



Decision and Reasons for Decision

Citation:	<i>Caldwell and Townsville City Council; Landel Pty Ltd (Third Party); Laurence Lancini Constructions Pty Ltd (Fourth Party)</i> [2018] QICmr 43 (17 October 2018)
Application Number:	313546
Applicant:	Caldwell
Respondent:	Townsville City Council
Third Party:	Landel Pty Ltd
Fourth Party:	Laurence Lancini Constructions Pty Ltd
Decision Date:	17 October 2018
Catchwords:	<p>ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION – BREACH OF CONFIDENCE – whether disclosure of information would found an action for breach of confidence – whether information is exempt information under schedule 3, section 8 of the Right to Information Act 2009 (Qld)</p> <p>ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – CONTRARY TO PUBLIC INTEREST INFORMATION – whether disclosure of information would, on balance, be contrary to the public interest – sections 47(3)(b) and 49 of the Right to Information Act 2009 (Qld)</p>

REASONS FOR DECISION

Summary

1. The applicant applied¹ under the *Right to Information Act 2009* (**RTI Act**) to Townsville City Council (**Council**) seeking access to:

Woolworths Development Approval (Mechanical Plant Noise) 383 Sturt Street, Townsville City: TCC decision letter 24 April 2017. Ref: CSN01/16/00229

Documents, reports, data and communications between the applicant and its representatives and TCC relating to Noise Compliance

Date range October 2016 to 30 April 2017.

¹ Application dated 9 May 2017 and received by Council on 10 May 2017.

2. Council consulted the third and fourth parties, part of the Lancini group of companies, referred to collectively in this decision as Lancini.
3. Council located a number of responsive documents, however, it failed to make a decision within the timeframe prescribed under the RTI Act, and was therefore deemed to have made a decision refusing access to these documents (**Deemed Decision**).²
4. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Deemed Decision.
5. During the external review, the applicant confirmed that he no longer sought access to certain information and Council agreed to release some information to which access had been deemed to be refused. The applicant also accepted OIC's preliminary view in relation to some information.³
6. In relation to the remaining information in issue, for the reasons set out below, I set aside the Deemed Decision. I find that this information is not exempt information under the RTI Act, nor would its disclosure, on balance, be contrary to the public interest.

Background

7. A development application (MC14/0170, CON14/0274) was submitted by Lancini Group of Companies (**Lancini**) for Woolworths Townsville City for major mechanical plant to be located on the roof of the service delivery dock (**Development**). Council approved the application for development permit subject to conditions in the schedule (**Development Approval**). Condition 2 of the Development Approval stated that the Development must occur in accordance with the Noise Impact Assessment⁴ (**Assessment**) and that post construction certification (**Acoustic Certification**) was required to be submitted by Lancini demonstrating that the Development complied with this condition.
8. The applicant made a complaint to Council where he raised concerns about aspects of the Assessment, Acoustic Certification and breaches of conditions of the Development Approval and *Environmental Protection Act 1994* (Qld) (**EP Act**).
9. Council investigated the applicant's complaint and concluded that the noise emitted from the Development did not exceed the relevant noise standards.⁵
10. Significant procedural steps relating to the external review are set out in the Appendix.

Reviewable decision

11. The decision under review is Council's Deemed Decision.

² In its purported decision dated 22 September 2017, Council did not identify the number of responsive documents it located. However, it purported to refuse access to the documents located pursuant to sections 47(3)(b) and (f) of the RTI Act.

³ The applicant accepted OIC's preliminary view conveyed in a letter dated 17 August 2018 that disclosure of the following information is contrary to the public interest:

- names of non-government employees (including complainants)
- mobile, direct telephone and facsimile numbers and email addresses
- personal opinions; and
- signatures.

The applicant also accepted that two pages of information fell outside the scope of this application.

⁴ The Assessment was prepared by MWA Environmental in December 2014.

⁵ Letter to applicant dated 24 April 2017.

Evidence considered

12. External review by the Information Commissioner⁶ is a merits review, an administrative reconsideration of a case. In conducting the external review, I have considered the documents that Council located as responsive to the access application (including the information in issue).
13. The evidence, submissions, legislation, and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and the Appendix).

Information which is no longer in issue

Excluded information

14. During the external review, the applicant excluded the following information from the review:⁷
 - correspondence that the applicant and/or his wife sent to or received from Council
 - development application decision notice for the decision made on 20 March 2015
 - report titled '*Noise Impact Assessment: Proposed Shopping Centre City Arcade*' by MWA Environment dated December 2014
 - correspondence⁸ between Council and individuals other than Lancini⁹
 - names of non-government employees (including complainants)
 - mobile, direct telephone and facsimile numbers and email addresses
 - personal opinions; and
 - signatures.

Released information

15. During the review, Council located 287 responsive pages.¹⁰ Taking into consideration the information excluded by the applicant, 97 full pages and 27 part pages were released to the applicant on 31 August 2018 and 18 September 2018 respectively.

Information in issue

16. The remaining information—31 full pages and 29 part pages comprises correspondence between Council and Lancini in compliance with the Development Approval and about Council's investigation into the noise emitted from the Development¹¹ and includes:
 - the Acoustic Certification;¹² and
 - a report titled '*Environmental Amplified Music and Patron Noise Assessment for Licensed Premises, City Lane, 373 Flinders Street, Townsville*' dated 31 July 2014 (**Acoustic Report**).¹³

⁶ Or delegate.

⁷ Confirmed in a letter to applicant dated 17 August 2018.

⁸ Including complaints.

⁹ Excluding information which was sent to or from the body corporate of the building complex where the applicant resides.

¹⁰ Including the complete email chain provided to OIC on 24 August 2018. A consulted third party also provided 36 pages which were released to the applicant.

¹¹ Pages 1 and 10-32.

¹² Pages 2-9.

¹³ Pages 33-60.

Objections to disclosure

17. Council objects to disclosure of the information in issue in the absence of Lancini's agreement to disclosure.¹⁴
18. Lancini objects to disclosure of the information in issue on the following grounds:
 - the information is exempt because its disclosure would found an action for breach of confidence
 - disclosure would, on balance, be contrary to the public interest because it could reasonably be expected to:
 - cause a public interest harm as the information consists of information of a confidential nature that was communicated in confidence¹⁵
 - prejudice private, business, professional, commercial or financial affairs of Lancini¹⁶
 - prejudice trade secrets of Lancini.¹⁷
19. Additionally, Lancini submitted, in respect of some of the documents, that it objected to disclosure on the basis that it owns the copyright in these documents and that its rights could be compromised if these documents are disclosed.

Exempt information – breach of confidence

20. The RTI Act gives a right of access to documents of government agencies.¹⁸ This right is subject to other provisions of the RTI Act, including grounds on which access may be refused. Access may be refused to information to the extent the information comprises 'exempt information'.¹⁹ 'Exempt information' includes information the disclosure of which would found an action for breach of confidence (**Breach of Confidence Exemption**).²⁰
21. The test for exemption must be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, with appropriate standing to bring an action to enforce an obligation of confidence claimed to bind Council not to disclose relevant information.²¹
22. In this case, it is not disputed that Lancini is the hypothetical plaintiff.
23. In its submissions regarding the Breach of Confidence Exemption, Lancini submitted that OIC has only considered the information it consulted Lancini on (that is, the remaining information in issue in this review), without any additional context. As noted at paragraph 12 above, I have considered the documents Council located as responsive to the access application including the information in issue.

¹⁴ Submission dated 27 June 2018. In its decision, Council relied on the following factors to refuse access to the located documents:

- Disclosure of the information could reasonably be expected to prejudice the private, business, professional, commercial or financial affairs of entities (schedule 4, part 3, item 2 of the RTI Act)
- Disclosure of the information could reasonably be expected to cause a public interest harm if—
 - the information consists of information of a confidential nature that was communicated in confidence; and
 - disclosure of the information could reasonably be expected to prejudice the future supply of information of this type (schedule 4, part 4, section 8(1)).

¹⁵ Schedule 4, part 4, item 8 of the RTI Act.

¹⁶ Schedule 4, part 3, item 2 of the RTI Act.

¹⁷ Schedule 4, part 3, item 15 of the RTI Act.

¹⁸ Section 23 of the RTI Act.

¹⁹ Section 47(3)(a) of the RTI Act.

²⁰ Section 48 and schedule 3 of the RTI Act.

²¹ *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (**B and BNRHA**), a decision of the Information Commissioner analysing the equivalent exemption in the repealed *Freedom of Information Act 1992* (Qld) (**FOI Act**) at [44].

Equitable obligation of confidence

24. Lancini submitted²² that it had an expectation that it was dealing confidentially with Council and that it expected Council to respect and preserve the confidentiality of the information it supplied. I have therefore considered whether the information in issue is subject to an equitable obligation of confidence.
25. The following five cumulative requirements must be established to give rise to an equitable obligation of confidence:
- a) the information must be capable of being specifically identifiable as information that is secret, rather than generally available;
 - b) the information must have the necessary quality of confidence, i.e., it must not be trivial or useless, and must have a degree of secrecy sufficient for it to be subject to an obligation of confidence;
 - c) the circumstances of the communication must create an equitable obligation of confidence;
 - d) disclosure of the information to the access applicant must constitute an unauthorised use of the confidential information; and
 - e) disclosure must cause detriment to the confider of the information.²³
26. While I am satisfied that requirements a) and b) may be established, I am not satisfied that requirement c) has been met.
27. Assessing whether requirement c) is satisfied requires an evaluation of all relevant circumstances surrounding the communication in question, so as to determine whether the recipient *'should be fixed with an enforceable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it.'*²⁴ The circumstances include public interest considerations relating to the public's legitimate interest in obtaining information about the affairs of government, which may affect the question of whether enforceable obligations of confidence should be imposed on agencies in respect of information purportedly supplied in confidence by parties outside government.²⁵
28. There is no indication on the face of the information in issue that the correspondence between Council and Lancini in compliance with the Development Approval and about Council's investigation into the noise emitted from the Development was communicated or received subject to any express assurance or undertaking as to confidentiality. Nor, do I consider that, in these circumstances, equity would imply any such obligation binding Council to keep the information in issue confidential. As Brennan J observed in *Esso*:²⁶
- 'Public authorities are not to be taken, prima facie, to have bound themselves to refrain from giving an account of their functions in an appropriate way: sometimes by giving information to the public directly'*
29. In this case, Council is the authority responsible for ensuring compliance with conditions of development approvals, investigating noise complaints made by the public, and taking

²² Submission dated 4 September 2017.

²³ *B and BNRHA* at [60-63].

²⁴ *B and BNRHA* at [76].

²⁵ See *Seeney, MP and Department of State Development; Berri Limited (Third Party)* (2004) 6 QAR 354, at [191] citing *Esso Australia Resources Ltd & Ors v Plowman & Ors* (1995) 183 CLR 10 (*Esso*), *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (1995) 36 NSWLR 662 and *Cardwell Properties Pty Ltd & Williams and Department of Premier, Economic and Trade Development* (1995) 2 QAR 671 at pp.693-698 ([51-60]). See also *Orth and Medical Board of Queensland; Cooke (Third Party)* (2003) 6 QAR 209 at [34].

²⁶ At 37.

action in respect of noncompliance. The information in issue directly relates to Council's performance of these important regulatory functions. I am satisfied that the public has a legitimate interest in scrutinising information regarding Council's performance of these regulatory functions. Given these circumstances, the information in issue cannot be said to have been communicated in circumstances giving rise to a mutual understanding of confidence binding Council. That is, I do not consider that equity would hold Council conscience bound to refrain from disclosing the information in issue.

Finding

30. I find that requirement c) of the cumulative requirements necessary to found an action in equity for breach of confidence is not established in respect of the information in issue. I find that the circumstances of the communication between Lancini and Council did not create an equitable obligation of confidence.
31. I therefore find that the information in issue is not exempt information under schedule 3, section 8 of the RTI Act.

Contrary to the public interest information

32. Lancini also contended that disclosure of the information in issue would, on balance, be contrary to the public interest²⁷ within the meaning of sections 47(3)(b) and 49 of the RTI Act. This comprises a further ground on which access to information may be refused under the Act.
33. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest²⁸ and explains the steps that a decision-maker must take, as follows:²⁹
- 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 would, on balance, be contrary to the public interest.

Irrelevant factors

34. Lancini submitted that:³⁰

'... [it has] been put to significant time and cost over a number of years as a result of the actions of the applicant. [Its] expectation is, and for some time has been, that any information disclosed to the applicant will likely be relied upon by the applicant to endeavour to cause further disruption and detriment'

35. The RTI Act provides that in deciding the balance of the public interest, it is irrelevant that disclosure of the information in issue could reasonably be expected to result in mischievous conduct, or as Lancini describe it, causing, 'disruption and detriment', by the applicant.³¹ I am also satisfied that the applicant's reasons for seeking information under the RTI Act are irrelevant to the public interest test.

²⁷ The phrase *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.

²⁸ Schedule 4 of the RTI Act – a non-exhaustive itemisation of potentially relevant considerations.

²⁹ Section 49(3) of the RTI Act.

³⁰ Submission dated 22 May 2018.

³¹ Schedule 4, part 1, item 3 of the RTI Act.

36. I have not taken the above irrelevant factors into account, nor have I considered other irrelevant factors, in making my decision.

Factors favouring disclosure

37. The RTI Act recognises that it will be in the public interest to disclose information where it could reasonably be expected to:
- promote open discussion of public affairs and enhance Council's accountability³²
 - inform the community of Council's operations, including, in particular, the policies, guidelines and codes of conduct followed by Council in its dealings with members of the community;³³ and
 - reveal the reason for a government decision and any background or contextual information that informed the decision.³⁴
38. Neither Council nor Lancini identified any public interest factors favouring disclosure.
39. I consider that there is a public interest in the investigation of complaints by a regulatory agency such as Council,³⁵ being conducted with a sufficient degree of transparency and accountability to allow the community to understand the outcome of the investigation and any conclusions made in the investigation. I am satisfied that the information in issue could reasonably be expected to provide background and contextual information about Council's management of a noise complaint and, in particular, would further inform the public about:
- the information before Council in investigating a noise complaint; and
 - Lancini's compliance with its obligations in the Development Approval.
40. The public interest factors favouring disclosure enunciated at paragraph 37 above, are important public interests which go to the very heart of the core duties undertaken by local government authorities such as the Council. Accordingly, I have afforded each of these factors favouring disclosure significant weight.

Factors favouring nondisclosure

41. The public interest factors favouring nondisclosure of the information in issue relied upon by Council and Lancini are set out at paragraphs 17 and 18 above.

Confidential information

42. Lancini submitted³⁶ that it had an expectation, in respect of the information it disclosed to Council, that it would be dealt with confidentially.³⁷ Further, Lancini submitted that if it knew that the information in issue would be disclosed to the applicant, it would not have supplied this information unless required to do so by law.³⁸

³² Schedule 4, part 2, item 1 of the RTI Act.

³³ Schedule 4, part 2, item 3 of the RTI Act.

³⁴ Schedule 4, part 2, item 11 of the RTI Act.

³⁵ Section 99 of the EP Act devolves the administration and enforcement of noise standards to local governments. Section 109 of the *Environmental Protection Regulation 2008* (Qld) (**EP Regulation**) declares local government authorised persons to be authorised persons under section 445(1)(c) the EP Act. Chapter 9 of that Act provides for the investigation and enforcement powers of authorised persons. Section 21 of Townsville City Council *Local Law No. 3 (Community and Environmental Management) 2011* provides specific information about circumstances when Council is the administering authority for chapter 8, part 3B of the EP Act.

³⁶ Submission dated 4 September 2017.

³⁷ Submission dated 4 September 2017 and 22 May 2018.

³⁸ Submission dated 22 May 2018.

43. These submissions raise the following public interest factors favouring nondisclosure:
- disclosure could reasonably be expected to prejudice an agency's ability to obtain confidential information (**Prejudice Factor – Confidentiality**);³⁹
 - disclosure could reasonably be expected to cause public interest harm if (**Harm Factor – Confidentiality**):⁴⁰
 - the information consists of information of a confidential nature that was communicated in confidence; and
 - disclosure of the information could reasonably be expected to prejudice the future supply of information of this type.
44. Most of the information in issue comprises communications between Lancini and Council in relation to a complaint made by the applicant. The remaining information is information that was required to be provided by Lancini under the Development Approval.
45. Firstly, in assessing the consequences of disclosure in this context, it is not strictly relevant what Lancini's specific attitude toward future supply of information would be, rather the test is whether a substantial number of entities in Lancini's position would decline to provide similar information to Council, if information of the kind in issue were to be disclosed under the RTI Act.⁴¹
46. It is also relevant to note that, where persons are under an obligation to continue to supply confidential information (eg where there is a statutory power to compel the disclosure of the information) or persons must disclose information if they wish to obtain some benefit from the government (or they would otherwise be disadvantaged by withholding information) then ordinarily, disclosure could not reasonably be expected to prejudice the future supply of such information.⁴²
47. In terms of the Prejudice Factor - Confidentiality, I note that an individual or organisation may be prosecuted under the EP Act for breaching noise standards or failing to rectify a breach of the noise standards.⁴³ Accordingly, I do not accept that disclosure of the information in issue would reduce Lancini's (or any person or organisation's) willingness to cooperate with Council in relation to investigations regarding complaints about alleged breaches under the EP Act given that doing so would only serve to leave such entities open to prosecution or other sanction.
48. Further, in relation to the Prejudice Factor – Confidentiality and the issue of development decisions, some of the information in issue includes information which Lancini was required to submit in compliance with a condition in the Development Approval. Again, I do not accept that developers in Lancini's position, would refrain from providing information in response to a condition of approval, as this would only serve to preclude them from pursuing development opportunities.
49. In relation to the Harm Factor - Confidentiality, I have noted in discussing the Breach of Confidence Exemption, that the information in issue could not be said to have been communicated in circumstances giving rise to a mutual understanding of confidence binding Council. Further, for the reasons set out at paragraph 48, I do not accept that disclosure of this information could reasonably be expected to prejudice the future supply of information to Council (or local governments generally), particularly given their role in

³⁹ Schedule 4, part 3, item 16 of the RTI Act.

⁴⁰ Schedule 4, part 4, section 8 of the RTI Act.

⁴¹ *B and BNRHA*, at [161].

⁴² *B and BNRHA*, at [161].

⁴³ Section 68 of the EP Regulation refers to the 'Australian Standards' as the prescribed standards for particular noise compliance. Section 440Q of the EP Act states that a person must not unlawfully contravene a standard and contains the relevant penalties.

development approval. I consider that failing to cooperate and share information with local government would be likely to prejudice developers, such as Lancini, to a far greater extent than would disclosing information about their projects.

50. On the available information, I am not satisfied that these factors arise in relation to the information in issue. I have therefore afforded no weight to these factors. However, in the event that I am mistaken in this conclusion, I would afford each factor only low weight.

Trade secrets and commercial value

51. Lancini submitted that certain correspondence between it and Council and the Acoustic Report, contains '*special information that [Lancini] consider to be a trade secret*'.

52. The RTI Act recognises that:

- a factor favouring nondisclosure will arise in circumstances where disclosure of the information could reasonably be expected to prejudice trade secrets, business affairs or research of an agency or person (**Trade Secrets Prejudice Factor**).⁴⁴
- disclosure could reasonably be expected to cause a public interest harm because:
 - disclosure of the information would disclose trade secrets of an agency or another person (**Trade Secrets Harm Factor**);⁴⁵ and
 - disclosure of the information would disclose information (other than a trade secret) that has a commercial value to an agency or another person (**Commercial Value Harm Factor**).⁴⁶

53. For the Trade Secrets Prejudice and Harm factors to apply, the information must disclose the trade secrets of Council, Lancini or another entity. A trade secret is a '*formula, pattern, device or compilation of information which gives an advantage over competitors who do not know it or use it*'.⁴⁷ I have reviewed the information referred to in Lancini's submissions⁴⁸ and more broadly, the information in issue, and have been unable to identify any information which could be described as a '*formula, pattern, device or compilation of information*' which would give an advantage to a competitor and therefore meet the criteria of being a trade secret.

54. Accordingly, I do not consider that the Trade Secrets Prejudice and Harm factors have been enlivened in relation to the information referred to by Lancini or the information in issue more broadly. Therefore, I have afforded no weight to these factors. However, in the event that I am mistaken in this conclusion, I would afford each factor only low weight.

55. In considering whether the Commercial Value Harm Factor applies, information will have commercial value if:

- it is valuable for the purposes of carrying on the commercial activity in which that agency or other person is engaged (i.e. because it is important or essential to the profitability or viability of a continuing business operation, or a pending "one-off" commercial transaction); or
- a genuine arms-length buyer is prepared to pay to obtain that information from that agency or person, such that the market value of the information would be

⁴⁴ Schedule 4, part 3, item 15 of the RTI Act.

⁴⁵ Schedule 4, part 4, section 7(1)(a) of the RTI Act.

⁴⁶ Schedule 4, part 4, section 7(1)(b) of the RTI Act.

⁴⁷ The Information Commissioner considered the meaning of trade secrets in the context of the now repealed FOI Act in *Wanless Wastecorp Pty Ltd and Caboolture Shire Council; JJ Richards & Sons Pty Ltd (Third party)* (2003) 6 QAR 242 at [33]-[43] and *Cannon* at [42]-[49].

⁴⁸ Pages 21-60.

destroyed or diminished if it could be obtained from a government agency which has possession of it.

56. Lancini engaged an Audio Engineering and Acoustic Consultancy company to complete a noise assessment (Acoustic Report) for another of its developments. Lancini utilised this report to demonstrate its compliance with the Development Approval. Given that Lancini utilised the Acoustic Report in this way, and that the Acoustic Report shows the company's methodology in relation to how it conducts noise assessments—specifically, the relevant considerations in conducting a noise assessment such as considering the receptor/s, where noise monitoring equipment is positioned, and how the assessment (including timing and equipment etc) is performed, I consider that the type of information in the Acoustic Report (which includes the results of noise measurements in areas within close proximity to the precinct including the building in which the applicant resides) could provide some value to other individuals or organisations in this industry. Similarly, in relation to the Acoustic Certification and correspondence between Lancini and Council, which refers to the results in the Acoustic Report,⁴⁹ I accept that, for the same reasons, referred to in relation to the Acoustic Report, this information could also be of value to others in this industry (including developers).
57. However, while the Acoustic Report is not publicly available, I note that the Noise Impact Assessment completed by MWA Environmental (**MWA**) in relation to the Development⁵⁰ is available on Council's ePlanning portal.⁵¹ This report contains MWA's methodologies in characterising the existing noise environment and the ambient background noise levels, including the method of assessment and other relevant considerations regarding the impacts of the Development.
58. In terms of whether disclosure of the above information⁵² could reasonably be expected to disclose information that has commercial value to Lancini or another person, I note that this information was compiled and reported on up to four years ago. Also, I again note that a report comprising MWA's noise assessment methodology is in the public domain and noise assessment reports, more broadly, could reasonably be expected to be made available to the public for these types of large scale developments.
59. Further, in relation to the Acoustic Report, a summary of the noise testing and results were included in Council's investigation report dated 4 April 2017.
60. Taking into account the above circumstances, I do not consider that disclosure of the information in issue would disclose information of significant commercial value and I have therefore afforded the Commercial Value Harm Factor low weight.

Business, commercial or financial affairs

61. Lancini submitted that:⁵³
- the Acoustic Report was commissioned by Lancini and it owns the copyright in this document; and
 - disclosure of the remaining information in issue more generally would compromise its business affairs.

⁴⁹ Pages 2-9 and 21-60.

⁵⁰ Report dated December 2014.

⁵¹ Refer to <<http://eplanning.townsville.qld.gov.au/Pages/xc.track/SearchApplication.aspx>>.

⁵² That is, the Acoustic Report, Acoustic Certification and correspondence between Council and Lancini which refers to the results in the Acoustic Report.

⁵³ Submission dated 4 September 2017.

62. The issue of copyright is not directly relevant to public interest factors regarding access but rather arises in terms of the form of access, if access is determined to be in the public interest.
63. Section 68(4) of the RTI Act allows an agency to refuse access to a document if granting same in the form requested by an applicant would, relevantly, infringe the copyright of a person other than the State.
64. On the basis of Lancini's submissions and my review of the Acoustic Report, I accept that this report is original work eligible for copyright protection under section 32 of the *Copyright Act 1968* (Cth), ownership which is held by Lancini or the Audio Engineering firm who prepared the Audio Report. On my review of the Acoustic Certification, I also consider that it is eligible for copyright protection, ownership of which is held by Lancini or the Audio Engineering firm who prepared the Acoustic Certification. Accordingly, access to this information should be by inspection only.
65. In terms of Lancini's submissions about business affairs, the RTI Act recognises that:
 - a factor favouring nondisclosure will arise in circumstances where disclosure of the information could reasonably be expected to prejudice the private, business, professional, commercial or financial affairs of entities (**Business Prejudice Factor**);⁵⁴ and
 - disclosure of the information could reasonably be expected to cause a public interest harm if it (**Business Harm Factor**);⁵⁵
 - would disclose information concerning the business, commercial or financial affairs of an agency or another person; 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.
66. The above factors favouring nondisclosure are directed towards preventing unwarranted commercial disadvantage to:
 - (i) persons who carry on commercial activity who supply information to government or about whom government collects information; and
 - (ii) agencies which carry on commercial activities.
67. In most instances, the question of whether disclosure of information could reasonably be expected to cause the necessary prejudice⁵⁶ or have the requisite adverse effect will turn on whether disclosure is capable of causing competitive harm to an entity.⁵⁷
68. I accept that Lancini, as a property development business, operates within a competitive business environment. However, on the information before me, I do not consider that the information in issue would reveal sensitive or novel business practices or strategies which would enliven the Business Prejudice Factor. Accordingly, I afford the Business Prejudice Factor no weight. However, in the event that I am mistaken in this conclusion, I would afford this factor only low weight.
69. While I am not satisfied that the Business Prejudice Factor applies, I have nonetheless considered the application of the Business Harm Factor.

⁵⁴ Schedule 4, part 3, item 2 of the RTI Act.

⁵⁵ Schedule 4, part 4, section 7(1)(c) of the RTI Act.

⁵⁶ Adopting the ordinary meaning of the term 'prejudice': see *Daw and Queensland Rail* (Unreported, Queensland Information Commissioner, 24 November 2010) at [16].

⁵⁷ See *Kalinga Wooloowin Residents Association Inc and Brisbane City Council; City North Infrastructure Pty Ltd; Treasury Department* (Unreported, Queensland Information Commissioner, 9 May 2012) at [89].

70. In respect of the first element of the Business Harm Factor, as explained at paragraph 68, I am satisfied that the information in issue would not disclose information concerning the business, commercial or financial affairs of Lancini which would enliven this factor. In terms of the second element of the Business Harm Factor, while the elements are cumulative and therefore it is not strictly necessary to consider the second element, I note that the Acoustic Certification and Acoustic Report contain specific information about acoustic levels which are unique to the location of the Development. It is my understanding that Lancini was required, as a condition of the Development Approval, to provide Acoustic Certification following the completion of the Development to demonstrate compliance. The Acoustic Report was provided by Lancini to Council in compliance with the conditions in the Development Approval and it would appear to be in the interests of Lancini to provide information to Council which demonstrates its compliance with Council's Development Approval and the EP Act. Accordingly, in relation to this information and the remaining information in issue, I am not satisfied that disclosure of this information could reasonably be expected to prejudice the future supply of information to Council or more broadly, to government.
71. I am satisfied that disclosure of the information in issue could not reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of Lancini, or prejudice the future supply of information of this nature. I am also satisfied that disclosure of this information could not reasonably be expected to cause a public interest harm. Accordingly, I afford the Business Harm Factor no weight. However, in the event that I am mistaken in this conclusion, I would afford this factor only low weight.

Deliberative process

72. Lancini submitted⁵⁸ that disclosure of certain information⁵⁹ within the information in issue would prejudice a deliberative process of Council.
73. In terms of Lancini's submissions, the RTI Act recognises that:
- a factor favouring nondisclosure will arise where disclosure of the information could reasonably be expected to prejudice a deliberative process of government (**Deliberative Process Prejudice Factor**);⁶⁰ and
 - disclosure of the information could reasonably be expected to cause a public interest harm through disclosure of (**Deliberative Process Harm Factor**):
 - an opinion, advice or recommendation that has been obtained, prepared or recorded; or
 - a consultation or deliberation that has taken place⁶¹
 in the course of, or for, the deliberative processes involved in the functions of government.
74. Once it is established that the information in issue is deliberative process information, the Harm Factor will apply. It is then relevant to consider the nature and extent of the public interest harm that may result through disclosure.⁶² For the Prejudice Factor to apply, a reasonable expectation of prejudice to the relevant deliberative process must be established.

⁵⁸ Submission dated 4 September 2017.

⁵⁹ Information comprising correspondence between Council and Lancini in relation to Council's investigation of a complaint.

⁶⁰ Schedule 4, part 3, item 20 of the RTI Act.

⁶¹ Schedule 4, part 4, section 4 of the RTI Act.

⁶² In *Trustees of the De La Salle Brothers and Queensland Corrective Services Commission* (1996) 3 QAR 206 at paragraph 34 the Information Commissioner considered, in the context of the exemption relating to deliberative process information in the repealed FOI Act, that 'specific and tangible harm to an identifiable public interest (or interests) would result from disclosure'. I consider that this is a relevant consideration when applying the Harm Factor under the RTI Act.

75. The Information Commissioner has considered the meaning of deliberative processes involved in the functions of an agency in *Eccleston and Department of Family Services and Aboriginal and Islander Affairs*.⁶³

The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action...

It by no means follows, therefore, that every document on a departmental file will fall into this category. ...Furthermore, however imprecise the dividing line may first appear to be in some cases, documents disclosing deliberative processes must, in our view, be distinguished from documents dealing with the purely procedural or administrative processes involved in the functions of an agency...

76. Lancini's submission suggests that disclosure of this information would reveal thinking processes of Council in deciding whether the mechanical plant complied with Condition 2 of the Development Approval or, more broadly, whether an offence has occurred under chapter 8, part 3B of the EP Act. Under the EP Act, Council is the administering authority responsible for investigating complaints raised by members of the public. In this context, the relevant '*thinking process*' is reflecting on and considering the submissions made by Lancini, as the developer, as part of a compliance investigation to determine whether the noise from the mechanical plant installed at the Development exceeded the noise criteria in the Development Approval. I note that a decision in relation to this matter has already been made by Council with the outcome provided to the applicant.
77. Given this investigation is complete, and Council considered this information (in addition to other information) in deciding that the noise from the mechanical plant complied with the conditions of the Development Approval, I do not consider that the Prejudice Factor applies. However, in the event that I am mistaken in this conclusion, I would afford this factor only low weight. As this information would reveal deliberative processes, I accept that the Harm Factor arises, however, given that those deliberations are now at an end and the process is complete, I consider that this factor attracts low weight.

Balancing the public interest

78. I afforded significant weight to the three public interest factors favouring disclosure and in respect of the factors favouring non-disclosure, I afforded low weight to two factors and no weight to seven factors.
79. After balancing those competing factors, I find that disclosure of the information in issue would, on balance, be in the public interest.
80. In light of the copyright issue—access to the Acoustic Report and Acoustic Certification is to be by inspection.

⁶³ (1993) 1 QAR 60 at [28]-[30] citing with approval the definition given in *Re Waterford and Department of Treasury* (No.2) (1984) 5 ALD 588 at [606]. The Information Commissioner's decision involved the repealed FOI Act but the comments are relevant to the application of these factors under the RTI Act.

DECISION

81. I set aside the decision under review. In substitution, I decide that there are no grounds upon which access to the information in issue may be refused under the RTI Act and access to the information in issue is granted in the form set out in this decision.
82. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Assistant Information Commissioner Corby

Date: 17 October 2018

APPENDIX

Significant procedural steps

Date	Event
17 October 2017	OIC received the external review application.
1 December 2017	OIC notified the applicant and Council that it had accepted the external review application and asked Council to provide information.
21 December 2017	OIC received the requested information from Council.
8 February 2018	An OIC staff member spoke with the applicant to clarify the scope of the application.
19 February 2018	OIC asked Council to provide search certifications and submissions.
5 March 2018	OIC received the requested information from Council.
22 March 2018	An OIC staff member spoke with the applicant to provide an update on the status of the review and confirm documents to be excluded from the scope of the review.
19 April 2018	OIC consulted with Lancini and invited Lancini to participate in the review. OIC's consultation letter included a preliminary view on the issues in the review. Lancini was invited to provide submissions in reply to that preliminary view by 3 May 2018
1 May 2018	Lancini requested a 45 day extension of time to provide submissions in response to OIC's 19 April 2018 preliminary view. Lancini also applied to participate in the review.
2 May 2018	OIC wrote to Lancini advising that its application to participate had been accepted and granted an extension of time, until 24 May 2018, to provide submissions.
22 May 2018	OIC received written submissions from Lancini.
28 May 2018	OIC responded to Lancini's 22 May 2018 submissions.
30 May 2018	OIC received further written submissions from Lancini.
6 June 2018	OIC conveyed a preliminary view to Council, and invited Council to provide submissions in response by 20 June 2018.
20 June 2018	Council requested an extension of time, until 27 June 2018, to provide submissions. OIC granted Council the requested extension of time.
27 June 2018	OIC received written submissions from Council.
17 August 2018	OIC wrote to the applicant confirming the scope of the review and conveyed a preliminary view. OIC invited the applicant to provide submissions in response by 7 September 2018. OIC asked Council to release 112 pages that it agreed to release to the applicant.
18 August 2018	OIC received written submissions from the applicant in relation to the scope of the review.

Date	Event
23 August 2018 – 7 September 2018	OIC consulted with a third party and invited them to participate in the review. OIC's consultation letter included a preliminary view on the issues in this review and an invitation to provide submissions in response.
10 September 2018	OIC wrote to Council and requested it to release the 12 pages of information, that the third party chose not to object to the disclosure of, to the applicant.