



Decision and Reasons for Decision

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| Citation: | <i>Clermont Group Pty Ltd and Isaac Regional Council [2022] QICmr 15 (18 March 2022)</i> |
| Application Number: | 315754 |
| Applicant: | Clermont Group Pty Ltd (ACN: 137 446 961) |
| Respondent: | Isaac Regional Council |
| Third Party: | Eriksen |
| Decision Date: | 18 March 2022 |
| Catchwords: | ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS – CONTRARY TO PUBLIC INTEREST - application for development applications and decision notices - whether disclosure would prejudice business affairs - whether disclosure enhances accountability and transparency - 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. By application dated 11 August 2020 (**Access Application**), the access applicant¹ (**Access Applicant**) applied under the *Right to Information Act 2009* (Qld) (**RTI Act**) to Isaac Regional Council (**Council**) for access to ‘any development applications or decision notices lodged or issued’ in relation to four lots of land.²
2. While processing the application, Council consulted with Clermont Group Pty Ltd (**Clermont**) as a relevant third party under section 37 of the RTI Act. While Clermont objected to the disclosure of all information located by Council, Council decided to disclose some of this information to the Access Applicant contrary to Clermont’s objection.³
3. Clermont applied for internal review of Council’s decision.⁴ In its internal review decision,⁵ Council varied its original decision, by:

¹ Who is the Third Party in this decision but, for ease of reference, will be referred to as the Access Applicant throughout this decision.

² Council released some of this information administratively under schedule 22, part 2, section 5(2) of the *Planning Regulation 2017*.

³ On 30 September 2020.

⁴ Application dated 9 October 2020.

⁵ 3 November 2020.

- removing some information on the basis that it was irrelevant to the scope of the Access Application; and
 - refusing access to some further information, on the ground that disclosure, would, on balance, be contrary to the public interest.⁶
4. Clermont then applied to the Office of the Information Commissioner (**OIC**) for external review of that decision.⁷
5. For the reasons set out below, I vary Council's decision and find that access may be:
- granted to parts of 63 pages and a further 193 full pages; and
 - refused to parts of 8 pages.

Background

6. The information located by Council comprises development applications and approvals relating to parcels of land situated between two large coal mining operations. Clermont operates a transport and coal screening/stockpiling operation on some of the land.⁸
7. Significant procedural steps relating to the application are set out in the Appendix.

Reviewable decision

8. The decision under review is Council's internal review decision dated 3 November 2020.⁹

Information in issue

9. The information to which Council decided to refuse access is not in issue in this review. Rather, it is the information to which Council decided to grant access that is in issue in this review.
10. During the external review, I identified a small amount of information that I considered should not be released on the ground that disclosure would, on balance, be contrary to the public interest. I conveyed a preliminary view to Council and the Access Applicant in this respect.¹⁰ Council accepted my preliminary view, however the Access Applicant did not accept my preliminary view and applied to become a participant in the external review in relation to that information (referred to below as the Category B Information).
11. I also identified eight pages that fall outside the scope of the Access Application,¹¹ on the basis the information comprised Council's internal case management notes, whereas the Access Application specifically requests access to '*any development applications and decision notices lodged/issued for*' the four named lots. I conveyed a preliminary view to Council in this respect, which Council accepted.¹²
12. Accordingly, this decision deals with:

⁶ Section 47(3)(b) of the RTI Act.

⁷ Application dated 1 December 2020.

⁸ Letter to OIC dated 12 May 2021.

⁹ Council notified the Access Applicant of its internal review decision on 6 November 2020.

¹⁰ In a letter to Council dated 14 January 2022 and in a letter to the Access Applicant dated 9 February 2022.

¹¹ At pages 49-52 of File 5 and pages 17-20 of File 8.

¹² On 10 March 2022. OIC also conveyed this view to the Access Applicant in a letter dated 3 March 2022. OIC advised the Access Applicant, if the Access Applicant wished to pursue access to the out of scope information, the Access Applicant could make a fresh application to Council.

- the remaining information which Clermont contends should not be released to the Access Applicant, being parts of 63 pages¹³ and a further 193 full pages (**Category A Information**);¹⁴ and
- the information which the Access Applicant contends should be disclosed being parts of eight pages (**Category B Information**).¹⁵

13. The Category A Information comprises:

- three development applications submitted to Council in 2003,¹⁶ 2008 and 2010 respectively, together with supporting documents
- copies of the decision notices in relation to the three development applications; and
- Council communications attaching the development notices.

14. The Category B Information comprises two paragraphs contained within a report, submitted to Council in support of the 2008 development application.¹⁷

Evidence considered

15. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including the footnotes and the Appendix)

16. The *Human Rights Act 2019* (Qld) (**HR Act**) affords human rights to individuals in Queensland. In this case, the external review applicant is a corporation but the Access Applicant (who is a participant in the review) is an individual. Kingham J in *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors*¹⁸ indicated that where section 58(1) of the HR Act applies, there need be no mover to raise human rights issues because that section requires the relevant public entity to properly consider engaged human rights and to not act or make a decision that is not compatible with human rights. As such, I have taken into account that the access applicant is an individual with human rights. I note Bell J's observations in *XYZ v Victoria Police (General)*¹⁹ on the interaction between the Victorian analogues of Queensland's RTI Act and HR Act: '*it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act.*' In observing and applying the law prescribed in the RTI Act, as I have done in this case, I am '*respecting and acting compatibly with*' applicable human rights as stated in the HR Act.²⁰

Issues for determination

17. Clermont contends that disclosure of the Category A Information, could reasonably be expected to prejudice Clermont's business or commercial affairs.

18. Accordingly, the first issue for determination is whether access to the Category A Information may be refused on the ground that on balance, disclosure would be contrary to the public interest pursuant to section 47(3)(b) of the RTI Act.

¹³ Pages 6 and 10 of File 1, pages 5, 6, 7, 60, 66, 67, 75, 76, 77, 78, 97, 99, 100, 108, 112, 128, 132, 133, 134, 138, 183, 187, 215, 221, 222, 230, 231, 232, 233, 252, 254 and 255 of File 3, pages 1, 7, 8, 16, 17, 18, 19, 38, 40 and 41 of File 4, pages 1, 7, 8, 16, 17, 18, 19, 37, 38, 40 and 41 of File 5 and pages 3, 4, 6, 8, 11, 12, 13 and 14 of File 8.

¹⁴ Pages 7-8 and 11-13 of File 1, pages 1-3 of File 2, pages 8-21, 61-65, 68-74, 79-96, 98, 101-107, 109-111, 129-131, 135-137, 184-186, 216-220, 223-229, 234-251, 253 and 256-262 of File 3, pages 2-6, 9-15, 20-37, 39 and 42-48 of File 4, pages 2-6, 9-15, 20-36, 39 and 42-48 of File 5 and pages 1-2, 5, 7, 9-10 and 15-16 of File 8.

¹⁵ Pages 66, 67, 221 and 222 of File 3, pages 7 and 8 of File 4 and pages 7 and 8 of File 5.

¹⁶ The 2003 development application was made to Belyando Shire Council, which subsequently amalgamated with two other shires to become Isaac Regional Council in 2008.

¹⁷ This comprises two part-pages and several duplicates of those pages.

¹⁸ [2020] QLC 33 at [90].

¹⁹ [2010] VCAT 255 (16 March 2010) (XYZ) at [573].

²⁰ XYZ at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

19. The Access Applicant contends that disclosure of the Category B Information, could *not* reasonably be expected to prejudice Clermont's business or commercial affairs.
20. Accordingly, the second issue for determination is whether access to the Category B Information may be refused on the ground that on balance, disclosure would be contrary to the public interest pursuant to section 47(3)(b) of the RTI Act.

Relevant law

21. Under the RTI Act, a person has a right to access documents of an agency,²¹ however, this right is subject to certain limitations, including grounds for refusal of access.²² Parliament intends for the grounds of refusal to be interpreted narrowly.²³ Relevantly, access may be refused where disclosure would, on balance, be contrary to the public interest.²⁴
22. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision-maker must:²⁵
 - identify any irrelevant factors and disregard them
 - identify any relevant public interest factors favouring disclosure and nondisclosure
 - balance the relevant factors favouring disclosure and nondisclosure; and
 - decide whether disclosure would, on balance, be contrary to the public interest.
23. 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,²⁶ together with all other relevant information, in reaching my decision. I have applied the RTI Act's pro-disclosure bias²⁷ and Parliament's requirement that grounds for refusing access to information be interpreted narrowly.²⁸
24. Section 87 of the RTI Act provides that if the decision under external review is a disclosure decision,²⁹ the participant in the external review application who opposes the disclosure decision has the onus of establishing that a decision not to disclose the information is justified or that the commissioner should give a decision adverse to the person who wishes to access the document. For the following reasons, I am satisfied that Clermont has not discharged this onus as regards the Category A information, but has as regards the Category B information.

²¹ Section 23(1)(a) of the RTI Act.

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

²³ Section 47(2)(a) of the RTI Act.

²⁴ Section 47(3)(b) of the RTI Act.

²⁵ Section 49(3) of the RTI Act.

²⁶ I have considered each of the public interest factors outlined in schedule 4 of the RTI Act, and any relevant factors are discussed below.

²⁷ Section 44 of the RTI Act.

²⁸ Section 47(2) of the RTI Act. 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 in making my decision.

²⁹ Section 87(3)(a) of the RTI Act provides that a disclosure decision means a decision to disclose a document or information contrary to the views of a relevant third party obtained under section 37 of the RTI Act.

Category A Information

Findings

Irrelevant factors

25. In considering whether disclosure of the Category A Information would, on balance, be contrary to the public interest, I have not identified or taken any irrelevant factors into account.³⁰

Factors favouring disclosure

26. I consider that the following public interest factors in favour of disclosure of the Category A Information are relevant in the circumstances of this review:
- disclosure of the information could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability³¹
 - disclosure of the information could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest³²
 - disclosure of the information could reasonably be expected to inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by the Government in its dealings with members of the community;³³ and
 - disclosure of the information could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision.³⁴
27. Council is accountable to the public for the decisions that it makes concerning land development and ensuring that a development is carried out in accordance with relevant legislative restrictions and approvals. Private sector businesses seeking approvals from Council, must also accept an appropriate level of scrutiny in their dealings with Council.³⁵
28. The Access Applicant raised concerns about whether the current business operation being conducted on the site, is in accordance with the development approvals.³⁶ The approval by Council of various development applications regarding large parcels of land is likely to have been the subject of considerable community discussion. It is reasonable to conclude that disclosure of the Category A Information, some of which was used by Council in its decision-making functions, and some of which comprises the conditions imposed in approving those applications, would foster informed debate³⁷ and enable the community to scrutinise the decisions made by government.³⁸
29. Taking these circumstances into consideration, I afford significant weight to the public interest factors favouring disclosure which relate to enhancing Council's accountability and transparency, informing the community about Council's compliance activities and contributing to the debate on important issues.

³⁰ Including those listed at schedule 4, part 1 of the RTI Act.

³¹ Schedule 4, part 2, item 1 of the RTI Act.

³² Schedule 4, part 2, item 2 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 *Campbell and North Burnett Regional Council; Melior Resources Incorporated (Third Party)* [2016] QICmr 4 (29 January 2016) at [37].

³⁶ Email to OIC dated 21 February 2022.

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

³⁸ Schedule 4, part 2, item 11 of the RTI Act.

30. I have considered the other public interest factors in schedule 4, part 2 of the RTI Act and am satisfied that no further factors favouring disclosure apply.

Factors favouring nondisclosure

31. In the course of the external review Clermont submitted:³⁹

If the Documents are disclosed, [they] will be put at a commercial disadvantage to their competitors, as the disclosure will reveal details about their commercial operations.

If the Documents are disclosed, there is a reasonable expectation that:

1. [their] commercial and financial affairs ... will be prejudiced⁴⁰
2. [their] business affairs ... will be prejudiced;⁴¹ and
3. the disclosure would amount to a public interest harm.⁴²

These factors favouring nondisclosure should be considered determinative of the detrimental effect disclosure would have on the public interest, which is reinforced by the lack of readily identifiable factors favouring disclosure.

This is merely another case of a commercial competitor seeking to gain an advantage over [their] business.

32. Clermont also submitted:⁴³

If the Documents are disclosed, our clients will be put at a commercial disadvantage to their competitors, as the disclosure will reveal details about their commercial operations.

33. And:⁴⁴

The Documents divulge information both about our client's transport and coal screening/operation, as well as our client's plan (which have not yet been realised) for the future use of those land parcels [information redacted]. That information is of value and is commercially sensitive.

34. Clermont's submissions raise specific nondisclosure factors which arise where disclosure could reasonably be expected to:

- prejudice the private, business, professional, commercial or financial affairs of entities⁴⁵
- prejudice trade secrets, business affairs or research of an agency or person;⁴⁶ and
- cause a public interest harm because disclosure of the information would disclose information concerning the business, professional, commercial or financial affairs of an agency or another person and could reasonably be expected to have an adverse effect on those affairs⁴⁷ (together the **Business Affairs Factors**).

³⁹ Letter to OIC dated 1 December 2020.

⁴⁰ Schedule 4, part 3, item 2 of the RTI Act.

⁴¹ Schedule 4, part 3, item 15 of the RTI Act.

⁴² Schedule 4, part 4, section 7(1)(c) of the RTI Act.

⁴³ Letter to OIC dated 1 December 2020.

⁴⁴ Letter to OIC dated 12 May 2021.

⁴⁵ Schedule 4, part 3, item 2 of the RTI Act.

⁴⁶ Schedule 4, part 3, item 15 of the RTI Act.

⁴⁷ Schedule 4, part 4, section 7(1)(c) of the RTI Act. Section 7(1) effectively contains three mutually exclusive public interest harm factors, at subsections (a)-(c). Some of the language used by Clermont in its submissions might arguably be construed as invoking section 7(1)(b), which operates to tell against disclosure of information possessed of a commercial value. Clermont has not developed any such submission, however, and in view of the onus it bears, I do not think it necessary to address that factor. Certainly, I cannot, on the information before me, see how the Category A Information could be said to be possessed of commercial value, within the meaning of section 7(1)(b).

35. Establishing a reasonable expectation of prejudice or adverse effect requires more than simply asserting that disclosure will result in such consequences. The words '*could reasonably be expected to*' call for a decision-maker to discriminate between what is merely possible or merely speculative and expectations that are reasonably based.⁴⁸ I must therefore be satisfied that there is a reasonably based expectation (and not mere speculation or mere possibility) that disclosure of the Category A Information could reasonably be expected to cause the prejudice or harm claimed by Clermont. In the course of the review, I sought further particulars from Clermont of the exact nature of the prejudice to their business affairs they claim would occur in the event of disclosure of the Information in Issue.⁴⁹
36. In response to this, Clermont provided a submission in relation to one document comprised within the Information in Issue, namely a town planning report (**Planning Report**), which was submitted as part of the 2008 development application to Council, for the reconfiguration of a lot. Clermont did not provide any submissions in relation to the remaining Category A Information.
37. In relation to the Planning Report, Clermont submitted:⁵⁰
- the Planning Report outlines future opportunities for the use of the created lots
 - the use opportunities in themselves are of commercial value
 - Clermont has spent a significant sum of money on development plans for those identified uses, which it intends to implement in the future; and
 - disclosure of those potential future use opportunities to a commercial competitor, may result in that commercial competitor taking steps to implement those uses itself and beat Clermont's client to market, which would be of detriment to Clermont and prejudice its business, commercial and financial affairs.
38. After carefully considering the Planning Report, I accept Clermont's submissions above, in relation to parts of two pages within the Report (which are subsequently duplicated through the Information in Issue). This information comprises the Category B Information, which I will address below. The remainder of the information in the Planning Report falls within the Category A Information.
39. While I accept that some of the Category A Information comprises the business affairs of Clermont (namely that it has submitted development applications to re-site two buildings and a third application to sub-divide some land), as previously held by the Right to Information Commissioner, under the RTI Act, the mere fact that information relates to commercial issues of entities does not, of itself, lead to an automatic presumption that disclosure under the RTI Act would be contrary to the public interest.⁵¹ Clermont's submissions do not sufficiently identify how their business, commercial and/or financial affairs could be prejudiced or adversely effected by the disclosure of the Category A Information. Nor has Clermont explained any causal link between disclosure of the

⁴⁸ See *Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 at [62]-[63] (**Cannon**). See also *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at [160]. Other authorities note that the words '*require a judgement to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous to expect a disclosure of the information could have the prescribed consequences relied upon*': *Smolenski v Commissioner of Police, NSW Police* [2015] NSWCATAD 21 at [34], citing *Commissioner of Police, NSW Police Force v Camilleri (GD)* [2012] NSWADTAP 19 at [28], *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 at [61] and *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 at 190.

⁴⁹ On 27 April 2021, 9 June 2021 and 11 November 2021.

⁵⁰ Letter to OIC dated 23 June 2021.

⁵¹ These comments were made in relation to a Queensland government-owned company but remain relevant here: *Kalinga Wooloowin Residents Association Inc and Brisbane City Council; City North Infrastructure Pty Ltd* (Third Party); *Department of Treasury* (Fourth Party) (Unreported, Queensland Information Commissioner, 9 May 2012) at [79] (**Kalinga**).

Category A Information and a resulting reasonable expectation of those prejudice/s or adverse effect/s.

40. Clermont's submissions focus on its view that knowledge about its commercial operations would be of high value to a commercial competitor, such that the commercial competitor could use the information to gain a commercial advantage over Clermont. However, I consider that at most, release of the majority of the Category A Information would merely disclose that Clermont has made three development applications to Council and those applications have been approved. I cannot identify any information within the Category A Information that comprises specific information about how Clermont conducts its transport and coal screening operations, such that disclosure of the information would enable a competitor to gain a commercial advantage over Clermont or reveal trade secrets of Clermont.
41. In relation to the information in the Planning Report and its attachments that form part of the Category A Information, the information comprises factual information about the land that Clermont sought to subdivide, including the size of land to be subdivided, information about access and whether the land is subject to any easements or encroachments. It is unclear how this information would be of value to a competitor, in that it does not disclose any information about Clermont's transport and coal screening operations. Given this, I cannot identify how disclosure could reasonably be expected to cause the prejudice or harm as suggested by Clermont.
42. The 2003 and 2010 development applications sought approval to re-site two buildings. Clermont contends that disclosure of the information would be to Clermont's detriment. The development applications do not contain any information about Clermont's transport and coal screening operations, for example the applications do not provide details as to the intended use of the buildings once they are re-sited, nor does the information disclose whether the approved work was actually undertaken by Clermont. Disclosure of this information would merely inform a competitor that over twelve years ago, Clermont intended to re-site two buildings – information which would appear to be of very little value to a competitor. Given this, I cannot identify any prejudice to Clermont's business affairs or public interest harm that could reasonably be expected to occur from the disclosure of this information.
43. In view of the above, I find that the Business Affairs Factors favouring nondisclosure of the Category A Information are not made out.
44. I have considered the other public interest factors listed in schedule 4, parts 3 and 4 of the RTI Act and am satisfied no further factors favouring nondisclosure apply.⁵²

Balancing the public interest

45. In terms of balancing the relevant public interest factors against one another, I consider that disclosing the Category A Information could reasonably be expected to enhance Council's accountability and transparency, inform the community and contribute to public debate and reveal the background or contextual information that informed Council's decision-making processes in relation to the development applications. I consider that these public interest factors warrant significant weight.

⁵² In the event that further relevant factors exist in favour of nondisclosure, I am satisfied that there is no evidence before me to suggest that any would carry sufficient weight to outweigh the significant weight that I have afforded to the public interest factors that favour disclosure of the Category A Information.

46. With respect to the nondisclosure factors, for reasons explained above, none apply to be balanced: in short, because I am not satisfied that there is a reasonable expectation of prejudice or adverse effect as anticipated by those factors arising from disclosure of the Category A Information.⁵³
47. There being multiple factors favouring disclosure, and none telling against, I find that disclosure of the Category A Information would not, on balance, be contrary to the public interest and the information should be disclosed to the Access Applicant.⁵⁴

Category B Information

Findings

48. Turning now to the Category B Information, as noted at paragraph 37, Clermont objected to the disclosure of the Planning Report and made submissions to support its view. After considering Clermont's submissions, I formed the preliminary view that access may be refused to parts of two pages within the Report. As noted at paragraph 10, while Council accepted my preliminary view in this respect, the Access Applicant objected to my view and applied to become a participant in the review.
49. While I am restricted by the RTI Act as to the detail that I can provide in relation to the Category B Information,⁵⁵ I can confirm that the information comprises two paragraphs in the Planning Report, which provides Council with a brief outline of Clermont's future operational plans for the land in question.

Irrelevant factors

50. In considering whether disclosure of the Category B Information would, on balance, be contrary to the public interest, I have not identified or taken any irrelevant factors into account.⁵⁶

Factors favouring disclosure

51. For the same reasons as referred to in my discussion of the Category A Information, at paragraphs 27 to 28, I consider that the following public interest factors favouring disclosure of the Category B Information apply:
- disclosure of the information could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability⁵⁷
 - disclosure of the information could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest⁵⁸
 - disclosure of the information could reasonably be expected to inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by the Government in its dealings with members of the community;⁵⁹ and

⁵³ However, if I am wrong in this respect and the factors favouring nondisclosure do require to be balanced against the factors favouring disclosure, I consider the factors favouring nondisclosure only warrant marginal weight.

⁵⁴ Section 47(3)(b) and 49 of the RTI Act.

⁵⁵ Section 108(3) of the RTI Act.

⁵⁶ Including those listed at schedule 4, part 1 of the RTI Act.

⁵⁷ Schedule 4, part 2, item 1 of the RTI Act.

⁵⁸ Schedule 4, part 2, item 2 of the RTI Act.

⁵⁹ Schedule 4, part 2, item 3 of the RTI Act.

- disclosure of the information could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision.⁶⁰
52. Given the specific nature of the Category B Information (a brief outline of Clermont's future operational plans), and that there is sufficient information in the Category A Information to show Council's decisions and reasons for decisions, I afford only moderate weight to these public interest factors favouring disclosure.
53. I have considered the other public interest factors in schedule 4, part 2 of the RTI Act and am satisfied that no further factors favouring disclosure apply.

Factors favouring nondisclosure

54. Clermont's submissions in relation to the Category B Information, as referred to at paragraph 37, raise the Business Affairs Factors referred to at paragraph 34.
55. For the Business Affairs Factors to arise, I must be satisfied that the Category B Information:⁶¹
- concerns the business, professional, commercial or financial affairs of an agency or another person; and
 - disclosure could reasonably be expected to have an adverse effect on those affairs.
56. In relation to the first criteria referred to in paragraph 55 above, given the Category B Information comprises details of Clermont's future operational plans for the land referred to in the Access Application, I am satisfied that the Category B Information does concern the business, professional or commercial affairs of Clermont.
57. In relation to the second criteria, the Information Commissioner has previously found that the adverse effect required by the business affairs harm provision will almost invariably be financial in nature, whether directly or indirectly. Accordingly, in most instances the question of whether disclosure of the Category B Information could reasonably be expected to cause the necessary prejudice or have the requisite adverse effect will turn on whether disclosure of the information is capable of causing competitive harm to the relevant entity, in this case Clermont.⁶²
58. In this respect, as noted at paragraph 37, Clermont submits that disclosure of its potential future use opportunities to a commercial competitor may result in that commercial competitor taking steps to implement those uses itself and beat Clermont to market, which would be of detriment to Clermont and prejudice its business, commercial and financial affairs.⁶³
59. Given the very specific nature of some of the information comprised within the Category B Information, which I am not able to describe in this decision without revealing one of Clermont's plans, I consider that disclosure of the Category B Information could reasonably be expected to result in a local commercial competitor being in a position to implement those plans itself in an attempt to beat Clermont to the market, thus resulting in the loss of income and/or profits for Clermont. Accordingly, I am satisfied that the expectation of adverse effects on Clermont's business, commercial or financial affairs is reasonably based.

⁶⁰ Schedule 4, part 2, item 11 of the RTI Act.

⁶¹ *Kalinga* at [71].

⁶² *Kalinga* at [89].

⁶³ Letter to OIC dated 23 June 2021.

60. In contending that disclosure of the Category B Information would not cause any prejudice or harm to Clermont, the Access Applicant submits:⁶⁴

In general, my RTI request seeks the provision of documentation and approvals to support current business operations conducted on the Lot and Plan mentioned, which current searches suggest has deficiencies. Now, I'm guessing, but any documentation held by council relating to the mentioned properties is likely to be old, perhaps 15 years or more so I will argue the older the document, the less confidential they become. Even the Federal Governments [sic] Cabinet minutes are publicly released after 20 years so it seems challenging the interested party might try and argue their documents confidentiality are considered in the same realm.

61. I acknowledge that in some circumstances, it may be argued that any prejudice or harm that could reasonably be expected to result from disclosure of information may be reduced, given the age of the information. In the circumstances of this matter, while I note the Category B Information was provided to Council in support of a development application in 2008, I also note that Clermont submits that the plans referred in the Category B Information have not yet been implemented. Accordingly, although the Category B information is nearly 14 years old, it appears that it still has relevance to Clermont's commercial operations, as it intends to implement the plans in the future. Furthermore, Clermont's submission that it still intends to implement the plans in the future suggests that at this stage, it has not been beaten to the market by a competitor in this respect.
62. In view of the above, I find that the Business Affairs Factors favouring nondisclosure of the Category B Information carry significant weight.⁶⁵
63. I have considered the other public interest factors listed in schedule 4, parts 3 and 4 of the RTI Act and am satisfied no further factors favouring nondisclosure apply.

Balancing the public interest

64. In terms of balancing the public interest factors which favour disclosure of the Category B Information against the public interest factors which favour nondisclosure of the Category B Information, I consider that disclosing the Category B Information could reasonably be expected to enhance Council's accountability and transparency, inform the community and contribute to public debate and reveal the background or contextual information that informed Council's decision-making processes in relation to the sites. I consider that these public interest factors warrant moderate weight.
65. With respect to the nondisclosure factors, for reasons explained above, given the nature of the Category B Information I consider these warrant significant weight.
66. On balance, when taking into consideration the position that disclosure of the Category B Information under the RTI Act means there can be no restriction on its use or dissemination⁶⁶ and noting the commercial sensitivity of the Category B Information, I consider that the factors favouring disclosure of the Category B Information are outweighed by the factors favouring nondisclosure in this case.

⁶⁴ Email to OIC dated 21 February 2022.

⁶⁵ As noted at footnote 47, schedule 4, part 4, section 7(1) of the RTI Act, effectively contains three mutually exclusive public interest harm factors, at subsections (a)-(c) – see *Cannon* at [66]. Given, that I have made the finding that the Business Affairs Factors require consideration in relation to the Category B Information, I have not considered schedule 4, section 7(1)(b) of the RTI Act.

⁶⁶ As observed by Judicial Member McGill SC in *FLK v Information Commissioner* [2021] QCATA 46 at [17]. While the observation was made in relation to the IP Act, I consider the observation is equally applicable to access of information obtained via the RTI Act.

67. Accordingly, I consider that access may be refused to the Category B Information on the ground that its disclosure would, on balance, be contrary to the public interest.⁶⁷

DECISION

68. For the reasons set out above, I vary Council's decision and find that access may be:

- granted to parts of 63 pages and a further 193 full pages; and
- refused to parts of 8 pages.

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

Assistant Information Commissioner Corby

Date: 18 March 2022

⁶⁷ Section 47(3)(b) and 49 of the RTI Act.

APPENDIX**Significant procedural steps**

| Date | Event |
|-------------------|---|
| 1 December 2020 | OIC received the applicant's application for external review. |
| 2 December 2020 | OIC requested preliminary documents from Council. |
| 3 December 2020 | OIC received the preliminary documents from Council. |
| 8 December 2020 | OIC contacted Council to clarify some of the information provided in the preliminary documents. |
| 11 December 2020 | OIC advised the applicant and Council that the application for external review had been accepted. |
| 21 January 2021 | Council provided OIC with a response to OIC's letter dated 11 December 2020. |
| 27 April 2021 | OIC issued a preliminary view to Clermont and provided an update to Council. |
| 12 May 2021 | Clermont provided OIC with a submission in response to OIC's preliminary view. |
| 9 June 2021 | OIC issued a second preliminary view to Clermont and provided an update to Council. |
| 23 June 2021 | Clermont provided OIC with a submission in response to OIC's second preliminary view. |
| 28 September 2021 | OIC raised some queries with Council in relation to the scope of the access application and the mark-up of one of the documents provided by Council. |
| 20 October 2021 | Council provided a response to OIC's query about the scope of the access application. |
| 21 October 2021 | Council provided OIC with a further mark-up of one of the documents. |
| 11 November 2021 | OIC called Clermont's lawyers to advise that Clermont had still not satisfied the onus that disclosure of the Information in Issue could reasonably be expected to cause prejudice or harm to Clermont's business affairs. OIC invited Clermont to provide further submissions. |
| 8 December 2021 | OIC contacted Clermont's lawyers noting that Clermont had not provided any submissions by the due date. |
| 15 December 2021 | Clermont's lawyer advised OIC that Clermont did not intend to provide any further submissions and instead requested a formal written decision. |
| 14 January 2022 | OIC conveyed a preliminary view to Council. |
| 25 January 2022 | Council advised OIC that it accepted OIC's preliminary view. |
| 9 February 2022 | OIC conveyed a preliminary view to the Access Applicant. |
| 21 February 2022 | The Access Applicant advised OIC that he wanted to participate in the external review. |

| Date | Event |
|---------------|---|
| 3 March 2022 | OIC acknowledged the Access Applicant's request and confirmed that he had been joined as a party to the review. |
| 10 March 2022 | OIC conveyed a preliminary view to Council in relation to a small amount of out of scope information. Council accepted this view. |