



## Decision and Reasons for Decision

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Citation:	<i>Niven and Moreton Bay Regional Council; Whiteroom Architects Pty Ltd (Third Party) [2020] QICmr 48 (4 September 2020)</i>
Application Number:	314883
Applicant:	Niven
Respondent:	Moreton Bay Regional Council
Third Party:	Whiteroom Architects Pty Ltd (ACN 600 450 664)
Decision Date:	4 September 2020
Catchwords:	<p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - DISCLOSURE DECISION - EXEMPT INFORMATION - BREACH OF CONFIDENCE - documents relating to a development approval - information contained in prelodgement meeting minutes - whether disclosure of the information would found an action for breach of confidence - whether exempt information to which access may be refused - sections 47(3)(a) and 48 and schedule 3, section 8 of the <i>Right to Information Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - CONTRARY TO THE PUBLIC INTEREST INFORMATION - documents relating to a development approval - information contained in prelodgement meeting minutes - whether disclosure of information would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld)</p>

## REASONS FOR DECISION

### Summary

1. The applicant applied to Moreton Bay Regional Council (**Council**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to information relating to a development approval and communications between Council and the proponent of the development.<sup>1</sup>
2. Council located 25 pages of relevant information and consulted with a third party about its disclosure.<sup>2</sup> Council received correspondence from the consulted party and two other entities, including Whiteroom Architects Pty Ltd (**Whiteroom**), objecting to disclosure of some information.

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<sup>1</sup> Application dated 6 August 2019, which was received by Council on 8 August 2019. The date range of the application is April 2019 to 8 August 2019.

<sup>2</sup> Under section 37 of the RTI Act.

3. Council decided to disclose 5 full pages and parts of 17 pages to the applicant and refuse access to the remaining information on various grounds.<sup>3</sup> The applicant applied<sup>4</sup> to the Office of the Information Commissioner (**OIC**) for external review of Council's decision.
4. The applicant confirmed<sup>5</sup> to OIC that he did not seek access to personal information but continued to seek access to information which Council identified as commercially sensitive, including a development plan and minutes of a prelodgement meeting held on 14 June 2019, between Council, a third party and Whiteroom.<sup>6</sup>
5. During the review, Council accepted OIC's preliminary assessment that the requested information may be disclosed. As the disclosure of this information was considered to be of concern to Whiteroom, Whiteroom was joined as a participant.<sup>7</sup> Whiteroom objects to disclosure of the requested information on the grounds that it comprises exempt information and disclosure would, on balance, be contrary to the public interest. The other objecting parties did not maintain their disclosure objections.<sup>8</sup>
6. For the reasons below, and having considered the submissions raised by Whiteroom, I set aside Council's decision to refuse access to the information remaining in issue, on the basis that the information is not exempt nor would it, on balance, be contrary to the public interest to disclose.

### Reviewable decision and evidence considered

7. The decision under review is Council's decision to the applicant dated 24 September 2019.
8. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and the Appendix). I have also had regard to the *Human Rights Act 2019* (Qld),<sup>9</sup> particularly the access applicant's right to seek and receive information.<sup>10</sup>
9. Significant procedural steps relating to this review are set out in the Appendix.

### Information in issue

10. The information in issue appears on 9 pages (**information in issue**) and comprises the information which Council initially identified as commercially sensitive information.<sup>11</sup>

<sup>3</sup> Decision dated 24 September 2019. Council also notified its decision to the three objecting parties on 24 September 2019.

<sup>4</sup> Application for external review dated 30 September 2019, received by OIC on 1 October 2019.

<sup>5</sup> Following the release of information to the applicant, in accordance with Council's decision, on 24 October 2019.

<sup>6</sup> As confirmed to the applicant by email dated 18 December 2019. Accordingly, I have not considered the refused personal information in this decision.

<sup>7</sup> Under section 89(3) of the RTI Act. On 5 May 2020, Whiteroom applied to participate.

<sup>8</sup> Under section 89(2) of the RTI Act, a person whose views were sought under section 37 of the RTI Act may apply to participate in the external review. As these two objecting parties did not seek to participate in this external review, their identities are not disclosed in this decision. Council disclosed the requested information which does not relate to Whiteroom, which appeared in 4 pages and was disclosed on 9 June 2020.

<sup>9</sup> Referred to in these reasons as the **HR Act**, and which came into force on 1 January 2020.

<sup>10</sup> Section 21 of the HR Act. I consider a decision-maker will be '*respecting and acting compatibly with*' that right and others prescribed in the HR Act, when applying the law prescribed in the RTI Act (*XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111]). I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between equivalent pieces of Victorian legislation: '*it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act*' (*XYZ* at [573]).

<sup>11</sup> Pages 3, 8–14, and 16 of the documents located by Council.

11. The RTI Act limits the level of detail I can include in these reasons to describe the particular content of the information in issue,<sup>12</sup> however, I can broadly describe it as a plan and information within Council's minutes of a prelodgement meeting held on 14 June 2019, between Council Officers, a third party, and Whiteroom.

### Issues for determination

12. On external review, Council accepted that access may be granted to the information in issue. However, Whiteroom continues to object to its disclosure on the grounds that it considers the information in issue to be confidential and commercially sensitive.<sup>13</sup> Therefore, the issues to be determined in this review are whether access may be refused to the information in issue on the grounds:
- it is exempt information as its disclosure would found an action for breach of confidence;<sup>14</sup> and
  - disclosure would, on balance, be contrary to the public interest.<sup>15</sup>

### Findings

#### Exempt information

13. The RTI Act gives a right to be given access to documents of an agency,<sup>16</sup> however, this right of access is subject to limitations, including the grounds on which access to information may be refused.<sup>17</sup> It is Parliament's intention that these refusal grounds are to be interpreted narrowly<sup>18</sup> and that the RTI Act be administered with a pro-disclosure bias.<sup>19</sup>
14. One ground of refusal is where information is exempt from disclosure.<sup>20</sup> Information will qualify as exempt where its disclosure would found an action for breach of confidence.<sup>21</sup> This exemption encompasses actions for breach of contractual obligations of confidence as well as equitable actions for breach of confidence.<sup>22</sup>
15. Whiteroom contends that disclosing the information in issue would found an action for an equitable breach of confidence.<sup>23</sup>
16. The elements of a claim for breach of confidence in equity were recently enunciated in *Ramsay*<sup>24</sup> as follows:
- the information must be identifiable with specificity
  - it must have the necessary quality of confidence
  - it must have been received in circumstances importing an obligation of confidence; and
  - there must be an actual or threatened misuse of the information.

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<sup>12</sup> Section 108(3) of the RTI Act.

<sup>13</sup> As confirmed in Whiteroom's final correspondence to OIC dated 24 August 2020.

<sup>14</sup> Sections 47(3)(a) and 48 and schedule 3, section 8 of the RTI Act.

<sup>15</sup> Sections 47(3)(b) and 49 of the RTI Act.

<sup>16</sup> Section 23(1)(a) of the RTI Act.

<sup>17</sup> The grounds on which an agency may refuse access are set out in section 47(3) of the RTI Act.

<sup>18</sup> Section 47(2)(a) of the RTI Act.

<sup>19</sup> Section 44 of the RTI Act.

<sup>20</sup> Section 47(3)(a) and 48 of the RTI Act.

<sup>21</sup> Schedule 3, section 8(1) of the RTI Act. I note that schedule 3, section 8(2) contains an exception to this exemption, however, that exception does not arise in the circumstances of this matter and therefore, is not addressed in these reasons for decision.

<sup>22</sup> *Ramsay Health Care Ltd v Information Commissioner & Anor* [2019] QCATA 66 (**Ramsay**) at [66].

<sup>23</sup> Submissions dated 13 March 2020.

<sup>24</sup> At [94], adopting *Optus Networks Pty Ltd v Telstra Corporation Ltd* [2010] 265 ALR 281 and *Smith Kline & French Laboratories v Department of Community Services & Health* [1990] FCA 206.

17. I accept that the information in issue meets the first requirement and can be identified with specificity.
18. In relation to whether the information in issue possesses the necessary quality of confidence, Whiteroom submits that the information in issue was '*given in confidence*' on the following basis:<sup>25</sup>
- the documents were part of a prelodgement meeting, that the parties in attendance knew was held in confidence
  - the meeting minutes are marked '*Commercial in Confidence*'; and
  - both parties confirmed in writing on September 2019<sup>26</sup> that they were aware of and agreed that the documents were provided in confidence.
19. The information in issue which was generated and disclosed to Council by Whiteroom, being a one page plan, is not marked confidential.<sup>27</sup> However, the prelodgement meeting minutes generated, after the exchange of information, by Council are marked '*Commercial in Confidence*'. The labelling of information, or lack thereof, is not determinative to a finding about the information's quality of confidence. Labelling information as '*confidential*' will not confer it with the necessary quality of confidence, if it in fact lacks the requisite degree of secrecy or inaccessibility.<sup>28</sup> How information is labelled will ordinarily constitute a relevant factor to be evaluated, in light of all the relevant circumstances, in determining whether an enforceable obligation of confidence is imposed, but will not of itself be conclusive of the issue.<sup>29</sup>
20. In this matter, the other relevant circumstances are that:
- the information in issue includes certain publicly accessible information<sup>30</sup>
  - the prelodgement meeting minutes were created, and disclosed to Whiteroom and its client, by Council
  - prelodgment meetings occur routinely and there is no clear indication on Council's public information in relation to this process, that such meetings are confidential<sup>31</sup>; and
  - the written exchange in which any understanding of confidentiality was conveyed occurred some months after the meeting occurred and during the processing of the access application under the RTI Act.
21. To the extent that Whiteroom relies on Council's decision about the access application to establish a mutual understanding that documents were provided in confidence, I note that Council notified Whiteroom that it did *not* consider disclosure of relevant documents would found an action for equitable breach of confidence. Whiteroom has not provided any evidence to suggest that at the time it disclosed information to Council, there was any undertaking by Council that such information would be considered confidential.
22. Having considered the circumstances outlined above, I am not satisfied that the information in issue possesses the necessary quality of confidence.

<sup>25</sup> Submissions dated 13 March 2020.

<sup>26</sup> Whiteroom refers to its letter to Council dated 19 September 2019 and Council's letter to Whiteroom dated 24 September 2019, notifying Whiteroom of its decision in respect of the access application.

<sup>27</sup> I acknowledge that it is subject to the copyright interests of Whiteroom.

<sup>28</sup> *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (*B and BNRHA*) at [91].

<sup>29</sup> *B and BNRHA* at [91].

<sup>30</sup> Although section 108(3) of the RTI Act prevents me from describing the content of the information in issue in any further detail, I note that general information about the relevant property and the approvals that have been issued for its proposed development may be accessed via Council's 'PD Online' (at <<http://pdonline.moretonbay.qld.gov.au/Modules/common/Default.aspx>>).

<sup>31</sup> I have had regard to the information available on Council's website here <<https://www.moretonbay.qld.gov.au/Services/Building-Development/DA-Lodgement/Pre-Lodgement-Advice>>.

23. Apart from generally contending that disclosure under the RTI Act would be an actual or threatened misuse of the information in issue, Whiteroom has not provided any submissions to substantiate this contention.
24. On the material before me, I am not satisfied that all the cumulative requirements are established to give rise to an equitable action for breach of confidence. For completeness, I also note that there is no evidence before me which indicates that disclosing the information in issue would give rise to an action for breach of any contractual obligation of confidence.
25. Therefore, I find that the information in issue is not exempt under schedule 3, section 8 of the RTI Act and access may not be refused to it under section 47(3)(a) of the RTI Act.

### ***Contrary to the public interest information***

26. Another ground of refusal is where disclosing information would, on balance, be contrary to the public interest.<sup>32</sup> In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision maker must:<sup>33</sup>
- 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.
27. I have taken no irrelevant factors into account in making my decision.
28. Schedule 4 of the RTI Act contains non-exhaustive lists of factors that may be relevant to determining where the balance of the public interest lies in a particular case. I have carefully considered these factors, the RTI Act's pro-disclosure bias<sup>34</sup> and Parliament's requirement that grounds for refusing access to information be interpreted narrowly.<sup>35</sup>

### **Factors favouring disclosure**

29. The information in issue records interactions between Council and private entities about a development proposal. Council is accountable to the public for the decisions it makes concerning land development and ensuring that development is carried out in accordance with relevant legislative restrictions and approvals. Private sector businesses working with, and seeking approvals from, Council must also accept an appropriate level of scrutiny in their dealings with Council.<sup>36</sup>
30. Council's prelodgement processes, which may include meetings, are intended to facilitate the lodgement of properly-made applications and enable a quicker decision process for development applications. Prelodgement meetings are generally used to exchange information and discuss identified matters concerning a proposed development prior to

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<sup>32</sup> Section 47(3)(b) of the RTI Act. The phrase '*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 merely private or personal interests, although there are some recognised public interest considerations that may apply for the benefit of an individual. See Chris Wheeler, 'The Public Interest: We know it's Important, But Do We Know What it Means' (2006) 48 *AIAL Forum* 12, 14.

<sup>33</sup> Section 49(3) of the RTI Act.

<sup>34</sup> Section 44 of the RTI Act.

<sup>35</sup> Section 47(2) of the RTI Act.

<sup>36</sup> *Campbell and North Burnett Regional Council; Melior Resources Incorporated (Third Party)* [2016] QICmr 4 (29 January 2016) at [37].

submission of a formal development application. An applicant for a prelodgement meeting is generally required to provide proposal plans, an assessment of relevant codes and identify the issues they are seeking to be discussed at the meeting.<sup>37</sup>

31. The access applicant has raised concerns about potential breaches of existing approval conditions for the relevant property and submits that disclosure of the information in issue will enable the community to scrutinise how Council monitors compliance with development conditions, particularly from an environmental management perspective.<sup>38</sup>
32. There has been significant public interest in the conditions Council previously imposed for development and land clearing at the relevant property.<sup>39</sup> More broadly, there is significant public interest in how all levels of government achieve the balance between protecting the natural environment and the interests of development. Specifically, the issue of Council discussions with private land developers is also a matter of public interest and scrutiny.
33. I am satisfied that there is a significant public interest in the community understanding, and being able to scrutinise, Council's town planning processes (including prelodgement negotiations and approvals) and how Council monitors, and manages, adherence to approval conditions. On this basis, I am satisfied disclosing the information in issue could reasonably be expected to:
  - promote open discussion of public affairs and enhance Council's accountability<sup>40</sup>
  - contribute to positive and informed debate about matters of serious interest<sup>41</sup>
  - inform the community of Council's operations, particularly the policies, guidelines and codes of conduct followed by Council in its dealings with members of the community<sup>42</sup>
  - allow or assist inquiry into possible deficiencies in the conduct or administration of Council;<sup>43</sup> and
  - reveal the reason for a decision of Council and the background or contextual information that informed the decision.<sup>44</sup>
34. Taking into account that the information in issue directly relates to Council's town planning processes and there is a significant level of community interest in how Council is managing (and monitoring) land development impacts and its relationship with private developers, I afford significant weight to the above public interest factors in favour of disclosure.

## **Factors favouring nondisclosure**

### ***Business and commercial factors***

35. Whiteroom contends that:<sup>45</sup>

*The information contained in the documents is of a valuable commercial nature, specific to the site in question and relevant to similarly zoned sites and was provided on commercial terms for*

<sup>37</sup> Details of Council's prelodgement processes can be accessed at: <<https://www.moretonbay.qld.gov.au/Services/Building-Development/DA-Lodgement/Pre-Lodgement-Advice>>. The Information Commissioner has also previously considered the general nature of the prelodgement meeting process in *Moore and Brisbane City Council* [2017] QICmr 35 (18 August 2017) at [48].

<sup>38</sup> External review application.

<sup>39</sup> This is evidenced by the number of submissions that were made regarding a proposed material change of use of the Property, which Council approved in 2018, and media reporting of community concerns about tree clearing on the Property (for example at: <<https://www.couriermail.com.au/questnews/moreton/council-has-approved-plans-to-build-a-new-child-care-centre-at-deception-bay/news-story/767dfd9bd35c56ba7dd9e80d2e9864ec>>).

<sup>40</sup> Schedule 4, part 2, item 1 of the RTI Act.

<sup>41</sup> Schedule 4, part 2, item 2 of the RTI Act.

<sup>42</sup> Schedule 4, part 2, item 3 of the RTI Act.

<sup>43</sup> Schedule 4, part 2, item 5 of the RTI Act.

<sup>44</sup> Schedule 4, part 2, item 11 of the RTI Act.

<sup>45</sup> Submissions dated 13 March 2020.

*our client's exclusive use in relation to this site. The release of this information would devalue our business' intellectual property and the business of our client. Furthermore, the release of the information threatens the commercial operations and livelihood of both our business, the business of our client.*<sup>46</sup>

36. Whiteroom's submissions raise specific nondisclosure factors which arise where disclosure could reasonably be expected to:<sup>47</sup>
- prejudice the business, professional, commercial or financial affairs of entities;<sup>48</sup> and
  - cause a public interest harm because disclosure of the information would disclose information that has a commercial value and could reasonably be expected to destroy or diminish the commercial value of the information.<sup>49</sup>
37. Establishing a reasonable expectation of prejudice, diminution or adverse effect requires more than simply asserting that disclosure will result in such consequences. The words '*could reasonably be expected to*' call for a decision-maker to discriminate between what is merely possible or merely speculative, and expectations that are reasonably based.<sup>50</sup> I must therefore be satisfied that there is a reasonably based expectation (and not mere speculation or a mere possibility) that disclosure of the information in issue could reasonably be expected to result in the prejudice claimed by Whiteroom.
38. Whiteroom submits that its business affairs include conducting investigations, for a fee, for owners and prospective owners of sites that are suitable for development and, in this context, the information in issue is:
- commercially sensitive and its disclosure would diminish Whiteroom's commercial interests and those of its client; and
  - disclosure will diminish or destroy its capacity to sell its intellectual property to many parties who have similarly zoned sites in the Moreton Bay area.<sup>51</sup>
39. I acknowledge that the information in issue generally concerns business and commercial affairs of private entities. However, the information in issue is about a specific property and particular development proposed for that property at a point in time. Development of this property has since progressed beyond the planning stages and its current development approvals are publicly available.<sup>52</sup>
40. Although some of the information in issue was provided to Council by Whiteroom, Whiteroom has not provided details of any usage or disclosure restrictions that were imposed upon Council when it submitted such information. The information in issue also includes certain publicly accessible information about the property. Despite general contentions about similarly zoned properties, Whiteroom has not provided any evidence

<sup>46</sup> Whiteroom's client was also consulted during this review and did not object to the disclosure of the information in issue on the basis of its own commercial interests.

<sup>47</sup> Submissions dated 13 March 2020.

<sup>48</sup> Schedule 4, part 3, item 2 of the RTI Act. I have also considered schedule 4, part 3, item 15 of the RTI Act.

<sup>49</sup> Schedule 4, part 4, section 7 of the RTI Act. This section includes three public interest harm factors, of which one may apply to the exclusion of the others. In this case, I consider that the most relevant harm factor is set out in Schedule 4, part 4, section 7(c).

<sup>50</sup> See *Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 at paragraphs 62-63. See also *B and BNRHA* at [160]. Other authorities note that the words '*require a judgement 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 a disclosure of the information could have the prescribed consequences relied upon*': *Smolenski v Commissioner of Police, NSW Police* [2015] NSWCATAD 21 at [34], citing *Commissioner of Police, NSW Police Force v Camilleri (GD)* [2012] NSWADTAP 19 at [28], *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 at [61] and *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 at 190.

<sup>51</sup> Submissions dated 13 March 2020.

<sup>52</sup> I have confirmed this via Council's 'PD Online' (at <<http://pdonline.moretonbay.qld.gov.au/Modules/common/Default.aspx>>). In this regard, I also note that the information which has been disclosed within the prelodgement meeting minutes states: '*If you intend to lodge a development application in the future, please include a copy of this advice with your application*'.

to support its argument that the same information in issue could be used again for the development of other properties.

41. Based on the site-specific nature of the information in issue, I am also not satisfied that disclosure under the RTI Act would diminish or interfere with Whiteroom's commercial activities or its capacity to sell this particular information in the future. It is unclear to me, how Whiteroom would be able to sell either the plan or the prelodgement meeting minutes to another developer, or how a party may use these documents to avoid obtaining its own plan or prelodgement advice for developing a different, albeit similarly zoned, parcel of land. Some of the information set out in the prelodgement meeting minutes may be relevant to similarly zoned properties. However, such information is in the form of Council views and not information that can be considered the uniquely or exclusively commercial information of Whiteroom.
42. Part of the information in issue comprises a plan that is marked as subject to Whiteroom's copyright. To the extent that Whiteroom may have intellectual property rights in respect of the information in issue, those rights are not, in themselves, a ground for refusal of access. Under section 68(4) of the RTI Act, inspection access may be provided where disclosing copies of a document would involve an infringement of copyright of a person other than the State. I recognise that Whiteroom retains copyright interests over the plan. In respect of the prelodgement meeting minutes prepared by Council, Whiteroom has not demonstrated that it holds any copyright interest in that information.
43. I note that other prelodgement meeting minutes form part of the information lodged in respect of the development approvals Council has issued for the property and that information can be accessed via Council's website.<sup>53</sup> In these circumstances, there is nothing before me which reasonably indicates that disclosing the information in issue would prejudice the future supply of information by development proponents in Council's town planning processes.
44. Given the specific content of the information in issue and the other information before me, I am not satisfied that disclosing the information in issue would, as Whiteroom contends, interfere in any significant way with the commercial activities of any entity, diminish the commercial value of the information in issue, or prejudice the ability of Whiteroom to sell information to other parties. Therefore, to the extent these business affairs and commercial value factors favouring nondisclosure apply to the information in issue, I find that they deserve low, if any weight.
45. Having considered the public interest harm factors set out in schedule 4, section 7(1)(b) and (c), I am not satisfied that either of these harm factors apply. I do not consider that disclosure of the information in issue would diminish any existing commercial value in that information, prejudice the business or commercial affairs of Whiteroom or prejudice the future supply of this information to government.

### **Confidential information**

46. As Whiteroom contends that the information in issue is confidential, I have also considered whether:
  - disclosing information could reasonably expected to prejudice an agency's ability to obtain confidential information;<sup>54</sup> and

<sup>53</sup> Via Council's 'PD Online' (at <<http://pdonline.moretonbay.qld.gov.au/Modules/common/Default.aspx>>). In this regard, I also note that the information which has been disclosed within the prelodgement meeting minutes states: 'If you intend to lodge a development application in the future, please include a copy of this advice with your application'.

<sup>54</sup> Schedule 4, part 3, item 16 of the RTI Act.



- the information is 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.<sup>55</sup>
47. I am not satisfied that Whiteroom's submissions reasonably indicate that the information in issue is confidential or that it was communicated on a confidential basis. However, even if some of the information in issue could be characterised as confidential, for these factors to apply I must also be satisfied that disclosure could reasonably be expected to prejudice Council's ability to obtain confidential information or the future supply of this type of information.
48. A significant amount of information about the property, and the development approvals Council has issued in respect of the Property, can be accessed via Council's website.<sup>56</sup> I also consider that development proponents expect that Council will, as part of their town planning processes, facilitate public access to certain development application information. On this basis, I consider that it is unlikely disclosure of this particular information in issue would prejudice Council's ability, in any significant way, to obtain similar information as part of Council's future town planning processes and I therefore afford these factors favouring nondisclosure low weight.

### **Other factors**

49. In its disclosure objection to Council,<sup>57</sup> Whiteroom argued that disclosure of the information in issue could reasonably be expected to prejudice their fair treatment, and the fair treatment of their client and their contractors. Whiteroom has not pressed the application of this factor favouring nondisclosure on external review.<sup>58</sup> There is no evidence before me which indicates disclosing the information in issue would impact the fair treatment of Whiteroom, or any other entity or individual, in their future dealing with Council. Given this, and the content of the information in issue, I find that this factor does not apply.
50. Taking into account the nature of the information in issue, I can identify no other public interest considerations favouring its nondisclosure.<sup>59</sup>

### **Balancing the public interest**

51. For the reasons set out above, I find that the factors favouring disclosure carry significant weight. Disclosure of information relating to Council's interactions with private entities in respect of development proposals for a particular property would enhance Council's accountability and transparency, promote public debate on a subject matter that is of serious interest to the local community and allow scrutiny of how Council manages compliance with development approval conditions.
52. With respect to the nondisclosure factors, I consider that they are deserving of low, if any weight because I am not satisfied that there is a reasonable expectation of prejudice, diminution or adverse effect, as anticipated by those factors, arising from disclosure of the information in issue. I note that the information in issue relates to the development plans and assessment of a specific property at a point in time and that at present, the disclosure of such information is not reasonably likely to have an adverse impact on Whiteroom's commercial or business affairs.

<sup>55</sup> Schedule 4, part 4, section 8(1) of the RTI Act.

<sup>56</sup> Including the minutes of other prelodgement meetings held in respect of the Property.

<sup>57</sup> Dated 19 September 2019.

<sup>58</sup> Schedule 4, part 3, item 6 of the RTI Act.

<sup>59</sup> In the event that further relevant factors exist in favour of nondisclosure, I am satisfied that there is no evidence before me to suggest that any would carry sufficient weight to outweigh the significant weight that I have afforded to the public interest factors that favour the disclosure of the information in issue.

53. On balance, I am satisfied that the public interest factors favouring disclosure outweigh the factors favouring nondisclosure. Accordingly, I find that disclosure of the information in issue would not, on balance, be contrary to the public interest.

## **DECISION**

54. I set aside Council's decision to refuse access to the information in issue and find that access to this information may not be refused under section 47(3)(a) of the RTI Act on the basis that it is exempt or under section 47(3)(b) of the RTI Act on the basis that disclosure would, on balance, be contrary to the public interest.
55. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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**S Martin**  
**Assistant Information Commissioner**

**Date: 4 September 2020**

## APPENDIX

### Significant procedural steps

Date	Event
1 October 2019	OIC received the application for external review.
11 November 2019	OIC advised the applicant and Council that the external review application had been accepted and asked Council to provide further information.
19 November 2019	OIC received the requested information from Council.
18 December 2019	OIC wrote to the applicant to confirm the information which he did not seek to access.
30 January 2020	OIC conveyed a preliminary view to Council.
18 February 2020	Council confirmed its acceptance of the preliminary view and that it did not wish to make any further submissions.
28 February 2020	OIC consulted the three objecting parties in relation to disclosure of the information in issue.
2 March 2020	OIC provided the applicant with an update.
13 March 2020	OIC received Whiteroom's disclosure objection and a response from another consulted party.
16 April 2020	OIC conveyed a preliminary view to Whiteroom and asked Whiteroom to notify if they wished to participate in the review. OIC invited the other consulted party to provide submissions if they objected to disclosure and to notify if they wished to participate in the review.
5 May 2020	OIC received Whiteroom's application to participate in the review.
11 May 2020	Council provided further information to OIC.
15 May 2020	OIC wrote to Whiteroom and confirmed Whiteroom had been recorded as a participant to the review.
18 August 2020	OIC wrote to Whiteroom to confirm the preliminary view.
24 August 2020	OIC received Whiteroom's further submissions.