



Decision and Reasons for Decision

Citation:	<i>Save Our Foreshore Incorporated and Department of Natural Resources and Mines; Shute Harbour Marina Development Pty Ltd (Third Party) [2017] QICmr 55 (24 November 2017)</i>
Application Number:	313122
Applicant:	Save Our Foreshore Incorporated
Respondent:	Department of Natural Resources and Mines
Third Party:	Shute Harbour Marina Development Pty Ltd ACN 081 285 832
Decision Date:	24 November 2017
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - financial and commercial information about a developer approved to undertake significant development on State land - high level of community interest in project - enhance accountability and transparency - reveal background information to a Government decision - contribute to positive and informed debate - prejudice to entity's business affairs - prejudice to Government's ability to obtain confidential information - whether disclosure would, on balance, be contrary to the public interest - whether access to information may be refused under section 47(3)(b) of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. Save Our Foreshore Incorporated (**SOFI**) applied to the Department of Natural Resources and Mines (**Department**) for all documents relating to the independent Financial and Managerial Capability Assessment (**FMCA**), and all government responses to the assessment, in relation to the proposed lease application by Shute Harbour Marina Development Pty Ltd (**SHMD**).¹
2. The Department located 466 pages and following a third party consultation process, decided to grant SOFI access to 196 full and 82 part pages.² The Department refused access to the remaining information on the basis that it was exempt, or contrary to the public interest to disclose, and excluded some irrelevant/out of scope information. This decision was upheld by the Department on internal review.

¹ Access application received by the Department on 19 June 2016.

² Decision dated 26 September 2016.

3. SOFI applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision to refuse access to parts of the FMCA.³ On external review, SOFI has advanced arguments that the public interest factors favouring disclosure should be afforded greater weight, due to the long standing community interest in the Shute Harbour development. In SOFI's view, the community should be made aware of SHMD's detailed financial information so it can independently assess the developer's ability to fully deliver the project.
4. For the reasons set out below, I find that access to the FMCA information may be refused on the basis that disclosure would, on balance, be contrary to the public interest under section 47(3)(b) of the *Right to Information Act 2009* (Qld) (**RTI Act**).⁴

Background

5. In 2015, SHMD applied for a new term lease of five years over property at Shute Harbour with the objective of constructing an integrated marina development.⁵ The development site is situated 10 kilometres south-east of Airlie Beach, adjacent to the Great Barrier Reef Marine Park.
6. Under the *Land Act 1994* (Qld) (**Land Act**), applications for a lease of State land for a significant development are subject to an independent assessment of the proponent's financial and managerial capabilities.⁶ As the SHMD proposal was considered to be a significant development,⁷ the Department retained PricewaterhouseCoopers (**PwC**)⁸ to conduct the independent assessment and provide a report to the Department. The Department has advised OIC that the lease was granted to SHMD earlier this year.
7. SHMD was consulted, as a third party, by the Department in relation to SOFI's access application and raised objections to disclosure of all of the information. Accordingly, access to the information which the Department decided could be disclosed to SOFI remained deferred pending SHMD's review rights. While SHMD did proceed to seek external review of the Department's disclosure decision, it elected not to pursue its objections and that external review⁹ was finalised earlier this year by OIC.¹⁰ As a result, SOFI has received access to the following (in part) during the external review process:
 - various sections of the FMCA¹¹
 - the Department's correspondence to SHMD seeking further information and SHMD's response; and
 - the FMCA addendum report.
8. Significant procedural steps relating to the external review process are set out in the Appendix to this decision.

³ This was described as "Category B" information in the Department's decisions and SOFI's external review application. In the interests of progressing the application, SOFI did not seek external review of the Department's decision to refuse access to any other categories of information and therefore, they are not considered in this decision.

⁴ This affirms the Department's internal review decision dated 17 November 2016.

⁵ The development was the subject of Environmental Impact Statement approval (with conditions) by the Coordinator General and Commonwealth Minister for the Environment in 2014.

⁶ Section 129 of the Land Act.

⁷ Under section 128 of the Land Act.

⁸ PwC did not participate in this review.

⁹ Review no. 313156.

¹⁰ Under section 90(4) of the RTI Act. Despite SHMD not pursuing its objections, I have named it as a third party in this review, given its historical involvement in the matter. However, as I have found that access to all remaining information in issue may be refused, no aspect of this decision is adverse to SHMD's interests.

¹¹ Including executive summary, contents, background/context, scope and approach, overview of the proposal, part of the financial model, conclusions, a summary of the key risks and potential options for the Department

Reviewable decision

9. The decision under review is the Department's internal review decision dated 17 November 2016.

Evidence considered

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

Information in issue

11. The information in issue in this review consists of 58 full and 20 part pages (**Information in Issue**) and is in the nature of:
- information supplied by SHMD to the Department for the purposes of the FMCA¹²
 - parts of the FMCA and addendum FMCA prepared by PwC;¹³ and
 - a document summarising/extracting parts of the FMCA and addendum FMCA.¹⁴
12. Generally speaking, the information describes the financial position of SHMD, including revenue forecasts, detailed financial modelling, investment strategies, company and shareholder arrangements, feasibility study and cash flow estimates, cost estimates, expenditure forecasts and risk assessment information.¹⁵

Relevant law

13. Under the RTI Act, a person has a right to be given access to documents of an agency. This right is however, subject to other provisions of the RTI Act, including the grounds on which access to documents may be refused. Relevantly, access may be refused to information where its disclosure would, on balance be contrary to the public interest.¹⁶
14. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest¹⁷ and explains the steps that a decision-maker must take¹⁸ in deciding the public interest as follows:
- identify any irrelevant factors and disregard them
 - identify relevant public interest factors favouring disclosure and nondisclosure
 - balance the relevant factors favouring disclosure and nondisclosure; and
 - decide whether disclosure of the information in issue would, on balance, be contrary to the public interest.

¹² Parts of pages 89 (duplicated at 219 and 225), 100-101; all of pages 117-122, 124-128, 200-208, 210-211 and 213-215.

¹³ Parts of pages 19-20, 29, 35-36, 54, 61, 318-320, 324, 327-328; all of pages 27-28, 30-32, 34, 37-53, 55-60, 315 and 322-323.

¹⁴ Parts of pages 286-287; all of page 289. This appears as an attachment to an email between Departmental officers.

¹⁵ Section 108 of the RTI Act prevents me from describing the exact content of the Information in Issue in any further detail.

¹⁶ Section 47(3)(b) and 49 of the RTI Act. The term '*public interest*' refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.

¹⁷ Schedule 4 of the RTI Act sets out the factors for deciding whether disclosing information would, on balance, be contrary to the public interest. However, this list of factors is not exhaustive. In other words, factors that are not listed may also be relevant.

¹⁸ Section 49(3) of the RTI Act.

Findings

15. No irrelevant factors arise in the circumstances of this case.

Factors favouring disclosure

16. Under section 44(1) of the RTI Act there is a pro-disclosure bias in deciding access to documents and this is the starting point for considering disclosure of the Information in Issue. I consider the following factors favouring disclosure are also relevant in this case as disclosure of the Information in Issue could reasonably be expected to:
- promote open discussion of public affairs and enhance the Department's accountability;¹⁹
 - reveal the reason for the Department's decision and any background or contextual information that informed the decision;²⁰ and
 - contribute to positive and informed debate on important issues or matters of serious interest.²¹
17. SOFI argues that the Information in Issue relates *'directly to valid doubts about the proponent's inability to deliver the fully integrated resort project'* and further that, *'based on the long standing level of public interest in the proposal, that the Whitsunday community be made aware of this financial capacity or lack of capacity and its potential to negatively impact on the community, life and property'*.²² SOFI also emphasises that it *'is not a development proposal on privately owned, freehold land'* but a *'public foreshore site, on the edge of the Great Barrier Reef...that will see the substantial loss of an iconic natural harbour and access for all'*.²³
18. I acknowledge that there is a great deal of community interest in the Shute Harbour Marina project and that the community is concerned about the potentially significant impacts of the various stages of the project. Accordingly, I consider disclosing the Information in Issue could reasonably be expected to promote further open discussion of public affairs. I also consider that disclosure could, to an extent, enhance the Department's accountability with respect to approving a lease for a significant development on State land. However, as outlined above, the Information in Issue is largely of a financial nature, and provides little evidence of the particular actions taken by the Department or the specific decisions made by the Department in relation to the lease. Accordingly, I consider the weight of this factor is somewhat reduced and afford it moderate weight in favour of disclosure.
19. I accept that the Information in Issue would reveal the background and contextual information that informed the Department's decision-making process when granting a lease over State land, including details of the capability and competency of the developer to deliver the project. However, taking into account the parts of the FMCA that have already been disclosed to SOFI, I consider this public interest has been discharged to a substantial extent, and accordingly, I afford this disclosure factor only moderate weight.
20. I acknowledge that the SHMD proposal is a project of considerable community interest which has attracted significant media attention and has been the subject of robust community debate. I have carefully considered SOFI's submissions in this regard, including its argument about the *'long and disreputable history of failed developments in*

¹⁹ Schedule 4, part 2, item 1 of the RTI Act.

²⁰ Schedule 4, part 2, item 11 of the RTI Act.

²¹ Schedule 4, part 2, item 2 of the RTI Act.

²² Submission to OIC dated 12 September 2017, page 2.

²³ Ibid.

[the] area'.²⁴ Taking into account the level of FMCA information that has already been disclosed to SOFI under the RTI Act, and the information already in the public arena about the project and SHMD, I consider that disclosure of the Information in Issue would moderately contribute to positive and informed debate on this matter of serious interest.

21. SOFI also contends that disclosure could reasonably be expected to:

- ensure effective oversight of expenditure of public funds²⁵
- contribute to the protection of the environment²⁶
- advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies;²⁷ and
- contribute to the administration of justice generally, including procedural fairness.²⁸

22. The Information in Issue relates to the business, commercial and financial affairs of SHMD—it does not directly reveal anything about the expenditure of public funds. Therefore, I do not consider this factor applies. Similarly, while the environmental impacts of the Shute Harbour Marina project have been the subject of media attention and public debate, I do not consider that disclosing the Information in Issue could reasonably be expected to advance this factor. As set out above, the Information in Issue relates to the business and financial affairs of SHMD—it does not canvass any environmental issues that may be associated with the project. Accordingly, while I am cognisant of SOFI's interest in protecting the environment, I am unable to see how that factor applies in relation to disclosure of the particular Information in Issue in this case.

23. SOFI has not provided specific submissions on how the disclosure factors regarding advancing fair treatment and administration of justice could be advanced through disclosure of the Information in Issue. Having considered the nature of the Information in Issue, I do not consider these factors apply.²⁹

Factors favouring nondisclosure

24. The RTI Act recognises public interest factors favouring nondisclosure where disclosing information could reasonably be expected to:

- prejudice the private, business, professional, commercial or financial affairs of entities;³⁰ and
- cause a public interest harm because it would disclose information concerning the business, professional, commercial or financial affairs of an agency or another person and could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of this type to government.³¹

25. In most instances, the question of whether disclosure of information could reasonably be expected to prejudice business affairs will turn on whether the information is capable of causing competitive harm to an entity.³² The Information in Issue relates to the business, commercial and financial affairs of SHMD and is commercially sensitive. I consider

²⁴ Submission to OIC dated 12 September 2017, page 3.

²⁵ Schedule 4, part 2, item 4 of the RTI Act.

²⁶ Schedule 4, part 2, item 13 of the RTI Act.

²⁷ Schedule 4, part 2, item 10 of the RTI Act.

²⁸ Schedule 4, part 2, items 16 and 17 of the RTI Act.

²⁹ I have also considered whether any other factors favouring disclosure apply, including those listed in schedule 4, part 2 of the RTI Act, and consider that none arise in the circumstances of this case.

³⁰ Schedule 4, part 3, item 2 of the RTI Act.

³¹ Schedule 4, part 4, section 7(1)(c) of the RTI Act.

³² *Kalinga Woolloowin Residents Association Inc and Brisbane City Council; City North Infrastructure Pty Ltd; Treasury Department* (Unreported, Queensland Information Commissioner, 9 May 2012) at [89].

revealing such information could reasonably be expected to prejudice SHMD's ability in the future to secure investment, negotiate with third parties and retain subcontractors. I have also taken into account the fact that there is no restriction on publication or dissemination of information disclosed under the RTI Act and I am satisfied that such disclosure could reasonably be expected to prejudice SHMD's business, commercial and/or financial affairs and have an adverse effect on those affairs. Accordingly, I afford both factors at paragraph 23 significant weight.

26. The RTI Act also recognises:

- a factor favouring nondisclosure will arise where disclosing information could reasonably be expected to prejudice an agency's ability to obtain confidential information;³³ and
- that disclosing information could reasonably be expected to cause a public interest harm if the information consists of information of a confidential nature that was communicated in confidence, and disclosing it could reasonably be expected to prejudice the future supply of information of this type.³⁴

27. SHMD provided its financial data to the Department on a '*commercial in confidence*' basis and submits that an implied obligation of confidence binds the Department from disclosing all further information it provided for the purpose of the creation of the FMCA. This assertion has been supported by the Department in refusing access to the Information in Issue in its initial decision and internal review decision. PwC were also engaged by the Department on the basis that the information provided by SHMD would be treated confidentially and the FMCA states that the information contained in the report '*is strictly confidential*'. There is no evidence before me to indicate that the Information in Issue has not been kept confidential by both the Department and PwC, on behalf of the Department.

28. I acknowledge that the Land Act required SHMD to provide certain information to the Department for the purpose of the FMCA. As discussed above, the Information in Issue is extremely detailed in nature and extensively canvasses SHMD's financial position. I consider that in providing such comprehensive financial information, SHMD expected it to be treated confidentially by the Department and PwC. As set out above, there is no evidence that it has been more broadly disclosed. I am satisfied that if such information was disclosed under the RTI Act, entities could be reluctant to provide such comprehensive financial details in the future and may seek to provide only minimum information due to concerns about wider disclosure.³⁵ I consider that, in practice, the prejudicial outcome of this would be that the Department may not be provided with sufficient information in the first instance to properly inform its decision making, and this could lead to inefficiencies and an overly complicated, bureaucratic process.

29. For the reasons set out above, I consider it reasonable to expect that disclosing the Information in Issue would prejudice or compromise the Department's ability to obtain confidential information, and would lead to a moderate level of public interest harm. Accordingly, I afford moderate weight to these nondisclosure factors.

³³ Schedule 4, part 3, item 16 of the RTI Act.

³⁴ Schedule 4, part 4, section 8(1) of the RTI Act.

³⁵ See *North Queensland Conservation Council Inc and Queensland Treasury* [2016] QICmr 21 (10 June 2016) at [64]-[66], however, there was no statutory requirement to provide information in that case and accordingly, the nondisclosure factor was afforded more weight.

Balancing the public interest factors

30. I am satisfied that, in addition to the general pro-disclosure bias, there are three relevant public interest factors favouring disclosure of the Information in Issue due to the significant community interest in the Shute Harbour Marina project.³⁶ As the Information in Issue relates solely to the financial, business and commercial affairs of SHMD rather than revealing any aspects of the Department's decision-making process, I have afforded those factors only moderate weight. The weight of those factors is also reduced due to the information which has been disclosed to SOFI under the RTI Act which I consider serves to partly satisfy the public interest in disclosure.
31. On the other hand, I find that disclosing the Information in Issue could reasonably be expected to prejudice, and have an adverse effect on, the business, commercial and financial affairs of SHMD due to the particularly sensitive financial information contained in the Information in Issue. I have afforded these factors significant weight. I have also afforded moderate weight to the nondisclosure factors concerning confidentiality due to the potential prejudice to the Department's ability to obtain such comprehensive financial information, when assessing significant developments in the future.
32. In this case, while I acknowledge that there are relatively strong arguments in favour of disclosure, I find that the weight of the nondisclosure factors outweighs that of the disclosure factors. Accordingly, I find that disclosure of the Information in Issue would, on balance, be contrary to the public interest and therefore, access to it may be refused under section 47(3)(b) of the RTI Act.

DECISION

33. For the reasons set out above, I affirm the Department's decision and refuse access to the Information in Issue under section 47(3)(b) of the RTI Act.
34. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Katie Shepherd
Assistant Information Commissioner

Date: 24 November 2017

³⁶ See paragraphs 16 to 20 above.

APPENDIX

Significant procedural steps³⁷

Date	Event
14 December 2016	OIC received the external review application.
15 December 2016	OIC asked the Department to provide procedural documents relevant to the review.
4 January 2017	OIC received the requested documents from the Department.
6 January 2017	OIC obtained further relevant information from the Department.
9 January 2017	OIC notified the applicant and the Department that the external review application had been accepted. OIC asked the Department to provide a copy of the documents located in response to the access application.
10 January 2017	OIC received the requested documents from the Department.
16 January 2017	OIC provided the applicant with an update on the status of the review.
1 March 2017	OIC asked the Department for additional information and submissions.
8 March 2017	OIC received the requested information from the Department.
28 March 2017	OIC provided the applicant with an update on the status of the review.
12 April 2017	OIC requested further information and submissions from the Department.
28 April 2017	OIC provided the applicant with an update on the status of the review.
5 May 2017	OIC received the requested submissions from the Department.
21 May 2017	OIC received submissions from the applicant.
19 June 2017	OIC provided the Department with an update on the status of the review.
18 July 2017	OIC provided the applicant with an update on the status of the review.
14 August 2017	OIC conveyed a preliminary view to the Department and requested submissions in response.
15 August 2017	OIC provided the applicant with an update on the status of the review.
22 August 2017	OIC conveyed a preliminary view to the applicant and requested submissions in response. OIC asked the Department to release some additional information to the applicant.
28 August 2017	OIC provided the applicant with an update on the status of the review.
31 August 2017	OIC received submissions from the Department.
1 September 2017	OIC provided the applicant with an update on the status of the review.
12 September 2017	OIC received submissions from the applicant.
21 September 2017	OIC responded to inquiries raised by the applicant about the review. OIC provided the Department with an update on the status of the review.

³⁷ This table does not particularise the steps taken in the related third party review, no. 313156, as it was finalised informally.