



Decision and Reasons for Decision

Application Number: 220024

Applicant: Lau Nap Huang

Respondent: Redland City Council

Decision Date: 8 September 2010

Catchwords: RIGHT TO INFORMATION – Section 47(3)(a) of the RTI Act – Grounds on which access may be refused – to the extent the document comprises exempt information under section 48 – whether disclosure would found an action for breach of confidence

Section 47(3)(b) of the RTI Act – Grounds on which access may be refused – to the extent the document comprises information the disclosure of which would, on balance, be contrary to the public interest under section 49

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REASONS FOR DECISION

Summary

1. The applicant applied to Redland City Council (**Council**) for access to a tender lodged by Aust Care Environmental Services¹ after receiving and paying an invoice from the Contractor for maintenance undertaken at her property on the instruction of Council. When the applicant asked Council to explain the basis for the amounts charged by the Contractor, Council advised her to apply for access to the relevant tender (**Tender**). Council then advised the applicant that the Tender was exempt information and release was contrary to the public interest.
2. After reviewing Council's decision to refuse access to the Tender, I am satisfied that Council's decision should be set aside and substituted with the decision that the Tender (other than where it contains personal information) should be released to the applicant as it is neither exempt information, nor is its disclosure contrary to the public interest.

Reviewable decision

3. The decision under review is Council's decision to refuse access to the Tender.

Evidence relied upon

4. In reaching this decision, I have taken the following into account:
 - the applications made by the applicant
 - the decisions issued by Council
 - the information provided by the applicant, Council and the Contractor (including in response to the preliminary views issued to each party)
 - the Tender and Invitation to Tender
 - relevant decisions and provisions of the *Right to Information Act 2009* (**RTI Act**).

The law

5. Access must be given to a document unless it contains exempt information or its disclosure would, on balance be contrary to the public interest.²
6. In making this decision, I have considered whether disclosure of the Tender:
 - would found an action for breach of confidence and/or
 - would, on balance, be contrary to the public interest.

Findings

Would disclosure of the Tender found an action for breach of confidence?

7. To establish that the Tender comprises exempt information, there must be evidence to show that the information was provided by the Contractor to Council on the basis of a mutual understanding of confidence.

¹ Which I will refer to as the **Contractor**.

² Sections 44, 48 and 49 of the *Right to Information Act 2009* (Qld) (**RTI Act**).

8. Clause 5.4 headed "Opening of Tenders" on page 15 of the relevant Invitation to Tender provides that:

For security and safety reasons Tenders will only be opened in the confined area of the RCC mail opening room. Company names and business detail of Tenders received shall be recorded at the time of opening. Detail of tenders shall be available by written request addressed to the Council Contact Officer within forty eight (48) hours from award of any subsequent Contract that may be entered into from this ITT. 'Commercial in Confidence' information including tendered prices and proposed solutions shall not be publicly released.

9. I take this to mean that Council will advise the details of parties which have lodged tender applications but will not release details of tendered prices and/or proposed solutions.

10. Council also places tenderers on notice³ that the successful tenderer's information will form part of any contract awarded to that contractor and Council's obligations of disclosure under legislation:

...

Section B: Tender Deliverable Attachments

The Tender Deliverable Attachments specify the information Tenderers are required to provide with their Tenders in order for Council to assess and evaluate the tenders. ...

... Section B Tender Deliverable Attachments as completed by the Tenderer will form part of any Contract that may be entered into from this [Invitation to Tender].

...

7. OBLIGATION OF DISCLOSURE

Tenders [sic] are advised that Council is subject to third party disclosure applications under the Freedom of Information Act [FOI]. Council is obliged to comply with its legal obligations which may include releasing information and documents from tender submissions or subsequent contracts to third parties.

...

11. While no written contract was entered into between Council and the Contractor as required, I am satisfied a contract was on foot, the terms of which are set out in the Invitation to Tender and the Tender lodged by the Contractor.

12. Where there is no written contract⁴ to access, the applicant can only find out the basis on which she was charged by applying for access to the Tender.

13. I acknowledge the Contractor's genuinely held objections to disclosure of the Tender:

- it says it was not aware that tender information may be accessible under legislation, particularly its pricing
- it has proceeded to perform services for Council on the basis that this information remained confidential or commercial in confidence.

14. After carefully considering all of the information available to me, I am satisfied that:

- Council places tenderers on notice that a successful tender will form part of any contract awarded, and of Council's disclosure obligations under legislation

³ See page 6 of the Invitation to Tender.

⁴ The terms and conditions of which are set out in Part A of the Invitation to Tender, which the applicant has been provided with.

- the Contractor relied on Council's stated general practice of not revealing pricing information provided in a tender process and has mistakenly proceeded on the basis that the terms of its contract with Council remain secret
- the Contractor has not understood Council's obligations under legislation to disclose information from the Tender now that it forms part of a contract between Council and the Contractor, under which ratepayers are charged for services
- in the absence of any specific evidence that Council and the Contractor agreed that this particular Tender would remain confidential even though it forms part of a contract awarded to the Contractor by Council under which ratepayers are charged for services, disclosure of the Tender would not found an action for breach of confidence
- the Tender is therefore not exempt information under section 47(3)(a) of the RTI Act.

Would disclosure of the Tender be contrary to the public interest?

15. To decide whether disclosure of the Tender would be contrary to the public interest, I must:

- identify any irrelevant factors and disregard them
- identify relevant public interest factors favouring disclosure and nondisclosure
- balance the relevant factors favouring disclosure and nondisclosure
- decide whether disclosure of the information, on balance, would be contrary to the public interest.

16. No irrelevant factors have been identified.

17. I will now consider the personal information and non-personal information in the Tender separately.

Personal Information

18. Personal information⁵ is "... information ... whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion." I am satisfied that the following information in the Tender comprises personal information (**Personal Information**):

Folio	Information
2	shareholder's residential address (which differs from the Contractor's registered address)
8	referees' mobile phone numbers
18	employee's residential address
19	employees' residential addresses employee's signature where they have signed the document in a personal capacity photo, residential address, date of birth, sex, height, donor information and signature which appears on the employee's driver's licence
20	employee's private postal address
21	employee's residential address

19. I am satisfied that disclosure of this information may promote Council's transparency, favouring disclosure in the public interest.

⁵ See section 12 of the *Information Privacy Act 2009* (Qld).

20. I have identified the following factor favouring non-disclosure in the public interest in respect of the Personal Information - disclosure of the information could reasonably be expected to prejudice an individual's right to privacy
21. On balance, taking into account the factors identified above, I am satisfied that:
- the factor favouring disclosure should be awarded little or no weight in the circumstances (as this information will not assist the applicant assess whether the charges were reasonable and appropriate in the circumstances)
 - the factor favouring non-disclosure should be awarded significant weight in the circumstances (as disclosure will disclose personal information of persons, which will not assist the applicant assess the charges rendered)
 - the factor favouring non-disclosure outweighs the factor favouring disclosure
 - access to the Personal Information may be refused under section 47(3)(b) of the RTI Act as its disclosure would be contrary to the public interest.

Non-Personal Information

22. I am satisfied that the factors favouring disclosure in the public interest in respect of the non-personal information in the Tender (**Non-Personal Information**) include that disclosure of the information could reasonably be expected to:
- allow public scrutiny of government procurement processes and whether government is achieving value for ratepayers in the delivery of services
 - promote open discussion of public affairs and enhance the government's accountability
 - allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official
 - advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies
 - contribute to the administration of justice for a person.
23. I am satisfied that the factors favouring non-disclosure in the public interest in respect of the Non-Personal Information include that disclosure of the information could reasonably be expected to:
- prejudice the private, business, professional, commercial or financial affairs of entities, or the business affairs of a person
 - cause a public interest harm if the information consists of information of a confidential nature that was communicated in confidence and disclosure of the information could reasonably be expected to prejudice the future supply of information of this type.
24. I acknowledge that Council's obligations under the RTI Act will not require it to release all tender information submitted to it. It is because the information in this Tender forms part of the contract between Council and the *successful tenderer*, and these particular terms are not set out in any other document, that requires me to consider whether this particular Tender must be disclosed to the applicant.
25. Government agencies including Council, are accountable to the public for the decisions they make in awarding tenders for the performance of work which would otherwise be undertaken by government. It is also necessary for Council to properly inform

- ratepayers⁶ about work carried out on their property and the basis for charges imposed for that work.
26. Even though the work may be undertaken by a contractor, Council remains ultimately responsible for procuring the services and ensuring that the work is carried out in accordance with the relevant contract. The RTI reforms require government agencies to undertake business in an open, accountable and transparent way.
 27. The RTI reforms require private sector businesses wishing to contract with government to perform public services to accept an appropriate level of scrutiny of their dealings with government and their performance including service delivery to the public and invoicing.
 28. For the reasons set out above, I am satisfied that the factors favouring disclosure of the Non-Personal Information should be afforded significant weight in the circumstances.
 29. On the other hand, I accept that the information concerns the Contractor's business⁷ affairs. In summary, the factors favouring non-disclosure concern prejudice of future supply of information to government and adverse affect on business affairs.
 30. Taking into account the Information Commissioner's statements in the decisions of *Macrossan & Amiet Solicitors and Department of Health*⁸ and *Wanless Wastecorp and Caboolture Shire Council; JJ Richards & Sons Pty Ltd*⁹ about prejudice to the future supply of information to government as a result of disclosure of successful tender information,¹⁰ I am satisfied that disclosure of a *successful tender submission* could not reasonably be expected to result in organisations deciding not to tender for work, homogenising tender submissions generally or omitting significant information needed for the evaluation of their tenders which would disadvantage them in the competition for government contracts, particularly when such organisations are warned of the possibility of disclosure under Council's legislative obligations.
 31. Accordingly, I am satisfied that disclosure of the Non-Personal Information could not reasonably be expected to prejudice the future supply of information of this type¹¹ to government and this consideration should be afforded little or no weight in the circumstances.
 32. In respect of the Contractor's claim that disclosure of the Tender to the applicant may set a precedent under which its competitors are able to access this information which in turn may adversely affect the Contractor's business affairs, I accept that the Contractor operates in a commercially competitive environment and note that the relevant contract between Council and the Contractor expired on 31 July 2010.
 33. As to whether disclosure of the Non-Personal Information *could reasonably be expected to* prejudice or have an adverse effect on the Contractor's business affairs, I note the applicant's submission that the Contractor:

... speculates that ... the disclosing of tender price to me would possibly prejudice their business. The truth is I have no association whatsoever with any grass cutting, lawn

⁶ Including business entities.

⁷ Or commercial, professional and/or financial.

⁸ Unreported, Queensland Information Commissioner, 27 February 2002 at paragraph 64.

⁹ (2003) 6 QAR 242 at paragraph 98.

¹⁰ Under the *Freedom of Information Act 1992* (Qld).

¹¹ And repeat and rely upon the matters set out on pages 2, 3 and 4 of this decision, that is, that the Tender does not comprise information of a confidential nature that was communicated in confidence.

mowing or slashing business. The background of this RTI application is that I, as the account payer, merely try to find out details of the charges. I am neither a competitor trying to find out [the Contractor's] price secret; nor an unsuccessful tenderer trying to undercut [the Contractor's] tender, or in any way prejudice their commercial affairs is not reasonably based....

34. I accept the applicant's submission that she is not a competitor of the Contractor and has no association with any business competitor of the Contractor, nor is she trying to undercut the Contractor's prices or prejudice the Contractor's commercial affairs in any way. She merely wishes to find out details of the charges paid by her for work carried out by the Contractor at the instruction of Council.
35. As to the Contractor's concerns that disclosure to a private party may set a precedent resulting in financial penalty to the Contractor (if competitors can access the information), I note that it is not a competitor seeking the information and this decision applies only to the facts of this matter and sets no precedent for any other application to which different facts apply.¹²
36. Accordingly, I am satisfied that in the circumstances, disclosure of the Non-Personal Information could not reasonably be expected to prejudice or adversely affect the Contractor's business affairs and this consideration should be afforded little or no weight in the circumstances.
37. On balance, taking into account the matters set out above, I am satisfied that:
- the factors favouring disclosure of the Non-Personal Information should be afforded significant weight in the circumstances
 - the factors favouring non-disclosure of the Non-Personal Information should be afforded limited weight in the circumstances
 - the factors favouring disclosure outweigh the factors favouring non-disclosure
 - access to the Non-Personal Information may not be refused under section 47(3)(b) of the RTI Act as its disclosure would not be contrary to the public interest.

DECISION

38. For the reasons set out above, I set aside the decision under review and find that except for the Personal Information, the Tender must be disclosed to the applicant as it is not exempt information, nor would its disclosure, on balance, be contrary to the public interest.

Julie Kinross
Information Commissioner

Date: 8 September 2010

¹² I am also mindful that a decision-maker is not bound to regard disclosure to an applicant as disclosure to the world.