under section 47(3)(b) of the RTI Act.

DECISION

33. For the reasons set out above, I vary Council's decision and find that access to the Third Party Information may be refused under section 47(3)(b) of the RTI Act.
34. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

K Shepherd
Assistant Information Commissioner

Date: 1 September 2017

⁴³ Schedule 4, part 3, item 2 and schedule 4, part 4, section 7(1)(c) of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
7 October 2016	OIC received the external review application.
7 October 2016	OIC asked Council to provide relevant procedural documents.
17 October 2016	OIC received the requested procedural documents from Council.
21 October 2016	OIC notified Council and the applicant that the external review application had been accepted, and asked Council to provide the documents located in response to the access application.
10 November 2016	OIC received a copy of the located documents from Council.
17 November 2016	The applicant advised OIC that he did not seek access to certain documents.
18 November 2016	OIC confirmed the scope of the external review with the applicant.
6 December 2016	Council provided submissions by telephone to OIC concerning the information in issue, and OIC conveyed its preliminary view that this information was not exempt under schedule 3, section 8 of the RTI Act.
13 December 2016	OIC contacted the relevant third party.
16 December 2016	OIC conveyed a preliminary view to the third party and invited him to provide submissions supporting his case. The third party contacted OIC by telephone with concerns about release of the information.
21 December 2016	The third party provided written submissions to OIC.
16 February 2017	OIC requested further documents from Council.
21 February 2017	OIC received the requested documents from Council.
1 March 2017	OIC conveyed a preliminary view to Council, and Council confirmed that it no longer held concerns about release of the information, subject to the removal of third party information.
18 April 2017	OIC conveyed a revised preliminary view to the third party and invited him to provide submissions supporting his case. The third party did not make any further submissions in response to this preliminary view.
24 May 2017	Council released the information in issue (with redactions) to the applicant.
2 June 2017	The applicant notified OIC that he continued to seek access to the redacted information.
6 June 2017	In a telephone conversation, OIC addressed the applicant's concerns about the content of the information and conveyed OIC's preliminary view concerning the redacted information. The applicant agreed to exclude certain categories of information.
16 June 2017	OIC conveyed a written preliminary view to the applicant concerning the remaining redacted information and invited him to provide submissions supporting his case.
30 June 2017	The applicant advised that he did not accept OIC's preliminary view and provided submissions to OIC.