



Decision and Reasons for Decision

Citation:	<i>H64 and Redland City Council</i> [2022] QICmr 26 (12 May 2022)
Application Number:	315880
Applicant:	H64
Respondent:	Redland City Council
Decision Date:	12 May 2022
Catchwords:	<p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - expert reports created for the purpose of assisting in the assessment of a development proposal - information provided to experts for purpose of preparing reports - whether disclosure would found action for breach of confidence - sections 47(3)(a) and 48 and schedule 3, section 8 of the <i>Right to Information Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - documents concerning terms of reference for third party consultants - whether agency has taken all reasonable steps to identify and locate documents applied for by applicant - sections 47(3)(e) and 52 of the <i>Right to Information Act 2009</i> (Qld)</p>

REASONS FOR DECISION

Summary

1. The applicant applied¹ to Redland City Council (**Council**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to documents relating to reviews into aspects of the Toondah Harbour development proposal that were conducted by two external consultants on behalf of Council, specifically:
 - the reports prepared by the consultants
 - the terms of reference for the reports
 - the dates of commissioning and dates of receipt of the reports; and
 - the cost of the reports.
2. Council located 89 pages comprising the consultants' reports and associated documents, as well as invoices from the consultants. It decided² to release 4 pages in full, 3 pages in part, and to refuse access to 82 pages on the grounds that those pages

¹ Application dated 22 October 2020.

² Decision dated 27 November 2020.

comprised exempt information, or their disclosure would, on balance, be contrary to the public interest. Council was unable to locate any terms of reference documents.

3. On internal review, Council varied its original decision and provided some further information to the applicant.³ Council continued to refuse access to the consultants' reports and remained unable to locate any terms of reference documents.
4. The applicant applied⁴ to the Office of the Information Commissioner (**OIC**) for external review of Council's refusal of access decision, also raising sufficiency of search issues, particularly in relation to terms of reference documents.
5. For the reasons set out below, I find that access to the information remaining in issue may be refused because it is exempt information under the RTI Act. In respect of the sufficiency of search issue raised by the applicant, I find that Council has taken all reasonable steps to locate responsive documents, and that access to further documents, including any additional terms of reference documents, may be refused on the basis they are nonexistent.

Background

6. Toondah Harbour was declared a Priority Development Area under the *Economic Development Act 2012* (Qld) in 2013. On 1 May 2013, Council resolved to call for expressions of interest for development of the site. Following an evaluation of the expressions of interest, the evaluation panel recommended that the relevant government parties enter into exclusive dealings with Walker Group Holdings Pty Ltd (**Walker Group**) to develop Toondah Harbour.
7. On 17 December 2014, Council resolved to award Walker Group '*preferred development status*' for Toondah Harbour. Council endorsed Walker Group's preliminary masterplan proposal and resolved to invite Walker Group to continue negotiations to finalise a Development Agreement (**DA**) for the Toondah Harbour site.
8. Also in late 2014, Council commissioned reports by two independent consultants - Aurecon and BDO Australia (**Consultants**). The Consultants were retained by Council to provide '*independent peer reviews*' of certain aspects of Walker Group's 'Request for Proposal' that had been submitted to Council, specifically, engineering and financial aspects. The Consultants finalised their reports in early 2015 and the findings were presented to Councillors on 10 March 2015.
9. Subsequently, a DA for Toondah Harbour was executed as a Deed between Council and Walker Group (and other relevant parties).
10. Significant procedural steps are set out in the Appendix to this decision.

Reviewable decision

11. The reviewable decision is Council's internal review decision dated 15 January 2021.

³ Internal review decision dated 15 January 2021.

⁴ External review application received 12 February 2021.

Evidence considered

12. In reaching my decision, I have had regard to the submissions, evidence, legislation, and other material referred to throughout these reasons (including footnotes and Appendix).
13. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.⁵ I consider a decision-maker will be '*respecting, and acting compatibly with*' that right and others prescribed in the HR Act, when applying the law prescribed in the RTI Act.⁶ I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between equivalent pieces of Victorian legislation:⁷ '*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.*'⁸

Information in issue

14. Additional information was released to the applicant throughout the course of the external review and some issues resolved.⁹ The only information remaining in issue comprises:
 - the reports of the Consultants (**Reports**);¹⁰ and
 - a reference in a letter from Aurecon to Council dated 23 January 2015 to the number of units (apartments) proposed to be built by Walker Group as part of the Toondah Harbour development, as communicated to Council by Walker Group in its Request for Proposal (**Unit Information**).

Issues for determination

15. The issues for determination are:
 - whether access to the Reports and the Unit Information (collectively referred to as the **Information in Issue**) may be refused under section 47(3)(a) of the RTI Act on the basis they are exempt information under schedule 3, section 8(1) of the RTI Act (breach of confidence); and
 - whether Council has taken all reasonable steps to locate information responsive to the access application, such that access to further documents may be refused on the grounds that they are nonexistent or unlocatable (sufficiency of search).¹¹

Relevant law - exempt information

16. The RTI Act gives a right of access to documents of government agencies.¹² This right is subject to other provisions of the RTI Act, including grounds on which access may be

⁵ Section 21 of the HR Act.

⁶ *XYZ v Victoria Police (General)* [2010] VCAT 255 (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 at [111].

⁷ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

⁸ *XYZ* at [573].

⁹ During the review, Council located additional documents comprising correspondence between Council and the Consultants concerning the work to be undertaken by the Consultants. OIC consulted with the Consultants about release of this information. The Consultants and Council consented to disclosure of the bulk of these letters, and this information was released to the applicant.

¹⁰ The report by Aurecon is titled 'Toondah Harbour Master Plan Review' and comprises seven pages. The report by BDO Australia is titled 'Financial Analysis of Toondah Harbour Project' and comprises 33 pages.

¹¹ Section 47(3)(e) and 52 of the RTI Act.

¹² Section 23(1)(a) of the RTI Act.

refused. Access may be refused to information to the extent the information comprises 'exempt information'.¹³

Breach of confidence

17. The test for exemption under schedule 3, section 8(1) of the RTI Act 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 said to be owed to that plaintiff by an agency such as Council.¹⁴
18. Following the decision of the Queensland Civil and Administrative Tribunal (**QCAT**) in *Ramsay Health Care v Office of the Information Commissioner & Anor*,¹⁵ it has been established that the cause of action referred to in schedule 3, section 8(1) of the RTI Act can arise in either contract or equity.
19. Although it is not entirely clear, it appears from the decision under review that Council intended to rely upon the existence of both a contractual and equitable obligation of confidence. However, in respect of the contractual obligation, Council did not identify in its decision the specific contractual clauses that it considered gave rise to this obligation. During the course of the review, it submitted that the confidentiality clause contained in the DA applied to some or all of the Information in Issue.

Contractual obligation of confidence

20. Concerning contractual obligations of confidence, in *B and BNRHA*, Information Commissioner Albietz said:

In the context of s.46(1)(a) the word "confidence" must be taken to be used in its technical, legal sense, thus:

"A confidence is formed whenever one party ('the confider') imparts to another ('the confidant') private or secret matters on the express or implied understanding that the communication is for a restricted purpose." (F Gurry "Breach of Confidence" in P Finn (Ed.) *Essays in Equity*; Law Book Company, 1985, p.111.)

My references to a cause of action for breach of a contractual obligation of confidence must be understood in this sense. A contractual term requiring that certain information be kept secret will not necessarily equate to a contractual obligation of confidence: an issue may arise as to whether an action for breach of the contractual term would satisfy the description of an "action for breach of confidence" (so as to fall within the scope of s.46(1)(a) of the FOI Act). An express contractual obligation of confidence ordinarily arises in circumstances where the parties to a disclosure of confidential information wish to define clearly their respective rights and obligations with respect to the use of the confidential information, thereby enabling the parties to anticipate their obligations with certainty. A mere promise to keep certain information secret, unsupported by consideration, is incapable of amounting to a contractual obligation of confidence, and its effectiveness as a binding obligation would depend on the application of the equitable principles discussed in more detail below.¹⁶

21. Following its decision in *Ramsay*, QCAT has issued a number of other decisions that have examined the operation of schedule 3, section 8(1) of the RTI Act, including a decision dealing with the DA between Council (and other government entities) and Walker Group, in which it found that the DA was subject to a contractual obligation of confidence: see *Walker Group Holdings Pty Ltd v Queensland Information*

¹³ Sections 47(3)(a) and 48 of the RTI Act.

¹⁴ *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (**B and BNRHA**).

¹⁵ [2019] QCATA 66 (**Ramsay**).

¹⁶ *B and BNRHA* at [45].

Commissioner.¹⁷ See also *Adani Mining Pty Ltd v Office of the Information Commissioner*¹⁸ and *Park v Office of the Information Commissioner*¹⁹ for relevant discussions about the application of schedule 3, section 8(1) of the RTI Act.

22. The *Adani Mining* decision made clear that public interest considerations are not relevant when considering the application of schedule 3, section 8(1) of the RTI Act to contractual obligations of confidence imposed upon a government agency.²⁰

Discussion

23. To found an action in contract for breach of confidence, it is necessary to be satisfied that the information in question is subject to an express contractual clause that binds the parties to keep the information confidential, supported by consideration.
24. In respect of the latter requirement, it is clear that both Consultants were paid by Council for their Reports and that they each entered into agreements with Council to conduct their reviews and prepare their Reports on arms-length, commercial terms.
25. As regards the terms of the engagement by Council of the Consultants, it appears from the material provided by Council that Council initially met with each Consultant to discuss Council's requirements for the reviews, and the work to be conducted. The Consultants then each wrote to Council to confirm the scope of work to be performed, and to set out the terms of their offer to undertake the work. Following Council's acceptance of the Consultants' proposals, it provided the Consultants with access to the relevant information contained in Walker Group's proposal.

Engagement of BDO Australia

26. Following its initial meeting with Council, BDO Australia wrote to Council on 8 December 2014 to outline the scope of work and its estimated fees. It also provided Council with a copy of its 'Terms of Trade', setting out the terms and conditions upon which it offered to perform the work and prepare its Report. Council accepted those terms and engaged BDO Australia.
27. The Terms of Trade include a confidentiality clause which defines 'confidential information' as meaning any confidential information in any form disclosed by Council or BDO Australia to each other whether before or after the date of the Engagement Letter. The operative clause then binds each party to keep the other's confidential information confidential, except for the purposes of exercising or performing the relevant rights and obligations under the engagement, and not to disclose any confidential information to a third party except as expressly permitted.
28. It is clear from the agreed scope of work set out in BDO Australia's letter that Council provided BDO Australia with access to relevant information upon which it required BDO Australia's advice, including financial modelling and predicated financial outcome information contained in Walker Group's proposal. In its Report, BDO Australia discussed and analysed that information, as well as conducting its own research into various issues in order to provide its advice about the expected financial outcome of the Walker Group proposal.

¹⁷ [2021] QCATA 30.

¹⁸ [2020] QCATA 52.

¹⁹ [2021] QCATA 109.

²⁰ At [38].

29. I am prevented by the operation of sections 107(1) and 108(3) of the RTI Act from discussing the contents of the Reports in any detail. However, having examined the contents of BDO Australia's Report, I am satisfied that it is reasonable to regard the information contained within it as falling within the definition of 'confidential information' contained in BDO Australia's Terms of Trade, given its commercially sensitive nature and the circumstances in which it was communicated, namely, in the context of providing independent advice to Council about the financial aspects of a preliminary development proposal that had not been approved.
30. There is nothing in the Terms of Trade to indicate that the relevant contractual term does not continue to bind the parties. I am satisfied that consideration has passed, and that there is nothing in the material before me that would raise an issue about the genuineness of the obligation of confidentiality imposed by the Terms of Trade, or that would suggest that the parties entered into the consultancy agreement for some collateral or improper purpose inconsistent with the claim for exemption.²¹
31. Accordingly, I am satisfied that BDO Australia's Report is subject to a binding contractual obligation of confidence arising from BDO Australia's Terms of Trade and that its disclosure would therefore found an action in contract for breach of confidence under schedule 3, section 8(1) of the RTI Act.
32. In his letter dated 5 May 2022, the applicant complained that he was at a '*distinct disadvantage in not being able to access the wording and context on which a number of these confidentiality claims are based*'. While this may be true (and unavoidable, for reasons I will discuss below) in respect of the confidentiality clause contained in the DA, the applicant has, in fact, been provided with the confidentiality clause contained in BDO's Terms of Trade and can therefore assess its operation for himself.²²

Engagement of Aurecon

33. The terms upon which Aurecon was engaged by Council to provide its Report are not as clear.
34. Following oral discussions between the parties about the required scope of work, Aurecon provided Council with a proposal letter dated 23 January 2015. This letter stated that '*we propose to use Local Buy standard conditions of engagement, which have already been modified and agreed by Aurecon*'.²³ A copy of those conditions of engagement do not appear to have been provided to Council at the time. Inquiries were made with Aurecon during the course of the review to try to determine what the conditions provided. Aurecon subsequently provided OIC with a copy of its contract with Local Buy, and the relevant terms and conditions. However, the contract is stated to commence on 1 November 2017 and therefore would not appear to have been operative at the time that Council retained Aurecon. In any event, the confidentiality provisions contained in the contract impose a unilateral obligation of confidence upon Aurecon, rather than a mutual obligation binding both Council and Aurecon to keep each other's confidential information confidential. As such, even if the Local Buy contract has been operative at the relevant time, disclosure of the Aurecon Report by Council would not have given rise to an action against Council in contract for breach of confidence, according to the terms of the contract.

²¹ As per *BGC (Australia) Pty Ltd v Fremantle Port Authority* (2003) 28 WAR 187 at [32] - [34]. See the discussion in *Park and Moreton Bay Regional Council & Ors* [2020] QICmr 39 (23 July 2020) at [28] - [32].

²² Released to the applicant by Council on 28 April 2022.

²³ Local Buy was established by the Local Government Association of Queensland to assist government with procurement processes. It provided procurement and probity services to the whole of government.

35. Council wrote to Aurecon on 28 January 2015 to accept Aurecon's proposal. This letter of acceptance stated as follows:

Documentation as follows shall form the complete Contract and shall be read and understood in the following order of precedence should any inconsistency arise between the said documents:

- *This Letter of Acceptance 28 January 2015*
- *Aurecon Proposal dated 23 January 2015*
- *General Conditions of Contract as evidenced in Attachment 1.*

36. Similarly to the Local Buy conditions, the General Conditions of Contract that were attached to Council's letter impose an obligation of confidence on the contractor only in respect of all 'contract material,' which is defined to mean all information that is either provided by Council to the contractor for the provision or performance of the services, or created or prepared by the contractor in or incidental to the provision of the services.²⁴ This obligation is stated to be binding on the contractor until such time as Council releases the contractor from its obligation of confidentiality or makes the contract material publicly available.
37. Again, as these General Conditions operate to bind only Aurecon to keep all contract material confidential, disclosure of such material by Council under the RTI Act would not found an action in contract for breach of confidence, according to these conditions.
38. In its submissions to OIC during the course of the review, Council advised OIC that, upon its retention of the Consultants, it would have provided each with Council's standard conditions of contract. Council referred to the current version of these conditions which is available on its website. Clause 2.1 defines 'confidential information' as '*information belonging or relating to a party to this contract, in any form, that is not generally available to the public at the time of its disclosure or that is in fact, or should reasonably be regarded as, confidential to the party to which it belongs or relates*'. Clause 47 provides that '*no party shall disclose any confidential information of the other party disclosed in the negotiating or performance of this contract except in certain limited circumstances, including, for example, if the other party's consent is obtained, or if the disclosure is required by law, a court or a regulatory body, et cetera*'.
39. These conditions clearly impose a mutual obligation of confidence upon the parties in respect of confidential information, as defined. However, there is no evidence before me to establish that this version of the conditions was provided to Aurecon. To the contrary, as I have noted above, it appears that the version of Council's conditions that was provided to Aurecon imposed only a unilateral obligation of confidence on Aurecon.

Operation of DA confidentiality clause

40. I have also considered the operation of the confidentiality clause contained in the DA. As noted, the DA and the scope of its confidentiality clause were considered by QCAT in *Walker Group Holdings Pty Ltd v Queensland Information Commissioner*. The DA was itself found to be subject to a contractual obligation of confidence. For this reason, and as mentioned in paragraph 32 above, I am prevented from discussing the terms of the DA in any detail, including the wording of the confidentiality clause.²⁵ As also noted,

²⁴ See clauses 1(b) and 4.5.

²⁵ See the discussion in *Park and Moreton Bay Regional Council & Ors* at [17] regarding an applicant's inability to examine the terms of the relevant confidentiality clause.

I am prevented by the operation of sections 107(1) and 108(3) of the RTI Act from discussing the Information in Issue in any detail.

41. The applicant argues that, because the DA was executed subsequent to the retention of the Consultants and the provision of their Reports, its confidentiality clause cannot operate to cover the Information in Issue.
42. However, it is clear from Aurecon's proposal letter dated 23 January 2015, which was accepted by Council, that Aurecon was retained to provide advice on the infrastructure aspects of Walker Group's masterplan proposal, including infrastructure contributions, construction methods, ongoing maintenance demands, *et cetera*.
43. Having considered the definition of 'Confidential Information' contained in the DA, as well the operative confidentiality clause contained in section 148 of the DA, I am of the view that it is open to interpret these clauses as operating to cover the information that Walker Group submitted to Council in its Request for Proposal. Relevant parts of this information were then provided by Council to the Consultants to enable them to conduct their reviews, and the Reports discuss this information. I consider that the confidentiality obligations imposed by the DA arguably cover the information that Walker Group submitted to Council as part of its Request for Proposal, given that all or most of it appears to have remained current at the time the DA was executed. As such, I consider that the confidentiality obligations would also extend to this information where it appears and is discussed in the Reports.
44. For these same reasons, I consider that the confidentiality clause contained in the DA also arguably extends to the Unit Information. This information was supplied to Council by Walker Group as part of Walker Group's Request for Proposal, and was then communicated by Council to Aurecon as information relevant to Aurecon's review. Aurecon re-stated this information in its proposal letter to Council.
45. If I am wrong about the scope and operation of the DA's confidentiality clause, I am also satisfied that the Information in Issue is subject to an equitable obligation of confidence, for reasons that I will discuss further below.
46. The applicant submitted that masterplan and associated information is in the public domain and therefore cannot be regarded as confidential information.²⁶ I am not satisfied that the Information in Issue is in the public domain. Council contends that it continues to remain confidential.²⁷ But even if it could be established that the Information in Issue is in the public domain, under the terms of the DA's confidentiality clause, that does not, of itself, determine whether the definition of 'Confidential Information' continues to be satisfied. Moreover, the Reports do not simply reproduce the information contained in Walker Group's Request for Proposal. Rather, the purpose of the Reports is to review, analyse and express an opinion/give advice about the relevant information. As far as I am aware, that type of information is not in the public domain.
47. I note the comments in *Park v Information Commissioner* in which QCAT upheld a decision of the Information Commissioner that a series of contracts concerning the re-development of the former paper mill site at Petrie were subject to contractual obligations of confidence. QCAT emphasised that the relevant issue to consider is the scope of the information covered by the contractual confidentiality provision:

²⁶ Letter dated 24 February 2022.

²⁷ In Council's email of 26 April 2022, Council confirmed that it contended that the Unit Information continued to remain confidential in accordance with the DA's confidentiality clause.

*The appellant challenged the proposition that the content of the relevant contracts was confidential information, and submitted that any confidential information provided during negotiations would not have ended up in the contract. Such an argument mistakes the significance of contractual confidentiality. What matters is the scope of the information covered by the contractual provision. That is a question of fact, which is not subject to appeal, unless it involves some question of interpretation of a particular contract. For this reason, there is no question of releasing the document with the confidential parts redacted, if the confidentiality extends to the whole document...*²⁸

48. I am satisfied that it is reasonably arguable that the scope of the information covered by the DA contractual confidentiality provision extends to the whole of the Information in Issue.

Findings

49. In summary, I find that Council is under a contractual obligation not to disclose the Information in Issue because:
- the BDO Australia Report is subject to the confidentiality clause contained in BDO Australia's Terms of Trade
 - both Reports are subject to the confidentiality clause contained in the DA; and
 - the Unit Information is subject to the confidentiality clause contained in the DA.
50. However, as noted above, in the event that I am wrong about the operation of the confidentiality clause in the DA, I am satisfied that Council is subject to an equitable obligation of confidence in respect of the Information in Issue.

Equitable obligation of confidence

51. An equitable obligation of confidence can arise where the formalities for the formation of a contract are not present. The obligation arises where information with the necessary quality of confidence is imparted in circumstances importing an obligation of confidence.
52. The cumulative requirements to establish an equitable obligation of confidence are as follows:
1. the information in question must be identified with specificity
 2. it must have the necessary quality of confidence
 3. it must have been received in circumstances importing an obligation of confidence; and
 4. there must be an actual or threatened misuse of the information.²⁹

Discussion

53. I consider that requirements 1 and 2 are met by the Information in Issue. I am satisfied that it has the necessary quality of confidence. I have responded at paragraph 46 above to the applicant's contentions about information in the public domain.
54. While I note the age of the Information in Issue, I also note that the Toondah Harbour re-development still has not received final government approval and that work on the project has not commenced. I am not satisfied on the material before me that the Information

²⁸ At [5].

²⁹ *Ramsay* at paragraph 94, adopting previous formulations in *Optus Networks Pty Ltd v Telstra Corporation Ltd* (2010) 265 ALR 281 and *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1990) 22 FCR 73. There will generally be a fifth element where the entity claiming to be owed the confidence is another government body. It is unlikely to apply in other circumstances.

in Issue is aged or out-of-date or has lost its sensitivity to such an extent as to no longer possess the necessary quality of confidence.

55. The third element is that the information must have been received in circumstances that import an obligation of confidence. Generally, an obligation of confidence is imposed at the time the information is imparted and it can be imposed expressly or by implication, based on the circumstances.
56. The existence and scope of any obligation of confidence will be determined both by what the entity receiving the information knew and what they ought to have known in the circumstances. Even when there is no express mention of confidentiality (or otherwise), certain kinds of discussions can be ones which are generally assumed by the participants will be treated as confidential. It is necessary to consider and evaluate all the circumstances surrounding the supply of the information to determine whether those circumstances, as a whole, imparted an obligation of confidence.
57. As part of those relevant circumstances, the applicant has raised public interest considerations favouring disclosure, couched in terms of a 'duty of care' that he contends is owed by Council to residents in respect of such a significant development with the potential for far-reaching impacts on residents as well as the local environment.
58. In *Ramsay*, it was found that:

...In the case of information produced to and held by a government agency, it can be accepted that the public interest in having access to the particular information is one of the factors to be considered when ascertaining whether or not that information is held under an obligation of confidence. Indeed, it may be a factor to which considerable weight attaches. But it is not the sole determining factor. It needs to be weighed in the mix of all the relevant circumstances under which the information was imparted to ascertain whether the information is held subject to an equitable obligation of confidence.³⁰

59. The applicant argues that an article appearing in the Redland City Council News on 25 March 2015 (and that he attached to his external review application) contained statements which may be indicative of a breach by Council of the appropriate standard of care:

The "Redland City Council News" article of March 25 quotes the Redland City Council Mayor as follows "These reviews were commissioned by Council as part of our due diligence process to ensure the Priority Development Area (PDA) proposal was sound on engineering and financial grounds".

My purpose in wishing to review the reports ... is I believe entirely consistent with the stated purposes as set out in the media article, ie to try and ensure as far [as] possible that that [sic] any proposals for the PDA are sound on engineering and financial grounds and that the risks are understood and appropriately addressed by Council.³¹

...

60. In attachments to his application for external review, the applicant identified the following public interest considerations that he considered ought to be taken into account in assessing the issue of confidentiality:

The Toondah Harbour PDA project is believed to pose a considerable risk to the Redland City Council related to a number of factors including:

³⁰ At [82].

³¹ Letter dated 24 February 2022.

- the size and scale of the project, \$1.36 Bn constructed over a 10 to 20 year period
- the nature of the project site, the majority of which at present is below the high tide line
- a relative lack of Council experience of similar projects of this scale
- the proposed reuse of dredged spoil from the site as the principal reclamation material
- the proposed transfer of Council owned land to the developer
- the impacts of generated traffic and services demands on existing infrastructure
- the projected impacts of climate change
- issues relating to the future availability and cost of insurance for low lying coastal sites in South East Queensland.

The expert reports by Aurecon and BDO Australia are reported to have "...assessed potential risks to Council and the State Government and recommended ways to avoid these risks."

It is the applicant's opinion that the majority of these risks cannot be "avoided" if the project were to proceed.

Council has however disclosed little or nothing to the community regarding the risks the [sic] posed by the proposed Toondah Harbour PDA development, despite having received the expert reports almost six years ago.

As far as the applicant is aware the expert reviews were paid for with Council funds sourced from ratepayers.

It is anticipated that a significant component of the long terms risks to Council will ultimately be borne by ratepayers.

The Toondah Harbour PDA project is expected in the near future to proceed through various stages of the approvals process. It is considered very important therefore that the community is well informed, particularly of the risks, were it to go ahead.

61. Later in the review, in response to my communicating a preliminary view that there was nothing in the material before me to support a finding that Council had acted unlawfully or breached its duty of care to residents in dealing with the Toondah Harbour proposal, the applicant submitted that OIC should give consideration to a number of issues, which he listed and which are set out below, before drawing any conclusions about confidentiality:³²

- the scoping and timeframe for each of the expert reviews. Were they appropriate, given that these formed key components of a due diligence process for a large and challenging project of a type not previously undertaken by Council?
- statements regarding; limitations, exclusions, qualifications, caveats etc contained or implied in the expert reviewer's reports. Could they impact on the veracity of statements made in the Council article?
- the nature of assumptions, outstanding investigations, etc, referred to in briefing material or in the expert reviewer's reports. Could they detract from the degree of confidence in outcomes expressed in the Council article?
- the investigation and analysis undertaken by the expert reviewers and others. Was it sufficiently thorough, robust and conclusive to "ensure it measures up" ('it' being the proposal to upgrade Toondah Harbour)?
- the statement that "... the independent reviews also assessed potential risks to Council and the State Government and recommended ways to avoid these risks." The definition of 'Risk avoidance' (AS/NZS 4360: 2004 Risk Management) is "a decision not to become involved in, or to withdraw from a risk situation". Council has not withdrawn from the project and significant risks remain.

³² Letter dated 18 February 2022.

I believe that in the case of the proposed Toondah Harbour Development, Council owes a duty of care to identify and manage risks on behalf of the community and ratepayers.

The concerns I hold are that Council may not have exercised the appropriate standard of care in managing the reviews in question and reporting the findings to the community.

62. In response, I advised the applicant that OIC holds a merits review role under the RTI Act and not an investigative role. OIC does not have jurisdiction to undertake the kind of inquiries proposed by the applicant in deciding whether or not documents should or should not be released under the RTI Act. OIC has no jurisdiction to investigate or make a determination about, for example, whether the scoping and timeframe for the reviews by the Consultants were appropriate, or to assess whether the reviews were '*sufficiently thorough, robust and conclusive...*'. OIC's role is to review the documents in issue and the submissions of the relevant parties and, applying the provisions of the RTI Act, decide whether or not the documents should be released under the RTI Act.
63. I also reject the applicant's contention that Council asserted that the Reports were commissioned in order to address the risks identified by the applicant in paragraph 60 above. It is clear from their letters of proposal that the Consultants were commissioned to review specific aspects of the proposed development by Walker Group, namely, engineering and financial aspects. Contrary to his assertion, the Reports do not address issues identified by the applicant, including, for example, Council's asserted lack of experience with similar projects, the projected impacts of climate change, or the availability of insurance.
64. I accept that, in dealing with the Toondah Harbour development proposal, the Council at all times acts on behalf of its residents and is accountable to the residents for the decisions it makes in respect of the development. I accept that there is a public interest in the ability of residents to scrutinise the information upon which Council bases its decisions, including the Information in Issue. Accordingly, the public interest in disclosure of the Information in Issue and the duty of Council to account to the public for its decisions is one of the '*relevant circumstances*' surrounding the supply of the Information in Issue that I must consider in determining whether those circumstances, as a whole, imparted an obligation of confidence pursuant to the third requirement.
65. The other circumstances that are relevant to consider are:
 - the commercial and arms-length terms upon which Council entered into the Consultancy Agreements
 - the circumstances under which the Consultants were retained by Council to prepare the Reports, that is, in order to conduct an expert peer review of certain aspects of a preliminary development proposal submitted by a developer that had not been approved
 - the commercially sensitive nature of the information contained in the Reports that discusses aspects of an unapproved development proposal submitted to Council by a company operating in a commercially competitive environment, including financial modelling and infrastructure planning and cost details; and
 - explicit recognition by Council that information provided to the Consultants about the Walker Group proposal was subject to confidentiality obligations.
66. In respect of the final circumstance listed above, I note that, in an email to Aurecon of 15 January 2015, Council advised Aurecon that it would be permitted access to Walker Group's masterplan information, '*but confidentiality prohibits your retention*'. In addition,

in the article referred to at paragraph 59 above, I note that the following statements appear:

Redlands City Mayor Karen Williams said the detail of the reviews was confidential at this stage due to the commercial nature of the Walker proposal, which was yet to receive final approval.

...

Council's infrastructure spokesperson Cr Paul Gleeson said the independent reviews also assessed potential risks to Council and the State Government and recommended ways to avoid these risks.

"The first review was conducted by consultant Aurecon and looked at the engineering elements of the proposal to see that it was achievable, while a second review looked at the proposal's finances and was conducted by BDO Australia," Cr Gleeson said.

"As with any business proposal the detail remains commercial in confidence at this time, but the community can be confident these independent reviews have provided invaluable information for council to benchmark the Walker Corporation proposal against. ..."

67. Consistent with this, I note that BDO Australia's Report is labelled 'Commercial in Confidence'.
68. Council clearly considered that it was under an obligation of confidence concerning the Reports given that they discussed sensitive, commercial information contained in Walker Group's preliminary and unapproved proposal. The same is true of the Unit Information, which is of a similar nature. As I have noted, the re-development of Toondah Harbour has not yet received final government approval and works have not commenced.
69. I acknowledge the strong public interest in giving access to the Information in Issue in the interests of government accountability and transparency. However, after considering and weighing the mix of all the relevant circumstances under which the Information in Issue was communicated, I find that the third requirement is satisfied and the Council is subject to an equitable obligation of confidence in respect of the Information in Issue.
70. In respect of the fourth requirement - that there must be an actual or threatened misuse of the information - the applicant submitted that he was '*not cognisant of any circumstances where this could arise. I have requested the information in my own right. I am not requesting it on behalf of or in conjunction with anyone else*'.³³ However, the applicant has misunderstood the intent of this requirement. For it to be satisfied, it need only be shown that disclosure under the RTI Act would be inconsistent with the purpose for which the information was received. This will depend on the scope of the obligation of confidence.
71. For the reasons discussed above in relation to the satisfaction of the third requirement, I am satisfied that the scope of the obligation of confidence binding Council means that disclosure of the Information in Issue to the applicant under the RTI Act would constitute a misuse of the information.

Finding

72. For the reasons given, I find that the four cumulative requirements to establish an equitable obligation of confidence are met and that disclosure of the Information in Issue would therefore found an action in equity for breach of confidence under schedule 3, section 8(1) of the RTI Act.

³³ Letter dated 24 February 2022.

Relevant law – sufficiency of search

73. Access to a document may be refused if the document is nonexistent or unlocatable.³⁴
74. To be satisfied that documents are nonexistent, a decision-maker must rely on their particular knowledge and experience and have regard to a number of key factors, including:³⁵
- the administrative arrangements of government
 - the agency's structure
 - the agency's functions and responsibilities
 - the agency's practices and procedures (including but not exclusive to its information management approach); and
 - other factors reasonably inferred from information supplied by the applicant including the nature and age of the requested document/s and the nature of the government activity to which the request relates.
75. If searches are relied on to justify a decision that the documents do not exist, all reasonable steps must be taken to locate the documents. What constitutes reasonable steps will vary from case to case as the search and enquiry process an agency will be required to undertake will depend on the particular circumstances.
76. To determine whether a document exists, but is unlocatable, the RTI Act requires consideration of whether there are reasonable grounds for the agency to be satisfied that:
- the requested document has been or should be in the agency's possession; and
 - whether the agency has taken all reasonable steps to find the document.
77. In answering these questions, regard should again be had to the circumstances of the case and the key factors listed in paragraph 74.³⁶
78. The Information Commissioner's external review functions include investigating and reviewing whether agencies have taken reasonable steps to identify and locate documents applied for by applicants.³⁷ Generally, the agency that 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.³⁸ However, where an external review involves the issue of missing documents, the applicant has a practical onus to establish reasonable grounds to be satisfied that the agency has not discharged its obligation to locate all relevant documents. Suspicion and mere assertion will not satisfy this onus.

³⁴ Sections 47(3)(e) and 52 of the RTI Act. A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist—section 52(1)(a) of the RTI Act. A document is unlocatable if it has been or should be in the agency's possession and all reasonable steps have been taken to find the document but it cannot be found—section 52(1)(b) of the RTI Act.

³⁵ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) (*Pryor*) at [19] which adopted the Information Commissioner's comments in *PDE and the University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009).

³⁶ *Pryor* at [21].

³⁷ Section 130(2) of the RTI Act. The Information Commissioner also has power under section 102 to require additional searches be conducted during an external review.

³⁸ Section 87(1) of the RTI Act.

Discussion

79. The applicant is dissatisfied with the volume of documents that Council located regarding its engagement of the Consultants and the Terms of Reference (**ToR**) for their Reports. He considers that, given the scale of the project, it is reasonable to expect that more documentation should exist.
80. Initially, Council was unable to locate any ToR information. At OIC's request, it conducted further searches and made further inquiries in an effort to locate responsive information. This took place over a significant period of time during the course of the review. Eventually, Council concluded that it did not, itself, prepare ToR for the Consultants, but rather, and as I have outlined above, it initially met with the Consultants to discuss the work which it required them to undertake. The Consultants then wrote to Council following those initial discussions to confirm the scope of work and to set out the terms and conditions under which they were prepared to undertake the work for Council.
81. Council's General Counsel explained Council's approach to locating responsive information as follows:³⁹

... I am again reviewing the records and believe I have found documents that describe the scope of works.

... I cannot locate a document titled "Terms of Reference" used by RCC in late 2014 to engage Aurecon and BDO Australia for their 2015 review the Toondah Harbour development (Aurecon & BDO Engagement). The phrase "Terms of Reference" is used in a Council letter of 26 April 2018 to Mr Steve MacDonald in response to the Aurecon & BDO Engagement.

... I cannot locate a specific Council document titled "Terms of Reference" in regard to the Aurecon & BDO Engagement. I have spoken to and communicated with the officers including Peter Kelly and Louise Rusan and their office staff and likewise have not located the documents.

... the use of the phrase "Terms of Reference" could have been used as a generic phrase for a "scope", "scope of work", "service engagement", "quote on deliverables", "consultant proposal", "requirements" or similar phrases.

... the term "scope" and "proposal" and "requirements" is used by Council exchanges with both Aurecon and BDO as:

1. *Aurecon: The Email exchange between Scott Hutchinson, RCC Principal Advisor dated 15 Jan 2015 (11.24am) and the Aurecon Group stating "please prepare a consultant proposal to provide consulting services doing a "Peer review" on the infrastructure costs exposure of Council."*
2. *BDO: The BDO group letter to Council dated 8 December 2014 by stating "This letter provides a brief outline of our scope and details of our estimated fee for completion of the assignment".*

In both these document exchanges a description of the work is described which subsequently led to Aurecon & BDO Engagement. I believe we have been focusing on a document titled "Terms of References" which we believe is used as a generic phrase to describe the engagement through the exchange of communications. Council uses a different processes [sic] now to engage suppliers.

³⁹ Letter from Council dated 22 November 2021.

82. The bulk of this correspondence between Council and the Consultants has been released to the applicant. However, he continues to contend that additional responsive documentation should exist:⁴⁰

From the statement contained in your letter and the information provided by Council it is now my understanding that:

- *Council did not prepare nor issue formal terms of reference for either the BDO Australia for the Aurecon expert reviews and*
- *the scope of services and other relevant material which fall within the ordinary meaning of 'terms of reference' were largely contained in correspondence prepared by the respective consultants.*

...

Whilst I have now received some information principally relating to scope of services there appears to be almost a complete absence of other material which falls within the ordinary meaning of 'terms of reference'. ...

Of significance is the consideration that the expert reviews in question formed key components of a due diligence process for a \$1.36 billion development proposed to be built principally on dredged, reclaimed land in Moreton Bay.

...

83. In my letter to the applicant dated 23 February 2022, I advised that:

Council has submitted that it has carried out extensive search of its records in order to locate any relevant documents. Several searches of the following areas have been conducted by Council:

- *Redland Investment Corporation (RIC) records*
- *Council's Document Management System (DMS)*
- *Council's network drive; and*
- *Council's email archive vault.*

Council has provided search certificates from those officers responsible for conducting the searches. After OIC requested that Council conduct further searches in an effort to locate any terms of reference information, searches of RIC records, the DMS and the network drive were conducted for a second time. In addition, as you are aware, Council's General Counsel then undertook further searches of Council's records in an effort to locate terms of reference information.

84. I expressed the preliminary view that, having reviewed the ToR information located by Council, as well as the searches and inquiries conducted by Council, those searches and inquiries were reasonable in all the circumstances, and I was unable to identify any further searches or inquiries that it would be reasonable to ask Council to undertake.

85. In response to the applicant's contention that the financial significance of the project was of relevance in considering what he contended was an absence of ToR documentation, I explained:

While I acknowledge the financial significance of the project, I do not accept that this is a relevant issue when considering the reasonableness of the searches conducted by Council. You may hold the view that the retention of the consultants by Council should have been documented differently or more thoroughly. However, that is not sufficient to discharge the onus on you to establish that there are reasonable grounds for believing that Council holds additional relevant documents, and identifying what further searches ought to be conducted.

⁴⁰ Letter dated 8 February 2022.

86. In his submission dated 17 March 2022, the applicant argued:

Council previously stated that “Council engaged Aurecon and BDO to prepare the reports and provided the terms of reference for the reports”. However, thus far Council has failed to produce any ‘terms of reference’ documentation that was provided to the consultants.

Also no material, other than the three letters from the consultants referenced above, has been made available which yields substantive information on the terms of reference.

Your letter states “It appears to indicate the likelihood that discussions about the project, Councils retention of the consultants, and the scope of work they were retained to undertake, took place during meetings/verbally between Council representatives and the consultants”.

You indicate that the onus is on me to establish that there are reasonable grounds for believing that counsel holds additional relevant documents.

If “discussions about the project, Council’s retention of the consultants, and the scope of work they were retained to undertake, took place during meetings/verbally”, it is reasonable business practice to record and report such interactions in ‘minutes of meetings’, ‘notes to file’, ‘briefing notes’ etc. Particularly where consultants are engaged on a “cost plus” basis, reasonable business practice includes monitoring and reporting; scope, progress and costs as well as recording any variations relating to the terms of reference as the work proceeds.

I am not familiar with Council’s document management system but I would expect such records to be retained in the project files.

87. I acknowledge that the applicant considers that Council should have more thoroughly documented its dealings with the Consultants in respect of ToR for their engagement. However, I would also note the short time frame involved. The Consultants were engaged by Council in December 2014 and had completed their reviews by early in 2015. This is relevant when considering the reasonableness of the applicant’s contention that there should exist ‘*monitoring and reporting, scope, progress and variation recording*’ documentation.
88. Moreover, and as I expressed to the applicant during the course of the review, I do not necessarily accept his interpretation of what ToR encompasses. In my view, the generally accepted meaning of ToR is a description of the objectives of a task or project; of what must be dealt with and considered when the task of project is being undertaken; of the agreed scope of work.⁴¹ Information of this nature has been released to the applicant in respect of both Consultants.
89. But in any event, even if I accepted that ToR covers the broader range of information contended for by the applicant, it remains the fact that I am unable to identify any further searches or inquiries that I consider it would be reasonable to ask Council to undertake in an effort to locate any additional documents.
90. I do not consider that the applicant has discharged the practical onus upon him to establish reasonable grounds to be satisfied that Council has not discharged its obligation to locate all relevant documents. As noted, suspicion and mere assertion will not satisfy this onus. In his most recent letter to OIC dated 5 May 2022, the applicant did not make any submissions relevant to this issue. He simply complained about ‘*Council’s apparently sloppy approach to project management*’.

⁴¹ Merriam-Webster Dictionary (online 6 May 2022) ‘terms of reference’.

Finding

91. I acknowledge that the level of documentation located by Council has not met the applicant's expectations. However, taking into account the type of information sought, the nature and extent of searches conducted, and the information provided by Council regarding the project and scope of works, I am satisfied that the searches and inquiries that Council has conducted have been reasonable in the circumstances of this case. I am not persuaded that the applicant has established reasonable grounds for believing that further documents should exist and I am unable to identify any additional searches or inquiries that Council could reasonably be asked to undertake.
92. I find that access to any additional documents may be refused on the basis that they are nonexistent under sections 47(3)(e) and 52(1)(a) of the RTI Act.

DECISION

93. I affirm Council's decision that access to the Reports may be refused because they are exempt information under schedule 3, section 8(1) of the RTI Act.
94. I also find that the Unit Information is exempt information and access to it may be refused under schedule 3, section 8(1) of the RTI Act.
95. In addition, I find that the searches and inquiries conducted by Council in an effort to locate all responsive documents have been reasonable in all the circumstances and that access to further documents may be refused under section 47(3)(e) of the RTI Act on the basis that they are nonexistent under section 52(1)(a) of the RTI Act.
96. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

K Shepherd
Acting Right to Information Commissioner

Date: 12 May 2022

APPENDIX

Significant procedural steps

Date	Event
12 February 2021	OIC received the applicant's application for external review.
15 February 2021	OIC received further supporting documents from the applicant. OIC confirmed receipt of the applicant's application for external review. OIC requested preliminary documents from Council.
16 February 2021	OIC received the preliminary documents from Council.
26 February 2021	OIC accepted the application for external review and requested the information in issue from Council.
2 March 2021	OIC received the information in issue from Council.
31 May 2021	OIC requested further information and documents from Council.
16 June 2021	OIC received an update from Council on Council's searches for additional responsive documents.
21 June 2021	Council requested a copy of correspondence from the applicant to assist with its document search.
22 June 2021	Applicant provided OIC with the requested correspondence.
23 June 2021	OIC provided Council with the requested correspondence.
30 June 2021	Council provided OIC with further submissions.
29 July 2021	OIC conveyed a preliminary view to the applicant and provided an update to Council.
3 September 2021	OIC received submissions from the applicant contesting the preliminary view.
25 October 2021	OIC conveyed a preliminary view to Council regarding sufficiency of search issues.
3 November 2021	OIC received an update from Council.
16 November 2021	OIC received a further update from Council.
22 November 2021	Council provided a response on the sufficiency of search issue and copies of additional responsive documents.
25 November 2021	OIC provided an update to the applicant.
3 December 2021	Applicant requested a further update.
6 December 2021	OIC provided an update to the applicant.
13 December 2021	OIC provided an update to Council and requested Council's consent to disclose information to the applicant about the searches undertaken by Council.
16 December 2021	OIC issued third party consultation letters.
12 January 2022	BDO advised that it did not oppose disclosure of consulted information.

Date	Event
14 January 2022	Aurecon advised that it objected to disclosure of some consulted information.
18 January 2022	OIC provided an update to Council regarding third parties and disclosure of documents. Council advised OIC that they did not object to disclosure of certain documents to the applicant.
25 January 2022	OIC issued a preliminary view to the applicant. OIC asked Council to release additional information to the applicant.
27 January 2022	Council released further documents to applicant.
8 February 2022	OIC received further submissions from the applicant.
9 February 2022	OIC consulted with Council about the release of additional information.
17 February 2022	Council advised that it consented to the release. OIC received an update from Council regarding issues raised with the proposed redactions and documents.
18 February 2022	OIC received further submissions from the applicant.
23 February 2022	OIC issued a further preliminary view to the applicant. Council released additional documents to the applicant.
24 February 2022	OIC received submissions from the applicant contesting the preliminary view.
17 March 2022	OIC received further submissions from the applicant contesting the preliminary view.
22 March 2022	OIC advised the applicant and Council that the review would proceed to a formal decision.
6 April 2022	OIC consulted with Aurecon about certain information. OIC consulted with BDO Australia about the release of additional information. BDO advised it did not object to disclosure of the additional information.
7 April 2022	OIC consulted with Council about the release of additional information.
26 April 2022	Council advised that it consented to the release of some information but objected to the disclosure of other information.
28 April 2022	OIC conveyed an update to the applicant. Council released additional information to the applicant. OIC received a response from Aurecon.
5 & 6 May 2022	OIC received further correspondence from the applicant.
9 May 2022	OIC responded to the applicant.
11 May 2022	OIC received further correspondence from the applicant.