



## Decision and Reasons for Decision

---

**Application Number:** 310243

**Applicant:** Hillier

**Respondent:** Redland City Council

**Decision Date:** 9 June 2011

**Catchwords:** RIGHT TO INFORMATION – APPLICATION FOR ACCESS TO INFORMATION – REFUSAL OF ACCESS – DOCUMENTS NOT IN POSSESSION – applicant contended additional documents should exist – whether there are reasonable grounds for agency to be satisfied that documents exist to the extent they should be in the agency’s possession – whether agency has taken all reasonable steps to locate the documents – whether access to documents can be refused under sections 47(3)(e) of the *Right to Information Act 2009* (Qld) on the ground set out in section 52(1)(b) of the *Right to Information Act 2009* (Qld)

RIGHT TO INFORMATION – APPLICATION FOR ACCESS TO INFORMATION – REFUSAL OF ACCESS – Grounds on which access may be refused – section 47(3)(a) of the *Right to Information Act 2009* (Qld) – to the extent the document comprises exempt information under section 48 – whether information would be privileged from production in a legal proceeding on the ground of legal professional privilege – whether employee legal advisers had the requisite degree of independence in giving professional advice

RIGHT TO INFORMATION – APPLICATION FOR ACCESS TO INFORMATION – REFUSAL OF ACCESS – Grounds on which access may be refused – section 47(3)(b) of the *Right to Information Act 2009* (Qld) – to the extent the document comprises information the disclosure of which would, on balance, be contrary to public interest under section 49 – whether disclosure of the information would, on balance, be contrary to the public interest

## Contents

REASONS FOR DECISION .....	3
Summary .....	3
Decision under review .....	4
Background.....	4
Evidence considered .....	4
Issues in this review.....	4
Scope .....	4
Sufficiency of search.....	6
Relevant law .....	6
Has Council taken all reasonable steps to find the documents? .....	7
Conclusion – Sufficiency of search .....	9
Remaining Issues .....	9
Category A – Legal professional privilege .....	10
Relevant law .....	10
Was there a professional relationship and independence? .....	11
Has privilege been waived? .....	12
Conclusion – Legal professional privilege.....	13
Category B – Contrary to public interest.....	13
Relevant law .....	13
Irrelevant factors .....	14
Factors in favour of disclosure and nondisclosure.....	15
Accountability .....	15
Positive and informed debate .....	16
Protecting an individual's right to privacy.....	16
Personal information .....	17
Balancing the public interest .....	17
Findings .....	17
DECISION .....	18
Appendix.....	20
Significant procedural steps .....	20

## REASONS FOR DECISION

### Summary

1. On 9 December 2009, the applicant made an application to Redland City Council (**Council**) under the *Right to Information Act 2009 (RTI Act)* seeking access to documents relating to a development application for a biomass power station at Mount Cotton and Council's investigation of a complaint to the CMC about the development application. By letter dated 22 January 2010, the applicant agreed to narrow the scope of the access application (**Amended Application**).<sup>1</sup>
2. Council located 757 pages and decided (**Decision**) to release 750 pages in full and 7 pages in part (**First Release Documents**). The applicant sought an internal review of Council's Decision. An additional 183 pages were located, 177 pages of which Council decided to release in full and 6 pages of which Council decided to release in part. (**Second Release Documents**).<sup>2</sup>
3. The applicant applied for external review and alleged that further documents responsive to his application must exist. As a result of further searches requested on external review, Council located 217 pages of emails (**Third Release Documents**). Council provided the applicant with full access to 205 pages and partial access to 12 pages on the basis that some of the information is outside the scope of the Amended Application. The applicant has not contested the out of scope issue and therefore the out of scope information on those 12 pages is not in issue in this review.
4. The applicant maintains that further additional documents exist. His claim is in two parts, firstly that specific documents exist (**Further Specific Documents**) that have not been provided to him and secondly; a general claim that further documents exist (**Further General Documents**).
5. After carefully considering all of the evidence and submissions before me, I am satisfied that:
  - Council may refuse access to the Further Specific Documents as they are outside the scope of the Amended Application
  - Council may refuse access to the Further General Documents sought<sup>3</sup> as they do not exist<sup>4</sup> on the basis that:
    - Council has conducted comprehensive searches for the Further General Documents sought by the applicant; and
    - such searches comprise all reasonable steps to locate them
  - Council may refuse access to some of the information on the basis that it would be privileged from production in a legal proceeding on the ground of legal professional privilege;<sup>5</sup> and
  - council may refuse access to some of the information on the basis that disclosure of the information would, on balance, be contrary to public interest.<sup>6</sup>

<sup>1</sup> See paragraph 11 below for wording of the Amended Application.

<sup>2</sup> Internal Review decision dated 6 May 2010 (**Internal Review Decision**).

<sup>3</sup> Under sections 47(3)(e) of the RTI Act.

<sup>4</sup> As mentioned in section 52(1)(a) of the RTI Act.

<sup>5</sup> Under section 47(3)(a) of the RTI Act.

<sup>6</sup> Under sections 47(3)(b) and 49 of the RTI Act.

## Decision under review

6. The decision under review is Council's Internal Review Decision dated 6 May 2010.

## Background

7. Significant procedural steps relating to the application are set out in the Appendix to this decision.

## Evidence considered

8. In making this decision, I have taken into account the following:

- the applicant's access application, amended application, application for internal review, application for external review and supporting material
- Council's Decision and Internal Review Decision
- submissions provided by the applicant
- submissions provided by Council
- file notes of telephone conversations between OIC staff and the applicant
- file notes of telephone conversations between OIC staff and Council
- relevant provisions of the RTI Act and the *Information Privacy Act 2009 (IP Act)*; and
- previous decisions of the Information Commissioner of Queensland and other relevant case law as identified in this decision.

## Issues in this review

9. The issues to be determined in this review are:

- the scope of the terms of the applicant's Amended Application
- the sufficiency of Council's searches to locate documents responsive to the Amended Application
- whether Council can refuse access to certain information<sup>7</sup> on the basis that the information is exempt matter as it is subject to legal professional privilege; and
- whether Council can refuse access to certain information<sup>8</sup> on the basis that disclosure of the information would, on balance, be contrary to public interest.

10. Each of these issues shall be dealt with separately.

## Scope

11. On 22 January 2010 the applicant wrote to Council and agreed to narrow the scope of his access application to the following information (**Amended Application**):

1. *Briefing notes from department heads and others to Susan Rankin re my complaint to the CMC that resulted in the Susan Rankin letter dated 15<sup>th</sup> February 2008 to me and the CMC, these would include notes from the legal department and the development department.*
2. *All notes from Kylie [Feron] (the appointed investigator) covering her investigation*

<sup>7</sup> Information contained in pages 12 to 16 of the Second Release Documents.

<sup>8</sup> Information contained in pages 284-285, 288, 530, 535-536 & 593 of the First Release Documents and page 183 of the Second Release Documents.

3. *E mails from and to those listed below covering the period from 1 December 2006 to March 2007*
  - a. *Donovan*
  - b. *Appleton*
  - c. *Doyle*
  - d. *Toohey*
  - e. *Quak*
  - f. *Purdy*
  - g. *Bray*
12. It is necessary to address the issue of the scope of the applicant's Amended Application as, in the course of this review<sup>9</sup> the applicant has sought access to the following Further Specific Documents:
  - a file note dated 25 May 2010
  - documents relating to the May 2008 complaint registered by Council on 26 May 2008
  - the record of a meeting held on 25 May 2010; and
  - a draft report submitted to Counciland such documents may be outside the scope of the terms of the Amended Application.
13. There have been a number of decisions of this Office that have considered the issue of the construction and interpretation of access applications.<sup>10</sup> These decisions<sup>11</sup> specify that the terms of an FOI Application will set the parameters for an agency's search efforts and that an applicant cannot unilaterally expand the terms of an FOI Application.
14. Additionally, in *Robbins* the Information Commissioner noted that where there is ambiguity in the terms of an FOI application it is rarely appropriate to apply legal construction techniques in preference to consulting with the author of the words for clarification. However, in the circumstances of that case the Information Commissioner was satisfied that there was no ambiguity in the terms of the FOI application that required clarification.<sup>12</sup>
15. I consider in this case there is no ambiguity in the terms of the Amended Application. It is clear from the terms of the Amended Application that the applicant seeks documents that are:
  - briefing notes (including notes from the legal department and the development department) to Susan Rankin about the applicant's complaint to the CMC in preparation for her letter dated 15 February 2008
  - notes relating to the investigation conducted by Kylie Fernon; or
  - emails from or to the various named persons in the period 1 December 2006 to March 2007.

<sup>9</sup> In submissions to this Office dated 24 February 2011, 28 February 2011, 6 March 2011, 7 March 2011 and 10 March 2011.

<sup>10</sup> While these decisions have considered the issue in the context of the *Freedom of Information Act 1992* (Qld) the principles have equal application to a consideration of the issue in the context of the RTI Act.

<sup>11</sup> *Robbins and Brisbane North regional Health Authority* (1994) 2 QAR 30 (**Robbins**).

*Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 (**Cannon**) paragraph 8.

<sup>12</sup> See *Robbins* at paragraph 16.

16. In relation to the file note dated 25 May 2010, the documents relating to the May 2008 complaint and the record of a meeting held on 25 May 2010, I consider such documents are outside the scope of the applicant's Amended Application as they are clearly not a briefing note (or note from the legal department or development department) designed to brief Susan Rankin in preparation of the letter dated 15 February 2008, because they were created after that date. Additionally, they are clearly not a note relating to Kylie Fernon's investigation as Kylie Fernon's investigation was completed in February 2008, well prior to the creation of the documents sought; and finally, they are not emails from or to the various named persons created in the period 1 December 2006 to March 2007.
17. Finally, in relation to the draft report which the applicant contends was submitted to Council, I am satisfied that this refers to a draft version of a final report which was submitted to Council on 24 June 2010. I consider the draft report to be outside the scope of the applicant's Amended Application for the same reasons as outlined in paragraph 16 above.
18. Accordingly, I am satisfied that the Further Specific Documents fall outside the scope of the Amended Application and therefore can not be considered further in this decision.

### **Sufficiency of search**

19. The applicant has contended that there are Further General Documents that have not been provided to him that should be in the Council's possession. This raises the issue of whether the documents are nonexistent or unlocatable or whether Council's searches for the documents have been sufficient.

### **Relevant law**

20. Under the RTI Act, a person has a right to be given access to documents of an agency<sup>13</sup> though this right is subject to other provisions of the RTI Act including the grounds on which an agency may refuse access to documents.<sup>14</sup> The RTI Act provides that access to a document may be refused<sup>15</sup> if the document is nonexistent or unlocatable.<sup>16</sup>
21. A document is nonexistent if there are reasonable grounds for the agency or Minister dealing with the access application to be satisfied that the document does not exist.<sup>17</sup>
22. The RTI Act is silent on how an agency or Minister can be satisfied that a document does not exist. However in *PDE and the University of Queensland*<sup>18</sup> (*PDE*) the Information Commissioner explained that, to be satisfied that a document does not exist, an agency must rely on its particular knowledge and experience, having regard to various key factors including:
  - the administrative arrangements of government
  - the agency structure

<sup>13</sup> Section 23 of the RTI Act.

<sup>14</sup> As set out in section 47 of the RTI Act.

<sup>15</sup> Section 47(3)(e).

<sup>16</sup> Sections 47(3)(e) and 52 of the RTI Act.

<sup>17</sup> Section 52(1)(a).

<sup>18</sup> Unreported, Queensland Information Commissioner, 9 February 2009. Note—Although *PDE* concerned the application of section 28A of the now repealed *Freedom of Information Act 1992* (Qld), the requirements of that section are replicated in section 52 of the RTI Act.

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

23. Alternatively, an agency may rely on searches to satisfy itself that a document does not exist. In such cases the Information Commissioner indicated in *PDE* that in order to substantiate a conclusion that there are reasonable grounds to be satisfied that the document does not exist, it may be necessary for the agency or Minister to take all reasonable steps to locate the document sought. To ensure all reasonable steps have been taken to locate documents, a decision-maker should make enquiries and undertake searches of all relevant locations, having regard to the key factors listed above.<sup>19</sup>

#### **Has Council taken all reasonable steps to find the documents?**

24. On internal review, the applicant stated that he believed there were documents that had not been provided. In response to this concern, Council's representative stated:

*... a directive [was issued] to all officers who had been identified as stakeholders in this matter asking them to review their records for any documents that fell within the scope of [the applicant's] initial application. To assist officers, I provided a copy of the document schedule listing the documents [the applicant] had already been provided with and specifically asked them to conduct a thorough search for any additional documents not on the schedule.*

*As required, the internal review has stuck strictly to the scope of [the] amended application ...*

25. As a result of the further searches on internal review, Council identified and provided the applicant with the Second Release Documents.

26. On external review, the applicant maintained his assertion that Further General Documents responsive to his request should be in existence. He voiced concern that he had gone back to Council on a number of occasions during the initial and internal review phases of the RTI process and each time Council had found more documents, thus in his view demonstrating that it was likely that more documents exist that had not been discovered.

27. In particular, the applicant indicated that the following Further General Documents must exist:

- email correspondence
- documents relating to Kylie Fernon's investigation; and
- briefing notes relating to Item 1 of the Amended Application.

28. Following receipt of the applicant's request for an External Review, the applicant was requested to provide a submission in relation to the Further General Documents which

---

<sup>19</sup> See *PDE* at paragraph 49.

he believed should have been located by Council. In response, the applicant submitted:<sup>20</sup>

- no search had been completed of Council's archived email records or the individual computers by the RTI officers. They relied upon officers the subject of the investigations to reveal documents and officers have been shown to have concealed these
- the legal department has further document relating to the complaint to the CMC that are being withheld; and
- no notes, diary entries, meeting notes or communications regarding advice or contacts with other officers, other than Appleton, have been provided regarding Kylie Fernon's investigation.

29. As a part of the external review process, Council was asked to conduct any further searches necessary to locate the Further General Documents identified by the applicant.

30. Council provided this Office with a detailed submission in relation to the further searches undertaken including certifications, records and schedules of the searches undertaken.

31. Council asserted in reply that the following locations were searched:

- individual files of officers for hard copy information
- Council's official records management system "dataworks"; and
- Council's email archive in relation to the seven persons specifically requested by the applicant.

32. Council submitted that these locations were searched for the following reasons:

- to satisfy the applicant's specific request relating to email searches
- because, in accordance with Council's policy, all material, business related documents pertaining to this matter should be contained in "dataworks"; and
- in recognition that officers maintain filing cabinets and hard copy files, it was considered prudent that hard copy file searches should be undertaken by relevant officers relating to items 1 and 2 of the Amended Application.

33. As a result of these searches, Council located the Third Release Documents.

34. Following receipt of the Third Release Documents, the applicant has maintained the contention that further documents must exist. The applicant has submitted that:<sup>21</sup>

- it appears that the RTI officer could be withholding for reasons that to release would provide the public with evidence that officers have breached aspects of policy, procedure or various Acts, and possibly be shown to be biased and unfair
- a number of documents have been withheld as they show that an officer has contravened due process and it is in the public interest to have these events made public
- Council either have problems or they did not want documents to be disclosed

<sup>20</sup> By correspondence dated 5 July 2010.

<sup>21</sup> As summarised from the applicant's submissions of 28 February 2011, 6 March 2011, 7 March 2011 and 23 May 2011.



- the additional documents released on external review were emails and he had previously been told that they were not available;
  - there should have been a number of documents that the RTI search should have found and it appears that these documents have been withheld; and
  - he has not been provided with a copy of the PowerPoint which is attached to the email at page 165 of the Third Release Documents.
35. Following enquiries by OIC, Council stated that the PowerPoint mentioned in the email at page 165 of the Third Release Documents was a working version of a document which had been released to the applicant.<sup>22</sup> While Council have identified the document as being part of a deliberative process, Council has nonetheless agreed to release a copy of the working version to the applicant.<sup>23</sup>
36. I note that apart from the PowerPoint issue the applicant has not adduced any direct evidence of the existence of further documents (that are within the scope of the Amended Application).

### **Conclusion – Sufficiency of search**

37. I consider that the locations identified by Council as having documents responsive to the applicant's Amended Application appear reasonable based on Council's policy and practice. The evidence before me indicates that Council have undertaken a thorough search of these locations.
38. The applicant's mere assertion, that more documents must exist, is not sufficient evidence upon which I can make a finding that documents do exist (that fall within the scope of the applicant's Amended Application).
39. Further, there is nothing before me to suggest that the search certifications or records completed by Council's staff are not credible.
40. Accordingly, I am satisfied that:
- Council has undertaken searches for the documents sought by the applicant in all relevant locations, having regard to Council's practices and procedures in relation to information management and other administrative practices;
  - such searches comprise all reasonable steps to locate the documents; and
  - access may be refused pursuant to section 47(3)(e) of the RTI Act on the ground that further documents do not exist.

### **Remaining Issues**

41. The issues that now remain to be resolved in this decision are the claims by Council that certain information is exempt on the grounds of legal professional privilege and that the disclosure of certain other information is contrary to the public interest.
42. The information that remains for me to consider can be categorised as follows:

**Category A Information** – information contained in pages 12 to 16 of the Second Release Documents which Council has claimed to be exempt under

---

<sup>22</sup> Correspondence dated 27 May 2011. Correspondence dated 25 May 2011 identified the final document which was released to the applicant as pages 115 to 144 of the Third Release Documents.

<sup>23</sup> Correspondence dated 27 May 2011.

schedule 3, section 7 of the RTI Act on the basis that it is subject to legal professional privilege; and

**Category B Information** – information in pages 284-285, 288, 530, 535-536 and 593 of the First Release Documents and page 183 of the Second Release Documents which Council claims it would, on balance, be contrary to the public interest to disclose.

43. Each category shall be dealt with separately.

#### **Category A – Legal professional privilege**

44. In relation to the Category A Information, Council refused the applicant access to parts of these pages on the basis that the information refused is subject to legal professional privilege.
45. The applicant has submitted that Council cannot claim legal professional privilege over the Category A Information as it was generated by an officer employed by Council and that even though they are possibly trained as a solicitor, they cannot claim legal privilege as they are not a separate body as a firm of lawyers would be.

#### **Relevant law**

46. Under section 23 of the RTI Act, a person has a right to be given access to documents of an agency or Minister. However, this right is subject to a number of exclusions and limitations, including grounds for refusal of access.<sup>24</sup>
47. Relevantly, information will be exempt if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.<sup>25</sup>
48. It is well settled that legal professional privilege attaches to confidential communications between a lawyer and client (including communications through their respective servants or agents) made for the dominant purpose of seeking or giving legal advice or professional legal assistance for use, or obtaining material for use, in legal proceedings that have commenced, or were reasonably anticipated, at the time of the relevant communication.<sup>26</sup>
49. For information to attract legal professional privilege, the following elements must be established:
- confidential communications
  - dominant purpose test; and
  - professional relationship and independence.
50. The applicant's submission that Council cannot claim legal professional privilege focuses on the issue of whether the third element of the test has been satisfied in relation to the Category A Information. Accordingly, I do not propose to explore the first two elements of the test except in so far as to state that I am satisfied, on the basis of the information before me in this review, that the first two elements of the test for legal professional privilege are satisfied.

<sup>24</sup> Set out in section 47 of the RTI Act.

<sup>25</sup> Under section 48 and schedule 3, section 7 of the RTI Act.

<sup>26</sup> *Esso Australia Resources Ltd v Commission of Taxation* (1999) 74 ALJR 339.

### Was there a professional relationship and independence?

51. Privilege only attaches to confidential communications between a legal adviser and a client if:
- the advice is provided by the legal adviser in his or her capacity as a professional legal adviser; and
  - the legal adviser is competent and independent.<sup>27</sup>
52. The High Court of Australia has established that legal professional privilege may protect communications between salaried employee legal advisers of a government department or statutory authority and his/her employer as client (including communications through other employees of the same employer) provided there is a professional relationship of legal adviser and client, which secures to the advice an independent character notwithstanding the employment.<sup>28</sup>
53. A lawyer employed by a government agency or an 'in-house' lawyer may claim privilege on behalf of his or her employer as the client.<sup>29</sup> However, an in-house lawyer will not have the required degree of independence if their advice is affected by their personal loyalties, duties and interests.<sup>30</sup>
54. In *Potter and Brisbane City Council*<sup>31</sup>, the Information Commissioner found that the Brisbane City Council City Solicitor and the professional staff of the City Solicitor's office:
- were appropriately qualified legal practitioners
  - conducted their practice with the requisite degree of independence from their employing organisation; and
  - had given legal advice to the Council which attracted legal professional privilege.
55. In this case, Council submitted<sup>32</sup> that:
- the communication was confidential and there were no third parties involved
  - the advice was provided with regard to prospects of success in litigation
  - the dominant purpose of the communication was the provision of a legal opinion
  - the advice was provided by a legal adviser in her capacity as a professional legal adviser who was a registered solicitor at the time of providing the advice; and
  - although the legal advisor was an "in house" lawyer, the advice given was independent and provided a balanced view of the matter.
56. Council further submitted<sup>33</sup> that staff of Council's Legal Services are not answerable to anyone else within Council in relation to the legal advice that they give to Council. The legal advice that the unit provides to Council is not vetted by any other area of Council prior to being given.

<sup>27</sup> *Proudfoot v Human Rights and Equal Opportunity Commission* (1992) 28 ALD 734 at 740.

<sup>28</sup> *Waterford v Commonwealth* (1986) 163 CLR 54 per Mason and Wilson JJ at paragraph 7 of their Honours' judgement.

<sup>29</sup> *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 at 530-531.

<sup>30</sup> *Seven Network News v News Ltd* (2005) 225 ALR 672 at 674.

<sup>31</sup> (1994) QAR 37.

<sup>32</sup> Contained in correspondence dated 21 April 2011.

<sup>33</sup> During a conversation between Council's current Manager Legal Services and an OIC officer on 7 June 2011.

57. Having reviewed the Category A Information, I note that it was contained within an email (**the Advice**) that was sent directly from the Manager Legal Services, who was the person providing the legal advice, to the person who was seeking the legal advice. There is no evidence before me to suggest that the Manager Legal Services was answerable to anyone else within Council in respect of the content of the Advice. Nor is there any evidence before me to suggest that the manner of the provision of the Advice deviated from the usual practice within Council of being provided directly from the Legal Services Unit without interference from other areas within Council. I consider that the Advice has the necessary character of independence.
58. On the basis of the nature of the Category A Information and taking into account Council's submission, I am satisfied that Council's legal advisor who authored the Category A Information was an appropriately qualified legal practitioner who conducted her practice with the requisite degree of independence from her employing organisation and gave advice to Council which attracted legal professional privilege. Accordingly, I am satisfied that the Category A Information is subject to legal professional privilege.

### **Has privilege been waived?**

59. Even where the elements of privilege are established, communications may not be subject to legal professional privilege because privilege has been waived, either expressly or impliedly.
60. When a party deliberately and intentionally discloses a privileged communication, legal professional privilege which once attached to that communication will be expressly waived.<sup>34</sup>
61. Privilege can be impliedly waived by voluntary conduct that is inconsistent with maintaining the confidentiality that the privilege is intended to protect.<sup>35</sup> The level of inconsistency required to constitute waiver will depend upon the circumstances of the case and the conduct of the privilege holder, viewed objectively.
62. In the case of *Osland v Secretary to the Department of Justice (Osland)*<sup>36</sup>, the majority judges recognised that a limited disclosure of the existence and the effect of legal advice could be consistent with maintaining confidentiality in the actual terms of the advice.<sup>37</sup>
63. I have carefully examined the entire document in which the Category A Information is situated and I note that the information which has been disclosed to the applicant in that document comprises:
- a statement that the author had been asked to provide advice on whether emails received from the applicant were defamatory and any action that may be taken in relation to them
  - general information about what 'defamation' is and the applicable law in Queensland
  - extracts taken from correspondence received from the applicant
  - an observation that the applicant's complaint was still before the Crime and Misconduct Commission; and

<sup>34</sup> *Goldberg v Ng* (1994) 33 NSWLR 639 at 670.

<sup>35</sup> *Mann v Carnell* (1999) 201 CLR 1.

<sup>36</sup> (2008) 234 CLR 275.

<sup>37</sup> At paragraphs 48 to 50.

- a statement that a draft letter to the applicant had been attached.

64. The above information reveals only the existence and effect of the legal advice given. It does not reveal the substance or the actual terms of the advice. In my view the disclosure of the above information is a limited disclosure of the legal advice that is not inconsistent with the maintenance of the confidentiality in the Category A Information (which contains the actual terms of the advice). Accordingly, in my view privilege in the Category A Information has not been waived.

### ***Conclusion – Legal professional privilege***

65. I am satisfied that:

- the element of professional relationship and independence of Council's legal advisor has been established; and
- privilege in the legal advice given has not been waived by the limited disclosure of the existence and effect of the legal advice being revealed to the applicant.

66. Accordingly, I am satisfied that the Category A Information is subject to legal professional privilege and is therefore exempt from disclosure under the *RTI Act*.

### **Category B – Contrary to public interest**

67. Council has refused the applicant access to certain information on the basis that disclosure would, on balance, be contrary to public interest. The **Category B Information** is contained in the following pages:

Documents	Page/s containing information
First Release Documents	284-285, 288, 530, 535-536, and 593
Second Release Documents	183

68. I have reviewed the Category B Information and note that it is comprised of names, addresses and personal email addresses of persons other than the applicant.

### ***Relevant law***

69. Sections 47(3)(b) and 49 of the RTI Act provide a ground for refusal of access where disclosure of information would, on balance, be contrary to public interest.

70. The term 'public interest' is not defined in the RTI Act. Instead the RTI Act recognises that many factors can be relevant to the concept of the public interest. The public interest refers to considerations affecting the good order and functioning of the community and governmental affairs for the well-being of citizens. The notion of the public interest is usually treated as separate from matters of purely private or personal interest. Usually, a public interest consideration is one that is available to all members or a substantial segment of the community should they choose to access it. Although, in some circumstances public interest considerations can apply for the benefit of particular individuals.

71. In determining whether disclosure of the Category B Information would, on balance, be contrary to public interest, I must:<sup>38</sup>

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

### **Irrelevant factors**

72. In the course of providing submissions in support of his case, the applicant has raised concerns that Council have refused access to certain information on the basis that disclosure of the information would:<sup>39</sup>

- reveal that Council officers had not followed procedures, had breached various Acts or contravened due process
- highlight that Council was incompetent and deceptive
- cause the public to lose confidence in Council's administration
- reveal that senior officers gave directions that could be detrimental, legally, to the applicant; and
- provide the public with evidence that showed Council to be biased and unfair.

73. As a result of the concerns raised by the applicant, I have identified the following irrelevant factors:

- disclosure of the information could reasonably be expected to cause embarrassment to the Government or to cause a loss of confidence in the Government;<sup>40</sup> and
- the person who created the document containing the information was or is of high seniority within the agency.<sup>41</sup>

74. Having reviewed the Category B Information I am satisfied that the information does not give rise to the first factor noted above. However the second irrelevant factor is made out on the information before me.

75. The purpose in identifying these irrelevant factors is to ensure that potential embarrassment to Council or the seniority of a person is not taken into account as a factor in favour of nondisclosure.

76. Accordingly, I confirm that the second irrelevant factor identified above has not influenced my decision when considering the factors in favour of disclosure and nondisclosure of the Category B Information.<sup>42</sup>

<sup>38</sup> Section 49 of the RTI Act. This section must be read in conjunction with the public interest factors listed in schedule 4 of the RTI Act.

<sup>39</sup> As summarised from the applicant's submissions dated 24 February 2011, 28 February 2011 and 6 March 2011.

<sup>40</sup> Schedule 4, part 1, factor 1.

<sup>41</sup> Schedule 4, part 1, factor 4.

<sup>42</sup> In accordance with section 49(3)(d) of the RTI Act.

### **Factors in favour of disclosure and nondisclosure**

77. Council have not identified any factors in favour of disclosure of the Category B Information in their Decision or Internal Review Decision.
78. Taking into account the applicant's submissions and the content of the Category B Information, I have identified the following factors in favour of disclosure:
- disclosure of the information could reasonably be expected to promote open discussion of public affairs and enhance Council's accountability; and
  - disclosure of the information could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest.
79. Council have identified the following factor in favour of nondisclosure:
- disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy.
80. In addition, I have identified the following factor in favour of nondisclosure because of public interest harm in disclosure:
- disclosure of the information could reasonably be expected to cause a public interest harm if disclosure would disclose personal information of a person, whether living or dead.
81. I shall consider each factor below.

### ***Accountability***

82. I accept that there is a broad public interest in Council being accountable to its electorate. However, it is necessary to consider the facts of each case to decide whether the relevant accountability interest is sufficiently strong and whether it is appropriately served by disclosure of the information.
83. In processing the applicant's Amended Application, Council has granted the applicant access to documents, including documents which may be either exempt or contrary to public interest documents, or outside the scope of the Amended Application, such as:
- various documents relating to Council's Internal Audit Report and the CMC investigation which resulted from the applicant's complaint referred to Council by the CMC on 20 December 2007 including:
    - briefing note prepared by Kylie Fernon detailing her findings and recommendation in relation to the investigation
    - the investigation running sheet
    - a copy of the Development Application Decision Notice dated 23 March 2007 issued to Cleveland Power Pty Ltd
    - a chronology of events for the development application
    - a copy of the sealed Judgment of the Planning and Environment Court dated 7 November 2007 approving the development application subject to stated conditions
  - briefing notes addressed to Council's CEO with dates prior to 15 February 2008

- copies of correspondence to the applicant and CMC dated 15 February 2008; and
- various emails between the dates of 1 December 2006 and March 2007.

84. I have reviewed the Category B Information and find that:

- it comprises a small percentage of the entirety of the information located by Council in response to the applicant's request; and
- consists of the personal information<sup>43</sup> of other persons, including names, addresses and personal email addresses.

85. Given the content of the information which has been disclosed to the applicant and the content of the Category B Information, I am of the view that disclosure of the Category B Information would not enhance the ability of the public to scrutinise Council's actions in relation to the proposed biomass power station.

86. Accordingly, I attribute limited weight to this factor in favour of disclosure.

***Positive and informed debate***

87. In his submission dated 24 February 2011, the applicant has submitted that the release of the information is in the public interest as 330 complaints, representing over 300 households, were received in relation to the proposed biomass power station.

88. I accept that the development approval application in relation to the proposed biomass power station was, and still is, an important issue or matter of serious interest for the applicant's local community. I also accept that release of the information sought by the applicant in his Amended Application would contribute to a positive and informed debate of the issue within that community.

89. Given the content of the information which has been disclosed to the applicant and the content of the Category B Information, I am of the view that disclosure of the Category B Information would not further the public interest in contributing to a positive and informed debate of the issue.

90. Accordingly, I attribute limited weight to this factor in favour of disclosure.

***Protecting an individual's right to privacy***

91. Disclosure of information that could reasonably be expected to prejudice the protection of an individual's right to privacy is a public interest factor favouring nondisclosure.

92. I am satisfied that the Category B Information comprises personal information about persons other than the applicant such as names, addresses and personal email addresses and that no authority to grant access to that personal information has been provided by any of the persons named.

93. On the information available to me, I am satisfied that disclosure of the Category B Information:

- would disclose the personal information of other persons; and

<sup>43</sup> Personal information is 'information or an opinion... whether true or not ... about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.' See section 12 of the IP Act.



- could reasonably be expected to prejudice the protection of their right to privacy.

94. Accordingly, I attribute significant weight to this factor in favour of nondisclosure.

### ***Personal information***

95. I accept that disclosing information may result in a public interest harm if the disclosure would disclose the personal information of a person.

96. Personal information is '*information or an opinion... whether true or not ... about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.*'<sup>44</sup>

97. The Category B Information consists of the names, addresses and personal email addresses of other persons. Such information is clearly personal information as per the above definition.

98. Accordingly, the question arising is how significant the public interest harm would be if the information were disclosed. In my view the public interest harm would be significant as the information is about other persons or concerns matters that affect the interests of persons other than the applicant. Disclosure of the Category B Information would invade the privacy rights of those individuals and cause a public interest harm.

99. Accordingly, I attribute significant weight to this factor in favour of nondisclosure.

### ***Balancing the public interest***

100. In balancing the competing public interest factors, I am satisfied that disclosure of the Category B Information would not:

- enhance the public interest in the accountability of Council; and
- contribute to the positive and informed debate on the issue of the development approval application for the proposed biomass power station.

101. I am also satisfied that disclosure of the Category B Information would:

- invade the privacy rights of other persons; and
- disclose personal information of other persons.

102. Accordingly, on balance I find that the public interest factors in favour of nondisclosure of the Category B Information outweigh the public interest factors in favour of disclosure.

### **Findings**

103. Taking into account all of the information set out above, I consider:

- in relation to the issue of the scope of the terms of the applicant's Amended Application:
  - there is no ambiguity in the terms of the Amended Application
  - the Further Specific Documents fall outside the scope of the Amended Application; and

---

<sup>44</sup> See section 12 of the IP Act.

- therefore, the Further Specific Documents can not be considered further in this decision.
- in relation to the issue of sufficiency of search:
  - Council has conducted comprehensive searches for the Further General Documents sought by the applicant
  - such steps comprise all reasonable steps to locate the Further General Documents
  - the Further General Documents do not exist for the purpose of section 52(1)(a) of the RTI Act; and
  - Council can refuse access to the Further General Documents under section 47(3)(e) of the RTI Act.
- in relation to the issue of whether Council can refuse access to the Category A Information on the basis that it is subject to legal professional privilege:
  - the element of a professional relationship and independence of Council's legal advisor has been established
  - privilege in the legal advice given has not been waived by the limited disclosure of the existence and effect of the legal advice being revealed to the applicant; and
  - Council can refuse access to the Category A Information under section 47(3)(a) of the RTI Act.
- in relation to the issue of whether Council can refuse access to the Category B Information on the basis that its disclosure is contrary to the public interest:
  - the Category B Information is comprised of the personal information of other persons and disclosure of the Category B Information would disclose the personal information of other persons and invade their right to privacy
  - release of the Category B Information would not enhance the ability of the public to scrutinise Council's actions in relation to the proposed biomass power station or further the public interest in contributing to a positive and informed debate of the issue; and
  - on balance, disclosure of the Category B Information is contrary to the public interest under section 47(3)(b) of the RTI Act.

## DECISION

104. I vary the decision under review by finding that:

- access to the Further General Documents sought can be refused under section 47(3)(e) of the RTI Act on the ground set out in 52(1)(a) of the RTI Act
- access to the Category A Information can be refused on the basis that it would be privileged from production in a legal proceeding on the ground of legal professional privilege under section 47(3)(a) of the RTI Act; and
- access to the Category B Information can be refused on the basis that disclosure would be contrary to the public interest under section 47(3)(b) of the RTI Act.

105. I have made this decision as a delegate of the Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

---

**Jenny Mead**  
**Right to Information Commissioner**

**Date: 9 June 2011**

## Appendix

### Significant procedural steps

Date	Event
18 December 2009	Council receives the applicant's RTI application.
22 January 2010	The applicant agrees to narrow the scope of his access application ( <b>Amended Application</b> ).
12 March 2010	Council locates 757 pages and decides ( <b>Decision</b> ) to release 750 pages in full and 7 pages in part ( <b>First Release Documents</b> ).
8 April 2010	The applicant requests Council to undertake an internal review of the Decision.
6 May 2010	On internal review, Council locates an additional 183, 177 pages of which Council decided ( <b>Internal Review Decision</b> ) to release in full and 6 pages of which Council decided to release in part ( <b>Second Release Documents</b> ).
2 June 2010	The applicant applies to the OIC for external review of Council's Internal Review Decision.
11 June 2010	Council provides OIC with copies of relevant documents.
22 June 2010	OIC informs Council and the applicant that the external review application has been accepted. The applicant is requested to provide a submission identifying the specific documents he believes should have been located by Council and providing his reasons for his belief that these documents exist.
5 July 2010	The applicant provides a submission.
24 August 2010	OIC provides Council with a copy of the applicant's submission dated 5 July 2010 and requests Council to complete the following steps: <ul style="list-style-type: none"> <li>• conduct any further searches Council identified as necessary to locate the requested documents</li> <li>• certify the records sheets; and</li> <li>• provide a submission on the outcome of the searches.</li> </ul>
24 August 2010	OIC asks the applicant to clarify the issues for consideration on external review.  The applicant confirms that he
31 August 2010	Council provides OIC with copies of the First Release Documents.
3 September 2010	Council provides OIC with copies of the Second Release Documents.
16 September 2010	Council provides a submission on further searches undertaken which is supported by signed search certifications and records of searches.  Council advises OIC that a further 217 pages of emails responding to the narrowed scope of the access application had been located ( <b>Third Release Documents</b> ). Council proposes to provide the applicant with full access to 205 pages and partial access to 12

	pages.
8 October 2010	Council provides OIC with a further signed search certification and record of searches.
22 February 2011	OIC conveys a written preliminary view to the applicant and invites the applicant to provide submissions in support of his case by 25 March 2011 if the view is contested.
24 February 2011	The applicant provides submissions in support of his case.
28 February 2011	The applicant provides further submissions in support of his case.
6 March 2011	The applicant provides further submissions in support of his case.
7 March 2011	The applicant provides further submissions in support of his case.
9 March 2011	OIC seeks clarification from the applicant about two points from his submission dated 24 February 2011.
10 March 2011	The applicant provides further submissions in support of his case.
8 April 2011	OIC requests Council to provide a submission addressing Council's claim for legal professional privilege.
21 April 2011	Council provides a submission addressing their claim for legal professional privilege.
23 May 2011	The applicant provides further submissions in support of his case and states that a PowerPoint document referred to in an email (contained in the Third Release Documents) has not been provided.
24 May 2011	OIC enquires with Council about the missing PowerPoint document. Council indicates that the applicant had contacted them and his concern was being addressed.
27 May 2011	Council advises that while the PowerPoint document mentioned in the email was an earlier working version of a document already released to the applicant, a copy would be released to the applicant.
3 June 2011	OIC seeks further information from Council regarding the independence of Council's Legal Team.