



## Decision and Reasons for Decision

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**Application Number:** 210478

**Applicant:** Mr K Luder

**Respondent:** Fraser Coast Regional Council

**Decision Date:** 7 April 2009

**Catchwords:** **FREEDOM OF INFORMATION – section 45(1)(b) of the *Freedom of Information Act 1992* – matter relating to trade secrets, business affairs and research – whether disclosure of the relevant matter would disclose information that has a commercial value to an agency of another person – whether disclosure could reasonably be expected to destroy or diminish the commercial value of the information**

**FREEDOM OF INFORMATION – section 28A(2) of the *Freedom of Information Act 1992* – document nonexistent or unlocatable - whether the relevant document has been or should be in the agency's possession – whether all reasonable steps have been taken to find the document but it cannot be found**

## Contents

REASONS FOR DECISION .....	3
Summary .....	3
Background.....	3
Decision under review .....	3
Steps taken in the external review process .....	3
Matter in issue .....	7
Issues for determination .....	7
PART A .....	7
Preliminary issues raised by the applicant in relation to the Survey Data .....	7
Issue 1 – Internal review process.....	8
The applicant’s submissions .....	8
Council’s submissions .....	8
Findings.....	9
Whether an internal review decision was made .....	9
Post-application document .....	10
Issue 2 – Ownership of the Survey Data and related issues .....	10
The applicant’s submissions .....	10
Findings.....	13
Category A.....	14
Category B.....	14
Category C.....	15
Category D.....	16
Category E.....	16
Issue 3 – Formal investigation by this Office.....	17
The applicant’s submissions .....	17
Findings.....	17
PART B .....	18
Whether the Survey Data is exempt from disclosure under the FOI Act .....	18
Council’s submissions.....	18
The applicant’s submissions .....	19
The law .....	20
Findings .....	22
Does the Survey Data have a commercial value to the surveying company?.....	22
Could disclosure of the Survey Data reasonably be expected to destroy or diminish its commercial value?.....	23
PART C .....	24
Whether the Consultancy Brief exists.....	24
Council’s submissions.....	25
The applicant’s submissions .....	27
The law .....	28
Findings .....	29
Are there reasonable grounds to be satisfied that the original version of the Consultancy Brief has been or should be in Council’s possession? .....	30
Have all reasonable steps been taken to find the original version of the Consultancy Brief but the document cannot be found? .....	30
Other issues .....	31
DECISION.....	33

## REASONS FOR DECISION

### Summary

1. For the reasons set out below, I find that:
  - the survey data is exempt from disclosure under section 45(1)(b) of the *Freedom of Information Act 1992* (**FOI Act**)
  - access to the consultancy brief is refused under section 28A(2) of the FOI Act as the document can not be located.

### Background

2. By letter dated 20 February 2008, the applicant sought access to a range of information from Fraser Coast Regional Council (formerly Hervey Bay City Council) (**Council**) under the FOI Act (**FOI Application**).
3. By letter dated 4 March 2008 (**Decision**), Council advised the applicant that:
  - certain documents had been identified as responding to the FOI Application
  - the survey data and part of a tax invoice from the surveying company were exempt from disclosure under section 45(1)(b) of the FOI Act
  - the consultancy brief would be released to the applicant in full.
4. By letter dated 9 March 2008, the applicant requested internal review of the Decision.
5. By letter dated 19 March 2008, the applicant advised Council that he also sought internal review in relation to the sufficiency of Council's searches for documents responding to the FOI Application and provided submissions in support of his case.
6. Although Council commenced the internal review process, it did not issue an internal review decision within the time limits provided by the FOI Act and therefore the Decision is taken to have been affirmed on internal review (**Deemed Decision**).<sup>1</sup>
7. By letter dated 8 April 2008, the applicant requested external review of the Deemed Decision.

### Decision under review

8. The decision under review is the Deemed Decision.

### Steps taken in the external review process

9. By email on 10 April 2008, Council was asked to provide certain initiating documents relevant to the review.
10. By email on 17 April 2008, Council forwarded the requested documents to this Office.
11. By letter dated 26 April 2008, the applicant provided submissions in addition to his external review application in relation to the sufficiency of Council's searches.

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<sup>1</sup> Section 52(6) of the FOI Act.

12. By letter dated 6 May 2008, Council was asked to provide further documents relevant to the review, including the matter claimed to be exempt and submissions in support of its case.
13. By letter dated 7 May 2008, Council provided the requested information and submissions in support of its case.
14. On 15 July 2008, a staff member of this Office telephoned a staff member of Council in order to clarify Council's submissions in relation to the survey data.
15. On 16 July 2008, the applicant telephoned a staff member of this Office and provided submissions in support of his case.
16. By letter dated 22 July 2008, the applicant provided this Office with documentation in support of his submissions.
17. By letter dated 2 September 2008, I requested that Council provide further submissions in support of its case in relation to the survey data and I set out the specific issues it should address.
18. By letter dated 5 September 2008, Council provided the requested submissions.
19. By letter dated 12 September 2008, the applicant provided this Office with further documentation in support of his submissions.
20. On 19 September 2008, a staff member of this Office telephoned the applicant to clarify the scope of the FOI Application in relation to the survey data. The applicant provided submissions in support of his case.
21. On 19 September 2008, a staff member of this Office telephoned a staff member of Council in order to clarify Council's submissions in relation to the survey data.
22. By email on 19 September 2008, Council provided this Office with further documentation.
23. By email on 11 October 2008, the applicant provided clarification in relation to the scope of the FOI Application.
24. By letter dated 20 October 2008, I advised Council that it was my preliminary view that the tax invoice was not partially exempt from disclosure under the FOI Act and should be released to the applicant in full. I invited Council to provide submissions in support of its case by 3 November 2008 if it did not accept my preliminary view. I advised Council that if I did not hear from it to the contrary by that date, I would assume that it accepted my preliminary view. Council did not respond to my preliminary view letter.
25. On 14 November 2008, a staff member of this Office telephoned the surveying company in order to determine whether it:
  - wished to participate in the external review process
  - objected to disclosure of the amount on the tax invoice.

The staff member of this Office was advised that the surveying company did not wish to participate in the external review and would support Council's position.

26. By letter dated 19 November 2008, I wrote to the surveying company to advise it that Council did not object to the release of the amount on the tax invoice and to notify it that the information would be released to the applicant.
27. On 20 November 2008, the applicant spoke to a staff member of this Office and provided further submissions in support of his case.
28. By email on 20 November 2008, the applicant confirmed the submissions he had made by telephone earlier that day.
29. By letter dated 25 November 2008, I asked Council to contact the applicant in order to arrange access to the tax invoice in accordance with my preliminary view.
30. By letter dated 25 November 2008, I provided the applicant with a preliminary view in relation to the survey data and the consultancy brief. The applicant was invited to provide submissions in support of his case by 11 December 2008 if he did not accept my preliminary view. I advised him that if I did not hear from him by 11 December 2008, I would assume that he accepted my preliminary view.
31. By email on 26 November 2008, the applicant advised that he did not accept my preliminary view as regards access (he did not dispute my view with regard to the scope of the review in relation to the survey data) and requested a full copy of the submissions made by Council during the course of this review.
32. By email to the applicant on 28 November 2008, this Office acknowledged that the applicant had not accepted the preliminary view.
33. By letter dated 28 November 2008, the applicant was provided with a full copy of the submissions that Council had made at that stage of the review.
34. By email on 1 December 2008, the applicant requested an extension of time in order to provide submissions in response to my preliminary view.
35. By email on 2 December 2008, I granted the applicant the requested extension of time.
36. By letter dated 14 December 2008, the applicant provided this Office with his submissions and supporting documents in response to my preliminary view.
37. By emails on 17 December 2008, the applicant requested that this Office correct various typographical errors in his submissions dated 14 December 2008 and set out what those errors were.
38. On 15 January 2009, a staff member of this Office telephoned a staff member of Council to clarify certain issues in the review relating to the consultancy brief.
39. By email on 15 January 2009, Council provided submissions to this Office on that issue.
40. By letter dated 20 January 2009, I requested that Council provide further specific submissions on that issue and conduct further searches for the relevant version of the consultancy brief.
41. By letter dated 28 January 2009, Council provided further submissions to this Office in relation to the consultancy brief.

42. On 9 February 2009, a staff member of this Office spoke with a staff member of Council in order to clarify Council's submissions on that issue.
43. On 9 February 2009, Council forwarded a document to this Office in support of its case.
44. By letter dated 10 February 2009, I wrote to Council in order to confirm its submissions in relation to the consultancy brief.
45. By letter dated 17 February 2009, I provided the applicant with a preliminary view in relation to the consultancy brief. I invited the applicant to provide submissions to this Office by 5 March 2009 in support of his case if he did not accept my preliminary view. I advised the applicant that if I did not hear from him by 5 March 2009, I would assume that he accepted my preliminary view.
46. By emails on 18 February 2009 and 19 February 2009, the applicant advised that he wished to contest my preliminary view and requested an extension of time to provide submissions to this Office. The applicant also asked this Office to confirm that he had been provided with all of the submissions made by Council and raised a number of other issues.
47. By email on 19 February 2009, the applicant was granted the requested extension of time and this Office confirmed a number of issues with the applicant.
48. By email on 20 February 2009, the applicant again advised that he wished to contest my preliminary view and that he *'invoked his legal right as a party to this dispute'*. He also requested that this Office provide official acknowledgment of his previous correspondence.
49. By letter dated 23 February 2009, this Office acknowledged the applicant's correspondence and again confirmed a number of issues with the applicant relating to Council's submissions.
50. By emails on 8 March 2009, the applicant informed this Office that he had received a letter from Council advising him that a particular development application would be decided at a Council Development Committee meeting on 11 March 2009 and offered to send the relevant letter to this Office.
51. By letter dated 4 March 2009, which was received by this Office on 10 March 2009, the applicant provided submissions and supporting documents to this Office in response to my preliminary view.
52. In making this decision, I have taken the following into account:
  - the FOI Application
  - the Decision
  - the applicant's internal review application dated 9 March 2008 and addendum to the internal review application dated 19 March 2008
  - the applicant's external review application dated 8 April 2008

- information the applicant provided to this Office throughout the course of this review including his submissions dated 26 April 2008, 22 July 2008, 24 July 2008, 12 September 2008, 11 October 2008, 20 November 2008, 26 November 2008, 14 December 2008, 17 December 2008, 4 March 2009, 8 March 2009 and supporting documentation
- information Council provided to this Office throughout the course of this review including its submissions dated 17 April 2008, 7 May 2008, 5 September 2008, 15 January 2009, 28 January 2009 and 9 February 2009 and supporting documentation
- various file notes recording conversations between the applicant and this Office
- various file notes recording conversations between staff members of Council and this Office
- the matter in issue
- relevant case law and previous decisions of this Office
- relevant provisions of the FOI Act.

### **Matter in issue**

53. The matter in issue in this review is:

- 12 pages which comprise raw survey data collected by the surveying company (**Survey Data**)
- a project brief purportedly between Council and the surveying company (**Consultancy Brief**).

### **Issues for determination**

54. The issues for determination in this external review are as follows:

- PART A: a number of preliminary issues raised by the applicant in relation to the Survey Data
- PART B: whether the Survey Data is exempt from disclosure under the FOI Act
- PART C: in relation to the Consultancy Brief:
  - whether the version of the Consultancy Brief that Council provided to the applicant is the document that he requested in his FOI Application  
  
and if not
  - whether the document the applicant requested in his FOI Application exists.

### **PART A**

#### **Preliminary issues raised by the applicant in relation to the Survey Data**

55. The applicant has raised a number of issues concerning the Survey Data during the course of this external review which I will address before considering the other issues for determination.

## **Issue 1 – Internal review process**

### **The applicant's submissions**

56. The applicant submits that Council has made an internal review decision to release survey data to him and that decision should be followed by this Office.
57. In this regard the applicant refers to an email from Council to this Office dated 17 April 2008 in which Council advises:

*The internal review decision was to create a PDF from the 12D software that would show the information for Mr Luder's property only. ... Note this has yet to be given to Mr Luder.*

58. In his submissions to this Office dated 14 December 2008, the applicant refers to this email from Council and states that *'an FOI internal review decision had already been made by HBCC to release the data taken from my land on 17/04/08, therefore why didn't your office follow the decision of this agency when you became aware of this information'*.<sup>2</sup>

59. In his submissions dated 4 March 2009, the applicant further argued as follows:<sup>3</sup>

*Mr. Shang says in his email to your office dated 17/04/08, '...The internal review decision has been **completed** however due to the amalgamation process has not been documented and sent ... the internal review has been stopped due to the external review... Note this has yet to be given to Mr. Luder ...' So there appears to have been a firm decision made by a senior officer, (possibly the outgoing CEO of the HBCC) to release the flood data to me. Mr. Shang also says in his letter to your office dated 07/05/08, 'Whilst the internal review has been **completed**, the new(ly) released documents prepared for sending, no decision notice has been prepared...' Both of these written comments verify in my submission, that a firm completed decision had been properly made, (probably by the old HBCC CEO), to release the survey data to me.*

60. The applicant then goes on to submit that:<sup>4</sup>

*... the new FCRC was legally (and morally) obligated under this local gov't implementation legislation, to fully implement the internal review decision made most probably by the outgoing HBCC CEO, to give me full access to the flood data illegally collected from my land on 30/08/06.*

### **Council's submissions**

61. In relation to the issue of Council having made an internal review decision to release survey data to him and the applicant's assertion that the decision should be followed by this Office, I note the following:

- By email on 17 April 2008, Council advised this Office that:

*The internal review decision has been completed however due to the amalgamation process has not been documented and sent. The internal review has been stopped due to the external review.*

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<sup>2</sup> At page 6 of his submissions dated 14 December 2008.

<sup>3</sup> At page 12 of his submissions dated 4 March 2009.

<sup>4</sup> As above.

...

*The internal decision was to create a PDF from the 12D software that would show the information for Mr Luder's property only. This is attached as 41 Fairway Dr.pdf. Note this has yet to be given to Mr Luder.*

- By letter dated 7 May 2008, Council advised this Office that:

*Whilst the internal review had been completed and the new released documents prepared for sending, no decision notice had been prepared.*

- By letter dated 5 September 2008, Council advised this Office that:

*Council intended to release this to Mr Luder as part of the internal review and even though it contains information outside the scope of the application, it was felt that this may satisfy Mr Luder's requirements.*

- By letter dated 28 Januarys 2009, Council advised this Office that:

*Mr Luder, in his submission, has made certain incorrect assumptions about the meaning behind the production of this document. This document was to try to resolve this FOI application to avoid an external review.*

## Findings

### ***Whether an internal review decision was made***

62. Section 52(6) of the FOI Act provides:

#### **52 Internal review**

...

- (6) *If an agency or Minister does not decide an application and notify the applicant of the decision within 28 days after receiving it, the agency's principal officer or the Minister is taken to have made a decision at the end of the period affirming the original decision.*

63. As I have explained at paragraph 6 above, Council commenced the internal review process but it did not issue an internal review decision to the applicant at any stage. Rather it is deemed to have made an internal review decision affirming its original decision by virtue of section 52(6) of the FOI Act.
64. As the applicant commenced the external review process, Council was not required to continue the internal review process. As a result, Council has not made a valid internal review decision.
65. At any rate, external review under the FOI Act is merits review and as such I am not bound to follow the decision of the initial decision maker or internal reviewer. On the contrary, I am obliged to consider the matter afresh and look at the facts of the matter as they stand at the time I make my decision.<sup>5</sup>

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<sup>5</sup> *Woodyatt and Minister for Corrective Services* (1995) 2 QAR 383.

### ***Post-application document***

66. An additional consideration in relation to this internal review issue is the fact that the document created by Council is a 'post application document' for the purpose of section 25(4) of the FOI Act.

67. Section 25 of the FOI Act relevantly provides:

#### **25 How applications for access are made**

a. *A person who wishes to obtain access to a document of an agency or official document of a Minister under this Act is entitled to apply to the agency or Minister for access to the document.*

...

(3) *The application is taken to apply to documents that are, or may be, in existence on the day the application is received.*

(4) *However, subsection (3) does not prevent an agency or Minister giving access to a document created after the application is received but before notice is given under section 34 (a **post-application document**).*

(5) *If an agency or Minister gives a person access to a post-application document –*

(a) *no processing charge or access charge is payable in relation to the document; and*

(b) *the person is not entitled to a review under section 52 or part 5 in relation to a decision about the document made in relation to the application concerned.*

68. Based on the information provided by Council (set out at paragraph 61 above) it is clear that:

- Council has created a document in response to the FOI Application
- that document was created after Council received the FOI Application
- that document is a post-application document as that term is defined by section 25(4) of the FOI Act.

69. Accordingly, under section 25(5)(b) of the FOI Act, I do not have jurisdiction to consider the document as part of the external review nor direct Council to provide the applicant with access to it. However I note that Council has advised this Office that the document will be provided to the applicant at the completion of this external review.

### ***Issue 2 – Ownership of the Survey Data and related issues***

#### **The applicant's submissions**

70. In his submissions to this Office, the applicant asserts that Council unlawfully obtained the Survey Data and that it should be returned to him. He has also requested that this Office conduct a formal investigation into the matters he has raised. That is, he wants this Office to investigate and determine:

- whether Council and/or the surveying company had authority to enter his land
- whether the Survey Data was obtained unlawfully as a result of a trespass
- that he lawfully owns the Survey Data.

71. In this regard the applicant states that on 30 August 2006, he found a person from a surveying company on his property carrying out a survey.
72. The applicant argues that he had not received any notice from either Council or the surveying company about access to his property and thus Council (and its agents) had no authority to enter his property and the data they collected was unlawfully obtained.
73. In support of his contention the applicant refers to section 1070 of the *Local Government Act 1993* and claims that, as he does not have a local government facility on his property and Council has no intention of placing one on his property, Council (or its agents) had no authority to enter his property. He states:<sup>6</sup>

*... S. 1070 of the LGA only allows local government employees (which include contractors) to enter private properties for infrastructure purposes, which does **not** include contractors entering into ratepayer's backyards to collect flood survey data. In a letter from [Council's] CEO dated 16/07/08... Mr. Brien stated [Council] currently has no plans and no intentions of creating an easement on my land. DNR state that there are no current registered easements on my land. Under 1070 of the LGA the entry into my backyard on 30/08/06 was illegal, because there were no local government facilities then on my land and [Council] had no intention then of placing any future local government facilities on my land. Therefore the gov't contractor found on my land on 30/08/06 was trespassing and any gov't data collected was unlawfully obtained and remains **my** property.*

74. The applicant states he has corresponded with Council about this incident and received an apology. He refers to a letter provided by Council dated 18 September 2006 which provides:<sup>7</sup>

*The project brief issued to the Surveyor requires that two days' notice be given to property owners for the purposes of entering private property. The actions undertaken by the Surveyor's employee were not in accordance with the brief, and at no stage did Council instruct any employee of any organisation to enter private property without permission, I have taken this matter up with [the owner of the surveying company], and he has assured Council that he will respond to our enquiry.*

*Please be assured that Council takes its responsibilities to property owners very seriously and apologises unreservedly for any inconvenience caused.*

75. The applicant submits that in this letter Council has made an informal admission that their contractor had no lawful right to be on his property and has accepted the applicant's allegations on that issue.<sup>8</sup>
76. The applicant also provided this Office with a letter he received from Council dated 16 July 2008 which states in part:

*You would be aware that section 1070 of the local government act says "An employee or agent of a local government may enter land or a structure, at all reasonable times, if the entry is necessary for the exercise of the local government's jurisdiction". Clearly, obtaining survey information to assist with determining infrastructure requirements is within a local government's jurisdiction.*

77. The applicant submits that, as the surveying company had no legal right to collect data from his property, they have committed trespass.

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<sup>6</sup> At page 4 of his submissions dated 14 December 2008.

<sup>7</sup> At page 5 of his submissions dated 14 December 2008.

<sup>8</sup> As above.

78. The applicant provides various definitions of the words 'trespass' and 'trespasser' and submits:<sup>9</sup>

*... that if the [Council] contract survey worker found in my backyard on 30/08/06 had no legal right to be there under the LGA, then he was trespassing and therefore all survey data collected by [the surveying company] at the time was mine and still is...*

79. He also submits:<sup>10</sup>

*I submit your office as an independent gov't decision making body is duty bound to consider all the available evidence and case law precedents on this issue and there is **overwhelming** evidence to find that the FOI exemptions of S.45(1)(b) cannot be applied in this issue, because of the manner in which the survey data was collected from my property on 30/08/06.*

80. The applicant refers me to the decisions of *Coco v R*,<sup>11</sup> *Entick v Carrington*<sup>12</sup> and *Morris v Beardmore*<sup>13</sup> in support of his case.<sup>14</sup>

81. The applicant also submits that, as the data was obtained unlawfully and constitutes his personal affairs, he owns the data.

82. In this regard the applicant claims that information associated with his property, including data collected from his property, falls within the meaning of 'personal affairs' as referred to in the FOI Act.

83. He suggests that this Office has formed the view that the surveyors own the Survey Data and, in doing so, has rejected the applicant's common law property rights given to him as a landowner.<sup>15</sup>

84. The applicant refers to the information provided by Council by email dated 17 April 2008 (the contents of which are referred to at paragraph 57 above) where Council submits that it created a document which it intended to release to the applicant with an internal review decision and contends that the fact that Council decided to release this document to him:<sup>16</sup>

*proves that this data collected on my land falls within my personal affairs ([Council] had already made this decision to release the survey data to me). Therefore in my submission they had already recognized that it belonged to part of my land being my asset, and therefore that I have ownership rights to the data collected, because of the manner in which it was collected by the council survey agent.*

...

*I own my property outright, therefore I am entitled to claim ownership of everything on my land, which includes all, real, personal and intangible property...*

...

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<sup>9</sup> As above.

<sup>10</sup> At page 9 of his submissions dated 14 December 2008.

<sup>11</sup> (1994) 179 CLR 427.

<sup>12</sup> (1765) 95 ER 807.

<sup>13</sup> [1980] 2 All ER 753.

<sup>14</sup> At page 8 of his submissions dated 14 December 2008.

<sup>15</sup> At page 6 of his submissions dated 14 December 2008.

<sup>16</sup> At pages 6 – 7 of his submissions dated 14 December 2008.

... when [Council] made this decision, Council accepted that I owned (or had some **ownership** rights) over the survey data taken from my land on 30/08/06, otherwise, in my submission, they wouldn't have made the decision to release the data to me...

85. In its submissions dated 7 May 2008, Council explained that clause 8 of the Conditions of Engagement (which appears in the version of the Consultancy Brief which was provided to the applicant) provides that: *Copyright in all drawings, reports, specifications, bills of quantity, calculations and other documents provided by the Consulting Engineer in connection with the project shall remain the property of the Consulting Engineer.* The applicant refers to this clause and submits as follows:<sup>17</sup>

... Council admits that [the surveyors] claim **ownership rights** over the flood survey data collected in Aug 2006 from my land & other locations in Fairway Drive, Hervey Bay.

...

Council have accepted this is an a definite fact in relation to their contractual rights regarding the ownership of flood survey data, collected by their survey contractor in Aug, 2006. ... This means that Council by virtue of clause 8 of the 'Conditions of Engagement' of the project brief, have **surrendered** all ownership rights to [the surveying company], as they now claim full intellectual property rights over the data collected, under the Copyright Act 1968 (Commonwealth).

...

Therefore I submit that all submissions received from Council during the external review process, have to be legally **rejected** and cannot **now** be considered in your final determination on this issue... The principal reason being that only the accepted **lawful owner** of the data collected can make lawful submissions, to be considered in your final determination. ... There is no data before you that [the surveyors] have legally authorized [Council] to act on their behalf in this dispute, therefore in my submission you must reject all Council submissions received on this issue, in your final decision on this matter, because they have no actual or accepted ownership rights over the flood data collected by the surveyor.

## Findings

86. The applicant's submissions in relation to issue 2 can be categorised as follows:
- Category A: that the Survey Data was unlawfully obtained and therefore Council has no lawful right to the Survey Data and it should be returned to the applicant
  - Category B: that the operation of the FOI Act is subject to the threshold question of whether the Survey Data was unlawfully obtained by Council
  - Category C: that the applicant owns the Survey Data
  - Category D: that Council cannot refuse the applicant access to the Survey Data under the FOI Act because the applicant owns the Survey Data and it constitutes his personal affairs
  - Category E: that Council's submissions in relation to the Survey Data should be rejected because only the legal owner of the Survey Data is entitled to make submissions in relation to it.

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<sup>17</sup> At pages 7 – 8 of his submissions dated 14 December 2008.

**Category A**

87. In relation to this issue, the applicant submits that:
- Council (and its agents) had no authority to enter his property and the data they collected was unlawfully obtained.
  - As the surveying company had no legal right to collect data from his property, they have committed trespass.
  - Council therefore has no legal right to the data and it should be returned to him.
88. The purpose of the FOI Act is to extend as far as possible the right of the community to access information held by the Queensland government.<sup>18</sup> It is not designed, to provide for the determination of private legal disputes concerning how information held by an agency was obtained. The question of whether the Council or the applicant owns the information is not a matter for which the FOI Act is an appropriate avenue for redress.
89. I note that section 101C of the FOI Act provides that the functions of the Information Commissioner are to investigate and review decisions of agencies and Ministers of the kinds listed in that section. Section 101C of the FOI Act relevantly provides:

**101C Functions of commissioner**

- (1) *The functions of the commissioner are to investigate and review decisions of agencies and Ministers of the following kinds—*
- ...
- (c) *a decision refusing to grant access to documents in accordance with an application under section 25;*
- ...
- (4) *The commissioner has power to do all things that are necessary or convenient to be done for or in connection with the performance of the commissioner's functions.*

90. I do not have jurisdiction to investigate or make any finding or comment in relation to whether the Survey Data was unlawfully obtained or whether trespass has occurred. These are matters that go beyond the Information Commissioner's functions as set out in section 101C of the FOI Act and are more properly matters to be investigated by other authorities.

**Category B**

91. In relation to this issue, the applicant contends that the operation of the FOI Act is subject to a threshold question of whether the Survey Data was unlawfully obtained.

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<sup>18</sup> Section 4(1) of the FOI Act.

92. I have considered the cases of *Coco v R*,<sup>19</sup> *Entick v Carrington*<sup>20</sup> and *Morris v Beardmore*<sup>21</sup> which the applicant refers me to in support of his case. These cases relate to the admissibility of evidence in legal proceedings. It appears the applicant considers the cases support his argument that the question of how the Survey Data was obtained (which in his view occurred illegally) must be addressed as the application of the FOI Act turns on the findings of such an investigation, that is, if the Survey Data was illegally obtained, it can not be subject to the FOI Act.
93. The question of whether evidence that was gathered illegally can be admissible in legal proceedings is very different to the question the applicant raises, namely, whether the FOI Act can apply to a document that has allegedly been obtained illegally by an agency.
94. Information held by government is subject to access under the FOI Act in furtherance of the ideals of accountable and transparent government. As such, to make access to information subject to the question of whether information was obtained illegally would effectively prevent accountability and transparency. One can envisage that such an arrangement might allow government to hide, or refuse to provide, documents tainted with some illegality, thus precluding transparency and accountability of government. An applicant should be able to seek access to documents held by government in order to question the integrity of government process.
95. While I appreciate the point the applicant is making, I am nonetheless of the view that the question of whether information was illegally obtained by an agency is not one that I have jurisdiction to investigate, nor is it one that is required to be answered before the FOI Act can operate.

### **Category C**

96. The applicant contends that the Survey Data was obtained unlawfully from his property and as the property owner he owns the data. He argues that because he owns the data it cannot be a document of Council for the purposes of the FOI Act.
97. Even if it could be said that the applicant owns the Survey Data (I make no finding in that regard) it would not necessarily preclude the Survey Data from being a document of Council. This is because of the operation of section 7 of the FOI Act.
98. In considering whether a document is subject to the provisions of the FOI Act, I must be satisfied that the document is a 'document of the agency' as that term is defined in section 7 of the FOI Act. It is not necessary to determine whether the applicant owns the information contained in the document for the purposes of the FOI Act.
99. Section 7 of the FOI Act relevantly provides:

**document of an agency or document of the agency** means a document in the possession or under the control of an agency, or the agency concerned, whether created or received in the agency, and includes—

- (a) a document to which the agency is entitled to access; and
- (b) a document in the possession or under the control of an officer of the agency in the officer's official capacity.

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<sup>19</sup> (1994) 179 CLR 427.

<sup>20</sup> (1765) 95 ER 807.

<sup>21</sup> [1980] 2 All ER 753.

[my emphasis]

100. In accordance with section 7 of the FOI Act, a document is a document of an agency if it is either in the agency's possession or under its control, whether it was created or received in the agency.
101. In this case it is clear that the Survey Data was received by Council and is in its possession. Accordingly, the Survey Data is a document of Council for the purpose of the FOI Act.

#### **Category D**

102. The applicant submits that information associated with his property (and to which he claims rights of ownership) falls within the meaning of 'personal affairs' as referred to in the FOI Act and therefore he is entitled to it and Council cannot refuse access to it under the FOI Act.
103. It is acknowledged in section 4(2)(c) of the FOI Act that members of the community should have access to information held by government in relation to their personal affairs. However, section 4(3) of the FOI Act provides:

#### **4 Object of the Act and its achievement**

...

(3) *Parliament also recognises there are competing interests in that the disclosure of particular information could be contrary to the public interest because its disclosure in some instances would have a prejudicial effect on—*

(a) *essential public interests; or*

(b) *the private or business affairs of members of the community about whom information is collected and held by government.*

104. I note that, even if the Survey Data can be characterised as information relating to the applicant's 'personal affairs' (although I make no finding on this issue), this in itself does not automatically entitle the applicant to access the information under the FOI Act.
105. The right of access to documents under the FOI Act is subject to certain limitations, namely the exemption provisions contained in Part 4 of the FOI Act.

#### **Category E**

106. The applicant claims that:
- Only the legal owner of the Survey Data is entitled to make submissions to this Office.
  - Council has surrendered all ownership rights to the surveying company.
  - The surveying company has not authorised Council to act on its behalf.
  - All submissions made by Council during the course of this external review should be rejected.

107. I repeat and rely on my findings above at paragraphs 98 to 101 above in relation to the Survey Data being a document of the agency.
108. Council is the relevant agency to which the applicant made the FOI Application and the applicant has sought external review of Council's decision. Therefore, Council is the respondent agency and it is appropriate that I obtain submissions from Council on the relevant issues in this review.
109. The FOI Act imposes a statutory obligation on an agency to:
- search for and identify all documents in its possession or under its control that are relevant to a valid application under the FOI Act
  - decide whether access to those documents should be granted in accordance with the provisions of the FOI Act.
110. Accordingly, as the applicant requested documents from Council under the FOI Act, Council was under a statutory obligation to:
- search for and identify all documents in its possession or under its control that are relevant to the FOI Application
  - decide whether access to those documents should be granted in accordance with the provisions of the FOI Act.

### ***Issue 3 – Formal investigation by this Office***

#### **The applicant's submissions**

111. Finally, the applicant also submits that this Office should carry out an investigation into the allegedly illegal collection of data from his property under section 101C(4) of the FOI Act before issuing a final decision.
112. In this regard the applicant refers me to the decision of *Shepherd v Department of Housing, Local Government & Planning (Shepherd)*<sup>22</sup> and submits that the Information Commissioner fully complied with the obligations under section 101C(4) of the FOI Act in that review by carrying out a formal investigation into the facts surrounding the case.
113. The applicant submits that this Office has not fully complied with section 101C of the FOI Act and has only carried out a cursory examination of the facts. He submits that a formal investigation should be carried out by the Information Commissioner into this matter as, like *Shepherd*, it also involves complex and contentious issues.<sup>23</sup>

#### **Findings**

114. There is an important distinction between the applicant's case and the matter of *Shepherd* to which he alluded. That is, *Shepherd* concerned the sufficiency of searches conducted by an agency on external review for documents requested by an applicant. In this case however, the applicant wants this Office to conduct an investigation (in accordance with the procedures adopted in *Shepherd*) into the various matters set out above. As I have explained at paragraphs 86 to 110 above, I either do not have jurisdiction to investigate those matters or the matters are not relevant to the operation of the FOI Act.

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<sup>22</sup> (1994) 1 QAR 464.

<sup>23</sup> At page 2 of his submissions dated 14 December 2008.

115. The procedures to be followed on external review are within the discretion of the Information Commissioner (or delegate). Proceedings are to be conducted with as little formality and technicality, and with as much expedition, as the requirements of the FOI Act and a proper consideration of the matters before the Information Commissioner permit. The Information Commissioner is not bound by the rules of evidence and may inform herself on any matter in any way the Information Commissioner considers appropriate.<sup>24</sup>

116. I consider the information before me is sufficient to enable a proper consideration of the matters which I have jurisdiction to determine.

## **PART B**

### **Whether the Survey Data is exempt from disclosure under the FOI Act**

117. Pursuant to section 21 of the FOI Act, a person has a legally enforceable right to be given access to documents of an agency and official documents of a Minister. This right of access is subject to other provisions of the FOI Act, in particular, section 28 of the FOI Act, under which an agency can refuse access to exempt matter.

118. In his initial FOI Application the applicant sought access to (among other things):

*All Q100 flood data (including computer data, flood maps and computer Q100 flood data modelling etc.) which was collected on my property on 30/08/06 by a HBCC agent namely a surveyor's assistant ... I also request full access to all the other Q100 flood survey data collected by [the surveying company] around August, 2006 on adjoining properties in Fairway Drive, Urraween, adjacent to land owned by Mr. T.C. Pantlin. ...*

119. In the course of this review I ascertained, and the parties agreed,<sup>25</sup> that the only document responsive to this part of the FOI Application is a 12 page document listing data known as raw natural surface data. It is this data that is referred to in this Decision as 'Survey Data'.

120. Council claims that the Survey Data is exempt pursuant to section 45(1)(b)(i) of the FOI Act but did not provide any reasons in the Decision.

121. I will now turn to a consideration of whether the Survey Data is exempt from disclosure.

### **Council's submissions**

122. Council has provided the following relevant submissions to this Office in relation to the application of section 45(1)(b) of the FOI Act to the Survey Data:

- The area that was surveyed is part of the Eli Creek Catchment Area. The area has been the topic of many discussions on the flooding of the surrounding land and the suitability of this area for development. As a result, there have been many studies conducted and plans developed over the years to mitigate any future problems.

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<sup>24</sup> Section 72 of the FOI Act.

<sup>25</sup> See paragraph 31.

- The location of this catchment area is close to the city heart and has undergone major development approvals in the last 10 years and will continue to be subdivided in the future. Since this catchment area is fragile, development applications within this catchment area must address drainage and flood mitigation for the proposed subdivision as part of the application. In most circumstances this may require some type of survey work.
- The applicant's property is in the middle of this catchment area and is one of the more controversial subdivisions. As a result, this current survey has a commercial value to the surveying company in obtaining survey work from potential developers.
- The surveying company's primary commercial activity is surveying of the land and formatting it into an electronic format for customers.
- The information has an intrinsic value and an arms-length buyer would be prepared to obtain this information. With the amount of development and further development still to be initiated in the area, the source of these arms-length buyers would be fairly realistic.
- The information is a survey of the ground levels and until the current property is changed by a major redevelopment then this information remains current.
- The surveying company would be financially disadvantaged should the information be released as this could be used by any developer or surveyor in the area in completing their strategies.
- The Survey Data that was collected by the surveying company can be converted into a spreadsheet and sold.

### ***The applicant's submissions***

123. The applicant submits that because he owns the Survey Data, it is not exempt from disclosure under section 45(1)(b) of the FOI Act (see paragraphs 70 to 85 above).
124. In his letter to Council dated 9 March 2008, the applicant makes submissions in relation to the application of section 45(1)(b) of the FOI Act.
125. The applicant cites a number of articles which discuss the provision (or its equivalent under the Commonwealth FOI Act) and submits as follows:<sup>26</sup>

*... that a FOI decision-maker in determining whether information is exempt under S.45(1)(b), must consider whether the document contains information of a commercial value and whether there is a reasonable likelihood that its value could **reasonably** be destroyed or diminished through disclosure under the FOI Act. I submit that where the exempted documents contains only the business or professional information (e.g. Q100 flood data) of a client or business etc, the general exemptions outlined in S.45 cannot be applied. Furthermore to satisfy the general exemptions detailed in S.45 of the FOI Act, I suggest that the decision-maker must demonstrate that the documents relate to a business or commercial activity.*

...

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<sup>26</sup> At pages 7 – 9 of his submissions dated 9 March 2008.

I submit that it is **not enough** for a FOI decision-maker to just say that the documents are exempt under S.45(1)(b). ... As stated, the decision-maker in my submission must be able to show (i.e. demonstrate) that the information is of a commercial value and **could reasonably** destroy or diminish its commercial value if released. In other words show that a **specific detriment** would occur if the information were released. I suggest that this has not occurred in this instance.

...

I submit that objective test of **could reasonably expected to** has not been **properly applied** in Mr Shang's decision to exempt the Q100 flood data under S.45(1)(b) and that his decision should be overturned. That is that all the Q100 flood data collected for Council by [the surveying company] in August 2006 be fully released to me ...

### **The law**

126. Section 45(1)(b) of the FOI Act provides:

**45 Matter relating to trade secrets, business affairs and research**

(1) Matter is exempt matter if—

...

(b) its disclosure—

- (i) would disclose information (other than trade secrets) that has a commercial value to an agency or another person; and
- (ii) could reasonably be expected to destroy or diminish the commercial value of the information; ...

127. The Information Commissioner explained the correct approach to the interpretation and application of section 45(1) of the FOI Act in *Cannon and Australian Quality Egg Farms Limited (Cannon)*.<sup>27</sup>

128. In that case he observed that section 45(1) is the primary vehicle for reconciling the main objects of the FOI Act (i.e. promoting open and accountable government administration, and fostering informed public participation in the processes of government) with legitimate concerns for the protection from disclosure of commercially sensitive information. Its basic object is to provide a means whereby the general right of access to documents in the possession or control of government agencies can be prevented from causing unwarranted commercial disadvantage to:

- persons carrying on commercial activity who supply information to government, or about whom government collects information
- agencies which carry on commercial activities.

129. The relevant principles from *Cannon* in relation to the application of section 45(1)(b) of the FOI Act can be summarised as follows:

- There are two possible interpretations of the phrase 'commercial value' in the context of section 45(1)(b) of the FOI Act which are set out below:

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<sup>27</sup> (1994) 1 QAR 491.

- Information has commercial value for the purposes of section 45(1)(b) of the FOI Act if it is valuable for the purposes of carrying on the commercial activity in which an agency or business is engaged, because it is important or essential to the profitability or viability of a continuing business operation, or a pending, one-off, commercial transaction.
  - Information has commercial value for the purposes of section 45(1)(b) of the FOI Act if there is a genuine market for the sale of the information, such that its market value would be destroyed or diminished if the information could be obtained from a government agency under the FOI Act.
  - The information must have a current commercial value at the time a decision is made as to whether section 45(1)(b) applies. This is because information which was once valuable may become aged or out-of-date such that it has no remaining commercial value.
  - The fact that resources have been expended in producing information, or money has been expended in acquiring it, are factors that may be relevant to take into account in determining whether information has a commercial value for the purposes of section 45(1)(b) of the FOI Act.
  - Furthermore, there must be a reasonable basis, not just speculation, for expecting the commercial value of the information to be diminished by its disclosure. This could not be shown if the information was public knowledge or common knowledge among competitors in the relevant industry.
130. In *Attorney-General v Cockcroft* (**Cockcroft**)<sup>28</sup> which dealt with the interpretation of the phrase 'could reasonably be expected to prejudice the future supply of information' in the context of the section 43(1)(c)(ii) (business affairs) exemption contained in the Commonwealth FOI Act, Bowen CJ and Beaumont J said:<sup>29</sup>

*In our opinion, in the present context, the words "could reasonably be expected to prejudice the future supply of information" were intended to receive their ordinary meaning. That is to say, they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that those who would otherwise supply information of the prescribed kind to the Commonwealth or any agency would decline to do so if the document in question were disclosed under the Act. It is undesirable to attempt any paraphrase of these words. In particular, it is undesirable to consider the operation of the provision in terms of probabilities or possibilities or the like. To construe s.43(1)(c)(ii) as depending in its application upon the occurrence of certain events in terms of any specific degree of likelihood or probability is, in our view, to place an unwarranted gloss upon the relatively plain words of the Act. It is preferable to confine the inquiry to whether the expectation claimed was reasonably based (see *Jason Kioa v. The Honourable Stewart John West*, High Court, unreported, 18 December 1985 per Mason, J. at p 36; see also per Gibbs, C.J. at p 12).*

131. The Justices' interpretation of the phrase 'could reasonably be expected to' and the proposed line of inquiry, while made in the context of the business affairs exemption contained in Commonwealth FOI legislation, is relevant in the context of the exemption contained in section 45(1)(b) of the FOI Act.

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<sup>28</sup> (1986) 64 ALR 97.

<sup>29</sup> *Cockcroft*, at 106.

132. Accordingly, the phrase *'could reasonably be expected to'* in this context requires a consideration of whether the expectation that disclosure of the Survey Data could destroy or diminish the commercial value of the information is reasonably based.
133. Shepherd J also noted in *Cockcroft* that it is not necessary for a decision-maker *'to be satisfied upon a balance of probabilities'* that disclosing the document will produce the anticipated prejudice.<sup>30</sup>

### **Findings**

134. I have addressed the applicant's submissions on a number of preliminary issues above. In accordance with my findings at paragraphs 86 to 110 above, those issues do not relate to the question of whether the Survey Data is exempt from disclosure under section 45(1)(b) of the FOI Act.

#### **Does the Survey Data have a commercial value to the surveying company?**

135. The first requirement for the application of section 45(1)(b) is that the matter in issue must comprise information which itself has a commercial value to an agency or another person.
136. I have carefully considered the submissions provided by Council on this issue and I note that:
- One of the business operations of the surveying company is to perform surveys and provide data to its customers and in performing surveys and collecting data, the surveying company is carrying on a commercial activity.
  - The activity of surveying and collecting data is essential to the viability of the business.
  - The data is valuable to the surveying company and there is a genuine market for the sale of the Survey Data in that:
    - Council anticipates further development of the area which was subject to the survey
    - developers are required to perform their own flood studies and in doing so would require surveying services and data for the area
    - it is reasonable to expect that the surveying company would be asked to provide surveying services for those developers and for the same area in future.

137. In light of the above, I consider the Survey Data has a commercial value to the surveying company because the company has the raw survey data for the corresponding area, not just for the applicant's property. As a result, I am of the view the surveying company can manipulate the Survey Data to produce reports for its clients and use it for a range of other purposes such as flood modeling, flood mapping and official flood study documents.

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<sup>30</sup> *Cockcroft*, at 106.

138. I also consider the Survey Data is likely to be relied on by developers in relation to any further development applications in the area or any changes to the current development application. In that respect, I consider the Survey Data has a current and ongoing commercial value to the surveying company.
139. I note that in *Cannon*, the Information Commissioner said that the investment of time and money is not a sufficient indicator in itself of the fact that information has a commercial value but they are factors that may be relevant to take into account in determining whether information has a commercial value for the purposes of section 45(1)(b) of the FOI Act.<sup>31</sup>
140. The applicant refers me to the decision of *Hassell and Department of Health of Western Australia (Hassell)*<sup>32</sup> and submits that the decision is inconsistent with *Cannon*. The applicant refers to a paragraph of the decision which provides:
- The investment of time and money is **not** a sufficient indicator in itself of the fact that information has a commercial value. Information can be costly to produce without necessarily being worth anything.*
141. The comments in *Cannon* are, in my view, consistent with the comments in *Hassell* the applicant has referred me to.
142. I consider that the surveying company has expended resources in collecting the Survey Data and Council has expended money in acquiring it and that this is a relevant factor (though not in itself a sufficient indicator) in determining whether the Survey Data has a commercial value.
143. For the reasons outlined above, I am satisfied that the Survey Data has a commercial value to the surveying company.

**Could disclosure of the Survey Data reasonably be expected to destroy or diminish its commercial value?**

144. If it is established that the matter in issue comprises information which has a commercial value to an agency or another person, it must then be established that disclosure of the information in issue could reasonably be expected to destroy or diminish its commercial value.
145. I consider that if the Survey Data is available from Council through an application for access under the FOI Act it follows that the surveying company would not be contracted by developers to provide the Survey Data in future. In that respect, the surveying company's competitive advantage would clearly be diminished by disclosure of the Survey Data.
146. Furthermore, I consider that the Survey Data is still up to date and still has a commercial value to the surveying company.
147. By email to this Office on 8 March 2009, the applicant states:

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<sup>31</sup> *Cannon* at paragraph 52.

<sup>32</sup> Information Commissioner of Western Australia, Decision D02194, 13 December 1994.

*On 06.03.09. I received a Fraser Coast Regional Council letter (FCRC), dated 05.03.09. ... advising me that the Pantlin D.A. will be decided at a FCRC Development Committee meeting commencing at 9.30am on Wed. 11.03.09. I don't know if this information/event, has any bearing on your final FOI external review decision, so I decided to advise you of the contents of this letter for your information...*

148. I have carefully considered the applicant's submission on this issue. I do not consider the fact that the Development Application which relates to the area subject to the survey may have been decided by Council affects the application of section 45(1)(b) to the Survey Data in the circumstances. Even if the Development Application has been approved by Council, I do not consider that the Survey Data:
- is publicly available in the requested form
  - no longer has a commercial value to the surveying company.
149. I note that certain information will also become available to the public as part of an official flood study and will include flood maps which are created as a result of manipulating the raw survey data. I do not consider however that the Survey Data itself is publicly available in that form.
150. For the reasons set out above, I am satisfied that disclosure of the Survey Data under the FOI Act could reasonably be expected to destroy or diminish its commercial value.
151. Accordingly, I am satisfied that the Survey Data is exempt from disclosure in its entirety under section 45(1)(b) of the FOI Act.
152. Section 28 of the FOI Act provides that an agency or Minister *may* refuse access to exempt matter or an exempt document. Therefore, despite my finding that the Survey Data is exempt from disclosure under section 45(1)(b) of the FOI Act, Council has discretion to release the Survey Data to the applicant.<sup>33</sup> As previously noted, Council has agreed to release a version of the data to the applicant at the conclusion of this review (see paragraph 69 above).

## **PART C**

### **Whether the Consultancy Brief exists**

153. The final issue for my consideration in this review is whether the version of the Consultancy Brief that Council provided to the applicant is the document that he requested in the FOI Application and, if not, whether the document requested by the applicant exists. I will turn now to consider these issues.
154. An agency has an obligation to locate, and apply the provisions of the FOI Act to all documents in its possession or control which fall within the terms of a valid application under the FOI Act.
155. In this case the applicant sought access to (among other things):

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<sup>33</sup> I note that section 88(3) of the FOI Act provides that if it is established that a document is an exempt document, the Information Commissioner does not have power to direct that access to the document is to be granted.

*The project brief given by [Council] to [the surveying company] (or their supervising engineers), to carry out the Q100 flood survey carried out on my land on 30/08/06 & other residential properties in Fairway Drive, adjoining Mr. Pantlin's land. The existence of this project brief is referred to in a [Council] letter to me dated 18/09/06 (DOCS#712821).*

156. In its Decision, Council advised the applicant that certain documents were identified as meeting the terms of the FOI Application and a copy of the project brief was enclosed, that is, the project brief was released to the applicant in full.

### **Council's submissions**

157. In an attempt to clarify Council's submissions in relation to the Consultancy Brief, a staff member of this Office made further enquires with Council. At a late stage in this review, Council provided more comprehensive submissions on the Consultancy Brief, which are summarised below:

- An electronic copy of the Consultancy Brief responsive to the FOI Application was created on 31 July 2006 and saved on Council's computer system (**the original version of the Consultancy Brief**).
- On 5 September 2006, a new employee of Council opened the document and made changes to it and saved the new document, thereby overwriting the electronic copy of the original version of the Consultancy Brief and creating a new version of it (**the new version**).
- As the project was small, Council contends that a paper copy of the original version of the Consultancy Brief was not signed and a copy was not retained. As the Council employee who dealt with the project no longer works for Council, Council is uncertain as to whether a copy of the original version of the Consultancy Brief was sent to the surveying company and if so, how it was sent, but notes that:
  - it is standard practice for such documents to be sent
  - the document history indicates that the original version of the Consultancy Brief was printed on 5 September 2006 and Council considers it may have been posted to the surveying company around that time
  - if the original version of the Consultancy Brief had been emailed to the surveying company, the word '*mailed*' would appear in the document history.
- Enquiries have also been made with other current Council officers who were involved in the project and they do not have a copy of the original version of the Consultancy Brief and cannot recall whether or how the original version of the Consultancy Brief was sent.
- Council has also made enquiries with the surveying company but they did not locate a copy of the original version of the Consultancy Brief.
- Council officers conducted the following searches but could not locate the Consultancy Brief:

- searches of the emails between Council and the surveying company from June 2006 to August 2006 (2 hours). These searches were conducted in case the document had been emailed as an attachment from Council to the surveying company.
- searches of the working paper files (approximately 20 boxes of documents) for the relevant area (30 minutes). These boxes were Council documents that a previous employee had copied and stored.
- Council does not keep a record of mail sent each day, nor does it keep a hard copy of outgoing mail. All mail is kept electronically in the document management system.
- Council does not consider the original version of the Consultancy Brief that was given to the surveying company is retrievable from Council's backup system for the following reasons:
  - Council's system is an incremental system and is backed up on a daily, weekly, monthly and yearly basis.
  - When a high level back up is conducted, the lower level back up tapes are reused.
  - The system is backed up each night. At the end of the week a full back up is conducted and this becomes a weekly tape. When the weekly full back up occurs, the information from the previous daily back ups is lost. That is, the full weekly back up will only provide a snapshot of the system as it is on a Friday night.
  - At the end of the fourth week another full backup is conducted and this becomes a monthly tape. When the monthly full back up occurs, the information from the previous weekly back ups is lost. That is, the full monthly back up will then only provide a snapshot of the system as it is in the last week of the month.
  - At the end of 12 months another full back up is conducted and this becomes the yearly tape. When the yearly full back up occurs, the information from the previous monthly back ups is lost. That is, the full yearly back up will only provide a snapshot of the system as it is on the last day of December of that year.
  - Thus, in the context of this review, the 2006 back up tape will only provide a snapshot of Council's system as it was on 31 December 2006. As the original version of the Consultancy Brief was created in July 2006 and that version was modified in September 2006, the original version of the Consultancy Brief is not retrievable from Council's back up system. The only document that would be retrievable from the backup system is the new version of the document, that is, the copy that has been provided to the applicant.
- In summary:

- The Consultancy Brief that was released to the applicant was not the version of the document that was given to the surveying company. The applicant was provided with a copy of the new version of the Consultancy Brief, that is, a modified version of the original version of the Consultancy Brief. This is why the formatting in the Consultancy Brief is irregular and there is a reference on the first page to a different project.
- Council did have the version of the Consultancy Brief that was provided to the surveying company some time prior to September 2006 but it cannot now be located.

### ***The applicant's submissions***

158. By letter dated 4 March 2009, the applicant made the following submissions in relation to the Consultancy Brief:<sup>34</sup>

*I continue to accept in **good faith** that the copy of the consultancy brief supplied to me ... is in fact a true copy of the original, **EXCEPT** for the following parts, namely **'Part 1 – Project Rational'** and paragraphs entitled **'1.1 OBJECTIVE & 1.2 BACKGROUND'** including all the data appearing hereunder in those particular paragraphs, which I **REJECT** as being part of the project brief, which was supplied to me in the FOI decision letter dated 04/03/08.*

159. The applicant then makes the following further submissions:

- That this Office has not gone far enough to fully comply with section 101C of the FOI Act by not having investigated the matter more aggressively.<sup>35</sup>
- The applicant refers to the decision of the Information Commissioner in *Shepherd* and suggests that in that review, the Information Commissioner ensured that all of the circumstances in the case were thoroughly investigated and left no room for criticism in the way the case was handled.<sup>36</sup>
- He submits that as this case also involves complex and contentious issues, the procedures followed in *Shepherd* should be followed in this external review.
- Specifically, he suggests that this Office do the following in this external review:<sup>37</sup>
  - conduct a formal investigation into the matter
  - obtain sworn affidavits or statutory declarations from two Council officers who he considers may have viewed the original consultancy brief or be aware of its contents.
- The applicant lists the information he considers the Council officers should be required to provide in the affidavits which includes detailing their recollection of the missing information from the Consultancy brief and a range of other information.

160. The applicant then submits:<sup>38</sup>

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<sup>34</sup> At page 7 of his submissions dated 4 March 2009.

<sup>35</sup> At page 10 of his submissions dated 4 March 2009.

<sup>36</sup> At pages 9 - 10 of his submissions dated 4 March 2009.

<sup>37</sup> At page 10 of his submissions dated 4 March 2009.

*In line with the natural justice principles laid down in common law, I submit that you could properly take the following factors into account in your final decision in this External Review, as your final decision is subject to appeal in a 'Judicial Review' in the Supreme Court.*

- (a) Have each party to this dispute acted reasonably towards each other and with your office during the course of this external review.*
- (b) Have the positions (or versions) of each party remained the same during the course of the review, or has 1 party changed their versions (or positions) at will, to counter arguments properly raised by another party during the course of the review*
- (c) Has the gov't party in this dispute made verbal or written promises to your office to release documents in its possession, then withdrawn such assurances, thereby possibly causing embarrassment to your office*
- (d) Are the versions of the parties involved in this dispute more credible than the other. This is, modelled on the written evidence before you and based on the civil standard of proof (i.e. on the balance of probabilities), which I submit is the applicable standard of proof to be applied in your final decision in this ext. review. I submit that the test to be applied in your final decision could be summarized as follows, is there a 50% or better chance that my written submissions and written evidence before you are more credible, than those provided by Council. If you so find, then your final decision in this review should go in my favour...*
- (e) Has the public agency concerned treated the member of the community involved in this dispute (i.e. me) in a fair and professional manner, and embraced the principles of 'Natural Justice' in its official dealings with the individual concerned...*

### **The law**

161. Section 28A of the FOI Act gives an agency discretion to refuse access to a requested document if the document does not exist or cannot be located. While Council did not claim in its Decision that section 28A of the FOI Act applied to the Consultancy Brief, section 88(1)(b) of the FOI Act provides that, in the conduct of a review, the Information Commissioner has power to decide any matter in relation to the application that could have been decided by the agency under the FOI Act. The Information Commissioner must also take into account relevant considerations which arise during the investigation and review of a decision.

162. Section 28A of the FOI Act relevantly provides:

#### **28A Refusal of access—document nonexistent or unlocatable**

...

- (2) An agency or Minister may refuse access to a document if—*
  - (a) the agency or Minister is satisfied the document has been or should be in the agency's or Minister's possession; and*
  - (b) all reasonable steps have been taken to find the document but the document can not be found.*

*Examples—*

- documents that have been lost*
- documents that have been disposed of under an authority given by the State Archivist*

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<sup>38</sup> At pages 11 – 12 of his submissions dated 4 March 2009.

- (3) *Subject to subsection (4), a search for a document from a backup system is not required before refusing access under this section.*
- (4) *A search for a document from a backup system is required before refusing access under subsection (1) only if—*
  - (a) *the document is—*
    - (i) *a document required to be kept under the Public Records Act 2002; and*
    - (ii) *not a document that the agency or Minister could lawfully have disposed of under the Public Records Act 2002; and*
  - (b) *the agency or Minister considers the document has been kept in, and is retrievable from, the backup system.*

163. The following questions are relevant to determining whether access to a document should be refused under subsection 28A(2) of the FOI Act.<sup>39</sup>

- Are there reasonable grounds to be satisfied that the requested document has been or should be in the agency's or Minister's possession?
- Have all reasonable steps been taken to find the document but the document cannot be found?

### **Findings**

164. I refer to the applicant's submission set out at paragraph 158 above. In that submission, the applicant acknowledges that parts of the Consultancy Brief that Council gave him are different to those parts in the original version of the Consultancy Brief.

165. Having carefully considered the submissions made by Council and the applicant in this external review, I am satisfied that:

- Council provided the applicant and this Office with the new version of the Consultancy Brief in the mistaken belief that it was the document responsive to the FOI Application.
- The document that Council released to the applicant in accordance with the Decision was not the version of the document that was given to the surveying company by way of confirmation of the agreement as to the particular project and therefore is not the document to which the applicant seeks access.

166. I note that the new version of the Consultancy Brief may, in part, be the same as the original version of the Consultancy Brief, that is, the whole of the document may not have been modified when the original was saved over. However, the document that Council provided to the applicant is not the document to which he sought access.

167. Accordingly, I must now consider whether the document to which the applicant seeks access exists.

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<sup>39</sup> *PDE and University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009).

**Are there reasonable grounds to be satisfied that the original version of the Consultancy Brief has been or should be in Council's possession?**

168. I accept Council's submission that the document to which the applicant seeks access was created on 31 July 2006 and therefore did exist and was in Council's possession. I note that Council does not contend that the document did not exist.
169. Therefore I am satisfied that the original version of the Consultancy Brief has been in Council's possession.

**Have all reasonable steps been taken to find the original version of the Consultancy Brief but the document cannot be found?**

170. If a decision maker is satisfied under section 28A(2) of the FOI Act that a document exists (to the extent it has been or should be in the agency's possession), the FOI Act requires the agency to take all reasonable steps to find the document. Whether an agency has taken all reasonable steps to find the document must be determined on a case by case basis.
171. In this case I note that Council:
- conducted an electronic search for the document and provided a print out of the document history which provides a record of what has happened to the document (including any modifications)
  - conducted a search of emails for the relevant period in order to determine if the document was emailed to the surveying company
  - searched approximately 20 boxes of Council documents that a previous employee who was involved with the project had collected
  - made enquiries with current Council officers about the possible location of the document
  - made enquiries with the surveying company about whether they held a copy of the document.
172. I accept that Council has conducted these searches and was not able to locate the document as a result of those searches.
173. Based on the information available to me, I consider that if the original version of the Consultancy Brief is still in Council's possession, a copy of the document would be kept on the electronic file or in the boxes of Council documents collected by the previous employee.
174. I accept Council's submission that if the original version of the Consultancy Brief had been emailed to the surveying company, the word '*mailed*' would appear in the document history. As the word '*mailed*' does not appear in the document history, I do not consider that the original version of the Consultancy Brief was emailed to the surveying company.
175. I consider it likely that the original version of the Consultancy Brief was printed on 5 September 2006, prior to its modification.

176. In light of Council's comments (set out at paragraph 157 above) as to the size of the project and its document retention practices at the time in relation to small projects, I do not consider it likely that a hardcopy of the Consultancy Brief was posted to the surveying company. The fact that the surveying company did not locate a copy of the brief substantiates this conclusion.
177. I note that Council does not consider that the original version of the Consultancy Brief is retrievable from the back up system. After carefully considering Council's submissions in relation to the back up system, I find that:
- the 2006 back up tape will only provide a snapshot of Council's system as it was on 31 December 2006
  - as the original version of the Consultancy Brief was created in July 2006 and modified in September 2006, the original version of the Consultancy Brief is not retrievable from Council's back up system.
178. On that basis, I do not consider it necessary for Council to conduct a search of its back up system for the original version of the Consultancy Brief.
179. In summary, I am satisfied that Council has taken all reasonable steps to find the original version of the Consultancy Brief but the document can not be located.
180. Accordingly, I am satisfied that access to the original version of the Consultancy Brief should be refused under section 28A(2) of the FOI Act because the document should be in Council's possession but it can not be located.

#### **Other issues**

181. In relation to the applicant's submission that this Office should investigate the matter more aggressively and obtain affidavits or statutory declarations from Council officers who dealt with the Consultancy Brief, as I have noted at paragraph 115 above, the procedures to be followed on external review are within the discretion of the Information Commissioner. Proceedings are to be conducted with as little formality and technicality, and with as much expedition, as the requirements of the FOI Act and a proper consideration of the matters before the Information Commissioner permit. The Information Commissioner is not bound by the rules of evidence and may inform herself on any matter in any way the Information Commissioner considers appropriate.<sup>40</sup>
182. There is no evidence available to me that Council has attempted to mislead this Office or is deliberately concealing information from the applicant. The fact that Council:
- did not retain a hardcopy or electronic copy of the original version of the Consultancy Brief
  - cannot confirm whether the original version of the Consultancy Brief was sent to the surveying company
  - does not appear to have sufficient safeguards in place to prevent documents kept electronically in the document management system from being saved over by employees

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<sup>40</sup> Section 72 of the FOI Act.

- provided the applicant and this Office with the new version of the Consultancy Brief in the mistaken belief that it was the document responsive to the FOI Application

may reflect poorly on the quality of Council's information management practices but are not evidence of an attempt to mislead me or deliberately conceal information.

183. Based on the applicant's submissions set out at paragraph 160 above, it would appear that the applicant wants this Office to address the following allegations:
- a) Council has not acted reasonably towards him or this Office during the course of this external review.
  - b) Council has changed its position in order to counter the arguments he raised during the review.
  - c) Council has made a promise to this Office about the release of a document and has withdrawn that promise.
  - d) His submissions are more credible than those of Council and accordingly, a decision should be made in his favour.
  - e) Council / this Office has not treated him in a fair and professional manner or embraced the principles of natural justice.
184. In relation to a), there is no evidence available to me, apart from the applicant's assertion, that Council has acted unreasonably during the course of this external review. I am satisfied that on every occasion Council clearly addressed the queries of this Office on what were often very technical issues.
185. In relation to b), this Office has made extensive enquiries with Council on a number of occasions in order to gather all the information that is relevant to making a decision in this external review. Although Council has provided more detailed information to this Office as the review progressed, I do not consider that Council has changed its position to counter the applicant's arguments.
186. I consider that the Consultancy Brief was unintentionally modified by Council and this became apparent as a result of Council providing more detailed submissions during the course of this external review. This does not mean, however, that Council has deliberately changed its position in response to the applicant's submissions and, in my view, Council has acted in good faith.
187. In relation to c), I repeat and rely on my comments at paragraphs 66 to 69 above.
188. In relation to d), the applicant's submissions largely relate to issues that I have no jurisdiction to consider. I have referred to and addressed the submissions made by the applicant and Council above where relevant to the issues for consideration in this review.

189. In relation to e), to ensure procedural fairness, the applicant was provided with two preliminary views which set out in detail the factors that would be taken into account in any decision. The applicant was afforded the opportunity to provide submissions to this Office in support of his case and in response to the information provided by Council. As a result, the applicant provided extensive submissions and supporting documents to this Office which I have carefully considered. The applicant also requested a number of extensions of time to provide submissions to this Office and those extensions were granted.

190. In light of the above, I consider that this review has been conducted appropriately, in accordance with the terms of the FOI Act and the principles of natural justice.

## **DECISION**

191. For the reasons set out above, I vary the decision under review by finding that:

- the Survey Data is exempt from disclosure under section 45(1)(b) of the FOI Act
- access to the Consultancy Brief is refused under section 28A(2) of the FOI Act as the document can not be located.

192. I have made this decision as a delegate of the Information Commissioner, under section 90 of the FOI Act.

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**Assistant Commissioner Corby**

**Date: 7 April 2009**