



Decision and Reasons for Decision

Application Number: 311503

Applicant: McCabe

Respondent: Moreton Bay Regional Council

Decision Date: 23 September 2013

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION – GROUNDS ON WHICH ACCESS MAY BE REFUSED – CONTRARY TO PUBLIC INTEREST INFORMATION – an agency may refuse access to a document to the extent the document comprises information the disclosure of which would, on balance, be contrary to the public interest – documents relating to enforcement action taken under the *Sustainable Planning Act 2009* (Qld) – sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The access applicant applied to Moreton Bay Regional Council (**Council**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to details of any enforcement action undertaken by Council under the *Sustainable Planning Act 2009* (Qld) (**SP Act**) relating to development on certain land owned by Mr McCabe (**Lot 1, Lot 2 and Lot 3**) for the period January 2010 to 11 January 2013.
2. Council consulted with Mr McCabe under section 37 of the RTI Act. Mr McCabe objected to the release of documents. Council, contrary to this objection, decided to release the information to the access applicant (subject to the deletion of Mr McCabe's identity, residential address and mobile phone number) on the basis that disclosure would not be contrary to the public interest. Mr McCabe sought internal review of Council's decision. On internal review, Council interpreted the scope of the application differently which resulted in different documents being captured by the access application. In relation to those documents, Council decided to release 17 pages in full and 12 pages in part to the access applicant.
3. Mr McCabe (**external review applicant**) applied to the Office of the Information Commissioner (**OIC**) for external review of Council's decision.¹
4. For the reasons set out below, I am satisfied that the factors favouring nondisclosure of the Information in Issue, relating to an individual's right to privacy and prejudice to a person's business affairs, are outweighed by the factors favouring disclosure of the

¹ Application dated 8 May 2013.

Information in Issue, relating to promoting open discussion of public affairs and enhancing the government's accountability, informing the community of the government's operations and revealing the reason for a government decision and any background or contextual information that informed the decision. Therefore, Council's decision to disclose the Information in Issue is affirmed.

Background

5. Significant procedural steps are set out in the appendix to this decision.

Reviewable decision

6. The decision under review is Council's internal review decision dated 12 April 2013.

Evidence considered

7. Evidence, submissions, legislation and other material considered in reaching this decision are disclosed in these reasons (including footnotes and appendix).

Information in issue

8. The Information in Issue in this review is the 17 full pages and 12 part pages Council decided to release contrary to the external review applicant's objection. The Information in Issue relates to show cause notices and penalty infringement notices issued by Council in relation to Lots 1, 2 and 3.

Would disclosure of the Information in Issue, on balance, be contrary to the public interest?

9. No, for the reasons that follow.

Relevant law

10. Under section 23 of the RTI Act, a person has a right to be given access to documents of an agency, subject to a number of exclusions and limitations, including grounds for refusal of access. These grounds are contained in section 47 of the RTI Act. Relevantly, access may be refused to information the disclosure of which would, on balance, be contrary to the public interest under section 49 of the RTI Act.
11. The term *public interest* refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.
12. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest² and explains the steps that a decision-maker must take³ in deciding the public interest as follows:
 - identify any irrelevant factors and disregard them

² Schedule 4 of the RTI Act sets out the factors for deciding whether disclosing information would, on balance, be contrary to the public interest.

³ Section 49(3) of the RTI Act.

- identify relevant public interest factors favouring disclosure and nondisclosure
- balance the relevant factors favouring disclosure and nondisclosure; and
- decide whether disclosure of the information in issue would, on balance, be contrary to the public interest.

Findings

Irrelevant factors

13. In submissions to Council⁴ the external review applicant submitted that *'Disclosure of the information could reasonably be expected to result in the [access] applicant misinterpreting or misunderstanding the documents.'* The external review applicant also submitted, in submissions to Council⁵ and in the application for external review,⁶ that *'disclosure of such information to a business competitor has the potential to result in mischief.'*

14. The external review applicant also submitted on external review⁷ that disclosing information about one of the show cause notices:

...does not [for the reasons set out in the external review applicant's letters] disclose the true state of affairs. It is submitted that the provision of only part of the information appears to us to be quite likely to result in misunderstanding or misinterpretation.

15. I accept that disclosure of the Information in Issue as it relates to this issue *'is merely part of the information and does not disclose the true state of affairs'*. However, I do not consider that this is a factor favouring nondisclosure of the Information in Issue. Whether disclosure of the information could result in the access applicant misinterpreting or misunderstanding a document is an irrelevant factor when deciding whether disclosure of the information is contrary to the public interest under section 49(3)(a) of the RTI Act.⁸ It is also irrelevant whether disclosure would result in mischievous conduct by the access applicant.⁹

16. In accordance with section 49(3)(d) of the RTI Act these factors have not influenced my consideration of whether disclosure of the information would be contrary to the public interest.

17. I do not consider that any other irrelevant factors arise in this case.

Factors favouring disclosure

18. On internal review, Council decided that disclosure of the Information in Issue could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision. In particular, Council stated:

Under the Sustainable Planning Act 2009, the Council plays an important role in effectively regulating development in its region.

⁴ Dated 4 February 2013.

⁵ Dated 4 February 2013 and 13 March 2013.

⁶ Dated 8 May 2013.

⁷ By letters dated 17 July 2013 and 7 August 2013.

⁸ Schedule 4, part 1 item 2.

⁹ Schedule 4, part 1 item 3.

Disclosure of the information in issue would allow the public to consider how the Council discharges its responsibilities as well as illustrating the reasons for its decisions and providing background or contextual information that informed the decision.

19. In the application for external review, the external review applicant submitted that:

The decision that is relevant is a decision relating to an application under the Town Planning Scheme that is not one where, pursuant to the Sustainable Planning Act 2009:

- (a) there is an opportunity for public notification;*
- (b) public comment may be invited; or*
- (c) submissions may be made by members of the public.*

Accordingly, there is no scope under the Sustainable Planning Act 2009 for third party subjective examination of, or review of the reasons for the decision.

Given that the legislature did not see fit to provide such an opportunity under the Sustainable Planning Act 2009, it seems that the reason for disclosure advanced by the Internal Reviewer is not relevant in this particular process.

20. The way in which Queensland councils are constituted and the nature and extent of their responsibilities and powers are governed by the *Local Government Act 2009 (LG Act)*. The LG Act expressly provides that any action taken under that Act is to be taken in a way that is consistent with the local government principles,¹⁰ including ‘transparent and effective processes, and decision-making in the public interest.’¹¹ Similarly, the *Sustainable Planning Act 2009 (SP Act)* provides that where a function or power is conferred on an entity under that Act, the entity must perform that function or power in a way that advances the SP Act’s purpose.¹² The SP Act’s purpose is to ‘seek to achieve ecological sustainability by managing the process by which development takes place, including ensuring the process is accountable, effective and efficient and delivers sustainable outcomes.’¹³
21. It is clear from the above that the legislature intended that local governments operate in a manner that is transparent and accountable and any decisions made are made in accordance with the public interest.
22. I do not accept that because there is no right of review under the SP Act in relation to decisions made on applications under the Town Planning Scheme that the legislature intended that, in respect of those decisions, councils are not required to comply with the principles of transparency and accountability. Rather, I am satisfied that in those circumstances disclosing the Information in Issue could reasonably be expected to:
- promote open discussion of public affairs and enhance the government’s accountability¹⁴ (in the form of the local Council)
 - inform the community of the government’s operations;¹⁵ and
 - reveal the reason for a government decision and any background or contextual information that informed the decision.¹⁶
23. I give these factors significant weight.

¹⁰ Section 4(1)(b) of the LGA Act.

¹¹ Section 4(2)(a) of the LGA Act.

¹² Section 4(1)(a) of the SP Act.

¹³ Section 3(a) of the SP Act.

¹⁴ Schedule 4, part 2, item 1 of the RTI Act.

¹⁵ Schedule 4, part 2, item 3 of the RTI Act.

¹⁶ Schedule 4, part 2, item 11 of the RTI Act.

Factors favouring nondisclosure

Right to privacy

24. The Information in Issue includes photographs and an aerial view of the external review applicant's properties. The external review applicant submitted on external review that disclosure of the photographic information could reasonably be expected to prejudice the protection of his right to privacy. The external review applicant submitted¹⁷ that Lot 3 contains his future residential dwelling and the adjoining lot, Lot 2, contains a tourist cabin. He also advised that he only conducts his business on Lot 2.
25. The RTI Act recognises that a factor favouring nondisclosure will arise in circumstances where disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy.¹⁸
26. I consider that disclosure of the Information in Issue to the extent it relates to Lot 2 could not reasonably be expected to prejudice the protection of the external review applicant's right to privacy because the external review applicant only uses Lot 2 for business purposes. There is generally no expectation of privacy when conducting a business which is aimed at providing services to the public. Therefore, I afford this factor no weight to the extent the Information in Issue relates to Lot 2.
27. As the external review applicant intends to use Lot 3 as his residential address once certain work is completed, I consider that disclosure of the Information in Issue to the extent it relates to Lot 3 could reasonably be expected to prejudice the protection of the external review applicant's right to privacy. I afford this factor moderate weight to the extent the Information in Issue relates to Lot 3.
28. The external review applicant further submitted that disclosure of certain information would prejudice the right to privacy of another individual who currently resides at Lot 3. I do not consider that disclosure of the Information in Issue will prejudice that individual's right to privacy as his or her personal information is not contained in the Information in Issue, nor would it seem likely that his or her identity could be readily ascertained and connected with the address contained in the Information in Issue (for example by a land title search). The Information in Issue does not disclose that another individual resides at the property. In any event, the individual in question resides at the property as part of his or her employment. I do not consider an address to be especially private where an individual resides at their place of employment.

Prejudice to private, business, professional, commercial or financial affairs of entities

29. In the application for external review,¹⁹ the external review applicant submitted that:

Disclosure of the photographic information:

...

(b) Could reasonably be expected to prejudice the private, business, professional, commercial or financial affairs of entities.

[The external review applicant] has co-operated with the Local Government for the purpose of achieving compliance with planning requirements by providing information in an open and transparent fashion. Disclosure of information to third parties is unlikely to

¹⁷ By way of letter dated 17 July 2013.

¹⁸ Schedule 4, part 3, item 3 of the RTI Act.

¹⁹ Dated 8 May 2013.

enhance the process of openness in dealings between [the external review applicant] and the Local Government...

Disclosure of the information could reasonably be expected to prejudice the business and commercial or financial affairs of [the external review applicant] as there is information contained that discloses [the external review applicant's] business plans.

30. The RTI Act recognises that factors favouring nondisclosure will arise where:

- disclosure of the information could reasonably be expected to prejudice the private, business, professional, commercial or financial affairs of entities;²⁰ and
- 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 affairs or to prejudice the future supply of information of this type to government.²¹

31. I have carefully reviewed the Information in Issue and I am satisfied that it does not disclose the external review applicant's business plans. Further, the Information in Issue is not information provided by the external review applicant to Council. The Information in Issue is contained in documents created by Council—this information appears to have been obtained from an inspection of the external review applicant's properties. Therefore, I do not consider that disclosure of the Information in Issue could reasonably be expected to prejudice the future supply of information to Council.

32. However, I accept that disclosure of the Information in Issue could reasonably be expected to prejudice the external review applicant's business affairs as disclosure of the show cause notices and penalty notices could have an adverse effect on the external review applicant's business reputation. To the extent the Information in Issue relates to Lot 2, I give these factors moderate weight. To the extent the Information in Issue relates to Lots 1 and 3 (the external review applicant's residential land), I give these factors no weight.

Information of a confidential nature that was communicated in confidence and prejudice to an agency's ability to obtain confidential information

33. In the application for external review,²² the external review applicant submitted that:

Some of the information given by [the external review applicant] to the Local Government was given on a "Commercial in Confidence" basis.

34. The RTI Act recognises that:

- a factor favouring nondisclosure will arise in circumstances where disclosure of the information could reasonably be expected to prejudice an agency's ability to obtain confidential information;²³ and
- disclosure could reasonably be expected to cause a public interest harm if:
 - the information consists of information of a confidential nature that was communicated in confidence; and
 - its disclosure could reasonably be expected to prejudice the future supply of information of this type.²⁴

²⁰ Schedule 4, part 3, item 2 of the RTI Act.

²¹ Schedule 4, part 4, section 7(1)(c) of the RTI Act.

²² Dated 8 May 2013.

²³ Schedule 4, part 3, item 2 of the RTI Act.

²⁴ Schedule 4, part 4, section 8 of the RTI Act.

35. As stated above, the Information in Issue is not information provided by the external review applicant to Council. The Information in Issue is contained in documents created by Council—this information appears to have been obtained from an inspection of the external review applicant's properties. Therefore, I am not satisfied that the Information in Issue is confidential in nature or communicated in confidence. In any event, even if the Information in Issue contained confidential information provided by the external review applicant, I understand from the external review applicant's submissions that he was required to provide this sort of information as part of Council's processes. Therefore, I am not satisfied that disclosure could reasonably be expected to prejudice the future supply of information of this type to Council. Accordingly, I give these factors no weight.

Balancing the relevant public interest factors

36. In summary, for the reasons set out above I afford moderate weight to the following public interest factors favouring nondisclosure of the Information in Issue:

- prejudice to the protection of an individual's right to privacy—to the extent the Information in Issue relates to Lot 3
- prejudice to a person's business affairs—to the extent the Information in Issue relates to Lot 2

and I afford significant weight to the following public interest factors favouring disclosure of the Information in Issue:

- promoting open discussion of public affairs and enhancing the government's accountability
- informing the community of the government's operations; and
- revealing the reason for a government decision and any background or contextual information that informed the decision.

37. I am therefore satisfied that disclosure of the Information in Issue would not, on balance, be contrary to the public interest.

DECISION

38. For the reasons set out above, I affirm the decision under review.

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

Lisa Meagher
Acting Assistant Information Commissioner

Date: 23 September 2013

APPENDIX**Significant procedural steps**

Date	Event
14 January 2013	Council received the access applicant's access application.
18 January 2013	Council consulted with the external review applicant under section 37 of the RTI Act.
4 February 2013	The external review applicant provided Council with its response to the third party consultation.
15 February 2013	Council issued its decision to the access applicant. Council issued its decision to the external review applicant.
13 March 2013	The external review applicant applied to Council for internal review of its decision.
12 April 2013	Council issued its internal review decision to the access applicant. Council issued its internal review decision to the external review applicant.
8 May 2013	OIC received the external review application.
30 May 2013	Council provided OIC with a copy of the Information in Issue
3 July 2013	OIC conveyed its view to the external review applicant that disclosure of the Information in issue is not, on balance, contrary to the public interest. OIC invited the external review applicant to make written submissions if he did not agree with the view.
17 July 2013	The external review applicant advised OIC that he did not accept OIC's view and provided submissions supporting his case.
24 July 2013	OIC conveyed a further view to the external review applicant and invited him to provide further submissions supporting his case if he did not accept the view.
7 August 2013	The external review applicant advised OIC that he did not accept OIC's view and provided further submissions supporting his case.