



## **Decision and Reasons for Decision**

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**Application Number:** 210304

**Applicant:** Mr R Metcalf

**Respondent:** Maroochy Shire Council

**Decision Date:** 19 December 2007

**Catchwords:** **FREEDOM OF INFORMATION – (section 41(1) of the *Freedom of Information Act 1992 (Qld)* – matter relating to deliberative processes – disclosure found to be contrary to public interest)**

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## REASONS FOR DECISION

### Summary

1. The decision of the Maroochy Shire Council (Council) to refuse the applicant access to the matter in issue is affirmed on the basis that the documents are exempt from disclosure under section 41(1) of the *Freedom of Information Act 1992* (Qld) (FOI Act).

### Background

2. By FOI application dated 4 June 2007, the applicant requested:
  - a) *As part of its application to build a bioreactor landfill at Kulangoor the Maroochy Shire Council has to prepare an Environmental Impact Statement. I would like a copy of the terms of reference for the EIS*
  - b) *In course of identifying Kulangoor as the site for the proposed bioreactor the council investigated 40+ sites. (The number of sites has variously been reported as 41, 42 and 43). We know two of the sites investigated were Image Flat and Kulangoor. I wish to obtain a copy of:*
    - (i) *a list of the remaining sites that were investigated, and*
    - (ii) *the report on each site in (a) that led to the site being excluded from further consideration as the site for the bioreactor.*
3. In a decision dated 2 July 2007, Ms Ferguson, Governance Project Officer, decided (Initial Decision):
  - a) that the document responsive to item 1 of the applicant's FOI application was already accessible on the EPA website – a link to this 47 page document was provided to the applicant
  - b) to refuse the applicant access to the documents responsive to item 2 of his FOI application.
4. By letter dated 4 July 2007, the applicant applied for internal review of the Initial Decision in relation to part b) of that decision.
5. In a decision dated 1 August 2007, Ms Wherrett, Manager Governance & Policy, affirmed the Initial Decision (Internal Review Decision).
6. By letter dated 2 August 2007, you applied to this Office for external review of the Internal Review Decision.

### Decision under review

7. The decision under review is Ms Wherrett's decision of 1 August 2007.

### Steps taken in the external review process

8. By letter dated 10 October 2007, I asked Council to provide me with further submissions in support of its claim for exemption of the matter in issue under section 41(1) of the FOI Act.
9. In response to the above request and under cover of its letter dated 5 November 2007, Council provided me with further submissions and evidence in support of its claim.

10. On 7 December 2007, I provided my preliminary view to the applicant that:
  - a) the information sought by the applicant discloses a consultation which occurred towards the 'end stage' of Council's deliberative process in finalising a suitable site for the proposed bioreactor landfill and is properly characterised as deliberative process matter
  - b) in the circumstances, disclosure of this information is not in the public interest
  - c) the information is exempt from disclosure under section 41(1) of the Freedom of Information Act 1992 (Qld) (FOI Act).
11. By email dated 10 December 2007, the applicant contested my preliminary view and provided this Office with further submissions.
12. In making my decision in this matter, I have taken the following into account:
  - the applicant's initial application, application for internal review and application for external review dated 4 June 2007, 4 July 2007 and 2 August 2007 respectively
  - Council's Initial Decision and Internal Review Decision
  - Council's further submissions dated 5 November 2007
  - the applicant's submission dated 10 December 2007.

### **Matter in issue**

13. The matter in issue comprises the following information:
  1. a 285 page report containing maps and assessments
  2. a power point presentation created by Council and an external consultant to the Council Landfill Bioreactor Reference Committee.

### **Findings**

#### **Section 41 of the FOI Act**

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

#### **41 Matter relating to deliberative processes**

(1) *Matter is exempt matter if its disclosure—*

(a) *would disclose —*

(i) *an opinion, advice or recommendation that has been obtained, prepared or recorded; or*

(ii) *a consultation or deliberation that has taken place; in the course of, or for the purposes of, the deliberative processes involved in the functions of government; and*

(b) *would, on balance, be contrary to the public interest.*

### **Requirements for exemption under section 41(1) of the FOI Act**

15. For matter to fall within section 41(1) of the FOI Act, there must be a positive answer to two questions<sup>1</sup>:

- (1) *would disclosure of the matter disclose any opinion, advice, or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, (in either case) in the course of, or for the purposes of, the deliberative processes involved in the functions of government? and*
- (2) *would disclosure, on balance, be contrary to the public interest?*

*The fact that a document falls within section 41(1)(a) (i.e., that it is a deliberative process document) carries no presumption that its disclosure would be contrary to the public interest.*

#### **(a) Deliberative Processes**

16. The term 'deliberative processes' is sometimes explained as the pre-decisional thinking processes of an agency. The term refers to the processes of evaluating relevant evidence, arguments and options, for the purpose of making a decision related to the performance of an agency's functions. It includes contributions to the formulation of policy, or to the making of decisions under statutory powers. Further in *Eccleston*, the Information Commissioner stated at paragraph 30 that:

*Normally, deliberative processes occur toward the end stage of a larger process, following investigations of various kinds, establishing facts, and getting inputs from relevant sources...*

17. I note that the relevant deliberative process to which the matter in issue relates is the choice of a suitable site for Council's proposed bioreactor landfill.
18. The applicant submits that this process is neither deliberative nor ongoing "because all the consultants' reports are in, decisions have been made, and the document has been finalised" and "the whole process has been finalised, including the identification of the site for the landfill..."<sup>2</sup>
19. In support of this submission, the applicant refers to page 3 of Council's document titled 'Site selection/alternative sites'<sup>3</sup> which states that:

*... Council will not make this report available. It contains results of the Consultant Team consideration of assessment criteria for seven potential short-listed sites, including Rinker quarry and the current Ferntree Creek site at Kulangoor. ... Releasing this report, ... would create unnecessary anxiety and potential concern for five other communities that were assessed as potential landfill sites. **These five sites are no longer considered for this project, for various reasons.** The council has every intention, subject to results of ground-truthing studies of proceeding with the Ferntree Creek site.*

[applicant's emphasis]

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<sup>1</sup> *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at paragraphs 21-22

<sup>2</sup> As set out in the applicant's submissions dated 10 December 2007

<sup>3</sup> Available from Council's website

20. The applicant submits that the relevant ground-truthing studies have been undertaken and incorporated into Council's development application which was submitted by Council to the relevant agencies on 30 November 2007.

21. The applicant also submits that there is:

*Clearly there is a discrepancy between [Council] saying the sites 'still require further consideration' and saying 'These five sites are no longer considered for this project..', but I think it would be reasonable to assume that the real position is reflected in the statement on the Council's web site because this is a public document for community information.*

22. I acknowledge that in certain circumstances the writing of a final report will conclude a deliberative process. However, on the information available to me, this is not the case in the current circumstances. I have formed this view on the following basis:

- the matter in issue concerns the consideration of seven potential sites for a proposed bioreactor landfill
- while Council's clear preference is to proceed with the Kulangoor site, both the applicant and Council acknowledge that this is ultimately dependent upon Council obtaining development approval from relevant agencies, a process which could take a significant period of time, perhaps some years
- the applicant acknowledges that once the current development application has been considered by relevant agencies, Council may be required to modify their plans and seek further public comment before submitting an application for material change of use of the land
- Council submits that any of the government agencies considering its development application may veto the project if it fails to meet their requirements<sup>4</sup>
- Council submits that if the current development application is unsuccessful, it will have no option than to proceed with a development application in relation to one of the other short-listed sites<sup>5</sup>.

23. I have carefully considered the matter in issue and submissions provided by both parties in this review. On the information available to me, I am satisfied that the matter in issue:

- discloses a consultation which occurred in the course of Council's deliberative process in choosing a suitable site for the proposed bioreactor landfill
- this process is ongoing as the development of any site is dependent upon development application approval by relevant agencies
- development application approval may or may not be granted in respect of the Kulangoor site
- the finalisation of this process may not occur for some years
- is properly characterised as deliberative process matter under section 41(1)(a) of the FOI Act.

24. On this basis, I must now consider the public interest considerations relevant to this review.

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<sup>4</sup> See page 1 of Bioreactor Landfill Technical Briefing 21/08/2007 and brochure entitled 'Responsible solutions for future quality of life', both of which are available on Council's website.

<sup>5</sup> See page 1 of Bioreactor Landfill Technical Briefing 18/09/2007 available on Council's website.

**(b) Public interest considerations**

25. The second question which must be answered in the affirmative is whether disclosure of the matter in issue would, on balance, be contrary to the public interest.
26. The term 'public interest' under the FOI Act refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. In general, a public interest consideration is one which is common to all members of, or a substantial segment of the community, as distinct from matters that concern purely private or personal interests.
27. The public interest balancing test contemplated in section 41(1)(b) of the FOI Act involves a weighing up of public interest considerations favouring disclosure against public interest considerations favouring non-disclosure, with a significant consideration in this balancing exercise being that disclosure of matter under the FOI Act is considered to be disclosure to the world at large<sup>6</sup>.
28. Under section 41(1) of the FOI Act an applicant is entitled to access documents unless an agency can show that disclosure of the particular deliberative process matter would be contrary to the public interest.
29. In considering this requirement I refer to the case of *Trustees of the De La Salle Brothers and Queensland Corrective Services Commission*<sup>7</sup>, where the Information Commissioner stated that:

*...An agency or Minister seeking to rely on s.41(1)(a) needs to establish that specific and tangible harm to an identifiable public interest (or interests) would result from disclosure of the particular deliberative process matter in issue. It must further be established that the harm is of sufficient gravity when weighed against competing public interest considerations which favour disclosure of the matter in issue, that it would nevertheless be proper to find that disclosure of the matter in issue would, on balance, be contrary to the public interest.*

30. I will consider each of the relevant public interest considerations in turn.

***Public Interest considerations favouring disclosure***

31. In summary, the applicant seeks access to the matter in issue:
  - to verify that Council has thoroughly examined each of the sites before settling on the Kulangoor site as their preferred option
  - as there is a genuine public interest for those adversely affected by the bioreactor (10 000+ residents of Nambour, Yandina and Kulangoor) to be given the facts surrounding the site selection process.
32. When examining a deliberative process, two significant public interest considerations favouring disclosure are often relevant:

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<sup>6</sup> I refer to the applicants comments on page 2 of his letter dated 2 August 2007 where he argues that Council's argument is invalid as it assumes the applicant intends to make the sites and reports public knowledge. As stated, disclosure under the FOI Act is considered to be disclosure to the world at large (see page 482 of *Dwyer and Department of Finance and Ors* (1985) 8 ALD 474) as there can be no restraints under the FOI Act upon the use of disclosed material (see page 405 of *Windsor and Australian Postal Corporation* (1991) 22 ALD 401).

<sup>7</sup> (1996) 3 QAR 206 at paragraph 34.

- accountability of government
- fostering informed public participation in the processes of government,

both of which are reflected in the applicant's reasons for seeking access to the matter in issue. I will discuss each of these public interest considerations in turn.

**(i) Accountability of government**

33. The applicant submits that he and over 10 000 other members of the affected public require access to the matter in issue to verify Council's selection process. He contends that the Kulangoor site was always preferred by Council and none of the other sites were seriously considered.
34. The applicant also questions the thoroughness of Council's examination of the sites before choosing Kulangoor as its preferred option as in his view:
  - Kulangoor has abundant water and is close to a power substation – these attributes are essential to operate a bioreactor landfill which is 40-70% liquid and typically captures methane gas emissions for electricity generation
  - ample water supply and proximity to a substation are not mentioned in the site selection criteria – the omission of these two essentials for bioreactor landfill is at odds with Council's preference for a site that has these two essentials but fails to meet other criteria (such as a suitable buffer zone).
35. Facilitating the accountability of government is a public interest consideration recognised by section 4 of the FOI Act.
36. The question in this case is whether disclosure of the matter in issue would allow members of the public a better understanding of action taken by the Council and enable them to better scrutinise and assess Council's performance.

**(ii) Public participation**

37. I also note that another of the FOI Act's objectives is to promote public debate in the processes of government by facilitating the accountability and public understanding of the operations of government.
38. The case of *Mendis and Electricity Corporation trading as Western Power Corporation*<sup>8</sup> concerned a similar fact situation involving the selection of a site for a wind farm. The applicant in that case submitted that the agency had not kept the public fully informed of its reasons for choosing a particular site. The agency argued that it had satisfied its obligations by:
  - holding meetings with landowners and other affected parties
  - making public information about the site of the wind farm and why that site was chosen
  - providing details of machines to be used
  - identifying the successful tenderer.

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<sup>8</sup> [2000] WalCmr 29 (1 June 2000) (*Mendis*).

39. On balance, the Information Commissioner was satisfied in *Mendis* that the agency had satisfied the public interest in informing the applicant of the reasons for the selection of the site and other information concerning the operation of the project.
40. In this regard, Council has provided this Office with a list of actions which it has undertaken to inform the community of relevant matters. I note the applicant's submission that "*it is not accurate to describe the process as 'as transparent as possible'. On the contrary, getting even the most basic information has proved difficult.*"
41. Accordingly, I must determine whether disclosure of the matter in issue would materially enhance these public interest considerations to an extent that warrants them being accorded significant weight in favour of disclosure.

***Public Interest considerations against disclosure***

42. I must also consider public interest considerations against disclosure.
43. Council submit the following public interest arguments against disclosure of the Matter in Issue:
  - the existing landfill site will no longer be useable after 2011<sup>9</sup>
  - investigations into a replacement site have been ongoing since 1993
  - the decision on a suitable site for the bioreactor landfill has not been finalised
  - the proposed site is dependent on the outcome of a development application and other ground-truthing studies<sup>10</sup>
  - of the 41 sites assessed, 7 may still require further consideration
  - on numerous occasions, Council has received requests to release the list of potential sites identified in the project. In each instance Council has responded by advising that it is not in the broad community interest to release the information
  - disclosure of this information would create unnecessary anxiety in each of the relevant communities within the Shire
  - the potential for negative impact for landholders including possible financial or commercial implications or the risk of speculative investment is a public interest consideration against disclosure. These potential, actual or even perceived financial repercussions could be serious and are unnecessary, given that only one location is likely to be finally developed.
44. Council has provided this Office with a folder of evidence in support of the above submissions<sup>11</sup>.
45. In my view, Council's submissions can be categorised into the following considerations favouring non-disclosure of the matter in issue:
  - prejudice to Council's decision-making process

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<sup>9</sup> Council claim that unless a new long-term infrastructure is finalised before this date, there will be no facility or landfill location to receive and dispose of all solid wastes from households and commerce.

<sup>10</sup> As identified in material circulated by Council to the general public and provided to me in Council's submissions dated 5 November 2007.

<sup>11</sup> I note the applicant's submission in respect of the first dot point set out above that there are alternative facilities which could receive and dispose of solid waste after the existing site is no longer usable.



- divulgence of confidential information
- financial and emotional harm to the public.

46. I will examine each of these public interest considerations in turn.

**(iii) Prejudice to Council's decision-making**

47. I note the public interest in an agency being able to:

- make informed decisions in the course of carrying out its functions and in doing so, to have access to the widest possible range of information and advice without fear of interference
- maintain the confidentiality of their deliberative process in some circumstances, particularly where those deliberative processes relate to ongoing negotiations.

48. As stated in the case of *Simpson v Director General, Department of Education and Training*<sup>12</sup>:

*...it is in the public interest for agencies to be able to explore and then abandon policy positions without those deliberations being the subject of later scrutiny.*

49. Further, at paragraph 87 the Deputy President stated:

*In my view an agency should not have to reveal its "thought processes" while deliberations are continuing if it would be contrary to the public interest.*

50. An example of such a situation was discussed by the Information Commissioner in *AMA Australian Medical Association Limited and Health Department of Western Australia*<sup>13</sup>:

*I do not consider that it is in the public interest for any agency to conduct its business with the public effectively "looking over its shoulder" at all stages of its deliberations and speculating about what might be done and why.*

51. As set out above, Council submits that:

- the site for the bioreactor landfill has not yet been finalised and is dependent on the outcome of a development application currently before relevant agencies
- of the sites assessed, some may require further consideration if the current development application is not approved by relevant agencies (a process which may take some years to conclude).

52. Having examined the evidence provided by Council, it is my view that this particular deliberative process has been lengthy and is ongoing.

53. As accepted in the case of *Bennett v Director General, National Parks and Wildlife Service*<sup>14</sup>, a factor which carries great weight in considering whether to disclose the matter in issue is whether release of such documents at a crucial stage of an agency's deliberative process may cause a 'deal' to fall through, particularly when during the process, extensive information has been available in the public forum.

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<sup>12</sup> [2000] NSWADT 134 at paragraph 85.

<sup>13</sup> [1999] WAICmr 7 (27 April 1999) at paragraph 38.

<sup>14</sup> [2000] NSWADT 136 (29 September 2000).



**(iv) Divulgence of confidential information**

54. I note that each page of the report which comprises part of the matter in issue has an embedded watermark of 'CONFIDENTIAL'.
55. While I note that a marking of 'confidential' on a document does not always evidence an enforceable obligation of confidence<sup>15</sup>, on the information available to me, I am satisfied that:
- the relevant information was sourced in a way which enabled the confidentiality of matter contained in the report to be maintained
  - the report contains sensitive material that was not intended for public release.<sup>16</sup>

**(v) Financial and emotional harm to the public**

56. Council's submissions on this point are set out in detail at paragraph 43 above of this letter. In summary, it argues that the following harm may result from disclosure of the matter in issue:
- further public anxiety related to each of sites considered by Council, which is unnecessary as only one site will actually be affected
  - possible financial loss on account of a property's proximity to one of the sites being considered, which again is unnecessary as only one site will actually be affected
  - Council may come under significant pressure to spend public funds unnecessarily (that is, in relation to each of the proposed sites). This is often the case when new or changed public infrastructure is proposed. If the matter in issue is released, this pressure is likely to be widespread on account of the large number of sites considered. This is unnecessary as only one site will be affected.

**Where does the balance of public interest considerations lie?**

57. In this review I must consider whether the public interest considerations favouring disclosure outweigh the public interest considerations telling against release of the matter in issue.
58. I have carefully considered all of the public interest considerations set out above. The applicant accepts that if site selection is not yet finalised, then releasing the matter in issue would not be in the public interest<sup>17</sup>.
59. On the information available to me, I am satisfied that although the public interest considerations favouring disclosure of the matter in issue are significant, on balance, they are outweighed by the public interest considerations favouring non-disclosure as disclosure of the matter in issue would constitute a specific and tangible harm (of sufficient gravity) to an identifiable public interest by:
- prejudicing Council's decision-making process, which is ongoing

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<sup>15</sup> *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at paragraph 91. In other words, it may merely indicate that the author of the document wished it to reach its intended recipient without being read by an intermediary (see also *Wolsley and Department of Immigration*).

<sup>16</sup> In *MP v Department of Infrastructure* [2004] VCAT 2346 a consultant report on '14 remaining sites' for hazardous waste sites was found to have been prepared on a strictly confidential basis.

<sup>17</sup> As stated on page 2 of the applicant's email dated 10 December 2007.

- divulging confidential information
- inflicting unnecessary financial and emotional harm

in circumstances where,

- the proposed site for the bioreactor landfill is dependent upon the outcome of a development application currently before relevant agencies
- of the sites assessed, one or more may require further consideration if Council's current development application is unsuccessful or is ultimately not one which is feasible for Council to proceed with (for example, on account of conditions imposed by relevant agencies)
- Council has engaged in a community involvement programme in an effort to keep members of the public informed as to the progress of this process.

60. Based on the matters set out above, I find that:

- the matter in issue comprises deliberative process material
- disclosure of the matter in issue would, on balance, be contrary to the public interest as specific and tangible harm (of sufficient gravity) to an identifiable public interest would result from disclosure of the matter in issue
- the matter in issue qualifies for exemption from disclosure under section 41(1) of the FOI Act.

## **DECISION**

61. I affirm the decision under review by deciding that the matter in issue is exempt from disclosure under section 41(1) of the FOI Act.

62. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

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**F Henry**  
**Assistant Commissioner**

**Date: 19 December 2007**