



## Decision and Reasons for Decision

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<b>Citation:</b>	<b><i>Mobbs and Cassowary Coast Regional Council [2020] QICmr 34 (18 June 2020)</i></b>
<b>Application Number:</b>	<b>314902</b>
<b>Applicant:</b>	<b>Mobbs</b>
<b>Respondent:</b>	<b>Cassowary Coast Regional Council</b>
<b>Decision Date:</b>	<b>18 June 2020</b>

**ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST INFORMATION - total amounts of legal expenses incurred by Council - 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. On 27 August 2019, the applicant applied to the Cassowary Coast Regional Council (**Council**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for information summarising the amount of legal expenses incurred by Council over the course of one financial year.<sup>1</sup>
2. Council decided to refuse access to the requested information on the ground it comprised exempt information, as it was subject to legal professional privilege and its disclosure may prejudice the investigation of a contravention or possible contravention of the law.<sup>2</sup>
3. The applicant then applied to the Office of the Information Commissioner (**OIC**) for external review of Council's decision.<sup>3</sup>
4. Council maintains its objection to disclosure of the requested information and has the onus of establishing that its decision to refuse access was justified.<sup>4</sup> On external review, Council maintained that it was entitled to refuse access to the requested information on the basis that disclosure would, on balance, be contrary to the public interest.<sup>5</sup>

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<sup>1</sup> The access application sought details of legal expenses appearing in information created in response to a Councillor's request, made at Council's meeting on 22 November 2018, for '*details of legal expenses incurred [in] 2017/2018*'.

<sup>2</sup> Under schedule 3, sections 7 and 10(1)(a) of the RTI Act.

<sup>3</sup> External review application dated 11 October 2019.

<sup>4</sup> Under section 87 of the RTI Act.

<sup>5</sup> Under section 47(3)(b) of the RTI Act. Council did not seek to maintain its claim that access could be refused under section 47(3)(a) of the RTI Act on the basis that the requested information was exempt.

5. During the review, I sought the disclosure views of two third parties.<sup>6</sup> One third party did not respond to OIC and the other third party did not object to disclosure.<sup>7</sup>
6. For the reasons below, I find that Council has not met the onus of establishing that its decision refusing access to information was justified and accordingly, I set aside Council's decision to refuse access to the requested information.

### Reviewable decision and evidence considered

7. The decision under review is Council's decision dated 17 September 2019.
8. Significant procedural steps relating to this review are set out in the Appendix. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and the Appendix).
9. As noted in paragraph 5, I sought the disclosure views of two third parties. Council also indicated during the review that I should consult with another party, being a Council officer. I did not consult with this other party, as I did not consider it necessary in the particular circumstances of this matter.<sup>8</sup> However, Council obtained the disclosure views of that party and provided those views to me during the review. In reaching my decision, I have considered the Council's submissions that set out the views of the relevant Council officer.
10. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.<sup>9</sup> I consider a decision-maker will be '*respecting and acting compatibly with*' this right and other rights in the HR Act when applying the law prescribed in the RTI Act.<sup>10</sup> I have acted in this way in making this decision in accordance with section 58(1) of the HR Act.

### Information in issue

11. The information in issue comprises part of a one-page table. This table was created in response to a Councillor's request, made at Council's meeting on 22 November 2018, for '*details of legal expenses incurred [in] 2017/2018*'. During the review, the applicant narrowed the scope of his request to that part of the table which lists the costs for legal matters involving specified parties.

### Issues for determination

12. Council has the onus of establishing that its decision refusing access to information was justified.<sup>11</sup> Council initially raised numerous grounds as the basis for its entitlement to refuse access to the information in issue.<sup>12</sup> However, Council subsequently confirmed to OIC that it seeks to refuse access to the information in issue on the basis disclosure would, on balance, be contrary to the public interest.<sup>13</sup>

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<sup>6</sup> Pursuant to section 37 of the RTI Act.

<sup>7</sup> Under section 89(2) of the RTI Act, a person whose views were sought under section 37 of the RTI Act may apply to participate in the external review. As neither third party objected to disclosure or sought to participate in this external review, the identities of these third parties are not disclosed.

<sup>8</sup> As I did not consult with this other party and they are not a participant in this external review, their identity is not disclosed.

<sup>9</sup> Section 21 of the HR Act.

<sup>10</sup> *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [11].

<sup>11</sup> Section 87(1) of the RTI Act.

<sup>12</sup> Including that it was entitled to refuse access under section 47(3)(a) of the RTI Act, on the basis the information in issue comprised exempt information under schedule 3, sections 6(a), 7, 8(1) and 10(1)(d) of the RTI Act.

<sup>13</sup> By email dated 10 June 2020.

13. For this reason, the issue to be determined in this review is whether Council has discharged its onus of demonstrating that disclosure of the information in issue would, on balance, be contrary to the public interest.

### Relevant law

14. Under the RTI Act, an individual has a right to access documents of an agency.<sup>14</sup> Although the RTI Act is to be administered with a pro-disclosure bias,<sup>15</sup> the right of access is subject to certain limitations, including grounds for refusal of access.
15. Access to information may be refused where disclosure would, on balance, be contrary to the public interest.<sup>16</sup> The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest and explains that a decision maker must take the following steps in deciding the public interest:<sup>17</sup>
- 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.

### Findings

#### *Irrelevant factors*

16. Council has raised a number of concerns about the applicant's reason for seeking the information in issue.<sup>18</sup> Council submits that disclosing the information in issue '*would be misleading to any third party considering it now*'<sup>19</sup> and would only cause the public to demand further confidential information that could not be disclosed and '*therefore leave the public in even further confusion and unrest*'.<sup>20</sup>
17. Under the RTI Act, disclosing information that could reasonably be expected to cause a loss of confidence in Government, result in the applicant misinterpreting or misunderstanding the information or result in mischievous conduct by the applicant are explicitly irrelevant factors in deciding the public interest.<sup>21</sup> Accordingly, Council's concerns and submissions referenced above are irrelevant and I have not taken them, or any other irrelevant factors, into account in making my decision.

#### *Factors favouring disclosure*

18. I consider that disclosure of the information in issue could reasonably be expected to:
- promote open discussion of public affairs and enhance the Government's accountability;<sup>22</sup> and
  - ensure effective oversight of public funds.<sup>23</sup>

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<sup>14</sup> Section 23 of the RTI Act.

<sup>15</sup> Section 44 of the RTI Act.

<sup>16</sup> Section 47(3)(b) of the RTI Act.

<sup>17</sup> Section 49(3) of the RTI Act.

<sup>18</sup> For example, Council submits that the applicant's primary objective for seeking the information in issue '*would be aimed at attempting to bring Council into disrepute*' (submissions dated 15 November 2019).

<sup>19</sup> Submissions dated 5 December 2019.

<sup>20</sup> Submissions dated 7 February 2020.

<sup>21</sup> Schedule 4, part 1, items 1, 2 and 3 of the RTI Act.

<sup>22</sup> Schedule 4, part 2, item 1 of the RTI Act.

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

19. Council is a public body set up to provide services to the local community and receives funding from ratepayers. As such, it is reasonable to expect that Council conducts itself in an open, accountable and transparent way. Council is also accountable to its local community for the actions that it has taken in commencing or defending legal proceedings and for the costs associated with those decisions.
20. Council contests that disclosure of the information in issue would promote public discussion about Council's expenditure on legal fees and considers that, without '*the fullness of data*' disclosure of the information in issue could reasonably be expected to '*skew ... rather than enhance Council's accountability*'.<sup>24</sup> Council also argues that '*[e]ffective oversight of the expenditure of public funds is provided by reference to Council's published Annual Report*'<sup>25</sup> and that it would be necessary to disclose information in addition to the information in issue '*to allow fully informed scrutiny*'.<sup>26</sup>
21. There is a significant level of community interest in the amount of ratepayer funds being spent in various legal proceedings, as evidenced by a number of public statements Council has made concerning its expenditure on legal fees.<sup>27</sup> Council's submissions also reference various instances of media commentary (including social media) about its expenditure on legal fees.<sup>28</sup> I also note that Council is not prevented by this decision under the RTI Act from disclosing any other information that it considers may add context or allow fully informed scrutiny of the information in issue.
22. Given the nature of the information in issue, I am satisfied its disclosure could reasonably be expected to:
  - enhance Council's accountability and transparency by demonstrating how it tracks expenditure on legal fees in the various proceedings in which it was involved; and
  - ensure effective oversight of expenditure of public funds and enable public scrutiny of, and discussion about, the costs involved in Council taking and/or defending court proceedings.
23. Given the particular information in issue, I consider that these factors carry significant weight in favour of disclosure.

### **Factors favouring nondisclosure**

#### **Business affairs**

24. The RTI Act recognises that the public interest will favour nondisclosure of information where disclosure could reasonably be expected to:
  - prejudice the private, business, professional, commercial or financial affairs of entities<sup>29</sup>
  - prejudice business affairs of an agency or person;<sup>30</sup> and
  - cause a public interest harm because it would disclose information concerning the business, professional, commercial or financial affairs of an agency or another person

<sup>24</sup> Submissions received 21 February 2020.

<sup>25</sup> Submissions received 21 February 2020.

<sup>26</sup> Submissions dated 27 March 2020.

<sup>27</sup> For example, refer to the Mayor's statement set out at item 2.1 of Council's minutes of the meeting held 26 September 2019. The minutes are accessible at: <[www.cassowarycoast.qld.gov.au/documents/1422210/47011632/2019-09-26%20Local%20Government%20Meeting%20Minutes](http://www.cassowarycoast.qld.gov.au/documents/1422210/47011632/2019-09-26%20Local%20Government%20Meeting%20Minutes)>.

<sup>28</sup> In submissions dated 15 November 2019, Council noted that '*legal fees spent in the course of litigation that council is involved in has been the topic of much conversation*'.

<sup>29</sup> Schedule 4, part 3, item 2 of the RTI Act.

<sup>30</sup> Schedule 4, part 3, item 15 of the RTI Act.

and could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of this type to government (business harm factor).<sup>31</sup>

25. The information in issue records the totals of amounts paid, at a point in time, to particular law firms in respect of certain legal matters in which Council is involved. The recorded information does not reveal the lawyers' fee structure or discounts applied.<sup>32</sup> It is unclear how any prejudice to, or adverse effect on, the private, business and professional affairs of any entity or individual could reasonably be expected to arise from disclosure of the information in issue. On this basis, I can only attribute low weight to these factors favouring disclosure.

### Personal information and privacy

26. A factor favouring nondisclosure will arise if disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy.<sup>33</sup> The RTI Act also recognises that disclosing personal information<sup>34</sup> of a person could reasonably be expected to cause a public interest harm.<sup>35</sup>
27. The information in issue includes the names of individuals. Council contends that these individuals would be concerned if their identities were disclosed.<sup>36</sup> Council also submits that, as a result of recent developments in certain legal proceedings, these personal information and privacy factors apply and deserve significant weight.<sup>37</sup>
28. The identity of individuals involved in legal proceedings with Council are disclosed in decisions that have been published in respect of those legal proceedings. The information in issue does not reveal any further personal information about these individuals. I also consulted with some of these individuals during the review and those consulted individuals raised no objection to the disclosure of their names. In these circumstances, I consider that very little prejudice or harm would result from disclosure of the names of these individuals and I therefore attribute low weight to the factors favouring nondisclosure which relate to personal information and privacy.<sup>38</sup>

### Confidential information

29. Under the RTI Act, the public interest also favours nondisclosure if:
- disclosing information could reasonably be expected to prejudice an agency's ability to obtain confidential information;<sup>39</sup> and
  - the information is of a confidential nature that was communicated in confidence and disclosure could reasonably be expected to prejudice the future supply of information of this type.<sup>40</sup>

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

<sup>32</sup> In *Price and Department of Justice and Attorney-General* (unreported, Queensland Information Commissioner, 12 March 2002) at [44], the Information Commissioner found that disclosure of information about lawyers' billing structure and hourly charge-out rates might reasonably be expected to assist the lawyers' competitors to compete with them more effectively in the legal services market generally and would therefore be contrary to the public interest to disclose.

<sup>33</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>34</sup> 'Personal information' is defined in section 12 of the IP Act as '*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*'.

<sup>35</sup> Schedule 4, part 4, section 6(1) of the RTI Act.

<sup>36</sup> Submissions received 21 February 2020. Council made similar submissions on 27 March 2020.

<sup>37</sup> Submissions dated 27 March 2020 and 10 June 2020.

<sup>38</sup> Schedule 4, part 3, item 3 and schedule 4, part 4, section 6 of the RTI Act.

<sup>39</sup> Schedule 4, part 3, item 16 of the RTI Act.

<sup>40</sup> Schedule 4, part 4, section 8(1) of the RTI Act.

30. It is a matter of public record that Council and the specified parties are involved in various legal proceedings.<sup>41</sup> However, there is nothing before me to suggest that the information in issue, as it appears in the spreadsheet, is itself in the public domain.<sup>42</sup>
31. Council submits that:
- a copy of the spreadsheet *'as it was then was only provided, in a confidential meeting, at the formal request of a Councillor to be briefed'*<sup>43</sup>
  - the spreadsheet forms part of the material Council has submitted to its insurers concerning its claim for reimbursement;<sup>44</sup> and
  - the information in issue is confidential and the spreadsheet *'has been maintained so as to use as a tool to communicate between [Council's] legal advisers and brokers'*.<sup>45</sup>
32. These submissions confirm that the apparent purpose of the spreadsheet containing the information in issue was to enable Council to track its legal costs and to share that information with Council's insurers. It is not, on its face, marked as being confidential. However, even if some of the information in issue could be characterised as confidential information, for these factors favouring nondisclosure to apply, I must also be satisfied that disclosure could reasonably be expected to prejudice Council's ability to obtain confidential information or the future supply of this type of information.
33. Despite being prompted to explain its position in this regard on external review, Council has not provided evidence to demonstrate that the information was clearly communicated in confidence or that disclosure would prejudice the future supply of the same information. As I am not satisfied that disclosure of the information in issue would significantly impact either the ability of Council to obtain confidential information or the future supply of similar information, I afford these factors favouring nondisclosure low weight.

### **Administration of justice**

34. Factors favouring nondisclosure arise where disclosing information could reasonably be expected to impede the administration of justice, generally or for a person.<sup>46</sup> Council asserts<sup>47</sup> that, due to material filed in certain legal proceedings involving Council and specified parties,<sup>48</sup> disclosure of any information about those proceedings could reasonably be expected to impede the administration of justice for a person.
35. Again, Council has not provided a clear explanation for how it considers disclosing information which comprises a summary of legal costs incurred by Council, could be expected to impede the administration of justice for any person. Accordingly, I do not consider that these factors apply, and even if they did, carry only low weight.

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<sup>41</sup> A number of Council's published meeting minutes refer to legal proceedings in which Council is a party and the issue of legal fees being spent in those proceedings. Additionally, decisions made in legal proceedings involving Council may also be accessed via <<https://www.sclqld.org.au/caselaw>> and <<https://www.fedcourt.gov.au/digital-law-library/judgments/latest>>. To avoid identifying the parties specified in the narrowed external review application, I am unable to provide further details about these minutes and decisions in these reasons.

<sup>42</sup> Although Council submits that the actual dollar amount of Council's legal fees has been the subject of evidence shared in the course of litigation.

<sup>43</sup> Submissions dated 7 February 2020. It is noted that this confidential meeting was identified by Council as being a Councillor Information Session.

<sup>44</sup> Submissions dated 15 November 2019.

<sup>45</sup> Submissions dated 7 February 2020.

<sup>46</sup> Schedule 4, part 3, items 8 and 9 of the RTI Act.

<sup>47</sup> Submissions dated 27 March 2020.

<sup>48</sup> To avoid identifying the parties specified in the narrowed external review application, I am unable to provide further details about the material provided by Council in support of this submission, however, I have carefully considered that material, including the court material provided by Council on 10 June 2020.

### **Other factors favouring nondisclosure**

36. Council bears the onus in this review of establishing that disclosing the information in issue would, as it contends, be contrary to the public interest. However, for completeness, I have considered all factors listed in schedule 4, parts 3 and 4 of the RTI Act, and I can identify no other public interest considerations favouring the nondisclosure of the information in issue.<sup>49</sup>
37. On external review Council provided OIC with several court records and orders in related legal proceedings. These records were initially referenced in Council's submissions of 27 March 2020 and then provided to OIC on 10 June 2020. It is not clear how the release of the information in issue here is affected by the matters discussed in these records. I am not satisfied that the information provided with respect to these related legal proceedings raises any further factors favouring nondisclosure of the information in issue in this matter.<sup>50</sup>

### **Balancing the public interest**

38. For the reasons set out above, it is my view that the factors favouring disclosure of the information in issue are deserving of significant weight. Disclosure of this information enhances Council's accountability and transparency and ensures effective oversight of expenditure of public funds by enabling public scrutiny of the costs involved in Council taking and/or defending court proceedings.
39. I am also satisfied that disclosure of the information in issue is not likely to impact the business affairs of identified law firms or the privacy of specified individuals in any significant way and, on this basis, I afford low weight to the nondisclosure factors relating to business affairs and personal information and privacy. I also afford low weight to the factors concerning Council's ability to obtain confidential information.
40. On balance, I find that the factors favouring disclosure outweigh the factors favouring nondisclosure. Accordingly, I find that disclosure of the information in issue would not, on balance, be contrary to the public interest.

### **DECISION**

41. I set aside Council's decision as I am not satisfied that Council has discharged its onus of demonstrating access to the information in issue can be refused on the basis that disclosure would, on balance, be contrary to the public interest.
42. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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**S Martin**  
**Assistant Information Commissioner**

**Date: 18 June 2020**

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<sup>49</sup> In the event that further relevant factors exist in favour of nondisclosure, I am satisfied that there is no evidence before me to suggest that any would carry sufficient weight to outweigh the significant weight that I have afforded to the public interest factors that favour the disclosure of the information in issue.

<sup>50</sup> I also note that Council, while providing copies of the relevant court records and orders, did not identify any specifically relevant public interest harm or nondisclosure factors.

## APPENDIX

### Significant procedural steps

Date	Event
11 October 2019	OIC received the application for external review.
24 October 2019	OIC notified the applicant and Council that it had accepted the external review application and asked Council to provide information.
25 October 2019	OIC received the requested information from Council.
31 October 2019	OIC wrote to the applicant to confirm the narrowed scope of the application.
15 November 2019	OIC received Council's submissions.
20 November 2019	OIC requested further information from Council.
5 December 2019	OIC received Council's further submissions.
18 December 2019	OIC conveyed a preliminary view to Council and invited Council to provide further submissions if it did not accept the preliminary view.
21 February 2020	OIC received submissions Council had obtained from another party.
2 March 2020	OIC conveyed a further preliminary view to Council and invited Council to provide further submissions if it did not accept the preliminary view.
27 March 2020	OIC received Council's further submissions and its notification that a third party wished to be consulted.
30 March 2020	OIC sought the disclosure views of a third party, who confirmed they did not have any objection to disclosure.
31 March 2020	OIC sought the disclosure views of another third party.
3 June 2020	OIC received Council's further submissions.
10 June 2020	OIC received Council's further submissions (including supporting information) and Council confirmed that it relied on section 47(3)(b) of the RTI Act as the basis for refusal of access.