

Office of the Information Commissioner (Qld)

Decision and Reasons for Decision

Application Number: 210797

Applicant: A Sandy

Respondent: Brisbane City Council

Decision Date: 18 September 2009

Catchwords: **FREEDOM OF INFORMATION – section 46(1)(a) of the *Freedom of Information Act 1992* (Qld) – matter communicated in confidence – whether section 46(2) applies - section 41(1) of the *Freedom of Information Act 1992* (Qld) - matter relating to deliberative process – whether disclosure would, on balance, be contrary to the public interest**

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REASONS FOR DECISION

Summary

1. I set aside the decision under review and find that the matter in issue is not exempt from disclosure under section 46(1)(a) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**) or section 41(1) of the FOI Act.

Background

2. By letter dated 5 November 2008 (**FOI Application**), the applicant applied to Brisbane City Council (**Council**) for access to:

Documents or reports since January 1, 2007 relating to the parity factor concerning CTS units.

3. In its original decision dated 12 January 2009, Council refused access to relevant documents under section 46(1)(a) of the FOI Act (**Original Decision**).
4. By letter dated 29 January 2009, the applicant applied for internal review and made submissions in support of her application (**Internal Review Application**).
5. By letter dated 26 February 2009 Mr David Askern, Chief Legal Counsel, affirmed Council's Original Decision (**Internal Review Decision**).
6. By letter dated 3 March 2009, the applicant applied under Part 5 of the FOI Act for external review of the Internal Review Decision.

Decision under review

7. The decision under review is Council's Internal Review Decision.

Steps taken in the external review process

8. By letters dated 12 and 13 March 2009, this Office notified the parties that the external review application had been accepted.
9. By letter dated 20 March 2009, Council provided copies of the documents relevant to this review.
10. By letter dated 1 April 2009, this Office asked Council to:
 - perform further searches for documents responding to the applicant's FOI Application; and
 - provide further submissions in support of its claim for exemption under section 46(1)(a) of the FOI Act by 15 April 2009.
11. In a telephone conversation on 16 April 2009, Mr Wesener of Council advised this Office that:
 - the file had been passed on to Mr Askern
 - it was likely that Council would request an extension of time in which to respond this Office's letter of 1 April 2009.
12. By letter dated 21 April 2009, Council requested a meeting in which to make submissions about the Lord Mayor's Expenditure Review Committee (**LMERC**) and Council's exemption claims.
13. On 20 May 2009, Mr Wesener, Mr Askern and Mr Nick Shaw (Council's Financial Performance Manager) participated in a teleconference with Ms Henry and Ms Banks of this Office to discuss the documents in issue, the LMERC process and the exemptions claimed by Council over relevant material.
14. By letter dated 24 June 2009, this Office advised Council:
 - of the preliminary view that apart from information which identified property owners^[1], the documents in issue were not exempt from disclosure under sections 46(1)(a) or 41(1) of the FOI Act
 - that unless this Office heard from Council by 8 July 2009, it would proceed on the basis that

Council accepted the preliminary view.

15. On 14 July 2009, a staff member of this Office telephoned Council and left a message with Mr Askern's office for him to call this Office regarding the external review.
16. By letter dated 15 July 2009, this Office advised Council that given that no response had been received to the letter of 24 June 2009, it assumed that Council accepted the preliminary view and the file had been closed in accordance with the matters set out on the final page of the preliminary view letter dated 24 June 2009 which explained that this would be the consequence if no response was received from Council.
17. By email dated 16 July 2009, Council requested that the external review file be re-opened and an extension of time until 31 July 2009 be granted for Council to make submissions in response to the preliminary view dated 24 June 2009.
18. By letter dated 22 July 2009, this Office asked Council to provide submissions by 31 July 2009 addressing:
 - Council's reasons for delay in responding to the preliminary view letter;
 - any prejudice which would be suffered by Council should the extension of time not be granted; and
 - the merits of Council's claim for exemption under sections 46(1)(a) and 41(1) of the FOI Act.
19. By email dated 31 July 2009, Council advised that:

"... Council would appreciate an extension of time in which to make our submission in support of our original request for an extension of time to make submissions against your Office's preliminary view on this matter. "
20. By letter dated 31 July 2009, the Information Commissioner advised Council that Council's request for a further extension of time was declined and set out the reasons for that decision.
21. By letter dated 4 August 2009 (received on 5 August 2009), Ms Sarah Zeljko, Council's Acting Chief Legal Counsel provided submissions regarding the merits of Council's claims for exemption and suggested that a meeting be held with Mr Askern upon his return from leave in the week starting 11 August 2009 to *"discuss any questions or concerns [this Office] may have regarding [Council's submissions]"*.
22. By letter to Council dated 2 September 2009, this Office confirmed that no further extension of time would be granted.
23. In a telephone conversation with a staff member of this Office on 16 September 2009, the applicant asked this Office to issue a formal decision.

Matter in issue

24. The matter remaining in issue in this review can be described as:
 - LMERC Minutes
 - LMERC Minutes Registers
 - Powerpoint presentation – Review of Rating Methodology for Community Title Schemes (2008-2009 Budget)
 - Powerpoint presentations – Rates and Charges (2008-09 Budget)
 - Examples showing rates on properties from realestate.com and other CTS developments

- CTS Rating Methodology Review - Impacts on CTS Differential Categories
- CTS Impact reports
- Powerpoint presentation – Review of the Rating of Community Title Schemes (2009-2010 Budget)
- General Rate Distribution Charts from 2008-09 to 2009-10 for each 'Option' presented for 2009-10 budget
- Graphs showing 2008-09 Average Annual General Rates for each 'Option' presented for 2009-10 budget
- Powerpoint presentations – CTS Rating Remission (2008-09)
- Remission Impact Reports
- Rates Parity Comparisons
- Parity examples – single properties (**Matter in Issue**).

25. I note that as the 'Decision of the Brisbane City Council' dated 9 December 2008 postdates the FOI application, it falls outside the scope of the review and does not form part of this decision.
26. I also note that as Council did not object to the part of the preliminary view dealing with information found to be exempt under section 44(1) of the FOI Act (comprising information which could identify property owners) and the applicant accepts this point, this information is no longer in issue in this review and does not form part of this decision.

Findings

Section 46(1) of the FOI Act

27. Section 46(1)(a) provides as follows:

46 Matter communicated in confidence

- (1) *Matter is exempt if -*
 (a) *its disclosure would found an action for breach of confidence; or*
 ...

28. Section 46(1)(a) of the FOI Act protects information which a court would order an agency to keep confidential on the basis that the agency was bound to comply with an equitable or contractual obligation of confidence.
29. However, prior to examining 46(1)(a) matters, it is necessary to determine whether section 46(2) of the FOI Act applies.

Section 46(2) of the FOI Act

30. Under section 46(2) of the FOI Act, if the relevant information consists of deliberative process matter, ^[2] it will not qualify for exemption under section 46(1)(a) of the FOI Act.

31. Section 46(2) of the FOI Act provides:

- ...
 (2) *Subsection (1) does not apply to matter of a kind mentioned in section 41(1)(a) unless it consists of information communicated by a person or body other than—*
- (a) *a person in the capacity of—*
 (i) *a Minister; or*
 (ii) *a member of the staff of, or a consultant to, a Minister; or*
 (iii) *an officer of an agency; or*

(b) *the State or an agency.*

32. Section 41(1)(a) of the FOI Act provides:

41 Matter relating to deliberative processes

(1) *Matter is exempt if its disclosure -*

(a) *would disclose –*

- (i) *an opinion, advice or recommendation that has been obtained, prepared or recorded; or*
- (ii) *a consultation or deliberation that has taken place;*
- (iii) *in the course of, or for the purposes of, the deliberative processes involved*

in the functions of government; and

...

33. The effect of section 46(2) of the FOI Act is that matter relating to the 'deliberative processes' of government cannot be exempt under section 46(1) of the FOI Act unless its disclosure would found an action for breach of a confidence owed to a person or body *other than* the State of Queensland, an agency or relevant official. This means that intra-agency and inter-agency communications of deliberative process matter cannot qualify for exemption under section 46(1) of the FOI Act.

34. As noted by the Information Commissioner in *Cairns Port Authority and Department of Lands* (1994) 1 QAR 663^[3] one of the purposes of section 46(2) of the FOI Act is to:

... prevent the possibility of agencies attempting to circumvent the public interest component of the test for exemption of deliberative process matter under s.41(1), by purporting to attach obligations of confidence to intra-agency and inter-agency communications of deliberative process matter, in the hope of attracting exemption under s.46(1).

Council's submissions

35. Council submits that:^[4]

- section 46(2) of the FOI Act does not apply to the Matter in Issue as LMERC is not an agency for the purposes of the FOI Act; and
- the Matter in issue is not matter of a kind mentioned in 41(1)(a) of the FOI Act, that is, deliberative process matter.

Analysis – is LMERC an 'agency' for purposes of the FOI Act

36. Council submits that LMERC is similar in function to the Executive Council and Expenditure Review Committee of the State Government.

37. While this may be the case, LMERC's similarity to the Executive Council or Expenditure Review Committee does not advance Council's argument that LMERC is not a relevant body comprised within an agency for the purposes of the FOI Act.

38. In this respect, I note that:

- the Executive Council and Expenditure Review Committee are clearly subject to the FOI Act
- the fact that Parliament has included certain exemption provisions specifically relating to

documents submitted to Executive Council and Cabinet supports this conclusion

- the fact that there are no exemption provisions under the FOI Act which specifically relate to the comparative functions of Council does not mean that its committees are not subject to the application of the FOI Act.

39. I also refer to section 8 of the FOI Act which provides:

8 Meaning of agency

(1) *In this Act –*

agency means a department, local government or public authority.

(2) *For this Act –*

(a) *a board council, committee, subcommittee or other body established by government to help, or to perform functions connected with, an agency is not a separate agency, but is taken to be comprised within the agency; and*

(b) *a reference to an agency includes a reference to a body that is taken to be comprised within an agency.*

40. On the basis of the matters set out above, I am satisfied that:

- LMERC is a committee established by the Lord Mayor to perform functions connected with Council
- LMERC is taken to be comprised within Council
- a reference in the FOI Act to an agency (in this case Council) includes a reference to a body that is taken to be comprised within an agency.

41. Accordingly, on the basis of the matters set out above, LMERC falls within the definition of an agency for the purposes of the FOI Act.

Analysis – is it deliberative process matter

42. In summary, Council submits that:

- the Matter in Issue is not matter of a kind mentioned in 41(1)(a) of the FOI Act (that is, that the Matter in Issue does not form part of the deliberative processes of government)
- the Matter in Issue comprises documents which:
 - are part of an investigatory mechanism set up to present options to the Lord Mayor for inclusion in his budget
 - simply reveal information about performance and requirements of Council (and do not reveal any information about the deliberative process of the Lord Mayor or Council)
- section 41(1) of the FOI Act applies only to protect documents that record the process of deliberation
- section 41(1) of the FOI Act does not protect documents containing expert opinion or analysis.

Expert opinion or analysis

43. I agree that section 41(1)(2)(c) contains an exception which excludes expert opinion or analysis by a person recognised as an expert in the field of knowledge to which the opinion or analysis relates.

44. In *Cairns Port Authority and Department of Lands* (1994) 1 QAR 663 the Information Commissioner found that a relevant indicator which will determine whether a person is recognised as an expert, is whether the person would be accepted by a court as qualified to give expert opinion evidence (in the relevant field of knowledge) on an issue requiring resolution by a court.
45. On the information available to me, I am satisfied that Council officers^[5] prepared the Matter in Issue in the course of their work as Council officers as there is no evidence before me that these officers were specifically retained as experts to perform this work. Accordingly, I am not satisfied that the Matter in Issue can be characterised as expert opinion or analysis.

Protection of documents prepared for deliberative processes

46. Section 41(1)(a) clearly encompasses documents *prepared* for the purposes of the deliberative processes of government and is not limited to documents which record deliberative processes.
47. The Matter in Issue consists of documents prepared by Council officers^[6] for presentation to LMERC in order for the Lord Mayor and LMERC to consider Council's options regarding changes to the rating system for properties which are part of community title schemes.
48. On the information available to me, I am satisfied that whether or not the Matter in Issue was created as part of an investigatory mechanism of Council, it can also be said to have been prepared by Council officers for the use of Council in its deliberative processes.
49. In summary and on the basis of the matters set out above, I am satisfied that:
- LMERC is taken to be comprised within Council and falls within the definition of an 'agency' for the purposes of the FOI Act
 - the Matter in Issue is an advice, opinion or recommendation, or forms part of a deliberation
 - the steps taken by LMERC in considering the options available regarding the system of rates for community title schemes comprise a deliberative process
 - the Matter in Issue is an advice, opinion or recommendation prepared for the purposes of the deliberative processes of government
 - the Matter in Issue was not communicated by a person or body other than an officer of an agency
 - the Matter in Issue is matter of a kind mentioned in section 41(1)(a) of the FOI Act.

Findings

50. Based on the matters set out above, I am satisfied that in the circumstances the Matter in Issue:
- consists of information prepared for the deliberative processes of government prepared by officers of an agency
 - falls within section 46(2) of the FOI Act and accordingly section 46(1) of the FOI Act does not apply.
51. On account of this finding, it is unnecessary to further consider Council's submissions in respect of its claim for exemption from disclosure under section 46(1)(a) of the FOI Act.
52. It is however necessary to consider whether the Matter in Issue is exempt from disclosure under section 41(1) of the FOI Act.

Section 41(1) of the FOI Act

53. Given my finding that the Matter in Issue satisfies the requirements of section 41(1)(a) of the FOI Act, it is necessary to consider whether its disclosure would be contrary to the public interest as set out section 41(1)(b) of the FOI Act.
54. I confirm that unlike other exemption provisions within the FOI Act that incorporate a public interest test, there is no prima facie public interest consideration favouring non-disclosure within section 41(1) of the FOI Act. Finding that disclosure would be contrary to the public interest is a separate requirement for exemption which must be independently established.
55. I also confirm that it is the responsibility of the party claiming the exemption to establish that: ^[7]
- a) specific and tangible harm to an identifiable public interest(s) would result from disclosing the matter in issue
 - b) the harm is of sufficient gravity that, when weighed against competing public interest considerations which favour disclosure, it would, on balance, be contrary to the public interest.
56. This means that Council must identify the specific and tangible harm that would result to an identifiable public interest or interests if the Matter in Issue were disclosed. The identified harm to the public interest must then be weighed against public interest considerations in favour of disclosure.

Council's submissions

57. I note Council's submissions made in the telephone conference on 29 April 2009 that:
- it is contrary to public policy to release the preliminary information used to formulate the budget
 - difficulties arise when information is released to the public in the preliminary stages of policy forming
 - members of the public are able to attend information sessions and have access to Council's call centre in order to obtain information about the impact of rate rises on individuals
 - release of the matter in issue would be contrary to the public interest.
58. I also note the matters set out in the letter dated 4 August 2009 signed by Ms Zeljko including that:

“ ...

[The OIC publication titled “Deliberative Process”] *further states that ‘where deliberative process matter is concerned, two significant public interest considerations favouring disclosure will frequently be relevant:*

- *enhancing the accountability of agencies and individual officers for the performance of their official functions*
- *promoting informed public participation in the processes of government’*

We submit that disclosure of the [Matter in Issue concerning] rates and Parity Factor LMERC would not enhance the accountability of LMERC and the members of LMERC. LMERC is framed in a confidential nature to encourage members and specialist consultants to provide submissions regarding the Lord Mayor's financial options.

Further, it should be noted that there is no public participation in the process of the Council budget, nor is there a requirement for public participation. Even once the Lord Mayor's Budget is presented to the

Chamber of Council, there is no public participation in the process of the Council budget. The public are only entitled to read the Lord Mayor's Budget Speech and view the final budget documents.

The specific and tangible harm to an identifiable public interest ... [is that]:

- *the Lord Mayor's decision making process would be compromised by release*
- *the Lord Mayor would be hampered in preparing and producing a commercially sound Budget to Council*
- *unlike other local governments, there is no alternative mechanism in place for Council to prepare and produce its own budget*
- *there is no other confidential mechanism whereby Council can make submissions, such as the submissions made in relation to the Parity Factor, to the Lord Mayor."*

Analysis – public interest

59. I note that the Information Commissioner has previously stated^[8] that public access to pre-decisional thinking processes of agencies, even well after the event may, in appropriate cases, be valuable in furthering accountability and public understanding of the operations of government agencies.

60. Additionally, the Information Commissioner has rejected the argument that it is not in the public interest to release information on the basis that it has the potential for being misrepresented. In *Queensland Community Newspapers Pty Ltd and Redland Shire Council; Civic Projects (Raby Bay) Pty Ltd & Others (Third Parties)*^[9] the Information Commissioner said:

If the public were to be denied access to any report answering that description, on the ground of its potential for being misrepresented by quoting out of context, there would be a substantial diminution in the flow of information to the public on issues of significant public importance that are being addressed through political/governmental processes. Opportunities for informed public debate allow for misrepresentations to be corrected.

61. It is also clear that:

- both the 2008-09 and 2009-10 budgets of Council have been released
- the Matter in Issue reveals that before coming to a decision, LMERC considered a number of options presented to it, along with a large amount of data, in order to decide upon an appropriate outcome.

62. On the information available to me, I am satisfied that:

- the public having access to documents which show Council's deliberation and decision-making process about a matter of considerable public interest (that is, rate rises), is not contrary to the public interest
- this is a case where the public interest would be served by release of documents which show Council's decision making process in coming to an important decision about increasing rates for a significant number of residents, particularly given that the Matter in Issue reveals that LMERC considered a number of options presented to it, along with a large amount of data, prior to deciding upon an appropriate outcome
- Council has not established that a specific tangible harm to an identifiable public interest would occur if the Matter in Issue were disclosed.

Findings

63. Based on the matters set out above, I am satisfied in the circumstances that:

- disclosure of the Matter in Issue would not, on balance, be contrary to the public interest
- the Matter in Issue does not qualify for exemption from disclosure under section 41(1) of the FOI Act.

DECISION

64. I set aside the decision under review and find that the Matter in Issue is not exempt from disclosure under section 46(1)(a) or section 41(1) of the FOI Act.

J Kinross
Information Commissioner

Date: 18 September 2009

[1] Which was found to be exempt from disclosure under section 44(1) of the FOI Act.

[2] Described as being the policy forming processes and decision-making functions of an agency which occur towards the end stage of a larger process following investigations of various kinds and obtaining inputs from relevant sources – see *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at paragraphs 28 and 30.

[3] At paragraph 41.

[4] In Ms Zeljko's letter dated 4 August 2009.

[5] As submitted by Council on page 7 of its submissions dated 4 August 2009, in its submissions made in the teleconference on 20 May 2009 and the Original and Internal Review Decisions.

[6] As submitted by Council on page 7 of its submissions dated 4 August 2009, in its submissions made in the teleconference on 20 May 2009 and the Original and Internal Review Decisions.

[7] *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at paragraph 140; *Trustees of the De La Salle Brothers and Queensland Corrective Services Commission* (1996) 3 QAR 206 at paragraph 34.

[8] *Criminal Justice Commission and Department of Public Prosecutions; Harris (Third Party)* (1996) 3 QAR 299 at paragraph 38.

[9] (1998) 4 QAR 262 at paragraph 48.