



Decision and Reasons for Decision

Application Number:	310352
Applicant:	Food business
Respondent:	Gold Coast City Council
Third Party	Seven Network Limited
Decision Date:	14 September 2011
Catchwords:	RIGHT TO INFORMATION – REFUSAL OF ACCESS – applicant sought information about failed food and health safety audits of a food business held by Gold Coast City Council – whether disclosure of information would, on balance, be contrary to the public interest – section 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld)

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REASONS FOR DECISION

Summary

1. Seven Network Pty Ltd (**Seven**) applied to Gold Coast City Council (**Council**) for documents about failed health and safety audits in relation to a food business.¹
2. After consulting with the food business as an interested third party, Council decided to grant access to the documents on the grounds that their release would not, on balance, be contrary to the public interest.²
3. The food business applied to Council for internal review of their decision. Council responded by affirming their original decision.³
4. The food business then applied to the Office of the Information Commissioner (**OIC**) for external review of Council's decision.
5. On external review, OIC issued a preliminary view to the food business that releasing the documents would not, on balance, be contrary to the public interest.⁴
6. On 20 May 2011, the food business provided submissions in response to OIC's preliminary view. In summary, the food business contends that relevant documents do not fall within the scope of Seven's access application, and in any event, that the prejudice to its business and privacy outweigh any other factors favouring disclosure in the public interest and access to the information should therefore be refused.
7. For the reasons set out below, I affirm Council's decision granting access to the information in issue.

Significant procedural steps

8. Significant procedural steps relating to the application and external review are set out in the Appendix.

Reviewable decision

9. The decision under review is Council's internal review decision dated 4 August 2010 granting access to information⁵ on the basis disclosure would not, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act.

Evidence considered

10. Evidence, submissions, legislation and other material I have considered in reaching my decision is disclosed in these reasons (including footnotes and appendix).

¹ As the name of the food business forms part of the information in issue, I cannot reveal it in this decision. See section 108(3) of the *Right to Information Act 2009* (Qld) (**RTI Act**).

² Council's decision dated 17 June 2010.

³ In a decision dated 4 August 2010.

⁴ The food business in this review is the same entity which participated as a third party in the external review the subject of my recent decision *Channel Seven and Redland City Council* (Unreported, Queensland Information Commissioner, 30 June 2011) (*Seven and Redlands*). The food business has made identical submissions on the public interest in this review as in *Seven and Redlands*. Therefore, much of my reasoning in *Seven and Redlands* is applicable in this case, and is referred to as relevant throughout these reasons.

⁵ In accordance with the right of access contained in section 23 of the RTI Act.

Findings

What is the scope of this application?

11. The terms of the access application are:

Specifically I am seeking access to documents produced in the last 3 years showing information about [food business].

I am seeking copies of all failed food, health and or safety issues audits in relation to the shop at [location] Queensland.

12. Council identified 29 pages as responsive to the access application. These documents comprise:

- audit reports
- letters and an Improvement Notice⁶ to the food business following up on audit reports; and
- letters and accompanying documents to an entity associated with the food business about environmental issues relating to the food business.

13. The food business submits⁷ that none of the documents the subject of this external review fall within the scope of the access application because:

- none of the information relates to 'failed' food health and or safety audits, rather they relate to levels of compliance and therefore they cannot fall within the scope of the application
- in relation to the correspondence, it comprises requests for action to be undertaken, not 'failed audits'; and
- the letters and documents to the entity associated with the food business are not addressed to the food business itself and do not relate to 'food, health or safety issues audits'.

14. Essentially, the food business contends that the information identified by the Council is not within scope because it does not relate to 'failed' audits and requests for action. I do not accept the food business' submission in this regard. It may be technically correct to state that the information identified by Council does not relate to 'failed' audits, but only because the *Food Act 2006* (Qld) (**Food Act**) and the *Environmental Protection Act 1994* (**Environmental Protection Act**) do not provide for 'failed' audits as such. These Acts are drafted with reference to food safety and environmental standards, and provide for a scheme of breaches and recommended corrective actions. Audits do not result in overall pass or fail marks, but identification of breaches and requirements for remedial action selected from a range of possible measures.

15. An access applicant is not required to frame an application using the specific technical terminology contained in particular legislation or as used by government agencies. An applicant is merely required to provide enough information to allow an agency to identify requested documents.⁸ Interpreting an access application is not an exercise

⁶ Issued under section 209 of the *Food Act 2006* (Qld).

⁷ In its' submission to Council dated 31 May 2010.

⁸ Section 24(2)(b) of the RTI Act.

equivalent to construing a statute or other legal document; the object is to ascertain the applicant's intention,⁹ and generally an application should be interpreted broadly.¹⁰

16. The information in issue contains audit information and correspondence where remedial action has been recommended, or required. I am satisfied that the applicant, in using the word 'failed', was seeking to access information documenting unsatisfactory audit results. All of the information in issue comprises information of this kind – references to breaches of the relevant Acts, and audit information and correspondence recommending or requiring remedial action. The application provided sufficient information to allow the Council to identify this information, and it falls within the scope of the access application.
17. The letters which are not addressed to the food business are about the food business and concern breaches of the Environmental Protection Act. Equally, I am satisfied that these documents also fall within the scope of the access application.

Information in Issue

18. The information in issue in this review is the 29 pages of documents described at paragraph 12. It does not include a small amount of information about the food business' employee, which the applicant does not seek to access.¹¹

Would release of the information be contrary to the public interest?

19. Under the RTI Act, a person has a right to be given access to documents of an agency.¹² However, this right is subject to other provisions of the RTI Act including the grounds on which an agency may refuse access to documents.¹³ Relevantly, access may be refused where disclosure would, on balance, be ***contrary to the public interest***.¹⁴

How is the balance of the public interest determined?

20. Schedule 4 to the RTI Act sets out non-exhaustive lists of factors that may be relevant to deciding the balance of the public interest.¹⁵ The Act also explains the steps that a decision-maker must take in deciding the public interest. To decide whether disclosure of the information in issue would be contrary to the public interest, I must:¹⁶

⁹ For the principles applicable to the interpretation of access applications see *Cannon v Australia Quality Egg Farms Ltd* (1994) 1 QAR 491 at paragraph 10.

¹⁰ See *Wenzel and Secretary, Department of Defence* [2005] AATA 1174 at paragraph 9.

¹¹ This information appears in the information in issue in a letter dated 22 September 2009. The applicant confirmed this on external review in a telephone discussion on 28 July 2011.

¹² Section 23 of the RTI Act.

¹³ As set out in section 47 of the RTI Act.

¹⁴ Sections 44, 48 and 49 of the RTI Act. For a brief overview of the concept of the 'public interest', see *Seven and Redlands*, paragraph 13.

¹⁵ The applicant's submissions to Council objecting to disclosure of the information in issue dated 31 May 2010 also note an 'expectation' that matter such as that in issue would 'retain [its] confidential and private nature' so as to ensure, in essence, frank dealings between entities such as the food business and regulatory authorities such as the Council. It is arguable a submission of this kind could be construed as seeking to raise additional nondisclosure factors regarding confidential information and preserving the flow of information to government. I have not considered those factors in this case because the food business did not expressly seek to raise them and has provided no information either to Council or on external review to substantiate any such claims. In any case, Council has mandatory powers under the relevant Acts. Businesses must cooperate with Council investigators or face a penalty. In these circumstances, there can be no expectation of confidentiality nor prejudice to the future supply of like information to Council.

¹⁶ Section 49(3) of the RTI Act.

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

Where does the balance of the public interest lie in this matter?

21. I am satisfied that disclosure of the information in issue would not, on balance, be contrary to the public interest for the reasons that follow.
22. I have examined the irrelevant factors in schedule 4 of the RTI Act and do not consider that any irrelevant factors arise here.
23. I consider that there are a number of factors favouring disclosure and nondisclosure in this case. I discuss these and their relative weight below.

Factors favouring disclosure

Accountability and positive and informed debate¹⁷

24. I am satisfied disclosure of the information in issue could reasonably be expected¹⁸ to promote open discussion of public affairs and enhance the Government's accountability. The information in issue comprises letters outlining breaches of the Food Act, an Improvement Notice relating to the food business issued under the Food Act and letters and accompanying documents outlining breaches of the Environmental Protection Act. Disclosure of this information will advance this public interest factor, by allowing the community to have a greater understanding of the way in which Council performs the significant regulatory functions conferred on it by both Acts, and enhancing Council's accountability for specific decisions and actions taken in discharge of those functions.
25. The food business disputes the application of this public interest factor. The food business essentially argues¹⁹ that as the information concerns the application and enforcement of the relevant legislation in a discrete context, that is, as against the food business (rather, presumably, than comprising an overview of the Council's regulatory activities in this regard) public scrutiny of Council would not be enhanced by disclosure of the information in issue. Alternatively, the food business contends any scrutiny of Council (in contrast to the food business itself) would be minimal and that accordingly the factor should be afforded little weight.
26. I reject this submission insofar as it argues that the factor does not arise at all for consideration. As noted above, I am satisfied disclosure could reasonably be expected to arm the community with information sufficient to allow it to consider and discuss the Council's discharge of specific regulatory functions and powers, and enhance the Council's accountability for its actions in that regard. That the information relates to the exercise of such powers in a discrete context – that is, as against the food business – in my view only serves to advance this public interest further, by permitting community

¹⁷ Schedule 4, part 2, item 1 and item 2 of the RTI Act.

¹⁸ Noting that the phrase 'could reasonably be expected to' requires an expectation that is reasonably based, ie. neither absurd, irrational or ridiculous: see my decision in *Seven and Redlands* at paragraph 20 for a contemporary restatement of principles applying to the interpretation of this phrase as it used throughout the RTI Act.

¹⁹ As it did in *Seven and Redlands*: see paragraph 21-22 of that decision for the full text of the food business' submissions dated 20 May 2011 in this regard.

insight into the practical manner in which such powers are actually exercised – a case study, in effect, of the enforcement of the relevant regulatory frameworks. This will allow the public to ‘see’ and discuss how Council has discharged its responsibilities in relation to the food business.

27. As releasing the information in issue could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability, I now consider the weight to be attributed to these factors. The Food Act is intended to ensure that food is safe and suitable for human consumption, to prevent misleading conduct relating to the sale of food, and to apply the food standards code.²⁰ The object of the Environmental Protection Act is to protect Queensland's environment.²¹ These objectives are achieved by, among other things, charging local Councils with obligations to monitor and enforce compliance with the Food Act and parts of the Environmental Protection Act.²²
28. Council performs an important function under the Food Act in regulating food businesses to ensure that food is handled and prepared in a way that does not jeopardise consumer health. Council also performs an important public safety function under the Environment Act by ensuring that businesses comply with environmental safety standards. Each are significant regulatory responsibilities, the adequate discharge of which has a significant role to play in protecting individual and community health and welfare. Contrary to the food business' submissions, I do not consider public scrutiny of the Council's regulatory performance will be minimal, but will in fact be increased, both by consideration of the Council's actions as described in the information in issue, and by drawing attention to its ongoing monitoring of food safety and environmental compliance.
29. Given the above, I am satisfied that:
- allowing members of the community to examine and discuss, and
 - enhancing the Council's accountability for,

performance of its regulatory functions are in this context public interest factors deserving of significant weight.

Revealing environmental or health risks or measures relating to public health and safety²³

30. I am satisfied that disclosure of the information in issue could reasonably be expected to reveal environmental or health risks or measures relating to public health and safety.
31. The food business submits²⁴ that disclosure of the information in issue could not reasonably be expected to reveal environmental or health risks because the information in issue:

...relates to reviews which happened many months ago where review matters raised and action requests have been answered and where there currently exists no outstanding action.²⁵

²⁰ See section 8 of the Food Act.

²¹ Section 3 of the Environmental Protection Act.

²² In this case, parts to do with the regulation of wastewater – see Part 3C of the Environmental Protection Act.

²³ Schedule 4, part 2, item 14 of the RTI Act.

²⁴ Food business' submission to Council dated 31 May 2010.

²⁵ Food business' submission to Council dated 31 May 2010.

32. This is a submission essentially going to the weight of the relevant public interest factor, rather than challenging whether it arises for consideration in this review. I have considered weight below. However, insofar as the food business submits the factor does not arise, I note that the wording of the factor is not temporally qualified, that is, it does not strictly require disclosure of 'current' or 'present' health risks, but simply the revelation of 'environmental or health risks'. Disclosure of the information in issue would appear to achieve this end, discussing as it does breaches of public health and environmental obligations.
33. In any event, the factor will also be enlivened where disclosure of relevant information could reasonably be expected to reveal measures relating to public health and safety; the information in issue reveals various actions taken by the Council – monitoring, auditing, recommending or requiring remedial action – steps which can only be described as public health and safety measures. I am therefore satisfied the factor arises for consideration.
34. I accept, however, that the information is relatively old and note that the issues raised by the Council have since been addressed by the food business. Given disclosure of the information would not, therefore, reveal an immediate or ongoing environmental or health risk, I consider the weight to be attributed to this factor is low.

Safe, informed and competitive markets

35. In *Seven and Redlands*, I noted the public interest in safe, informed and competitive markets. I remarked that competitive markets require both multiple participants and informed consumers. I recognised a public interest in disclosing information where that disclosure could reasonably be expected to inform consumers about the marketplace – including particular participants in a specific market – so as to empower consumers to make more informed decisions about such participants, their products and their services.²⁶
36. As in *Seven and Redlands*, the food business in this case contends that this factor is not listed in Schedule 4 to RTI Act, and therefore I cannot rely on it. Further, the food business argues any public interest in competitive and informed markets is the responsibility of organisations such as the Australian Competition and Consumer Commission, not decision-makers applying the RTI Act.²⁷
37. I addressed these submissions in *Seven and Redlands* at paragraphs 35-36 and found that I was not precluded from considering this factor in that review. For the same reasons I am satisfied that I can consider whether the factor arises in this case.
38. Similarly, I consider the factor does actually arise, as it did in *Seven and Redlands*, for consideration in this case. The information on its face comprises technical data and/or conclusions based upon that data as formed by qualified officers with appropriate competence. Disclosing the information would provide the community with sound empirical information detailing key aspects of the food business' compliance history, operations and performance as they relate to the safe handling and production of food and observance of environmental obligations. As I said in *Seven and Redlands*, this will, in turn, give consumers a more informed understanding of how the food business discharges its public health and environmental responsibilities and risks relevant to individual purchasing decisions.

²⁶ *Seven and Redlands* at paragraph 33.

²⁷ Food business' submission to OIC dated 20 May 2011.

39. As to weight, I consider this public interest factor merits considerable weight in the circumstances of this case. Disclosure of the information in issue will increase considerably the information available to consumers, and will therefore significantly advance the public interest in informed and transparent markets. Additionally, disclosure will notify the food business and others within the industry that information relating to the way they meet their obligations under the Food Act and the Environmental Protection Act is open to public exposure, which of itself could reasonably be expected to increase compliance in the food services industry generally, and lead to a concomitant reduction in public health issues.²⁸
40. In view of the above, I am satisfied that significant weight should be attributed to this public interest factor.

Factors favouring nondisclosure

Prejudice the business, commercial or financial affairs of an entity or a person

41. The food business submits that releasing the information in issue could reasonably be expected to prejudice its privacy and business affairs.²⁹ There is a public interest in nondisclosure of information where its release could reasonably be expected to prejudice the private, business, commercial or financial affairs of persons or entities.³⁰
42. The reference to 'private' in the context of a nondisclosure factor aimed at otherwise avoiding business or commercial prejudice to an 'entity' is somewhat incongruous, given the common understanding of privacy as a human right limited to natural persons.³¹ However, the reference to 'private' in this context does make sense if seen as a reference to an increase of scrutiny or public attention. In this sense, I accept that disclosing the information in issue could reasonably be expected to prejudice the food business' commercial reputation by revealing its identity in connection with food and environmental safety audit findings. This is likely to increase public scrutiny of the food business, thus potentially impairing its business or commercial affairs.
43. I also accept that given the information in issue relates to breaches by the food business of the Food Act and the Environmental Protection Act, disclosure could reasonably be expected to prejudice the business affairs of the food business, by, for example, damaging the food business' reputation and possibly deterring existing or potential customers from patronising the business.
44. As I am satisfied these factors apply, I must consider the extent of the prejudice and therefore the weight to be attributed to these factors. In this case, I consider the age of the information, and the fact that the food business has subsequently addressed the

²⁸ In this regard I note the comments of Consumer Focus UK and the study of health inspection scoring in Los Angeles County discussed and relied on by me in *Seven and Redlands*: see paragraph 45 and note 36 of that decision.

²⁹ Certain of the documents in issue contain a small amount of personal information concerning an employee of the food business. The applicant indicated during the course of this external review it did not seek access to this information, and it is no longer in issue. It is therefore unnecessary to consider the personal information and personal privacy nondisclosure factors contained in the RTI Act.

³⁰ Schedule 4, part 3, item 2 and the substantially similar item 15 of the RTI Act., which was also cited by the food business. This latter factor also encompasses prejudice to 'trade secrets' and 'research'; the food business simply cited the factor without supporting argument or evidence; given the information in issue cannot be characterised as either a trade secret or research, I assume the food business relies on this factor in support of its claim disclosure of the relevant information will prejudice its business affairs.

³¹ An understanding restated with some emphasis by the Australian Law Reform Commission in its relatively recent review of Australian privacy law and practice, 'For your information: Australian Privacy Law and Practice', Report No. 108. 11 August 2008. In considering the extension of the Commonwealth *Privacy Act 1988* to corporate and commercial entities, the Commission stated that it was 'not appropriate to extend privacy protection to corporations and other commercial entities. Extending the protection of a human right to an entity that is not human is inconsistent with the fundamental approach of Australian privacy law.': at paragraph 7.58.

various issues canvassed in the information and performed satisfactorily in later audits (information which, as noted in *Seven and Redlands*, it is open for the food business to disclose and publicise) are such that any prejudicial effect that may now flow from disclosure of the information would be moderate.

45. I also note my discussion at paragraphs 56-61 in *Seven and Redlands* of the possible prejudice flowing from 'piecemeal' disclosure under the RTI Act compared with publication under systematic 'name and shame' schemes such as that operating in New South Wales. As explained in *Seven and Redlands*, it is my understanding the food business contends that, given the difference between regulatory regimes, disclosure of the information in issue under the RTI Act is not equivalent to 'naming and shaming' under such schemes, and would therefore be 'unfair', imposing on the food business a greater level of prejudice.
46. As in *Seven and Redlands*, I am satisfied that, while differences exist, relevant information disclosed in each case either comprises information recorded by authorised officers who have formed a reasonable belief as to the commission of an offence under the particular Act, or technical information relating to waste water levels on which such beliefs are based. I am not satisfied the level of prejudice flowing from disclosure of this type of information under the RTI Act would be any higher, and accordingly, do not consider this submission of itself warrants attribution of any additional weight to the relevant nondisclosure factors.
47. In this regard, I afford these factors moderate weight.

Prejudice the effectiveness of testing or auditing procedures³²

48. A public interest factor favouring nondisclosure will arise for consideration where disclosure of the information could reasonably be expected to prejudice the effectiveness of testing or auditing procedures.
49. The food business listed this factor in their original submission to Council objecting to disclosure of the information in issue. The submission did not, however, contain any supporting evidence or reasoning explaining the application or relevance of the factor in this case.
50. The information in issue does contain some audit material, in the form of standard forms completed by Council auditors during inspections under the Food Act. There is nothing on the face of that information, or otherwise before me, to suggest that its disclosure could reasonably be expected to prejudice the effectiveness of relevant audit processes. The material is routine in nature and follows the general requirements of the Food Act. Importantly, Council obviously saw no risk of prejudice to its audit procedures, as it decided to disclose the information. In the circumstances, I am satisfied the factor does not arise for consideration in this case (and it therefore obviously deserves no weight).

Conclusion – balancing competing public interest factors

51. I have identified four factors favouring disclosure of the information in issue and two factors favouring nondisclosure.

³² Schedule 4, part 3, item 21 of the RTI Act.

52. Of the factors favouring disclosure, I consider that the public interest in revealing health risks should in the circumstances of this case be afforded marginal weight (due to the age of the relevant information). However, I consider that the public interest in
- enhancing Council's accountability,
 - promoting public discussion about the way in which Council performs its roles under the Food Act and the Environmental Protection Act, and
 - having safe, informed and competitive marketplaces
- should each be afforded significant weight.
53. Weighing against these public interests is the public interest in avoiding prejudice to the food business' commercial and business affairs. I consider that these nondisclosure factors should be afforded moderate weight, and do not outweigh the factors favouring disclosure discussed above.
54. I am therefore satisfied that disclosure of the information in issue would not, on balance, be contrary to the public interest. The applicant is therefore entitled to access the information, in accordance with the right of access conferred by section 23 of the RTI Act.

DECISION

55. I affirm Council's decision to grant access to the information in issue and find that disclosure would not, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act.
56. 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: 14 September 2011

APPENDIX

Significant procedural steps

Date ³³	Event
15 March 2010	Seven Network applied to Gold Coast City Council (Council) under the RTI Act for documents about failed health and safety audits in relation to a food business.
20 May 2010	Council consulted the food business regarding the release of the information requested by the applicant.
31 May 2010	The food business responded objecting to release of the information requested by the applicant.
17 June 2010	Council issued its decision (access decision).
15 July 2010	The food business applied to Council for internal review of the access decision.
4 August 2010	Council's issued an internal review decision affirming the access decision.
1 September 2010	The food business applied to the Office of the Information Commissioner (OIC) for an external review of Council's access decision.
24 September 2010	OIC informed Council and the food business that the application had been accepted for external review.
21 April 2011	OIC conveyed a written preliminary view the food business and invited it to provide submissions in support of its' case it did not accept the preliminary view.
20 May 2011	OIC received submissions from the food business in response to the preliminary view.
28 July 2011	Seven Network indicated that it would like to be included as a third party in the review.

³³ Of correspondence or relevant communication unless otherwise stated.