



Decision and Reasons for Decision

Citation:	<i>Kroymans Developments Pty Ltd and Cairns Regional Council [2024] QICmr 60 (14 November 2024)</i>
Application Number:	317214
Applicant:	Kroymans Developments Pty Ltd ACN 636 101 687
Respondent:	Cairns Regional Council
Decision Date:	14 November 2024
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST INFORMATION - information relating to the agency's decision to enter into an Infrastructure Agreement with the applicant - email about risks and options before Council meeting - meeting paper presented to Councillors - audio of Council meeting closed under section 254J of the <i>Local Government Regulation 2012</i> (Qld) - casual comment made by Councillor in audio of closed Council meeting - 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 Cairns Regional Council (**Council**)¹ under the *Right to Information Act 2009* (Qld) (**RTI Act**) for:²

Minutes, file notes or records of Council meeting regarding the Rocky Creek Stage 1 Early Plan Sealing Infrastructure Agreement between [Council] and [the applicant].

2. As Council processed the application, the applicant specifically confirmed that the scope of its application included the following:³

... an audio recording of the closed session meeting held on Wednesday 19 January 2022 regarding the approval of the Infrastructure Agreement Amendment.

3. Council located information relevant to the application and decided to⁴ allow access to 983 pages; refuse access to a 16-minute audio recording,⁵ 68 pages⁶ and parts of 137

¹ On 3 November 2022.

² For the timeframe 1 January 2022 to 3 November 2022.

³ Email from applicant to Council on 25 January 2023.

⁴ Decision dated 6 March 2023.

pages;⁷ and delete information from parts of five pages on the basis that it was irrelevant to the scope of the application.⁸

4. The applicant then applied to the Office of the Information Commissioner (**OIC**) for an external review of Council's decision.⁹
5. For the reasons set out below, I set aside Council's decision and find that disclosure of the remaining information in issue would not, on balance, be contrary to the public interest. As no grounds on which access may be refused under the RTI Act have been established, the applicant is therefore entitled to access this information.

Background

6. The applicant is a developer and carries on business in the local government area of Council.¹⁰ One of the applicant's current developments is a development at a location known as Rocky Creek.
7. The applicant made a request to Council for early plan sealing for Stage 1 of the Rocky Creek development. Council's website describes early plan sealing as:¹¹

an option for some developments to enable an early approval of the Plan of the Subdivision, prior to the full completion of works required for the development, at Council's discretion.

8. Information that is publicly available on Council's website demonstrates that the applicant's request was considered by Council during a closed session of an Ordinary Meeting on 19 January 2022 (**Meeting**)¹² and Council unanimously resolved to enter into an infrastructure agreement (**Infrastructure Agreement**) with the applicant which allowed for early plan sealing despite the applicant not having yet complied with certain requirements.¹³
9. Council's website notes requirements that an applicant satisfy in order for Council to consider early plan sealing, including:¹⁴
 - paying an Uncompleted Works Bond of 1.5 times (ie 150%) the estimated costs of the uncompleted works
 - paying infrastructure charges prior to the approval of the 'Early Plan Seal Plan of Subdivision'; and

⁵ Council's decision states that it refused access to the audio recording under schedule 4, part 3, item 22 of the RTI Act.

⁶ Council states that it refused access to 40 pages under schedule 3, section 7 of the RTI Act, one page under schedule 4, part 3, item 20 of the RTI Act, and 27 pages under schedule 4, part 3, item 22 of the RTI Act.

⁷ Council states that it refused access to parts of 135 pages under schedule 4, part 4, section 6(1) of the RTI Act, part of one page under schedule 4, part 3, item 2 of the RTI Act, and part of one page under schedule 4, part 3, item 20 of the RTI Act.

⁸ Pursuant to section 73 of the RTI Act. Council's decision also stated that 19 pages located in its searches were, once considered in light of the terms of the application, outside its scope.

⁹ External review application dated 30 March 2023.

¹⁰ Ibid.

¹¹ Council's website *Early Plan Sealing* available at <https://www.cairns.qld.gov.au/property-and-business/op-works/early-plan-sealing> (accessed on 31 October 2024).

¹² Council's website *Ordinary Meetings*. See agenda for ordinary meeting available at <https://www.cairns.qld.gov.au/council/meetings/ordinary-meeting/19-january-2022> (accessed on 31 October 2024) and the closed session table of contents available at https://www.cairns.qld.gov.au/_data/assets/pdf_file/0008/496961/Closed-Session-Table-of-Contents_Ordinary-Meeting-19-January-2022.pdf (accessed on 31 October 2024).

¹³ Council's website *Minutes Ordinary Meeting 19 January 2022* available at https://www.cairns.qld.gov.au/_data/assets/pdf_file/0007/497410/Minutes-Ordinary-Meeting-19-January-2022.pdf - see pages 17 and 18 (accessed on 31 October 2024).

¹⁴ Above n 11 and Council's *Guideline – Approval of Early Seal Plan of Subdivision* available at https://www.cairns.qld.gov.au/_data/assets/pdf_file/0006/587112/GuidelineEarlyPlanSealing_PlanSubdivision.pdf (accessed on 31 October 2024).

- declaring there are no significant external infrastructure works to be undertaken as part of that stage of development.
10. The Minutes from the Meeting¹⁵ record that Council unanimously resolved to enter into an Infrastructure Agreement allowing for early plan sealing of Stage 1 of the Rocky Creek development despite the applicant having not yet complied with eight development approval conditions, and subject to amendments to the draft agreement provided to the Meeting to reflect that Council agreed to:
- the value of the Uncompleted Works Bond being reduced from 150% to 110% of the value of the external works
 - payment of the infrastructure charges being deferred; and
 - amendments to the applicant's obligations to have the external water, external sewer and interim external road works completed prior to works acceptance.¹⁶

Reviewable decision

11. The decision under review is Council's decision dated 6 March 2023.

Evidence considered

12. The evidence, submissions, legislation and other material I have considered in reaching my decision are set out in these reasons (including footnotes and Appendix).
13. Decision-makers must have regard to the *Human Rights Act 2019* (Qld) (**HR Act**), as section 11(1) of the HR Act provides that '[a]ll **individuals** in Queensland have human rights' (my emphasis). While the HR Act does not apply to the applicant (as it is a company), I have had regard to the HR Act in relation to the individual Councillor who I discuss further below. I consider that in observing and applying the law prescribed in the RTI Act, a decision-maker will be '*respecting and acting compatibly with*' the rights prescribed in the HR Act.¹⁷ In this regard, I note Bell J's observations 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.*'¹⁸

Information in issue

14. During the external review, Council released¹⁹ its officers names, work email addresses and work landline telephone numbers to the applicant, on the basis that the information comprises the routine personal work information of those officers and any prejudice or public interest harm relating to disclosure of this information would, in the circumstances, be minimal. Council also released²⁰ some information which it accepted it had waived legal professional privilege. In addition, the applicant confirmed that it did not wish to pursue access to the remaining information that was subject to a claim of legal professional privilege, the names and direct contact details of individuals other

¹⁵ Above n 13.

¹⁶ In particular that the external road and drainage works were required to have reached works acceptance within twelve months of the Infrastructure Agreement being signed.

¹⁷ *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]. I note that OIC's approach to the HR Act set out in this paragraph was considered and endorsed by the Queensland Civil and Administrative Tribunal in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23] (where Judicial Member McGill saw 'no reason to differ' from this position).

¹⁸ *XYZ* at [573].

¹⁹ On 15 February 2024.

²⁰ On 27 March 2024.

than Council officers, a portion of about 10 seconds of an audio recording²¹ comprising a reference to the personal information of an individual other than a Council officer, and information that Council had deleted on the basis it was irrelevant.²² Accordingly, this information is no longer in issue and will not be considered in this decision.

15. The remaining **Information in Issue** comprises 41 pages and an audio recording. While I am constrained in the level of detail I can provide,²³ the Information in Issue can generally be described as:
- A. two documents related to the Meeting, namely –
 - **Meeting Paper** – a document²⁴ that appears to have been provided to the Councillors for the Meeting, which provides background information about the applicant's request and negotiations with Council,²⁵ and attaches a draft copy of the Infrastructure Agreement; and
 - **Audio** – an audio recording from the closed session of the Meeting,²⁶ which is approximately sixteen minutes in length and records a Council officer explaining the information in the Meeting Paper to attendant Councillors and a subsequent discussion of that information.
 - B. **Email** – an internal email,²⁷ sent between Council planning officers a number of weeks before the Meeting, in which a planning officer discusses ways to reply to the applicant's requests regarding terms of the Infrastructure Agreement and seeks the views of the Interim Manager of Planning; and
 - C. **Councillor's comment** – a portion of about five seconds of the Audio²⁸ comprising a comment made by a particular Councillor.

Issue for determination

16. The issue for determination is whether the Information in Issue comprises information the disclosure of which would, on balance, be contrary to the public interest.²⁹

Relevant law

17. The primary object of the RTI Act is to give a right of access to information, in the government's possession or under the government's control unless, on balance, it is contrary to the public interest to give the access.³⁰ The Act is to be applied and interpreted to further this primary object.³¹
18. Section 23 of the RTI Act gives effect to the Act's primary object, by conferring a right to be given access to documents. This right is subject to the RTI Act,³² including

²¹ Namely, the Audio described in the next paragraph of this decision.

²² Email from OIC to applicant dated 3 June 2024, email from applicant to OIC dated 11 June 2024 and letter from applicant to OIC dated 13 June 2024.

²³ Section 108(3) of the RTI Act.

²⁴ Pages 1138-1176 of the documents located by Council.

²⁵ Set out in a table as the applicant's representations and the Council officer's assessment of those representations.

²⁶ At 1:47:35 to 2:03:45 of a 2:09:40 recording of the entire Council meeting on 19 January 2022 that Council provided to OIC, **except for** the information at 1:57:04 to 1:57:12 which comprises a reference to the personal information of a non-public sector individual. On 11 June 2024, the applicant accepted my view that disclosure of this information would, on balance, be contrary to the public interest, and agreed not to pursue access to it.

²⁷ Pages 1-2 of the documents located by Council.

²⁸ At 02:03:15 to 02:03:20 of the Audio.

²⁹ Section 47(3)(b) of the RTI Act.

³⁰ Section 3(1) of the RTI Act.

³¹ Section 3(2) of the RTI Act.

³² Section 23(1) of the RTI Act.

grounds on which access may be refused.³³ These grounds relevantly allow an agency to refuse access to information, to the extent that it comprises information disclosure of which would, on balance, be contrary to the public interest.³⁴ The grounds are to be interpreted narrowly,³⁵ and the RTI Act is to be administered with a pro disclosure bias.³⁶

19. In deciding whether disclosure of information would, on balance, be contrary to the public interest,³⁷ the RTI Act requires a decision-maker to:³⁸
 - 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.
20. Schedule 4 of the RTI Act contains non-exhaustive lists of factors that may be relevant in determining where the balance of public interest lies in a particular case. I have considered these lists, together with all other relevant information, in reaching my decision.
21. In a review of this kind, the agency *'who made the decision under review has the onus of establishing that the decision was justified or that the information commissioner should give a decision adverse to the applicant'*.³⁹ Council therefore bears the onus in this review.

Findings

22. As noted at paragraph 19 above, the RTI Act requires a decision-maker to undertake certain steps to determine whether disclosure of information would, on balance, be contrary to the public interest. Council's decision does not demonstrate that these steps were followed. While the decision identifies the factors favouring *nondisclosure* that Council considers to be applicable, it does not identify any factors favouring disclosure and, as a result, does not balance all relevant factors against one another to decide where the balance of the public interest lies.
23. In deciding whether disclosure of the Information in Issue would, on balance, be contrary to the public interest, I have taken no irrelevant factors into account.
24. I will firstly address A. the Meeting Paper and Audio, then B. the Email, and finally C. the Councillor's Comment.

A. Meeting Paper and Audio

³³ Section 47 of the RTI Act.

³⁴ Section 47(3)(b) and 49 of the RTI Act.

³⁵ Section 47(2)(a) of the RTI Act.

³⁶ Section 44 of the RTI Act.

³⁷ 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, although there are some recognised public interest considerations that may apply for the benefit of an individual: Chris Wheeler, 'The Public Interest: We Know It's Important, But Do We Know What It Means' (2006) 48 *AIAL Forum* 12, 14.

³⁸ Section 49 of the RTI Act.

³⁹ Section 87(1) of the RTI Act.

Public interest factors favouring disclosure

25. The applicant submits that disclosure could reasonably be expected to:⁴⁰
 - a. promote public discussion of affairs⁴¹ and enhance Council's accountability⁴²
 - b. ensure effective oversight of expenditure of public funds⁴³
 - c. allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official⁴⁴
 - d. reveal or substantiate that an agency or official has engaged in misconduct⁴⁵
 - e. advance fair treatment of individuals and other entities in accordance with the law and their dealings with Council;⁴⁶ and
 - f. reveal the reason for a government decision and any background or contextual information that informed the decision.⁴⁷
26. I will therefore consider these factors, together with the general public interest in promoting access to government-held information⁴⁸ and the public interest in informing the community of government operations.⁴⁹
27. The transparency and accountability of Council meetings is important, as they are the principal decision-making forum for local government. Given the applicant did not meet Council's usual requirements for Council to consider whether early plan sealing was an option,⁵⁰ it is, in my opinion, even more important that Council is transparent and accountable about the reasons that it decided to enter into the Infrastructure Agreement with the applicant. Disclosure of the information would go some way to achieving this.
28. In addition, disclosure of the information would provide background information in relation to Council's decision. Also, noting the extent to which the information includes a discussion of the risks to Council in entering into the Infrastructure Agreement and any mitigating steps taken by Council, I consider that disclosure would inform the community of Council's operations and contribute to informed debate on an important issue.
29. There is a strong public interest in ensuring government in Queensland, including local government, is conducted as transparently as possible. This is particularly the case in this review, noting the key role local governments play in ensuring that development proceeds in a way which meets housing needs while also promoting community amenity, and also noting the corruption risks that have, from time to time, arisen in relation to this role.⁵¹ I therefore afford the factors at a. and f. relating to informing the community of government operations⁵² significant weight.

⁴⁰ Letter to OIC dated 30 March 2023.

⁴¹ Schedule 4, part 2, item 2 of the RTI Act.

⁴² Schedule 4, part 2, item 1 of the RTI Act.

⁴³ Schedule 4, part 2, item 4 of the RTI Act.

⁴⁴ Schedule 4, part 2, item 5 of the RTI Act.

⁴⁵ Schedule 4, part 2, item 6 of the RTI Act.

⁴⁶ Schedule 4, part 2, item 10 of the RTI Act.

⁴⁷ Schedule 4, part 2, item 11 of the RTI Act.

⁴⁸ Implicit, for example, in the preamble, and sections 3 and 44 of the RTI Act.

⁴⁹ Schedule 4, part 2, item 3 of the RTI Act.

⁵⁰ As noted at paragraphs 9 and 10 above.

⁵¹ As noted by the Crime and Corruption Commissioner in *Common corruption risks in local government* available at <https://www.ccc.qld.gov.au/local-government-councillor-resources/common-corruption-risks-local-government> (accessed on 31 October 2024).

⁵² Schedule 4, part 2, items 1, 2, 3 and 11 of the RTI Act.

30. The information that is publicly available, as referred to at paragraph 10, does not refer to any expenditure of public funds. It only refers to the applicant's funds, insofar as it records that the applicant was required to provide an Uncompleted Works Bond as part of entering into the Infrastructure Agreement, albeit at a reduced rate to what Council would usually require. In the absence of any material before me to suggest that the decision of Council to enter into the Infrastructure Agreement involved the expenditure of public funds, I do not consider that the factor at b. above applies in the circumstances of this matter.
31. It is not my role to investigate Council's decision to enter into the Infrastructure Agreement or the conduct of Councillors or Council officers in this respect. My role is limited to undertaking merits review of Council's decision on access to information under the RTI Act. However, the RTI Act recognises that factors favouring disclosure may arise when information shows misconduct or enables inquiry into possible deficiencies in conduct, as referred to at c. and d. above. I have carefully reviewed the information and I am satisfied that, given its nature, these factors do not apply. However, if I am wrong and they do apply, I consider that they would warrant only low weight.
32. In respect of the application of the factor at e., I note that Council's decision to enter into the Infrastructure Agreement on less onerous terms than its usual requirements was generally favourable to the applicant. On the other hand, I note that, at certain points in the Audio, the Councillors are recorded discussing requirement/s that they understood the applicant would prefer not to be included in the agreement. Notwithstanding any actual or perceived reservations held by the applicant in this regard, I note that Council and the applicant subsequently entered into the Infrastructure Agreement. In these circumstances, and noting the content of the information itself, I cannot see how disclosure to the applicant could, to any discernible degree, advance fair treatment of the applicant in its future dealings with Council. In these circumstances, I consider that this factor should be afforded only low weight.

Public interest factors favouring nondisclosure

33. Council's decision relied on the factor favouring nondisclosure that disclosure is prohibited by an Act⁵³ – namely, section 254J of the *Local Government Regulation 2012* (Qld) (**LG Regulation**), which allows a Council meeting to be closed in certain circumstances. During the external review, most of Council's submissions related to this factor, and/or a nondisclosure factor relating to closed meetings of Council.
34. Council's submissions also raised the following, both in support of its position that the factor about closed Council meetings warranted high weight, and also as factors in and of themselves:
 - prejudice to Councillors' privacy⁵⁴ and public interest harm through disclosing their personal information⁵⁵
 - prejudice to Council's deliberative processes⁵⁶ and public interest harm through disclosure of deliberative process information;⁵⁷ and
 - prejudice to Council's business affairs⁵⁸ and competitive commercial activities.⁵⁹

⁵³ Pursuant to schedule 4, part 3, item 22 of the RTI Act.

⁵⁴ Schedule 4, part 3, item 3 of the RTI Act.

⁵⁵ Schedule 4, part 4, section 6(1) of the RTI Act.

⁵⁶ Schedule 4, part 3, item 20 of the RTI Act.

⁵⁷ Schedule 4, part 4, section 4(1) of the RTI Act.

⁵⁸ Schedule 4, part 3, item 15 of the RTI Act.

Closed Council meetings

35. While Council meetings are generally open to the public,⁶⁰ Council may resolve to close all or part of a meeting if its Councillors or members consider doing so necessary to discuss specific matters referred to in the LG Regulation. In the circumstances relevant to this review, Council resolved to close part of the Meeting⁶¹ under section 254J(3)(g) of the LG Regulation, to discuss:

negotiations relating to a commercial matter involving the local government for which a public discussion would be likely to prejudice the interests of the local government

36. During the external review, OIC informed Council of its preliminary view that this factor favouring nondisclosure does not apply to the Meeting Paper or Audio. In this regard, OIC observed that while section 254J of the LG Regulation provides a discretion for Council to resolve that all or part of a meeting of local government may be closed to the public, it does not provide any restrictions or prohibitions on disclosure of the information discussed in the closed session – and, accordingly, the prohibited by an Act factor⁶² relied on by Council was not enlivened.⁶³
37. Initially, Council's response was simply that it was not agreeable to disclosing the Audio, as the discussions in the Meeting 'were 'closed' for a reason and consequentially [were] conducted in a manner not intended for public release'.⁶⁴ Later, Council asserted that:⁶⁵

... the principles of transparency and openness have already been considered and accounted for in the drafting of 254J of the [Regulation], which gives Council power to preserve the confidentiality of its deliberations in certain circumstances.

38. However, in the same submissions, Council accepted that there is nothing in the Regulation that 'strictly prevents, at law, the disclosure of material from a closed meeting', thereby acknowledging that the prohibited by an Act factor⁶⁶ does not apply.
39. Council then raised another factor favouring nondisclosure as follows:⁶⁷

... the narrow circumstances in which the [LG Regulation] permits a departure from the default position that a Council meeting should be open to the public, demonstrates a public interest in keeping the material discussed in a closed meeting confidential, mitigating against an RTI release.

...

... the [LG Regulation] recognises that there are limited circumstances in which the public interest in the transparent and open decision making of local governments will be outweighed by the public interest in ensuring confidentiality in some aspects of Council's operations.

...

⁵⁹ Schedule 4, part 3, item 17 of the RTI Act.

⁶⁰ Pursuant to section 254I of the LG Regulation.

⁶¹ Closing of the meeting is recorded at 1:39:00 of the 2:09:40 recording of the entire Council meeting on 19 January 2022 that Council provided to OIC, prior to discussion of item 1 on the closed session table of contents noted at n 13 above; and moving to open session is recorded at 2:03:45. Both of these resolutions are noted at page 16 of the Minutes.

⁶² Schedule 4, part 3, item 22 of the RTI Act.

⁶³ Letter from OIC to Council dated 23 August 2023.

⁶⁴ Email to OIC dated 6 September 2023.

⁶⁵ Letter to OIC dated 8 November 2023.

⁶⁶ Pursuant to schedule 4, part 3, item 22 of the RTI Act.

⁶⁷ Letter to OIC dated 8 November 2023.

The exercise of Council's power to close this meeting due to the commercial negotiations to be discussed and the likely prejudice that would result from those matters being discussed in a public forum is important context to the consideration of the public interest factors and potential prejudice in this case. To disclose an audio recording of the matters discussed by Council in a closed session, where the session was closed due to the likely prejudice that would result from those matters being in the public domain, would undermine the purpose and intent of section 254J of the [LG Regulation] which is already drafted tightly to constrain circumstances in which a meeting can be closed, having regard to the public interest.

To conclude that it is within the public interest to release material from a closed session of Council would undermine the very purpose of the closed meeting process, rendering it effectively useless – contrary to the intention of the drafters of the [Local Government Act 2009 (Qld)] and [the LG Regulation]. Council in serving the public needs to be able to discuss frankly and confidentially the limited matters identified in section 254J of the [LG Regulation] it would harm the public interest to remove this ability by compelling later disclosure of discussions.

40. I am satisfied that, while section 254J of the LG Regulation does not specifically prohibit disclosure of information, and therefore does not raise the prohibited by an Act factor, it does raise a nondisclosure factor relating to closed Council meetings.⁶⁸
41. In terms of the weight this factor should be afforded regarding the Meeting Paper and Audio, I note that during the external review, OIC conveyed a preliminary view to Council that this factor should be given low weight for the following reasons.⁶⁹
 - more than two years have passed since the proposed Infrastructure Agreement was discussed and Council's resolution was passed
 - information relating to its resolution to enter into the Infrastructure Agreement can be found on its website, as noted at paragraph 10 above
 - Council's submissions indicate that the Infrastructure Agreement has been entered into; and
 - Council has not explained how the disclosure of the Audio could be expected to cause 'harm to the public interest' or Council's ability to discuss the negotiation of commercial matters ahead of their finalisation.
42. In response, Council submitted⁷⁰ that the factor should be given substantial weight '... in recognition of Parliament having determined that local governments should have the ability to discuss certain matters (including negotiations relating to commercial matters involving the local government for which public discussion would likely prejudice the local government's interests) within closed meetings'. In this regard, Council submitted that the entire basis of the closed session is that it allows officers and Councillors to have 'frank, robust and transparent conversation[s] within the confines of the [Local Government Act 2009 (Qld)] and [the LG Regulation] protections'. Council also stated that, if the narrow-closed meeting protection afforded to local governments to discuss sensitive negotiations was undermined by the discussions being disclosed, local governments would not be able to have the robust and frank discussions needed to serve the public.

⁶⁸ This factor is not set out in schedule 4 of the RTI Act – however, the wording of section 49(3) of the RTI Act indicates that the factors listed in schedule 4 are not exhaustive. It has previously been considered in *Australian Broadcasting Corporation and Townsville City Council; Adani Mining Pty Ltd (Third Party) & Ors* [2019] QICmr 7 (12 March 2019) (**ABC**) at [141]-[144] and *Cook Shire Ratepayers and Residents Association Inc and Cook Shire Council* [2020] QICmr 38 (30 June 2020) at [54]-[56].

⁶⁹ Letter to Council dated 5 February 2024. While OIC's preliminary view only referred to the Audio, its reasoning applies equally to the Meeting Paper.

⁷⁰ Letter to OIC dated 27 February 2024.

43. Based on these submissions, I understand Council's position to be that the nondisclosure factor regarding closed Council meetings should be given substantial weight, simply by virtue of there having been a closed Council meeting. I also understand Council's position to be that the weight of this factor should be so significant that the public interest balancing test invariably results in a decision not to disclose – achieving, in effect, a de facto exemption.
44. Indeed, Council initially suggested⁷¹ an equivalence between information in closed Council meetings and information that is subject to legal professional privilege.⁷² Later, Council submitted⁷³ that disclosure of a discussion from a closed meeting would be akin to cabinet discussions being disclosable proximate to when the discussion occurred.⁷⁴
45. I am, however, satisfied that information relating to closed Council meetings cannot be equated with information that is subject to legal professional privilege. I also observe that the RTI Act's differing approaches to closed Council meetings and Cabinet meetings seem consistent with the respective entities' different constitutional / legislative underpinnings, party-political compositions and roles. I also note that changes have been made to the disclosure of Cabinet information under the RTI Act to support a proactive release of some Cabinet information.^{75,76}
46. More generally, I consider that the following observations of the Information Commissioner are pertinent:⁷⁷

... it is relevant to bear in mind that while in legislating section 275 of the LG Regulation^[78] Parliament may, as [the agency] decided, have recognised a 'public interest in ensuring that certain matters discussed by Council should not be publically disclosed', in enacting the RTI Act – particularly:

- *the right of access enshrined in section 23, and*
- *section 6, overriding any other provisions in other Acts prohibiting disclosure –*

Parliament has also determined that there is a prevailing public interest in enabling public access to information in the government's possession or under the government's control, including that in the possession or under the control of local governments. This is a right that has existed in Queensland in one enactment or another for more than 25 years, and one the existence of which I expect all local governments would be aware – such that they would appreciate that information discussed in closed session, insofar as it falls to be recorded in a document as defined in the RTI Act, may be subject to disclosure in accordance with that right.

47. Consistent with these observations, I do not accept Council's position, as set out at paragraphs 42 to 44 above. The weight of the nondisclosure factor relating to closed

⁷¹ Email to OIC dated 6 September 2023.

⁷² Which may qualify as exempt information under schedule 3, section 7 of the RTI Act.

⁷³ Letter to OIC dated 27 February 2024.

⁷⁴ In this respect Council referred to schedule 3, section 2(1) of the RTI Act.

⁷⁵ See sections 18A, 22A and schedule 3, section 2 of RTI Act, as added or amended by the *Information Privacy and Other Legislation Amendment Act 2023*, commencing on 1 March 2024, along with chapter 7.0 'Proactive release of Cabinet Material' of the *Cabinet Handbook* at <https://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/cabinet-handbook.aspx>.

⁷⁶ For the sake of completeness, while I understand that Council was suggesting that the Meeting Paper and Audio were equivalent to privileged information and Cabinet information, and therefore should be protected to the same degree – and not saying that they *actually* were privileged information or Cabinet information – I confirm that I am satisfied that neither of these documents qualifies as exempt information under schedule 3, section 2(1) or 7 of the RTI Act.

⁷⁷ *ABC* at [144] (footnotes omitted).

⁷⁸ A previous iteration of section 254J of the Regulation

Council meetings is not, in my opinion, automatically substantial and/or determinative simply because a closed meeting occurred. Rather, the weight may vary, depending on the nature of the information in issue regarding the particular closed meeting, what has occurred since, and the extent to which disclosure would prejudice (rather than preserve) the purpose of closing that meeting. In the present matter, where the Council meeting was closed under section 254J(3)(g) of the LG Regulation, the relevant purpose was to avoid a public discussion of negotiations relating to a commercial matter which would be likely to prejudice the interests of Council.

48. Council submitted⁷⁹ that 'prejudice', as referred to in section 254J(3)(g) of the LG Regulation, is *not* limited to negotiations on foot at the time of the Meeting, as this limitation is not apparent from the language of the section. This submission was made in response to OIC's comment⁸⁰ that section 254J(3)(g) appears to be directed at avoiding the discussion of ongoing negotiations in a public forum, because such discussion could prevent or delay finalisation of the negotiations, or perhaps disadvantage Council in them. To clarify, the intent of this comment by OIC was not to make a finding regarding the interpretation of 'prejudice' as used in section 254J(3)(g) (a matter regarding which it is unnecessary for me to make a finding). Rather, this comment was offered as part of explaining OIC's view as to why, in the particular circumstances of this review (where deliberations are complete, negotiations have concluded and the parties have entered into the Infrastructure Agreement), the relevant factor warrants only low weight.
49. Council submitted that⁸¹ prejudice to Council's interests in future negotiations (with the same or different parties, in relation to the same or similar topics) may well result from disclosure of the Meeting Paper and Audio. It considered that Council would be placed in a disadvantageous bargaining position (contrary to the public interest) if its views, preferences and negotiation approach⁸² were known to the parties it was negotiating with, but the reciprocal was not known. According to Council, planning decisions (including to enter into infrastructure agreements) are decisions that are made regularly and so proponents (developers) could easily study the deliberative processes to gain an upper hand in a negotiation, which would be to the detriment of Council's position.
50. While the RTI Act prevents me from providing a detailed explanation as to why Council agreed to enter into this particular Infrastructure Agreement when all of the conditions that it usually requires to consider early plan sealing had not been met,⁸³ I can say that it was because of an unusual set of factual circumstances in relation to Stage 1 of the Rocky Creek development which are discussed in the Meeting Paper and Audio. Given these relatively unusual circumstances, I do not consider it reasonable to expect that any information in the Audio or the Meeting Paper could indicate to any proponent any approaches to future negotiations that they could deploy to Council's disadvantage.
51. Nor do I consider that the Audio reveals information about Council's general negotiation techniques etc, as suggested by Council. The Audio records a Council officer providing an explanation to Councillors of the background circumstances as to why the matter is being brought to the Meeting, followed by a discussion about the risk to Council in entering into the Infrastructure Agreement and the steps that are being taken to mitigate any risk that Council may face. While I accept that Council may

⁷⁹ Letter to OIC dated 27 February 2024.

⁸⁰ Letter to Council dated 5 February 2024.

⁸¹ Letter to OIC dated 27 February 2024.

⁸² 'Or indeed, differences between Councillors on views, preferences and negotiations.'

⁸³ Section 108(3) of the RTI Act.

frequently be required to enter into infrastructure agreements, as noted at paragraph 7, entering these agreements is at the discretion of Council and accordingly Council is not required to accept any terms suggested by a proponent that would be to the detriment of Council's public interest position.

52. In terms of Council's future negotiations with the applicant regarding this development in particular, Council responded to OIC's request that it identify any specific information in the Meeting Paper or Audio that it considered could impact ongoing negotiations by stating *'[t]here is no one specific detail, it is the broad principle, and the opportunity for a different interpretation to be made and represented in negotiations'* and explaining *'Council's position is that whilst the Infrastructure Agreement is still binding the parties, the materials and information leading into it would remain prejudicial until the parties are no longer bound to the terms of the agreement'*.⁸⁴ I have carefully considered both these comments, along with the content of the Meeting Paper and Audio – which I note includes a brief, high level reference in the Audio to how Council could approach future matters involving the development.⁸⁵ I have also considered the applicant's advice that it has lodged a formal complaint with Council in relation to the conduct of some of its officers, including conduct when briefing Councillors about the administration of the Infrastructure Agreement.⁸⁶
53. While the applicant was not a party to the discussion that took place during the closed session of the Meeting, it is ultimately aware of which of its proposals Council did or did not accept, as it was a party to the negotiations with Council and executed the Infrastructure Agreement in its final format. Further, it would be highly unlikely that the approach to future matters involving the development that Council could take, as briefly mentioned in the Audio, would be unexpected or surprising to the applicant. In these circumstances, and also taking into account the particular content of the Meeting Paper and Audio – which relates to *entering* the Infrastructure Agreement rather than its subsequent *administration* – I am unable to identify how disclosure could reasonably prejudice the interests of Council in future negotiations with the applicant regarding the Rocky Creek development.
54. Given these considerations, Council's submissions have not persuaded me that the factor favouring nondisclosure relating to closed Council meetings attracts any more than low weight regarding the Meeting Paper and Audio.

Privacy and personal information of Councillors

55. Council submitted that those participating in the closed meeting discussions were not aware that they were being recorded and had not consented to the recording of the closed portion of the Meeting⁸⁷ and that this raises a privacy factor favouring nondisclosure regarding the Audio.⁸⁸
56. I do not accept Council's contention that the participants in the closed session of the Meeting were not aware that they were being recorded and did not provide their consent. I have carefully listened to the Audio and I note at the beginning of the Meeting the Chairperson specifically reminds the attendees that the Meeting is being live streamed and that the Meeting will be able to be viewed and heard *'in perpetuity'*. When Council enters into the closed session and again when it re-enters open

⁸⁴ Letter to OIC dated 15 May 2024.

⁸⁵ At 2:01:58 to 2:02:28 of the Audio.

⁸⁶ Letter to OIC dated 13 June 2024.

⁸⁷ Letters to OIC dated 27 February 2024 and 15 May 2024.

⁸⁸ Pursuant to schedule 4, part 3, item 3 of the RTI Act.

session, the Chairperson does not say anything to the attendees to suggest that the recording is being stopped for the purposes of the closed session or that the recording was re-started when Council went back into open session. Given this, and also noting that all attendees were acting in the capacity of Councillors or Council officers at the Meeting (so the recorded information is more akin to routine work information than sensitive personal information), I do not consider that the nondisclosure factors regarding privacy⁸⁹ or personal information⁹⁰ apply to the Audio. However, if I am wrong and they are relevant, I consider that the circumstances outlined above render them deserving of very low weight only.

Deliberative processes

57. Council's concern that disclosure of the Meeting Paper and Audio would prejudice its negotiations with the applicant and other proponents was not only raised in support of its view that the factor relating to closed Council meetings was deserving of high weight (as set out above). This concern also formed the basis for Council's contention that deliberative process factors favouring nondisclosure are relevant, as follows:⁹¹

The [Audio] involves discussions between Council officers and Councillors in relation to Council's legal and financial interests in the context of ongoing contractual negotiations with the Applicant. The [Audio] includes details in relation to Council's position in those negotiations and the matters on which it would or would not be willing to compromise.

*It is clear that the [Audio] is a record of a deliberative process of government, in that it involves weighing up or evaluation of competing arguments and considerations that would have a bearing on Council's course of action in relation to the Applicant's Rocky Creek development (**Development**).*

The matters ventilated in the [Audio] relate to council's attitude and approach to negotiations with the Applicant in relation to the Development. These matters also have more general application to Council's engagements and negotiations with other proponents on similar issues.

58. The RTI Act seeks to protect deliberative processes of government⁹² and recognises that there is a public interest harm in disclosing an opinion, advice or recommendation that has been obtained, prepared or recorded in the course of or for the deliberative processes involved in the functions of government.⁹³ Deliberative processes involved in the functions of government have been defined as '*... thinking processes – the process of reflection for example upon the wisdom and expediency of a proposal, a particular decision or course of action*'.⁹⁴ It has also been defined as '*careful consideration with a view to decision*'.⁹⁵
59. The Information Commissioner has recognised that prejudice to a deliberative process can arise where releasing a document would cause disruptive public debate, reallocation of resources to deal with the disruption (resources which would otherwise

⁸⁹ Pursuant to schedule 4, part 3, item 3 of the RTI Act.

⁹⁰ Pursuant to schedule 4, part 4, section 6 of the RTI Act.

⁹¹ Letter to OIC dated 8 November 2023.

⁹² Schedule 4, part 3, item 20 of the RTI Act.

⁹³ Schedule 4, part 4, section 4(1) of the RTI Act.

⁹⁴ Refer to *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) QAR 60 at [28]-[30] (**Eccleston**), citing with approval the definition given in *Waterford and Department of Treasury (No.2)* 91984) 5 ALD 588 at 606.

⁹⁵ *Eccleston* at [28].

be involved in finalising the deliberative process) and interference with the ability of an agency to objectively consider its options and reach a decision.⁹⁶

60. Having considered the Audio and the Meeting Paper, I acknowledge that it records Council's 'thinking processes' about whether to enter into the Infrastructure Agreement with the applicant on the terms proposed and that it can be considered deliberative process information. However, I also note that after unanimously resolving to enter into the Infrastructure Agreement at the Meeting, Council did in fact enter into this agreement with the applicant. Given this position, during the external review, OIC advised Council⁹⁷ that it had not explained *how* disclosure of the 'particular content' could reasonably be expected to prejudice the deliberative process that had already occurred (that is entering into the Infrastructure Agreement), interfere with any ongoing negotiations with the applicant, or prejudice any future negotiations involving Council.
61. In response, Council submitted that while it resolved to enter into the Infrastructure Agreement on 19 January 2022, the matters discussed in the Audio relate more broadly to the applicant's development which is ongoing, and the resolutions made by Council went beyond just entering into the Infrastructure Agreement – in particular one of the resolutions delegated the Chief Executive Officer to engage in further negotiations in relation to the development. Council also stated that the Infrastructure Agreement:⁹⁸

... has been amended on two or more occasions since it was resolved to enter into the agreement at the [Meeting]. Council anticipates that there will be further negotiations or requests for amendments in relation to the [I]nfrastructure [A]greement before it is finalised, when the development the subject of the [I]nfrastructure [A]greement is complete. It is not a 'static' document reflecting a point in time transaction – it is a 'living' document with council and the proponent continuing to engage with each other, and the [I]nfrastructure [A]greement.

There are a number of outstanding matters still to be completed under the [I]nfrastructure [A]greement. These outstanding items relate to external works yet to be completed, such as water supply, sewerage and road infrastructure ...

The release of the [Audio], while the [I]nfrastructure [A]greement remains on foot and subject to continuing negotiation and amendment, would be prejudicial to negotiations which are continuing in association with it.

62. I accept Council's submission that the Infrastructure Agreement is a 'living' document, which is subject to amendment as the development progresses. However, in this respect, the Information Commissioner has previously held that the fact of an ongoing deliberative process does not, of itself, permit a conclusion that disclosure would, on balance, be contrary to the public interest.⁹⁹ In the external review process, Council bears the onus of establishing that its decision was justified or that the Information Commissioner should give a decision adverse to the applicant.¹⁰⁰ Beyond general

⁹⁶ *Queensland Newspapers Pty Ltd and Queensland Police Service* [2014] QICmr 5 (20 February 2014) at [29], where reference is made to *Pallara Action Group Inc and Brisbane City Council* (Unreported, Queensland Information Commissioner, 21 September 2012) and *Johnston and Brisbane City Council* (Unreported, Queensland Information Commissioner, 6 December 2013).

⁹⁷ Letter to Council dated 5 February 2024.

⁹⁸ Letter to OIC dated 27 February 2024.

⁹⁹ *Barling and Brisbane City Council* [2017] QICmr 47 (15 September 2017) at [32], citing *Johnson and Department of Transport; Department of Public Works* (2004) 6 QAR 307 at [39]. While Johnson was decided under the *Freedom of Information Act 1992* (Qld) (**FOI Act**), the comments remain relevant to the objects of the RTI Act.

¹⁰⁰ Pursuant to section 87(1) of the RTI Act.

assertions about prejudice, Council has not provided any explanation¹⁰¹ as to *how* disclosure of the Audio,¹⁰² which as I have previously noted comprises a discussion of the risks and mitigating factors being taken by Council in relation to *entering into* the Infrastructure Agreement, could reasonably be expected to *'interfere with Council's ability to efficiently and effectively carry out its functions in relation to ongoing negotiations with the Applicant ... [or] negotiations with other proponents on similar issues'*.¹⁰³

63. In the circumstances, I consider that my reasoning and conclusions at paragraphs 50 to 53 above – where I found that the limited prospect of prejudice to negotiations with the applicant and other proponents rendered the factor relating to closed meeting discussions of Council deserving of low weight only – to be apposite. Accordingly, with respect to the Meeting Paper and Audio, I consider that the deliberative process factors warrant no more than low weight.

Council's business affairs and commercial activities

64. Again, Council's concern that disclosure of the Meeting Paper and Audio would prejudice its negotiations with the applicant and other development proponents was not only raised in support of its view that the factor relating to closed Council meetings was deserving of high weight (as set out above). Council also raised this concern when submitting that disclosure could reasonably be expected to prejudice the business affairs of Council and the competitive commercial activities of Council.¹⁰⁴

65. With respect to these factors favouring nondisclosure, Council stated:¹⁰⁵

The details discussed in the [Audio] disclose Council's commercial considerations and priorities in the context of a contractual negotiation.

Those matters are of a sensitive nature and have commercial value for Council in preserving its ability to negotiate agreements of this kind with the Applicant in the future, as well as other proponents.

Delivery of later stages of development in the southern growth corridor, by multiple parties, will require trunk infrastructure contributions. These contributions will be administered via Infrastructure Agreements. Due to the commercial, competitive nature of these parties, the substantive terms should be confidential. If they are not, Council's negotiating position is compromised.

66. I am not persuaded that disclosure of the Meeting Paper or Audio could reasonably be expected to prejudice Council's business affairs or the competitive commercial activities of Council. The information Commissioner has previously found that the business affairs factor should only apply to:¹⁰⁶

the extent that an agency is engaged in a business undertaking carried on in an organised way for the purpose of generating income or profits, or is otherwise involved in an ongoing

¹⁰¹ Noting that OIC has raised this issue with Council in letters dated 12 October 2023 and 5 February 2024, a telephone conference on 7 May 2024 and an email of 14 May 2024.

¹⁰² While Council's submissions focussed on disclosure of the Audio, given the Meeting Paper comprises information that was discussed during the Meeting, I consider Council's submissions apply equally to this information.

¹⁰³ Letter to OIC dated 8 November 2023.

¹⁰⁴ Pursuant to schedule 4, part 3, items 15 and 17 of the RTI Act. Council did not seek to rely on any of the business affairs harm factors as referred to in schedule 4, part 4, section 7 of the RTI Act.

¹⁰⁵ Letter to OIC dated 8 November 2023.

¹⁰⁶ *Seeney and Department of State Development* (2004) 6 QAR 354 at [199]. While this decision was made under the now repealed FOI Act, I consider it applies equally to the factor favouring nondisclosure under the RTI Act.

operation involving the provision of goods or services for the purpose of generating income or profits.

67. I do not consider that Council's statutory town and land planning responsibilities under the *Planning Act 2016* (Qld) (**Planning Act**) can be equated to the provision of services for the purpose of generating income or profits. I also do not consider for the same reason, that in deciding whether to enter into the Infrastructure Agreement, Council was conducting a competitive commercial activity.
68. In addition, the specific content of the Audio does not comprise any detailed discussion about the terms of the Infrastructure Agreement. While the Meeting Paper contains a draft of the Infrastructure Agreement, I note that the Planning Act provides for public access to infrastructure agreements by way of inspection and purchase.¹⁰⁷ In addition, the information located by Council in response to the applicant's access application indicates that back in June 2022, lot owners on the development were requesting copies of the Infrastructure Agreement and accordingly this information is already in the public domain.¹⁰⁸ I am therefore not satisfied that Council has established that disclosure of the Audio would compromise its negotiating position by disclosing the agreement terms.¹⁰⁹
69. Given the above, I am not satisfied that the factors favouring nondisclosure in relation to prejudicing Council's business affairs or competitive commercial activities¹¹⁰ apply in the circumstances of this case. However, if I am wrong and they do apply, I consider that they would warrant only low weight due to the circumstances noted above.
70. Having carefully considered the material before me, I can identify no other considerations that might be argued to favour nondisclosure of the Meeting Paper and Audio, listed either in schedule 4, parts 3 or 4 of the RTI Act or more generally. In this regard, I confirm that, given Council's references to confidentiality in its submissions which prompted me to consider the nondisclosure factor relating to closed Council meetings,¹¹¹ I considered whether nondisclosure factors relating to confidential information apply,¹¹² despite Council having made no particular submissions in this regard. I cannot see how disclosure could prejudice Council's ability to obtain confidential information from either the applicant or other proponents – and therefore I am satisfied that the nondisclosure factor does not apply. In terms of the harm factor, I note that Council's abovementioned submissions regarding prejudice to its deliberative processes effectively acknowledge that the deliberative process exception to the harm factor¹¹³ operates to prevent the harm factor from applying.
71. I turn now to balancing the competing public interest factors.

Balancing the public interest factors

72. I have taken into account the pro-disclosure bias in deciding access to the Meeting Paper and Audio under the RTI Act. I have identified above several factors favouring disclosure of this information that warrant significant weight. I have also concluded that the factor in relation to fair treatment warrants low weight. Further, I have concluded

¹⁰⁷ See section 264 of the Planning Act and schedule 22, section 1(zb) of the *Planning Regulation 2017* (Qld).

¹⁰⁸ See in particular page 1040 of the information located by Council.

¹⁰⁹ I also note the information located by Council suggests that the agreement has been released to some lot owners on the development. See page 1040 of the PDF titled '1 – RTI_IP 12-2022-2023 All documents reviewed'.

¹¹⁰ In schedule 4, part 3, items 15 and 17 of the RTI Act or, indeed, in schedule 4, part 4, section 7(1)(c) of the RTI Act.

¹¹¹ Letter to OIC dated 8 November 2023.

¹¹² Schedule 4, part 3, item 16 and part 4, section 8(1) of the RTI Act.

¹¹³ Schedule 4, part 4, section 8(2) of the RTI Act.

that the factors related to revealing deficiencies in conduct do not apply, but if they did they should be afforded low weight.

73. As against this, on the information currently before me, I have identified a factor favouring nondisclosure that the Meeting Paper and Audio comprise information discussed in a closed Council meeting. For the reasons referred to above, I consider this factor warrants low weight. Similarly, I accept that the deliberative process factors apply, but again warrant only low weight.
74. In terms of factors regarding Council's business affairs and commercial activities, I consider that these factors are not relevant; however, if they are, I consider that they warrant low weight. With respect to the Audio only, I consider that the factors about Councillors' privacy and personal information are not relevant; however, if they are, I consider that they warrant very low weight.
75. On balance, I am satisfied that the public interest factors favouring disclosure of the Meeting Paper and Audio outweigh the factor favouring nondisclosure. Accordingly, I find that their disclosure would not, on balance, be contrary to the public interest.

B. Email

76. I will now address the Email. As noted at paragraph 15, the Email precedes the Meeting by a number of weeks, and is between officers in Council's Planning Department. A planning officer discusses ways to reply to the applicant's requests regarding terms of the Infrastructure Agreement and seeks the views of the Interim Manager of Planning.
77. Council's position that access should be refused to the Email is similar to its position regard the Meeting Paper and Audio.¹¹⁴ In addition, Council stated its position is:¹¹⁵

that whilst the Infrastructure Agreement is still binding the parties, the materials and information leading into it would remain prejudicial until the parties are no longer bound to the terms of the agreement.

78. In relation to the disclosure of the Email in particular, the applicant submitted that:¹¹⁶

... the case for releasing an internal email must necessarily be stronger than any case for the Closed Audio Session because the email is just that – an email – and not a closed meeting so the deliberative process argument advanced by Council has no application.

79. In absence of more specific submissions, I take it that Council does not contend that the nondisclosure factor relating to closed Council meetings applies, given the Email precedes the meeting; and I also take it that Council does not suggest that nondisclosure factors regarding privacy and personal information apply, given the routine, entirely work focussed nature of the Email.
80. I accept that the Email comprises a Council officer's views about how Council should respond to the applicant's request for changes to be made before the parties entered into the Infrastructure Agreement and therefore comprises information relating to a deliberative process. However, I also note that the associated decision-making process

¹¹⁴ Council's letter to OIC dated 8 November 2023 advises that it relies on certain paragraphs of that letter which address the Audio regarding the Email as well, and its letter dated 27 February 2024 states 'Council's position ... in relation to the ... [Audio] applies equally to the [Email], which relates to similar matters and attracts equivalent public interest factors'.

¹¹⁵ Letter to OIC dated 15 May 2024.

¹¹⁶ Letter to OIC dated 15 April 2024.

has concluded and the Agreement is on foot. In relation to Council's position that disclosure of the Email would be prejudicial while the Infrastructure Agreement is still binding on the parties, other than making the assertion, Council has not provided any explanation as to why such prejudice would occur from disclosure of the Email. Similarly, Council has not explained how disclosure of the particular contents of the Email could reasonably be expected to prejudice any further deliberative processes by Council regarding the applicant's development or any future deliberations involving other proponents.

81. In these circumstances, I again consider that my reasoning and conclusions at paragraphs 50 to 53 above are apposite, and am satisfied that the deliberative process factors warrant no more than low weight with respect to the Email. Also, I hold the same opinion regarding the factors about prejudicing Council's business affairs or competitive commercial activities¹¹⁷ as that which I have set out at paragraphs 66 to 68 above – and therefore conclude that these factors do not apply; however, if I am wrong and they do apply, the circumstances noted in those paragraphs render them deserving of low weight only.
82. I can identify no other considerations that might be argued to favour nondisclosure of the Email, listed either in schedule 4, parts 3 or 4 of the RTI Act or more generally. On the other hand, I am satisfied that the factors favouring disclosure, as discussed above regarding the Meeting Paper and Audio, also apply to the Email and are deserving of the same weightings for the same reasons. That is, I consider that the factors about enhancing Council's accountability, promoting public discussion of affairs, informing the community of Council operations, and revealing background or contextual information to a decision should be given significant weight; while the factors about revealing misconduct or enabling inquiries into possible misconduct and fair treatment warrant no to low weight.
83. Balancing the competing public interest factors against one another, I am satisfied that the factors favouring disclosure of the Email outweigh those favouring nondisclosure of it. Accordingly, I find that disclosure of the Email would not, on balance, be contrary to the public interest.

C. Councillor's comment

84. As noted at paragraph 15, the Councillor's comment is a portion of about five seconds of the Audio comprising a comment made by a particular Councillor.¹¹⁸ In terms of this comment, Council stated:¹¹⁹

the Councillor has been made aware and would request these comments be redacted on the basis [they were] unaware that the meeting was being recorded and such comments are not relevant to the issue being discussed.

85. The Councillor's comment was offered as a concluding comment near the end of the closed session of the Meeting. It was more a casual, colloquial remark than a considered observation. Nevertheless, it was made in the context of the Councillors' discussions about Council entering into the Infrastructure Agreement and comprised a view offered by the Councillor as part of those discussions. Consequently, I must find that the comment was relevant to the issue being discussed, and therefore falls within the scope of the applicant's application.

¹¹⁷ In schedule 4, part 3, items 15 and 17 of the RTI Act or, indeed, in schedule 4, part 4, section 7(1)(c) of the RTI Act.

¹¹⁸ At 02:03:15 to 02:03:20 of the Audio.

¹¹⁹ Email to OIC dated 30 July 2024.

86. Taking into account the context in which the comment was made, I consider that some factors favouring disclosure – namely those relating to enhancing Council's accountability, informing the community of Council operations, and revealing background or contextual information to a decision – are relevant. The brevity and nature of the comment itself limits the extent to which these factors could reasonably be advanced, and I therefore consider they warrant moderate weight.
87. There is congruence between the comment and the resolution of *all* Councillors, including the Councillor who made the comment, to enter into the Infrastructure Agreement. In these circumstances, I cannot see how the factors about revealing misconduct or enabling inquiries into possible deficiencies in conduct could reasonably arise. Perhaps, given what may be described as a somewhat resigned tone, the comment could be construed as tending towards a less than favourable disposition towards the applicant; however, it could equally be construed as more general in application. I therefore consider that the factor regarding fair treatment is deserving of no more than very low weight.
88. In terms of factors favouring nondisclosure, I repeat and rely on my above findings regarding the factor relating to closed Council meetings, deliberative process factors and prejudicing Council's business affairs or competitive commercial activities.
89. I acknowledge the Councillor's statement that they were unaware that the meeting was being recorded. As stated at paragraph 56 above regarding the Audio generally, the privacy factor and personal information harm factor therefore arise for consideration; having carefully listened to the Audio I do not accept that participants in the closed session of the Meeting were not aware that they were being recorded and did not provide their consent; and I consider all attendees – including the Councillor – were acting in their professional capacities, so the recorded information is more akin to routine work information than sensitive personal information. I do consider, however, that given the casual, offhand character of the comment, it is relatively more personal in nature than the rest of the Audio. However, the context and subject matter of the comment involve the work of Council. As such, I consider that these factors should be given low weight.
90. I can identify no other considerations that might be argued to favour nondisclosure of the Councillor's comment, listed either in schedule 4, parts 3 or 4 of the RTI Act or more generally. Weighing the competing public interest factors against one another, and taking into account the RTI Act's pro-disclosure bias, I am satisfied that the factors favouring disclosure of the Councillor's comment outweigh those favouring nondisclosure of it. Accordingly, I find that disclosure of the Councillor's comment would not, on balance, be contrary to the public interest.

DECISION

91. For the reasons set out above, I set aside Council's decision and find that disclosure of the Information in Issue – that is, the Meeting Paper, the Audio including the Councillor's comment, and the Email – would not on balance, be contrary to the public interest. As no grounds on which access may be refused under the RTI Act have been established, the applicant is entitled to be given access to the Information in Issue.
92. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

A Rickard
Assistant Information Commissioner

Date: 14 November 2024

APPENDIX

Significant procedural steps

Date	Event
30 March 2023	OIC received the external review application.
5 May 2023	OIC notified the applicant and Council that the application for external review had been accepted and requested information from Council.
30 May 2023	OIC received the requested information from Council.
22 June 2023	OIC requested that Council provide clarification about the location of the Information in Issue.
29 June 2023	OIC received a response from Council.
27 July 2023	OIC provided an update to the applicant and requested that the applicant advise if there was any specific information it wished to access.
8 August 2023	OIC received a response from the applicant, in which the applicant advised that it was seeking access to all refused information, but requested that OIC prioritise access to the Audio.
23 August 2023	OIC conveyed a preliminary view to Council in relation to access to the Audio.
6 September 2023	OIC received a response from Council.
25 September 2023	OIC provided an update to the applicant and requested that the applicant consider narrowing the amount of information it sought to access.
12 October 2023	OIC conveyed a second preliminary view to Council.
17 October 2023	OIC spoke to the applicant's representative by telephone regarding OIC's email of 25 September 2023.
8 November 2023	OIC received a response from Council.
5 February 2024	OIC conveyed a further view to Council.
8 February 2024	OIC requested that Council release certain information regarding Council officers to the applicant.
15 February 2024	OIC received confirmation that Council had released the information regarding Council officers to the applicant.
27 February 2024	OIC received further submissions from Council.
28 February 2024	OIC requested that Council provide a copy of a document redacted to show information that Council accepted was not subject to legal professional privilege and also asked Council confirm OIC's summary of its submissions.
8 March 2024	OIC received a response from Council in relation to the summary of its submissions.

Date	Event
20 March 2024	OIC provided Council with a copy of a document redacted to show information that OIC understood Council accepted was not subject to legal professional privilege and provided the applicant with the summary of Council's submissions.
27 March 2024	Council disclosed the copy of the redacted document to the applicant.
15 April 2024	OIC received submissions from the applicant.
23 April 2024	OIC requested a telephone call with Council to discuss the next steps in the external review process.
7 May 2024	OIC spoke with Council officers by telephone.
14 May 2024	OIC provided Council with a summary of the issues discussed in the telephone call and invited Council to provide final submissions.
16 May 2024	OIC received submissions from Council. OIC confirmed its approach regarding the remaining information in issue and repeated its request for Council's response regarding certain information.
3 June 2024	OIC conveyed a preliminary view to the applicant.
10 June 2024	OIC spoke with the applicant's representative by telephone and received confirmation that the applicant wished to pursue access to the Councillor's comment , but otherwise accepted OIC's preliminary view.
11 June 2024	OIC spoke further with the applicant's representative by telephone. OIC received an email from the applicant confirming it wished to pursue access to the Councillor's comment.
13 June 2024	OIC received a submission from the applicant regarding the Councillor's comment.
17 June 2024	OIC requested that Council and the relevant Councillor respond to the applicant's submission about the Councillor's comment.
10 July 2024	OIC received a submission from Council.
11 July 2024	OIC reiterated its preliminary view to Council and asked that Council confirm whether the Councillor had been given the opportunity to respond regarding the Councillor's comment.
30 July 2024	OIC provided an update to the applicant. OIC repeated its request that Council confirm whether the Councillor had been given the opportunity to respond regarding the Councillor's Comment. OIC received a response from Council which relayed the Councillor's response.
15 August 2024	OIC provided an update to the applicant.
18 October 2024	OIC provided an update to the applicant.