



## Decision and Reasons for Decision

---

**Application Number:** 210545

**Applicant:** Ms L Rolfe

**Respondent:** Banana Shire Council

**Decision Date:** 30 September 2009

**Catchwords:** **FREEDOM OF INFORMATION – section 44(1) of the *Freedom of Information Act 1992* – matter affecting personal affairs – information concerning an employee’s course of study – whether matter would disclose information concerning the personal affairs of a person – whether disclosure would, on balance, be in the public interest**

**FREEDOM OF INFORMATION – section 45(1)(c) of the *Freedom of Information Act 1992* – matter relating to business affairs – information provided during a tender process – whether the matter in issue concerns the business, commercial or financial affairs of a person – whether disclosure could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to government – whether disclosure would, on balance, be in the public interest**

**FREEDOM OF INFORMATION – section 28A(1) of the *Freedom of Information Act 1992* – documents nonexistent – whether there are reasonable grounds for the agency to be satisfied the documents do not exist**

**FREEDOM OF INFORMATION – section 25 of the *Freedom of Information Act 1992* – how applications for access are made – whether documents the applicant submits should exist fall within the scope of the request**

## Contents

Summary .....	3
Background.....	3
Decision under review .....	4
Steps taken in the external review process .....	4
Issues for determination .....	7
Part A - Refusal of access .....	7
Information about an employee's course of study .....	7
Relevant law.....	7
Personal Affairs Question .....	8
Public Interest Question.....	8
The applicant's submissions .....	9
Findings.....	9
Personal Affairs Question .....	9
Public Interest Question.....	9
Figures relating to the extraction of gravel.....	10
Relevant law.....	10
The applicant's submissions .....	12
The Quarry Owner's submissions.....	12
Findings.....	13
Information concerning business affairs .....	13
The quantity of gravel extracted by Council.....	13
The price per unit .....	13
Payment information .....	13
Part B – Sufficiency of search.....	15
Whether some of the requested documents exist.....	15
Relevant law.....	15
The applicant's submissions .....	16
Contractual documents .....	16
Delivery dockets.....	16
Daily run sheets for contract cartage .....	17
Council's submissions.....	17
Contracts and letters of acceptance .....	17
Delivery dockets and daily run sheets for contract cartage .....	18
Findings.....	18
Scope of the FOI Application .....	19
The applicant's submissions .....	19
Relevant law.....	21
Findings.....	21
DECISION.....	23

## REASONS FOR DECISION

### Summary

1. Banana Shire Council (**Council**) operates a quarry on property owned by a third party (**Quarry Owner**). The applicant requested information relating to the extraction of gravel from a pit located on that property (**Gravel Pit**).
2. A number of issues have been informally resolved during the course of this external review and Council has located and agreed to provide a number of additional documents to the applicant. This decision relates to the issues remaining for determination.
3. For the reasons set out below, I vary the decision under review by finding that:
  - information relating to an individual's course of study as it appears in a tender submission is exempt from disclosure under section 44(1) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**)
  - figures relating to the extraction of gravel from the Gravel Pit are not exempt from disclosure under section 45(1)(c) of the FOI Act
  - access to some of the requested documents can be refused under section 28A(1) of the FOI Act.
  - the additional documents the applicant has requested on external review fall outside the scope of the applicant's initial request for documents.

### Background

4. By letter dated 14 April 2008, the applicant requested information from Council under the FOI Act which related to the extraction of gravel from the Gravel Pit (**FOI Application**).
5. By letter dated 2 June 2008, the Chief Executive Officer (**CEO**) of Council issued a considered decision<sup>1</sup> advising the applicant that Council had:
  - located a number of documents responding to her FOI Application
  - decided to:
    - release a number of documents to her
    - refuse her access to a number of the requested documents under sections 28A and 46(1)(a) of the FOI Act
    - delete some matter from the documents under section 27(3) of the FOI Act as it was irrelevant to the FOI Application.
6. As Council's CEO made the considered decision, the applicant was not entitled to apply for internal review of the decision.<sup>2</sup>
7. By letter dated 19 June 2008, the applicant applied to the Information Commissioner for external review of the considered decision, providing various supporting documents.

---

<sup>1</sup> In accordance with section 27B(4) of the FOI Act.

<sup>2</sup> Section 52(3)(b) of the FOI Act.

### **Decision under review**

8. The decision under review is the considered decision dated 2 June 2008 referred to at paragraph 5 above.

### **Steps taken in the external review process**

9. By letter dated 8 August 2008, the applicant made submissions to the Office of the Information Commissioner (**Office**) in support of her case.
10. On 24 September 2008, a staff member of the Office telephoned Council and requested a copy of the documents claimed to qualify for exemption.
11. By letter dated 8 October 2008, Council forwarded the requested documents to the Office.
12. By letter dated 18 November 2008, I advised Council that the decision would be reviewed.
13. By letter dated 25 November 2008, I advised the applicant that the decision would be reviewed.
14. By letter dated 3 December 2008, I asked Council to conduct searches for the requested documents and to provide further information in relation to matters raised by the applicant.
15. By letter dated 18 December 2008, Council requested an extension of time to process the request at paragraph 14 above.
16. By letter dated 22 December 2008, I agreed to extend the period for Council to respond to the request.
17. Under cover of letter dated 8 January 2009, Council provided various documents to the Office which were located as a result of further searches and provided submissions in support of its case. Council claimed that some of the documents it had located were exempt from disclosure under sections 45 and 46 of the FOI Act or contained '*irrelevant matter*' which should be deleted under section 27(3) of the FOI Act.
18. By letters dated 20 April 2009, the Office consulted two third parties in relation to the possible release under the FOI Act of parts of the matter in issue to the applicant. Those parties were invited to provide submissions in support of their case if they objected to release of the documents.
19. By letter dated 26 April 2009, one of the third parties wrote to the Office to express general concern about the information being released to the applicant. By letter dated 12 June 2009, I wrote to the third party in response to that issue.
20. On 27 April 2009 and 28 April 2009, a staff member of the Office spoke with one of the third parties who indicated that they objected to release of the documents and made submissions in support of their case.
21. On 5 May 2009, a staff member of this Office spoke with the other third party who indicated that they objected to disclosure of the documents and made submissions in support of their case.

22. On 8 May 2009 and 12 May 2009, a staff member of the Office spoke with the Quarry Owner and advised her of the possible release of documents under the FOI Act to the applicant. The Quarry Owner indicated that she objected to release of some of the information.
23. By letters dated 4 June 2009 and 5 June 2009, I provided the third parties with a preliminary view and invited each of the third parties to provide submissions in support of their case if they did not accept my preliminary view. I indicated that if I did not hear from the third parties to the contrary by 19 June 2009, I would proceed on the basis that they accepted my preliminary view and no longer maintained their objection to release of the relevant documents.
24. By letter dated 5 June 2009, I provided the applicant with a preliminary view and invited her to make submissions in support of her case if she did not accept my preliminary view. I advised the applicant that if I did not hear from her to the contrary by 19 June 2009, I would proceed on the basis that she accepted my preliminary view, that those matters were no longer in issue in this external review and that she did not wish to make any further submissions.
25. By letter dated 12 June 2009, I provided Council with a copy of the preliminary view letters sent to the applicant, the third parties and the Quarry Owner and invited Council to provide submissions in support of its case if it did not accept any aspect of my preliminary view. Council did not provide further submissions to this Office in relation to its initial claim that some of the matter in issue was exempt under sections 45 and 46 of the FOI Act or contained '*irrelevant matter*' which should be deleted under section 27(3) of the FOI Act. Council is therefore deemed to have accepted my preliminary view and to have withdrawn its claim in relation to the application of sections 45, 46 and 27(3) of the FOI Act.
26. By letter dated 18 June 2009, the applicant requested an extension of time to respond to the preliminary view. I agreed to extend the period of time as requested.
27. On 26 June 2009, the Office received a partial facsimile of six pages from the applicant in response to the preliminary view. A staff member of the Office telephoned the applicant to advise that only six pages of the facsimile had been received. The applicant indicated the remaining pages would be faxed to the Office by 29 June 2009. On 29 June 2009, a staff member of the Office left a message for the applicant to contact the Office. The applicant did not make further contact with the Office at this time.
28. A staff member of the Office telephoned Council on 8 July 2009 and requested further information relevant to the review.
29. In a telephone conversation with a staff member of the Office on 17 July 2009, Council advised that it had located a number of additional documents responding to the FOI Application which it was prepared to release to the applicant, subject to any third party objections.
30. By facsimile on 17 July 2009, Council provided further submissions to the Office in support of its case and forwarded a copy of the additional documents it had located.
31. On 20 July 2009, a staff member of the Office contacted Council to clarify some of the information provided in the letter at paragraph 30 above.

32. By email on 20 July 2009, Council provided further submissions to the Office in support of its case.
33. By letter dated 30 July 2009, I advised the applicant that as the third parties had not provided submissions in response to my preliminary view, she would receive a large number of the documents she had requested. I provided the applicant with a further preliminary view in relation to the remaining documents. The applicant was invited to provide submissions in support of her case if she did not accept my preliminary view. I indicated to the applicant that unless I heard from her to the contrary by 14 August 2009, I would proceed on the basis that she accepted my preliminary view in resolution of the issues remaining in the review.
34. On 14 August 2009, the Office received a facsimile from the applicant in response to the further preliminary view.
35. On 18 and 19 August 2009, a staff member of the Office spoke to the Quarry Owner to determine whether she objected to release of the additional documents to the applicant. The Quarry Owner indicated that she objected to release of those documents and requested an extension of time to provide submissions in support of her case. I agreed to extend the period for the Quarry Owner to provide those submissions.
36. By letter dated 28 August 2009, the Quarry Owner provided submissions in support of her case.
37. On 23 September 2009, a staff member of the Office telephoned a staff member of Council to request further information relevant to the review.
38. On 24 September 2009, a staff member of Council telephoned the Office to provide the information requested at paragraph 37 above.
39. On 25 September 2009, a staff member of the Office contacted a staff member of Council to discuss matters relevant to the review.
40. The FOI Act was repealed by the *Right to Information Act 2009 (RTI Act)*<sup>3</sup> which commenced on 1 July 2009.<sup>4</sup> However, because the FOI Application was made under the FOI Act and has not yet been finalised, for the purposes of making a decision in this review, I am required to consider the application of the FOI Act (and not the RTI Act) to the matter in issue.<sup>5</sup>
41. In making my decision in this review, I have taken into account the following:
  - the FOI application dated 14 April 2008
  - Council's considered decision dated 2 June 2008
  - the applicant's external review application dated 19 June 2008
  - the applicant's submissions dated 8 August 2008 and the submissions received by this Office on 26 June 2009 and 14 August 2009
  - a file note of a conversation with the applicant on 19 June 2009
  - Council's submissions dated 8 October 2008, 8 January 2009, 17 July 2009 and 20 July 2009
  - file notes of conversations with Council staff dated 24 September 2008, 17 July

---

<sup>3</sup> Section 194 of the RTI Act.

<sup>4</sup> With the exception of sections 118 and 122 of the RTI Act.

<sup>5</sup> Section 199 of the RTI Act.

2009, 24 September 2009 and 25 September 2009

- file notes of conversations with the Quarry Owner on 8 May 2009, 12 May 2009, 18 August 2009 and 19 August 2009
- the Quarry Owner's submissions dated 28 August 2009
- the matter in issue
- relevant provisions of the FOI Act and previous decisions of the Information Commissioner, as referred to in this decision.

### Issues for determination

42. The remaining issues for determination in this review are:

- Part A - Refusal of access:
  - whether information about an employee's course of study is exempt from disclosure under section 44(1) of the FOI Act
  - whether figures relating to the extraction of gravel from the Gravel Pit are exempt from disclosure under section 45(1)(c) of the FOI Act.
- Part B - Sufficiency of search:
  - whether access to some of the requested documents can be refused under section 28A(1) of the FOI Act
  - whether the additional documents the applicant has requested on external review fall outside the scope of the FOI Application.

### Part A - Refusal of access

#### *Information about an employee's course of study*

43. This issue relates to whether information about an employee's course of study as it appears in a document provided to Council as part of a tender submission is exempt from disclosure under section 44(1) of the FOI Act.

#### Relevant law

44. Section 44(1) of the FOI Act provides:

#### **44 Matter affecting personal affairs**

(1) *Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.*

45. Section 44(1) therefore requires me to consider the following questions in relation to the matter in issue:

- Firstly, does the matter in issue concern the personal affairs of person/s (other than the applicant)? (**Personal Affairs Question**) If so, a public interest consideration favouring non-disclosure of the matter in issue is established.
- Secondly, are there public interest considerations favouring disclosure of the matter in issue which outweigh all public interest considerations favouring non-disclosure of the matter in issue? (**Public Interest Question**)

### **Personal Affairs Question**

46. In *Stewart and Department of Transport (Stewart)*<sup>6</sup> the Information Commissioner discussed in detail the meaning of the phrase 'personal affairs of a person' (and relevant variations) as it appears in the FOI Act. In particular, he said that information concerns the 'personal affairs of a person' if it concerns the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase 'personal affairs', that phrase has a well accepted core meaning which includes:
- family and marital relationships
  - health or ill-health
  - relationships and emotional ties with other people
  - domestic responsibilities or financial obligations.
47. Whether or not matter contained in a document comprises information concerning an individual's personal affairs is essentially a question of fact, to be determined according to the proper characterisation of the information in question.
48. The Information Commissioner also noted in *Stewart* that:
- for information to be exempt under section 44(1) of the FOI Act, it must be information which identifies an individual or is such that it can readily be associated with a particular individual<sup>7</sup>
  - information, such as a person's name, must be characterised according to the context in which it appears.<sup>8</sup>

### **Public Interest Question**

49. The 'public interest' refers to considerations affecting the good order and functioning of community and governmental affairs, for the well-being of citizens. In general, a public interest consideration is one which is common to all members of the community, or a substantial segment of them, and for their benefit. The public interest is usually treated as distinct from matters of purely private or personal interest. However, some recognised public interest considerations may apply for the benefit of individuals in a particular case.
50. In *Fox and Department of Police*,<sup>9</sup> the Information Commissioner indicated that:

*Because of the way that section 44(1) of the FOI Act is worded and structured, the mere finding that information concerns the personal affairs of a person other than the applicant for access must always tip the scales against disclosure of that information (to an extent that will vary from case to case according to the relative weight of the privacy interests attaching to the particular information in issue in the particular circumstances of any given case), and must decisively tip the scales if there are no public interest considerations which tell in favour of disclosure of the information in issue. It therefore becomes necessary to examine whether there are public interest considerations favouring disclosure, and if so, whether they outweigh all public interest considerations favouring non-disclosure.*

---

<sup>6</sup> (1993) 1 QAR 227. See in particular paragraphs 79 – 114.

<sup>7</sup> At paragraph 81.

<sup>8</sup> At paragraph 90. See also paragraphs 21 – 23 of *Pearce and Queensland Rural Adjustment Authority; Various Landowners (Third Party)* (1999) 5 QAR 242.

<sup>9</sup> (2001) 6 QAR 1 at paragraph 19.



## The applicant's submissions

51. The applicant made the following submissions on the Public Interest Question:

*The employees are required by law to have specific training and specific licences to work in a quarry and on and beside roads. EPA Act 1994 WH&S REGs 2008 Integrated Planning Act 1997 Banana shire council own occupational health and safety requirements. The relevant licence is of public interest, if the required training and licence are not in place then the general public are at risk along with business associated with any council tenders or quarry operations.*

## Findings

### Personal Affairs Question

52. In *Griffiths and Building Services Authority (Griffiths)*<sup>10</sup>, the Information Commissioner said:<sup>11</sup>

*In my view, the decision to undertake a course of study at a public or private educational institution, the time and effort expended in its pursuit, and the subject results thereby obtained, fall within the realm of an individual's personal affairs (notwithstanding that the study may have been undertaken as a step towards acquiring trade, professional or employment qualifications).*

53. For the reasons set out in *Griffiths*, I am satisfied that the relevant matter in issue:

- relates to an individual's course of study and is therefore characterised as concerning the individual's personal affairs
- is *prima facie* exempt from disclosure under section 44(1) of the FOI Act.

### Public Interest Question

54. Where matter is *prima facie* exempt from disclosure under section 44(1) of the FOI Act, it is exempt '*unless its disclosure would, on balance, be in the public interest*'.
55. The matter in issue appears in a tender document, that is, a document that is submitted prior to contracts being awarded. Public interest arguments such as those raised in the applicant's submissions do not arise in these circumstances because the relevant document does not disclose information about work being performed.
56. Tenderers are not accountable to the public for the contents of their tenders. Rather, it is a consequence of those documents being in the possession of Council that any person has a right to obtain access to them under the FOI Act (though subject to the Act).<sup>12</sup> However, local government authorities are accountable to the public regarding the decisions they make to award tenders for the performance of work that is to be paid for from public funds. Government agencies must be able to demonstrate that tender processes have been carried out fairly and equitably, and that the successful tenderers were the best candidates, in terms of efficiency, effectiveness and economy in the delivery of services to be paid for from public funds.<sup>13</sup>

<sup>10</sup> (Unreported, Queensland Information Commissioner, 31 August 1998).

<sup>11</sup> At paragraph 17.

<sup>12</sup> Which means the information cannot be accessed if it, for example, qualifies for exemption under the FOI Act.

<sup>13</sup> *Wanless Wastecorp and Caboolture Shire Council; JJ Richards & Sons Pty Ltd (Third party)* (2003) 6 QAR 242 at paragraph 145.

57. I am satisfied that:

- the public interest in Council being accountable for the tender process in this matter is met by disclosure of a significant amount of the information in the tender documents
- disclosure of the information concerning an individual's course of study does not advance the public interest in Council's accountability in this tender process.

58. Where information is *prima facie* exempt from disclosure under section 44(1) of the FOI Act, there is a strong public interest in protecting the personal privacy of the individual. The public interest in persons having access to information held by government and promoting the ideals of accountable and transparent government often carries less weight when the matter in issue constitutes personal information concerning private individuals (as is the case in this review), rather than information held by the government about the government.

59. Having considered the above, I am satisfied that there are no public interest considerations favouring disclosure of this information and the matter is exempt from disclosure under section 44(1) of the FOI Act.

#### ***Figures relating to the extraction of gravel***

60. This issue relates to whether figures relating to the extraction of gravel from the Gravel Pit are exempt from disclosure under section 45(1)(c) of the FOI Act.

61. The figures relating to the extraction of gravel from the Gravel Pit appear in the following documents:

- gravel tally sheets
- recipient created tax invoices
- job ledgers
- a table showing payments made to the Quarry Owner.

#### **Relevant law**

62. Section 45(1)(c) of the FOI Act provides:

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

(1) Matter is exempt matter if—

...

(c) its disclosure—

- (i) would disclose information (other than trade secrets or information mentioned in paragraph (b)) concerning the business, professional, commercial or financial affairs of an agency or another person; and
- (ii) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to government;

*unless its disclosure would, on balance, be in the public interest.*

63. The Information Commissioner explained the application of section 45(1) of the FOI Act in *Cannon* and observed that section 45(1) is the primary vehicle for reconciling the main objects of the FOI Act (i.e. promoting open and accountable government administration, and fostering informed public participation in the processes of government) with legitimate concerns for protecting commercially sensitive information.<sup>14</sup> The basic object of the provision is to provide a means whereby the general right of access to documents in the possession or control of government agencies can be prevented from causing unwarranted commercial disadvantage to:
- persons carrying on commercial activity who supply information to government, or about whom government collects information
  - agencies which carry on commercial activities.
64. To be *prima facie* exempt under section 45(1)(c) of the FOI Act:
- the matter in issue must be properly characterised as information concerning the business, professional, commercial or financial affairs of an agency or another person
  - it must be determined that disclosure of the matter in issue could reasonably be expected to have either of the prejudicial effects contemplated by section 45(1)(c)(ii), namely:
    - an adverse effect on the business, professional, commercial or financial affairs of the agency or other person, which the information in issue concerns or
    - prejudice to the future supply of such information to government.
65. If these requirements are established, the information will qualify for exemption, unless disclosure would, on balance, be in the public interest.
66. The common link between the words 'business, professional, commercial or financial' in section 45(1)(c) is to activities carried on, at least to some degree, for the purpose of generating income or profits.
67. In *Cannon* the Information Commissioner made the following observations:<sup>15</sup>
- An adverse effect under section 45(1)(c) will almost invariably be financial in nature, whether directly or indirectly (e.g. an adverse effect on an entity's 'business reputation or goodwill ... is feared ultimately for its potential to result in loss of income or profits, through loss of customers').
  - If information is already in the public domain or is common knowledge in the industry, it would ordinarily be difficult to show that disclosure of the information could reasonably be expected to have an adverse effect.
  - In most instances the question of whether disclosure of information could reasonably be expected to have an adverse effect will turn on whether the information is capable of causing competitive harm to the relevant entity – a relevant factor in this is whether the entity enjoys a monopoly position or whether it operates in a commercially competitive environment.

<sup>14</sup> *Cannon and Australian Quality Egg Farms Ltd* (1994) 1 QAR 491 (**Cannon**) at paragraph 27.

<sup>15</sup> At paragraphs 82-84.

68. The term 'could reasonably be expected to' in section 45(1)(c) of the FOI Act, requires a decision-maker to consider whether the expectation claimed, that is, either of the prejudicial effects contemplated by section 45(1)(c)(ii), is reasonably based.<sup>16</sup>

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

69. By letter received by the Office on 14 August 2009, the applicant made the following submissions in relation to the royalty payments:

*These payments are not personal payments they are the payments of a business activity that will verify the amount of gravel removed from [the Gravel Pit]. These payments, I know will contradict what council has supplied as their tally sheets.*

*The council have already supplied some of these records and therefore should have no problem with supplying the rest of the information.*

*If these payments relate to Royalty payments received from other people/business and have been paid to the council, then they are directly related to the quantities of material taken from [the Gravel Pit] (BSC quarry operations). These documents will also quantify the amount of material taken from [the Gravel Pit] and would not be on the BSC tally sheets.*

*The public interest in this case is the non compliance of the council in relation to the efficient and legal running of this particular quarry.*

*The \$ value is also required for the material quantities as it is also of public interest whether the council are wasting rate payers money in operating a quarry of its own. Also the \$ paid should reflect the quantities of material removed from the quarry.*

*The public need to know the council are using the correct standard of materials on their roads and are not wasting the public's money or putting the public at risk of accidents.*

*... council were the ones that stated in previous FOI paperwork they charged standard rates for Royalties. They pay many different people royalties for material obtained from their properties; There has to be documentation in relation to what they pay each different person. The quality of the material changes from property to property.*

...

*The council need to be transparent with this as the residents of the shire are paying for this material to be extracted, carted and then placed on their local roads. The public should be entitled to know the council have the public's best interest in mind by using their inferior material on the local roads. There are local quarries which supply materials that are to main roads specifications at a reasonable price. The public should be aware of what and why the council are paying for this material.*

*Also the royalty payments will provide the truth about the quantities of materials removed from this quarry. They will either support the council's documents (run sheets) or they won't.*

### **The Quarry Owner's submissions**

70. By letter dated 28 August 2009, the Quarry Owner provided the following submissions in support of her objection to the release of the relevant information:

---

<sup>16</sup> See *Attorney-General v Cockcroft* (1986) 64 ALR 97 (**Cockcroft**) at 106 and consideration of *Cockcroft* in the context of section 42(1)(ca) in *Sheridan and Dalby Regional Council and Others* (Unreported, Queensland Information Commissioner, 9 April 2009).

*My concern in releasing figures re the gravel pit is that the information is commercially sensitive and the release of such information to a competitor could be detrimental to my business.*

## **Findings**

71. The relevant matter in issue relates to the extraction of gravel from the Gravel Pit and the payment of gravel royalties to the Quarry Owner from Council. Specifically, the information comprises:
- the quantity of gravel extracted by Council
  - the price per unit for gravel royalty payments
  - payment information including payments to be paid to the Quarry Owner, the payments actually made to the Quarry Owner, the date the payments were made, the payment method and the progressive totals of those payments.

### ***Information concerning business affairs***

72. I am satisfied that the matter in issue relates to the Quarry Owner's business and financial affairs as she operates the Quarry as a business for profit.

### ***The quantity of gravel extracted by Council***

73. In a telephone conversation on 8 May 2009 with a staff member of this Office, the Quarry Owner advised that she was not concerned about the release of information which would disclose the quantity of gravel extracted by Council.
74. In any event, and in the absence of any specific submissions on the issue, I am unable to contemplate how disclosing information of this nature could reasonably be expected to have either of the prejudicial effects set out in section 45(1)(c)(ii). Accordingly, I do not consider that this information would qualify for exemption under section 45(1)(c) of the FOI Act.

### ***The price per unit***

75. Council submits that it pays royalties for materials obtained from private property at a fixed rate. Council has agreed to release information to the applicant about the rate per unit for gravel royalty payments. This information is also publicly available.
76. Based on my review of the matter in issue, it appears that the rate that the Quarry Owner is paid by Council accords with the fixed rate. Therefore, I am not satisfied that this information is commercially sensitive or that its release to a competitor could be detrimental to the Quarry Owner's business or financial affairs.
77. Therefore, I am satisfied that this information is not exempt from disclosure under section 45(1)(c) of the FOI Act.

### ***Payment information***

78. The relevant payment information relates to the payments to be paid to the Quarry Owner, the payments actually made to the Quarry Owner, the date the payments were made, the payment method and the progressive totals of those payments.

79. Council has already provided the applicant with partial copies of some invoices which show the quantity of gravel extracted and the price per unit. As the dollar amount in these folios can be ascertained from the information already provided to the applicant, that is, by multiplying the quantity of gravel extracted and the price per unit, I do not consider that there is any basis for considering that the dollar amount in these folios could be exempt from disclosure under section 45(1)(c) of the FOI Act.
80. I do not consider the calculation and payment of royalties is conducted in a competitive commercial environment. This is because Council indicates that it pays royalties at a fixed rate and on this basis, everyone in the area who supplies gravel to Council would be expected to receive royalty payments in accordance with that fixed rate. I am unable to contemplate how any aspect of that agreement would be conducted on a competitive basis. For that reason, I am satisfied that disclosure of the payment information could not reasonably be expected to have an adverse effect on the Quarry Owner's business or financial affairs.
81. I am satisfied that disclosure of the payment information could not reasonably be expected to prejudice the future supply of such information to government. It is an inevitable consequence of doing business with Council that Council will collect and compile information about its operations and I do not consider that disclosure of such information could reasonably be expected to discourage people from doing business with Council or supplying related information.
82. For the reasons set out above, I find that the figures relating to the Gravel Pit are not exempt from disclosure under section 45(1)(c) of the FOI Act. Accordingly, the gravel tally sheets, recipient created tax invoices, job ledgers and table showing payments made to the Quarry Owner are to be released to the applicant (with the exception of a small amount of information which I am satisfied falls outside the scope of the FOI Application).<sup>17</sup>
83. Although I am not required to consider the public interest balancing test (as I am satisfied that the matter in issue does not qualify for exemption under section 45(1)(c) of the FOI Act), I note that the public interest in promoting the accountability and transparency of government decisions and conduct in relation to expenditure of public monies should be accorded considerable weight. It has been observed that:<sup>18</sup>

*The public must be able to scrutinise the actions and expenditure of the government if it is to make judgements as to a government's effectiveness and participate meaningfully in the political process.*

84. Access to information under the FOI Act is one important avenue for enabling public scrutiny of government activity and thus enhancing accountability and transparency. Accordingly, the public interest in expenditure of public funds in royalty payments would ordinarily be accorded considerable weight.

---

<sup>17</sup> Some of the information contained in the job ledgers falls outside the scope of the FOI Application as the entries do not relate to the Gravel Pit. Several entries on the table showing payments made to the Quarry Owner fall outside the scope of the FOI Application as they relate to payments which post date the FOI Application. Under section 25(3) of the FOI Act an application is taken only to apply to documents in existence on the day the application is received.

<sup>18</sup> Senate Finance and Public Administration References Committee, *Commonwealth Contracts: A New Framework for Accountability*, Canberra, 2001 at paragraph 2.1 at [http://www.aph.gov.au/Senate/committee/fapa\\_ctte/completed\\_inquiries/199902/dept\\_agency\\_contracts/report2/report1.pdf](http://www.aph.gov.au/Senate/committee/fapa_ctte/completed_inquiries/199902/dept_agency_contracts/report2/report1.pdf) on 30 September 2009.

## Part B – Sufficiency of search

### *Whether some of the requested documents exist*

85. This issue relates to whether access to the following documents can be refused under section 28A(1) of the FOI Act:
- contracts given out by Council for extracting, crushing, screening and carting material from the Gravel Pit since 1/10/2004 (including letters of acceptance to the contractors)
  - delivery dockets from contractors for quantise of materials carted on behalf of Council from the quarry and daily run sheets for contract cartage.

### Relevant law

86. Section 28A(1) of the FOI Act relevantly provides:

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

- (1) *An agency or Minister may refuse access to a document if the agency or Minister is satisfied the document does not exist.*

*Example—  
documents that have not been created*

87. In *PDE and the University of Queensland*<sup>19</sup> (**PDE**) the Acting Information Commissioner indicated that:<sup>20</sup>

*Sections 28A(1) and (2) of the FOI Act address two different scenarios faced by agencies and Ministers from time to time in dealing with FOI applications: circumstances where the document sought does not exist and circumstances where a document sought exists (to the extent it has been or should be in the agency's possession) but cannot be located. In the former circumstance, an agency or Minister is required to satisfy itself that the document does not exist. If so satisfied, the agency or Minister is not required by the FOI Act to carry out all reasonable steps to find the document. In the latter circumstance an agency or Minister is required to satisfy itself that the document sought exists (to the extent that it has been or should be in the agency's possession) and carry out all reasonable steps to find the document before refusing access.*

88. In *PDE* the Acting Information Commissioner also considered how an agency is to satisfy itself as to the non-existence of documents sought by an applicant and found that to be satisfied that a document does not exist, it is necessary for the agency to rely upon its particular knowledge and experience with respect to various key factors including:

- the administrative arrangements of government
- the agency structure
- the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it)
- the agency's practices and procedures (including but not exclusive to its information management approach)
- other factors reasonably inferred from information supplied by the applicant including:

<sup>19</sup> (Unreported, Queensland Information Commissioner, 9 February 2009).

<sup>20</sup> At paragraph 34.

- the nature and age of the requested document/s
- the nature of the government activity the request relates to.

89. Section 28A(1) is silent on the issue of how an agency is to satisfy itself that a document does not exist. When proper consideration is given to the key factors discussed above and a conclusion reached that the document sought does not exist, it may be unnecessary for the agency to conduct searches. However, where searches are used to substantiate a conclusion that the document does not exist, the agency must take all reasonable steps to locate the documents sought.

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

90. During the course of this external review, the applicant made submissions stating that she considers Council has not provided her with:

- letter of acceptance to contractor
- all other contracts and tenders (including quoted prices for crushing and screening at the quarry)
- delivery dockets from contractors for quantise of materials carted on behalf of Council from the quarry
- daily run sheets for contract cartage.

### **Contractual documents**

91. By letter received by the Office on 14 August 2009, the applicant made the following general submissions in relation to the contracts:

*The completed contracts for the winning tenders are required and have not been supplied. These projects are long since finished. No one could gain financially from viewing them.*

### **Delivery dockets**

92. By letter received by the Office on 14 August 2009, the applicant made the following general submissions in relation to the delivery dockets:

*Delivery dockets which specify materials supplied per load are also available for this contract and have been called for.*

...

*Any council also require delivery dockets for supplies from any supplier for any goods. All quarries have to keep delivery records to be compliant with their EPA quarry licence.*

...

*All councils require delivery dockets to accompany any loads of materials carted or purchased. In the case of tender so the council are receiving the correct amounts of material to which the tender calls for. Also so they are not being charged for the wrong quantity of materials. Also so the correct amount of material is used on the specific project. I.e. build the roads to the required legal standards for the safety of the general public. Also 99% of all business provide purchase orders and delivery dockets as a standard practice.*

...

*All quarries who deliver materials have to have a weighing system and delivery docket system. All have to comply with main road standards for sales of their products used in road building. Ie Main roads jobs.*



### **Daily run sheets for contract cartage**

93. By letter received by the Office on 14 August 2009, the applicant made the following submissions in relation to the daily run sheets for contract cartage:

*The material had to be documented each day **some how**, as the material was being carted from the site while it was still being produced. If it was not measured in any way, then HOW did the contractor know when to stop producing material and how did the council know that what they had been charged was for the correct amount of material produced by the contractor.*

...

*Again these documents are very relevant as these documents will prove that council are deliberately not supplying requested paperwork.*

*They are relevant as they prove there are more tally sheets for the [Gravel Pit].*

### **Council's submissions**

94. Council has described the searches it conducted for documents responding to the FOI Application as follows:

*In response to Ms Rolfe's submission for documents that should have been provided to her, please be advised that Council has conducted extensive searches in the following locations in trying to locate further information in response to some of Ms Rolfe's additional requests:*

*Physical searches have been conducted in Council's:*

- *Records Management Room (approximately 20 archive boxes);*
- *Records Store Room (over 100 filing folders each between 4cm and 10cm thick)*
- *Records Shed (over 300 archive boxes);*
- *Archives Building (over 100 archive boxes); and*
- *Depot Office (currently being renovated with a number of Records in various locations*

*Electronic searches have been conducted in:*

- *DataWorks (Council's EDRMS);*
- *Council's IT networks drives;*
- *Lotus Notes (Council's former financial management system); and*
- *Practical (Council's current financial management system).*

*There have been a number of meetings with various staff members involved in identifying what information is obtainable and relevant. The total hours spent searching and discussing this external review to date is estimated at 27 hours. A further 25 hours was spent compiling information, co-ordinating meetings, referring to the FOI Act and drafting up documents.*

### **Contracts and letters of acceptance**

95. Council submits that contracts for extracting, crushing, screening and carting material from the Gravel Pit (including letters of acceptance to the contractors) do not exist and has explained that:

- Activities such as crushing and screening of materials were carried out under tender QT07/08-0005.
- Letters of acceptance to the contractor were not drafted as the contractor was advised verbally.
- Council staff verbally advised the tenderers of Council's requirements and advised of the quantities and timeframes at the same time.
- Haulage of materials was carried out separate to the contract. Council hauls the materials itself and if it does get additional trucks, these are engaged under a prequalified suppliers list (for which Council does not keep paperwork).

96. In a separate but related external review to which the applicant is a party,<sup>21</sup> Council provided the following explanation in its decision dated 11 July 2008 in relation to the relevant tender process:

*Tender number QT07/08-0005 is a standing offer arrangement. Council's procedure in relation to standing offer arrangements is as follows:*

1. *Contract called*
2. *Tenders assessed and ranked in order of preference in accordance with weighing factors*
3. *Selection of appropriate contractor based on rank and availability by Project Manager*
4. *The next appropriate contractor on the list is approached if initial selection is unavailable*

#### ***Delivery dockets and daily run sheets for contract cartage***

97. Council submits that delivery dockets and daily run sheets for contract cartage do not exist and has explained that:

- Information about the extraction and haulage of gravel from the Gravel Pit is recorded in the Gravel Tally Sheets.
- Council uses the Gravel Tally Sheets to calculate the royalties payable to the Quarry Owner and also for internal job costing etc.
- Contractors keep their own records in relation to the extraction and haulage of gravel but Council does not obtain these records.
- Council does not have delivery dockets or daily run sheets as the only relevant information relating to the quantities of gravel extracted and hauled is recorded in the Gravel Tally Sheets.

#### **Findings**

98. I have carefully considered the information provided by Council in relation to the existence of:

- contracts for the tender process and letter of acceptance
- delivery dockets and daily run sheets for contract cartage.

---

<sup>21</sup> External review 210609.

99. In relation to the contracts for the tender process and letters of acceptance, I am satisfied that:

- the relevant tender process resulted in a standing offer arrangement
- due to the nature of Council's procedures in relation to standing offer arrangements, Council did not create a written contract with any one of the tenderers or provide them with a letter of acceptance.

100. Further, I am satisfied that Council's searches have been extensive and comprehensive in the circumstances and that Council has taken all reasonable steps to locate the contracts for the tender process to which the applicant seeks access.

101. Accordingly, I find that:

- there are reasonable grounds for Council to be satisfied that the contracts and letters of acceptance do not exist
- access to the requested contracts and letters of acceptance can be refused under section 28A(1) of the FOI Act.

102. In relation to the delivery dockets and daily run sheets for contract cartage, I accept Council's submissions that:

- it does not create these documents or obtain such records from contractors
- the only documents which record information about the quantities of gravel extracted and hauled from the Gravel Pit are the Gravel Tally Sheets.

103. The extent of the searches undertaken by Council and the outcomes also afford weight to Council's submissions.

104. Accordingly, I am satisfied that:

- there are reasonable grounds for Council to be satisfied that the delivery dockets and daily run sheets for contract cartage do not exist
- access to the requested documents can be refused under section 28A(1) of the FOI Act.

### ***Scope of the FOI Application***

105. This issue relates to whether the additional documents the applicant has requested on external review fall within the scope of the FOI Application.

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

106. During the course of this external review, the applicant made submissions stating that she considers Council has not provided her with all the relevant documents. A number of those submissions have been previously dealt with in this external review.<sup>22</sup> The remaining documents the applicant claims should be provided to her are as follows:

---

<sup>22</sup> The issues relating to the applicant's submissions about delivery dockets and daily run sheets are dealt with at paragraphs 85 to 104 above. Council has located documents relating to the applicant submissions about job costing information and access to those documents is dealt with at paragraphs 60 to 84 above.

- In relation to Item A of the FOI Application:
  - Council's old 'standard royalty payment list' for property owners
  - Council's new 'standard royalty payment list' for property owners
  - list of borrowed material quantities for the quarry
  - all work sheets for borrowed materials
  - allocation of borrowed materials
  - correspondence and communications between Council and the property owner in relation to borrowed materials
  - documentation for repaying of borrowed materials.
  
- In relation to Item C of the FOI Application:
  - copies of all incoming (private works) purchase orders or requests for material from the quarry
  - all Council internal purchase orders or internal requests for material from the quarry
  - copy of purchase orders to contract carters for material quantities to be carted from the quarry
  - all Council diesel supply run sheets for the quarry (including amounts supplied to each machine and delivery date supplied)
  - all Council daily work sheets for machinery operation in the quarry
  - all separate contractor daily work sheets for machinery operation in the quarry
  - all daily work sheets for contractor for crushing and screening amounts
  - all purchase orders for crushing and screening contractor for the quarry
  - all purchase orders for all cartage of materials from the quarry
  - all site inspection documents for the quarry
  - all site inspection documents for crushing and screening operations at the quarry
  - all material measurement documents in relation to crushing and screening at the quarry
  - all material test results for materials crushed and screened at the quarry
  - all material test results for any material used by Council for road building
  - all material test results for material removed from the quarry
  - documents for sale of material from the quarry
  - documents in relation to cartage of the material from the quarry by contractors
  - documents in relation to material allocations.
  
- In relation to Item D of the FOI Application:
  - details of all phone conversations in relation to the quarry operations
  - all office file notes in relation to the Quarry Owner and the quarry operations.
  
- In relation to Item E of the FOI Application:
  - all details and correspondence re 'arrangements' i.e. take it as you need it arrangement
  - full details how this arrangement works.

107. On 14 August 2009, the applicant provided further submissions relating to these documents. The submissions set out why the requested documents are important in terms of what they will demonstrate and why they should be provided. However those submissions do not relate to the question of whether the requested documents fall within the scope of the FOI Application. Therefore I consider those submissions are not relevant to the issues for determination in this decision.

### **Relevant law**

108. Section 25 of the FOI Act relevantly states:

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

- (1) *A person who wishes to obtain access to a document of an agency or an official document of a Minister under this Act is entitled to apply to the agency or Minister for access to the document.*
- (2) *The application must—*
- ...
- (b) *provide sufficient information concerning the document to enable a responsible officer of the agency or the Minister to identify the document; and*
- ...

### **Findings**

109. Under section 25(2)(b) of the FOI Act an applicant must, at the time of making the FOI application, provide sufficient information concerning the documents sought to enable a responsible officer of an agency to identify the documents. There are sound practical reasons for the documents sought in an FOI application being clearly and unambiguously identified. On this point the Information Commissioner has previously said:<sup>23</sup>

*The terms in which an FOI access application is framed set the parameters for an agency's response under Part 3 of the FOI Act, and in particular set the direction of the agency's search efforts to locate all documents of the agency which fall within the terms of the FOI access request. The search for relevant documents is frequently difficult, and has to be conducted under tight time constraints. Applicants should assist the process by describing with precision the document or documents to which they seek access. Indeed the FOI Act itself makes provision in this regard with s.25(2) not only requiring that an FOI access application must be in writing, but that it must provide such information concerning the document to which access is sought as is reasonably necessary to enable a responsible officer of the agency to identify the document.*

110. The applicant's FOI Application was relatively specific. The applicant states relevantly in her FOI Application:

*I am requesting the following documents:*

*All documents: pertaining to [a particular lot] in regards to extracting gravel.*

*Property owner: [name and address of Quarry Owner]*

- A) *contracts between Council and owners of the above property relating to the*

---

<sup>23</sup> Cannon at paragraph 8.

*property's gravel pit*

- B) *all records of royalty payments from Council to [the Quarry Owner] or pertaining to the property from 1/09/2004 to 4/42009*
- C) *all documents pertaining to quantise of road building material removed from the property by Council since 1/09/2004*
- D) *all correspondence to and from Council and the owners of this property in relation to any quarry or extracting materials from the property*
- E) *all tenders and contracts given out by Council for extracting, crushing, screening and carting material from [the Gravel Pit] since 1/10/2004.*

111. The FOI Application is broadly worded in terms of the types of documents to which the applicant seeks access (i.e. documents relating to the extraction of gravel). However, I am satisfied the FOI Application is specifically confined to documents concerning the extracting of gravel from the Gravel Pit and those documents specified in items A) to E) in the application.

112. It is not uncommon for documents released under the FOI process to suggest new or parallel avenues of inquiry involving a different set of documents. However, even though a new avenue has been suggested, if the new documents do not fall within the terms of the FOI application they must be sought through a fresh FOI application. On this issue, the Information Commissioner has previously indicated:<sup>24</sup>

*It is not possible for an applicant to unilaterally extend the terms of an FOI access application at the external review stage. The terms in which the FOI access application was framed will already have set the parameters for an agency's response under Part 3 of the FOI Act, and in particular set the direction of the agency's search efforts to locate all documents of the agency which fall within the terms of the FOI access application (see Re Cannon at paragraph 8). ... (There would appear to be no impediment to the terms of an FOI access application being extended by agreement, and there is, of course, nothing to prevent an applicant from making a fresh application for access to matter which falls outside the scope of an earlier FOI access application.)*

113. I am satisfied that the parameters of the FOI Application cannot reasonably encompass the following additional documents the applicant has requested on external review:

- information about borrowed materials including:
  - list of borrowed material quantities for the quarry
  - all work sheets for borrowed materials
  - allocation of borrowed materials
  - documentation for repaying of borrowed materials
- information about purchase orders including:
  - copies of all incoming (private works) purchase orders or requests for material from the quarry
  - all Council internal purchase orders or internal requests for material from the quarry
  - copy of purchase orders to contract carters for material quantities to be carted from the quarry
  - all purchase orders for crushing and screening contractor for the quarry
  - all purchase orders for all cartage of materials from the quarry

---

<sup>24</sup> *Robbins and Department of Health* (1994) 2 QAR 30 at paragraph 17.

- information about work sheets/run sheets including:
  - all Council diesel supply run sheets for the quarry (including amounts supplied to each machine and delivery date supplied)
  - all Council daily work sheets for machinery operation in the quarry
  - all separate contractor daily work sheets for machinery operation in the quarry
  - all daily work sheets for contractor for crushing and screening amounts
- information about site inspections including:
  - all site inspection documents for the quarry
  - all site inspection documents for crushing and screening operations at the quarry
- information about material test results including:
  - all material test results for materials crushed and screened at the quarry
  - all material test results for any material used by Council for road building
  - all material test results for material removed from the quarry
- other information including:
  - all material measurement documents in relation to crushing and screening at the quarry
  - documents for sale of material from the quarry
  - documents in relation to cartage of the material from the quarry by contractors
  - documents in relation to material allocations
  - details of all phone conversations in relation to the quarry operations
  - all office file notes in relation to the Quarry Owner and the quarry operations
  - all details and correspondence re 'arrangements' i.e. take it as you need it arrangement
  - full details how this arrangement works
  - Council's old 'standard royalty payment list' for property owners
  - Council's new 'standard royalty payment list' for property owners.

114. Accordingly, I am satisfied that the documents listed at paragraph 113 above which the applicant has requested on external review fall outside of the scope of the FOI Application.

## **DECISION**

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

- the relevant information which appears in the tender submission is exempt from disclosure under section 44(1) of the FOI Act as it relates to an individual's course of study
- figures relating to the extraction of gravel from the Gravel Pit are not exempt from disclosure under section 45(1)(c) of the FOI Act
- access to some of the requested documents can be refused under section

28A(1) of the FOI Act

- the additional documents the applicant has requested on external review fall outside the scope of the FOI Application.

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

---

**Suzette Jefferies**  
**Acting Assistant Commissioner**

**Date: 30 September 2009**