



Decision and Reasons for Decision

Application Number: 311310

Applicant: Daglish

Respondent: Redland City Council

Third Party: Barro Group Pty Ltd

Decision Date: 13 June 2013

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

REASONS FOR DECISION

Summary

1. The applicant applied¹ under the *Right to Information Act 2009* (Qld) (**RTI Act**) to the Redland City Council (**Council**) for access to all annual Quarry Development Review Reports submitted by Barro Group Pty Ltd (**Barro Group**) to Council between September 1993 and August 2012 (**Reports**). The Reports relate to Barro Groups' Mount Cotton Quarry.
2. Council located Reports for the years 1994, 2003 to 2006 and 2008 to 2010.² Council did not locate any Reports for the years 1995 to 2002, 2007, 2011 and 2012. Council consulted³ with Barro Group about the potential disclosure of the Reports located. Barro Group objected to the disclosure of the Reports to the applicant.
3. Council decided⁴ to refuse access to the Reports on the ground that disclosure would, on balance, be contrary to the public interest. On internal review, Council again decided⁵ to refuse access to the Reports on the ground that disclosure would, on balance, be contrary to the public interest.

¹ By access application dated 1 August 2012.

² In 2005 Barro Group provided a letter to Council instead of a Report. This document was also considered by Council and is part of this external review.

³ In accordance with section 37 of the RTI Act.

⁴ By decision dated 26 September 2012.

⁵ By internal review decision dated 24 October 2012 in response to an internal review application dated 1 October 2012.

4. The applicant applied⁶ to the Office of the Information Commissioner (**OIC**) for external review of Council's decision to refuse access to the Reports. During external review, OIC also considered the sufficiency of Council's searches. Council conducted further searches for documents on external review but did not locate any additional documents which responded to the access application. On 23 May 2013, the applicant accepted OIC's view that there is a reasonable basis to be satisfied that no additional documents responding to the access application exist. Accordingly the sufficiency of search issue is not considered in these reasons for decision.
5. On external review, the applicant agreed⁷ to narrow the scope of the information he is seeking to information in the Reports which relates to environmental management only (**environmental management information**).
6. In considering disclosure of the environmental management information, OIC consulted with Barro Group and invited Barro Group to participate in the external review.⁸ Barro Group confirmed that it wished to participate in the external review, again objected to disclosure of the environmental management information and maintained its objection to the disclosure of the environmental management information on the basis that disclosure would, on balance, be contrary to the public interest.⁹
7. On external review, Council stated¹⁰ that it had no objection to the release of the environmental management information.
8. For the reasons set out below, I am satisfied that there are no factors favouring nondisclosure of the environmental management information and I afford substantial weight to the public interest factors relating to promoting open discussion of public affairs and enhancing the Government's accountability, contributing to positive and informed debate on important issues or matters of serious interest, contributing to protection of the environment and revealing environmental or health risks or measures relating to public health and safety. Therefore, Council's decision to refuse access to the environmental management information under section 47(3)(b) of the RTI Act is set aside as its disclosure would not, on balance, be contrary to the public interest.

Background

9. Significant procedural steps relating to the application are set out in the appendix to this decision.

Reviewable decision

10. The decision under review is Council's internal review decision dated 24 October 2012.

Evidence considered

11. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and appendix).

⁶ By letter dated 13 December 2012.

⁷ By phone conversation on 3 January 2013.

⁸ In accordance with section 89 of the RTI Act.

⁹ By letter dated 20 May 2013.

¹⁰ By letter dated 21 May 2013 in response to a view from OIC.

Information in issue

12. The information in issue in this external review is the environmental management information.

Would disclosure of the environmental management information, on balance, be contrary to the public interest?

13. No, for the reasons that follow.

Relevant law

14. Under section 23 of the RTI Act, a person has a right to be given access to documents of an agency, subject to a number of exclusions and limitations, including grounds for refusal of access. These grounds are contained in section 47 of the RTI Act. Relevantly, access may be refused to information the disclosure of which would, on balance, be contrary to the public interest under section 49 of the RTI Act.
15. The term *public interest* refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.
16. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest¹¹ and explains the steps that a decision-maker must take¹² in deciding the public interest as follows:
- identify any irrelevant factors and disregard them
 - identify relevant public interest factors favouring disclosure and nondisclosure
 - balance the relevant factors favouring disclosure and nondisclosure; and
 - decide whether disclosure of the information in issue would, on balance, be contrary to the public interest.

Findings

Irrelevant factors

17. No irrelevant factors arise on the information before me.

Factors favouring disclosure

18. In the circumstances of this case, the following factors favouring disclosure are relevant:
- promoting open discussion of public affairs and enhancing the Government's accountability¹³
 - contributing to positive and informed debate on important issues or matters of serious interest¹⁴

¹¹ Schedule 4 of the RTI Act.

¹² Section 49(3) of the RTI Act.

¹³ Schedule 4, part 2, item 1 of the RTI Act.

- contributing to protection of the environment;¹⁵ and
 - revealing environmental or health risks or measures relating to public health and safety.¹⁶
19. Barro Group submitted¹⁷ that it does not believe that there is any public interest in releasing the environmental management information. Barro Group submitted that any public interest favouring release of the environmental management information would be outweighed by the significant adverse effect that would be suffered by disclosure of the information. Barro Group did not otherwise provide any submissions why the factors set out above do not apply or should be afforded limited weight in respect of the environmental management information.
 20. The environmental management information relates to Barro Group's compliance with the Quarry Development Plan submitted to Council, a Deed of Agreement entered into with Council and, to a limited extent, the Environmental Authority issued in respect of the Mount Cotton Quarry. Barro Group has provided information to the public about a proposed extension to the Mount Cotton Quarry both on its website¹⁸ and at a 'Community Information Day' held on 3 September 2011. Barro Group emphasises on its website its commitment to the environment and its proposed environmental management of the extended quarry.
 21. I consider that the fact that Barro Group has gone to such lengths to consult with the community about its environmental management (albeit in respect of the proposed extension), demonstrates that the matter is of serious interest to the community and there is a public interest in disclosing the environmental management information, as its disclosure could reasonably be expected to contribute to and inform the community's debate about the environmental management of both the existing and proposed quarry, promote open discussion of public affairs and enhance the Government's accountability. I am satisfied that these factors arise for consideration and I give them substantial weight.
 22. Additionally, as the environmental management information discloses whether or not, and the extent to which, Barro Group is complying with its existing environmental management obligations, its disclosure could reasonably be expected to contribute to protection of the environment as well as reveal environmental or health risks, particularly given Barro Group's proposed extension to the quarry. Therefore, these factors also apply to the circumstances of this case and I give them substantial weight.

Factors favouring nondisclosure

Adverse effect on business affairs or prejudice to future supply of information

23. Barro Group submitted that disclosure of the environmental management information could reasonably be expected to prejudice its private, business, professional, commercial or financial affairs.
24. The RTI Act recognises that:

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

¹⁵ Schedule 4, part 2, item 13 of the RTI Act.

¹⁶ Schedule 4, part 2, item 14 of the RTI Act.

¹⁷ By letter dated 20 May 2013.

¹⁸ At www.mtcottonquarry.com.au.

- a factor favouring nondisclosure will arise in circumstances where disclosure of the environmental management information could reasonably be expected to prejudice the business affairs of an entity;¹⁹ and
- disclosure could reasonably be expected to cause a public interest harm if disclosing the environmental management information:²⁰
 - would disclose information concerning the business affairs of an agency or another person; and
 - could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of this type to government.

25. Barro Group submitted to Council that the Reports:

...relate to the legal obligations of [Barro Group], details of [Barro Group's] quarry operations, its extraction techniques, operational innovations, work practices, the equipment it employs on site, its rehabilitation techniques and environmental compliance activities (commercially sensitive information).

...This technical information has been developed from the experience and knowledge [Barro Group] has gathered and developed over many years and to allow it to be disclosed to [Barro Group's] competitors will destroy or diminish the commercial value and adversely affect [Barro Group's] future business, professional and commercial dealings.

The disclosure of [Barro Group's] commercially sensitive information is counterproductive to market competition and could reasonably be expected to cause a public interest harm because it will have a significant adverse impact on the ability of [Barro Group] to:

- *maintain a market leadership position without the competitive advantage of its commercially sensitive information*
- ...
- *supply annual compliance reports and information to Council which concern its business, professional, commercial or financial affairs.*²¹

26. I do not accept Barro Group's submissions for the following reasons:

- the environmental management information does not appear to disclose any specific information about Barro Group's '*operational innovations, work practices [or] the equipment it employs on site*'
- any information contained in the environmental management information about Barro Group's '*quarry operations, its extraction techniques... rehabilitation techniques and environmental compliance activities*' is of a general nature and appears to be information about standard environmental management practices widely used in the mining industry such as noise and dust controls
- I accept that the environmental management information contained in the 1994 Quarry Development Review Reports sets out, in some amount of detail and substantially more detail than contained in the later reports, information regarding monitoring, controls and plans. However, I am satisfied this information is also of a general nature (it does not disclose any specific information about Barro Group's techniques) and appears to be information about standard environmental management practices. In any event, given the age of this

¹⁹ Schedule 4, part 3, item 2 of the RTI Act.

²⁰ Schedule 4, part 4, section 7(1)(c) of the RTI Act.

²¹ By letter dated 21 September 2012. On external review, Barro Group relied on these submissions by letter dated 22 February 2013 and essentially repeated these submissions by letter dated 6 May 2013.

information, I am satisfied that any commercial value this information may have once had to Barro Group has been substantially diminished by the passage of time

- the environmental management information does not appear to contain any *'technical information [which] has been developed from the experience and knowledge [Barro Group] has gathered and developed over many years'*. The environmental management information is not technical in nature and appears to be about standard environmental management practices widely used in the mining industry
- there is no evidence before me to suggest that disclosure of the environmental management information could reasonably be expected to affect Barro Group's *'market leadership position'* and/or be *'counterproductive to market competition'*; and
- there is no evidence before me to suggest that disclosure of the environmental management information could reasonably be expected to impact on Barro Group's ability to provide annual compliance reports to Council. In any event, I understand that Barro Group is contractually obligated to provide these annual compliance reports to Council.

27. I set out these reasons in my letter to Barro Group dated 6 May 2013; Barro Group did not, in effect, provide any further submissions in response, but rather repeated the submissions set out at paragraph 25 above, replacing references to the Reports with references to the environmental management information.

28. Based on my reasons set out above, I am not satisfied that disclosure of the environmental management information could reasonably be expected to prejudice Barro Group's private, business, professional, commercial or financial affairs nor am I satisfied that its disclosure could reasonably be expected to prejudice the future supply of information of this type to government. Accordingly, I find that these factors do not apply to the environmental management information.

Prejudice trade secrets, business affairs or research

29. Barro Group submitted that disclosure of the environmental management information could reasonably be expected to prejudice its trade secrets, business affairs or research.²²

30. A trade secret is a formula, pattern, device or compilation of information which gives an advantage over competitors who do not know it or use it.²³ The relevant question is whether the environmental management information can be properly characterised as a trade secret. In my view it cannot for the reasons set out in paragraph 26 above. I acknowledge that Barro Group considers the environmental management information should not be revealed and accept, for present purposes, that Barro Group does not widely disseminate that information. However, the environmental management information, on its own, does not reveal how Barro Group operates nor would it reveal a formula, pattern, device or compilation of information which gives an advantage over competitors. In my view, these arguments do not give rise to a factor favouring nondisclosure of the environmental management information.

²² Schedule 4, part 3, item 15 of the RTI Act.

²³ The Information Commissioner considered the meaning of *trade secrets* in the context of the now repealed *Freedom of Information Act 1992* (Qld) in *Wanless Wastecorp Pty Ltd and Caboolture Shire Council; JJ Richards & Sons Pty Ltd (Third party)* (2003) 6 QAR 242 [33] – [43] and *Cannon and Australian Quality Egg Farms Ltd* (1994) 1 QAR 491 [42] – [49].

31. To the extent that disclosure of the environmental management information could reasonably be expected to prejudice Barro Group's business affairs, I have discussed this above and will not address it again here. For the reasons set out above, I am satisfied disclosure cannot reasonably be expected to prejudice Barro Group's business affairs.

32. In its submissions to Council, Barro Group submitted that:

The disclosure of [Barro Group's] commercially sensitive information is counterproductive to market competition and could reasonably be expected to cause a public interest harm because it will have a significant adverse impact on the ability of [Barro Group] to:

- ...
 - *invest in research and development of commercially sensitive information...*

33. There is no evidence before me to suggest that disclosure of the environmental management information would impact on Barro Group's ability to 'invest in research and development of commercially sensitive information'. In my view, whether or not, and the extent to which, Barro Group chooses to invest in research and development of commercially sensitive information is unlikely to be affected by disclosure of the environmental management information.

34. For these reasons, I find that these factors do not apply to the environmental management information.

Flow of information to a law enforcement or regulatory agency

35. Barro Group submitted that disclosure of the environmental management information could reasonably be expected to prejudice the flow of information to the Council as a law enforcement or regulatory agency.²⁴

36. In particular, Barro Group submitted that:

The disclosure of [Barro Group's] commercially sensitive information is counterproductive to market competition and could reasonably be expected to cause a public interest harm because it will have a significant adverse impact on the ability of [Barro Group] to:

- ...
 - *supply annual compliance reports and information to Council which concern its business, professional, commercial or financial affairs.*

37. I am not satisfied that Council is properly classified as a regulatory agency in respect of the environmental management information (it would appear to me that this role is more likely to be held by the Department of Environment and Heritage Protection as the administering authority for environmental authorities issued for resource activities). In any event, Barro Group is contractually obligated to provide the annual compliance reports to Council. Disclosing the environmental management information could not reasonably be expected to prejudice the flow of information to the Council as a regulatory agency because it does not appear to be a regulatory agency in respect of the environmental management information and Barro Group is obliged to provide the information in any case. Therefore, I find that these factors do not apply to the environmental management information.

²⁴ Schedule 4, part 3, item 13 of the RTI Act.

Agency's ability to obtain confidential information

38. Barro Group submitted that disclosure of the environmental management information could reasonably be expected to prejudice an agency's ability to obtain confidential information. Barro Group has simply listed this public interest factor without providing any supporting argument or evidence.
39. The RTI Act recognises that the public interest will favour nondisclosure of information where disclosure could reasonably be expected to:
- a) prejudice an agency's ability to obtain confidential information;²⁵ or
 - b) cause a public interest harm if:
 - the information consists of information of a confidential nature that was communicated in confidence; and
 - disclosure could reasonably be expected to prejudice the future supply of information of this type.²⁶
40. For these factors to apply, it is first necessary to be satisfied that the information is confidential. Information will have a necessary quality of confidence if it is not trivial or useless and has a sufficient degree of secrecy.²⁷ I am satisfied that the information, although general in nature, is not trivial or useless. However, whilst I acknowledge that Barro Group considers the environmental management information should not be revealed and accept, for present purposes, that Barro Group does not widely disseminate that information, the environmental management information is not technical in nature and appears to be about standard environmental management practices widely used in the mining industry. Therefore, I am not satisfied that the information has a sufficient degree of secrecy.
41. Accordingly, I am not satisfied that the environmental management information is confidential. In any event, even if the environmental management information were confidential, Barro Group is contractually obligated to provide the annual compliance reports to Council. Therefore, I find that disclosing the environmental management information could not reasonably be expected to prejudice the future supply of information of this type or prejudice an agency's ability to obtain confidential information. These factors, therefore, do not apply to the environmental management information.

Deliberative process of government

42. Barro Group submitted that disclosure of the environmental management information could reasonably be expected to prejudice a deliberative process of government. Barro Group has simply listed this public interest factor without providing any supporting argument or evidence.
43. The RTI Act recognises that that the public interest will favour nondisclosure of information where disclosure could reasonably be expected to:
- prejudice a deliberative process of government;²⁸ and

²⁵ Schedule 4, part 3, item 16 of the RTI Act.

²⁶ Schedule 4, part 4, section 8 of the RTI Act.

²⁷ *Re B and Brisbane North Regional Health Authority* (1994) 1 QAR 279; *Abbot and the University of Queensland* (Unreported, Queensland Information Commissioner, 16 October 2012).

²⁸ Schedule 4, part 3, item 20 of the RTI Act.

- cause a public interest harm through disclosure of a consultation or deliberation that has taken place in the course of, or for, the deliberative processes involved in the functions of government.²⁹
44. Deliberative processes involved in the functions of government have been defined as *'...thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action'*.³⁰
45. For the above factors to apply, the environmental management information must constitute deliberative process information.³¹ The environmental management information clearly does not constitute deliberative process information. The environmental management information was provided by Barro Group, a private company, and sets out certain information regarding the environmental management of its rock quarry; it does not reveal Council's thinking processes. For this reason, I find that these factors do not apply to the environmental management information.

Balancing the public interest

46. In summary, for the reasons set out above I am satisfied that there are no factors favouring nondisclosure of the environmental management information and I afford substantial weight to the public interest factors relating to:
- promoting open discussion of public affairs and enhancing the Government's accountability
 - contributing to positive and informed debate on important issues or matters of serious interest
 - contributing to protection of the environment; and
 - revealing environmental or health risks or measures relating to public health and safety.
47. Therefore, I am satisfied that disclosure of the environmental management information would not, on balance, be contrary to the public interest.

DECISION

48. For the reasons set out above, I set aside the decision under review and substitute a decision to grant access to the environmental management information on the basis that disclosure is not, on balance, contrary to the public interest.
49. I have made this decision as a delegate of the Acting Information Commissioner, under section 145 of the RTI Act.

Lisa Meagher
Acting Assistant Information Commissioner

Date: 13 June 2013

²⁹ Schedule 4, part 4, section 14 of the RTI Act. This public interest *harm factor* is similar to the previous exemption in section 41(1) of the repealed *Freedom of Information Act 1992* (Qld).

³⁰ *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at [28-30] citing with approval the definition given in *Re Waterford and Department of Treasury (No.2)* (1984) 5 ALD 588 at [606].

³¹ *Abbot and the University of Queensland* (Unreported, Queensland Information Commissioner, 16 October 2012).

APPENDIX

Significant procedural steps

Date	Event
2 August 2012	Council received the access application.
26 September 2012	Council decided to refuse access to the Reports.
2 October 2012	Council received the applicant's application for internal review of its decision dated 26 September 2012.
24 October 2012	Council again decided to refuse access to the Reports.
13 December 2012	OIC received the applicant's application for external review of Council's decision dated 24 October 2012.
17-19 December 2012	OIC made preliminary enquiries to establish whether the application for external review should be accepted, despite being out of time.
2 January 2013	Council provided OIC with a copy of the Reports.
3 January 2013	The applicant agreed to narrow the scope of the application to the environmental management information only.
8 January 2013	OIC notified the applicant in writing that the external review application had been accepted. OIC notified Council that the external review application had been accepted and asked Council for submissions about the sufficiency of search issue.
21 January 2013	Council provided OIC with submissions on the sufficiency of search issue.
7 February 2013	OIC conveyed to Barro Group the view that disclosure of the environmental management information would not prejudice Barro Group's commercial affairs. OIC asked Barro Group for information about the sufficiency of search issue.
22 February 2013	Barro Group advised OIC that it did not accept OIC's view and that it was not prepared to provide information about the sufficiency of search issue.
9 April 2013	OIC asked Council for further submissions about the sufficiency of search issue. Council provided OIC with further submissions about the sufficiency of search issue.
6 May 2013	OIC conveyed to Barro Group the view that disclosure of the environmental management information is not, on balance, contrary to the public interest. OIC invited Barro Group to make written submissions and become a participant in the external review if it did not agree with the view.
7 May 2013	OIC conveyed to Council the view that disclosure of the environmental management information is not, on balance, contrary to the public interest and invited Council to make submissions if it did not agree with the view.
20 May 2013	Barro Group advised OIC that it objected to OIC's view and wished to be a participant in the external review. Barro Group provided written submissions.
21 May 2013	Council advised OIC that it accepted OIC's view.
23 May 2013	OIC conveyed a view to the applicant on the sufficiency of search issue. The applicant accepted OIC's view.