Office of the Information Commissioner
Queensland

Decision and Reasons for Decision

Application Number: **2006/F0005 (53629)**

Applicant: **Dr B Moon**

Respondent: **Gold Coast City Council**

Decision Date: **13 February 2007**

Catchwords:

sufficiency of search – Council decision making process – Integrated Planning Act – no further documents exist – Council searches reasonable - s.22(a) – access to documents held in Planning and Environment Court Registry – Gold Coast City Council administrative access regime

Contents

Background 2

Steps taken in the external review process 3

Matter in issue 5

Scope of FOI Application and Sufficiency of Search 5

Section 22(a) of the FOI Act 14

Decision 17

Reasons for Decision

Background

1. Dr Moon (the **Applicant**) seeks review of the Gold Coast City Council's (the **Council**) decision to exempt material from disclosure under section 43(1) of the *Freedom of Information Act 1992* (**FOI Act**). Additionally, he claims that there are further documents that should be released to him that are responsive to his freedom of information (**FOI**) application relating to the determination of the assessment procedure for a particular development application.

2. The Applicant's FOI application dated 19 April 2005 was expressed to encompass 'primary' and 'ancillary' components relating to how the Council made the decision that the relevant development application should be assessed under the *Integrated Planning Act 1997* (**IPA**) as 'code assessable':

> *This is a request for information about matters by Council in regard to the way Council has acted to determine the assessment procedure for a development application by the Co-You Corporation…*
>
> *Essentially, this information request is to gain material that enables me to comprehend how Council made this decision (to be Code Assessable). In effect this is the primary component in this information request.*
>
> *To fully comprehend how Council made this development application to be 'processed' as Code assessable, some background material pertinent to the original decision is being sought. The intention for seeking selective aspects of the original decision is to compare the logic assumably embraced in documents pertinent to the primary component. Thus, this part of the information request is an ancillary component.*

3. 'Council' was defined broadly in the FOI request to include persons contracted to undertake work for the Council.

4. In its decision of 24 June 2005 the Council advised that it found 158 documents falling within the FOI request, to which 15 of the documents were refused access under section 43(1) of the FOI Act.

5. On 1 July 2005 the Applicant subsequently contacted the Council to clarify the scope of his FOI application. In a file note of the conversation (noted in his application for external review) he wrote:

> *Went on to discuss the basis of application – that it sought information about how Council (it's officers) <u>decided</u> how a development application on a piece of land in Currumbin be considered to be assessed under the Integrated Planning Act as '*Code Assessable' *(a term that denotes a specific method by which to assess a development application). Thus, the focus of the FoI was upon the material used by Council (officers) to come to that <u>decision</u>*. [original emphasis]

6. In a letter dated 19 August 2005, based on the Applicant's clarification, Council rescinded the decision of 24 June 2005 and replaced it with a decision that found 210

documents responsive to the application to which 28 documents (folios) were refused access under section 43(1) of the FOI Act.

7. The Applicant applied to this Office for external review of the decision in a letter dated 23 September 2005. This Office advised the Applicant that it has no jurisdiction to undertake the review as he had not applied in writing for internal review of the Council's decision (section 73(3) of the FOI Act).

8. In a letter dated 10 October 2005, the Applicant sought an extension of time from the Council in which to make an application for internal review. In support of his application, the Applicant provided a list of specific documents or categories of documents, which he believed the Council held and that he claimed were responsive to his initial application (hereinafter referred to as the '**list'**).

9. The internal review decision-maker decided to accept the late application for internal review and in a decision dated 19 December 2005 affirmed the original decision maker's decision. He said that there are no further documents responsive to the FOI application; however, he did not specifically address the items requested by the Applicant in the 'list'.

10. By letter dated 2 January 2006, the Applicant sought external review of the Council's decision that relevant documents were exempt under section 43(1) of the FOI Act and that the Council does not control or possess additional documents responsive to his FOI application.

Steps taken in the external review process

11. The matter in issue was obtained and examined.

12. During a telephone conversation in May 2006 the Applicant accepted this Office's oral preliminary view that the matter in issue was exempt from disclosure under section 43(1) of the FOI Act and agreed to withdraw this component of the review.

13. This Office asked the Council whether it was willing to release to the Applicant the documents detailed in the 'list'. In a letter dated 25 May 2006 the Council provided further documents responsive to some of the items requested in the 'list', and reasons why the Council does not hold other documents requested in the 'list'.

14. In a letter dated 30 June 2006, this Office provided its preliminary view to the Applicant that there are no reasonable grounds for believing the Council holds further documents responsive to his FOI request.

15. In a letter dated 14 July 2006, the Applicant advised that he did not accept the preliminary view and provided further grounds as to his claim that additional documents responsive to his FOI application are within the control of Council. This Office forwarded to the Council the Applicant's arguments and requested that further searches be undertaken.

16. In a letter dated 17 October 2006 the Council responded to the Applicant's submissions and provided an explanation as to why there are no further searches it could take that would produce other documents in the possession or under the control of the Council (including documents in the possession of third parties) falling within the scope of the FOI request.

17. On 25 October 2006, a case officer from this Office had a meeting with the Applicant to provide him with the opportunity to respond to the Council's submissions of 17 October 2006. He made further submissions at the meeting.

18. In a letter dated 6 November 2006 I asked the Council to respond to the Applicant's submissions, to which the Council responded in a letter dated 23 November 2006.

19. I advised the Applicant in a letter dated 11 December 2006 of my preliminary view that:

    a. the documents he sought relating to the assessment of the development application were outside the scope of his FOI request;
    b. the Council correctly exercised its discretion under section 22(a) of the FOI Act to refuse access to specified documents; and
    c. there are no reasonable grounds for believing that there exists any further documents responsive to the FOI application and the search efforts by the Council have been reasonable in all the circumstances of the case.

20. In a letter dated 30 December 2006 the Applicant:
    a. accepted my view that documents relating to the actual assessment of the development applications are outside the scope of his request however he claimed that the relevant documents related to "*how Council (via both officers and Councillors) assessed/decided/interpreted how the development application would be assessed*"; and
    b. did not accept my view in relation to section 22(a) of the FOI Act and sufficiency of search issues.

21. During a telephone conversation on 4 January 2007 the Applicant provided further clarification on his submissions to this Office.

22. On 18 January 2007, a case officer from this Office attended the Council to:
    a. view the process by which Council files are searched;
    b. clarify Council processes for handling development applications; and
    c. clarify the historical, legislative and policy context of the relevant development applications.

23. On 24 January 2007, an officer from this Office searched the Planning and Environment Court Registry for documents to which access was refused under section 22(a) of the FOI Act.

24. In making my decision I have taken into account the following material:

- the Applicant's correspondence dated 19 April 2005, 23 September 2005, 10 October 2005, 2 January 2006, 14 July 2006, and 30 December 2006;
- the Council's correspondence dated 24 June 2005, 19 August 2005, 19 December 2005, 25 May 2006, 17 October 2006, 23 November 2006, and 25 January 2007;
- information provided at the meeting with the Applicant on 25 October 2006 and with the Council on 18 January 2007;
- verbal submissions from both parties in telephone conversations during the course of the review; and
- the 1995 Albert Shire Planning Scheme and relevant provisions under IPA and the *Integrated Planning Regulation 1998*.

Matter in issue

25. As the Applicant accepted the preliminary view that the relevant documents are exempt from disclosure under section 43(1) of the FOI Act, those documents no longer form part of this review.

26. Therefore, the outstanding issue in this review relates to the sufficiency of the Council's searches for documents that are responsive to the Applicant's FOI request. During the course of the review, the Council provided further documents responsive to the 'list' provided by the Applicant, however the Applicant raised various grounds as to why he believed the Council held further documents responsive to his FOI application (in general) and his 'list' (in particular).

27. During the course of this review, and in response to the Applicant's submissions that the Council holds various documents, the Council raised arguments that it may refuse access to particular documents under section 22 of the FOI Act.

28. Thus, in addition to the question whether Council's searches were sufficient in this case, I must also consider whether the Council correctly exercised its discretion to refuse access under section 22 of the FOI Act to two items from the 'list', namely:
    - the minutes and relevant attachments for the Council meeting dated 4 June 2004; and
    - Sheets 52/16 and 80/3 of the 1992 Planning Scheme maps.

Scope of the FOI Application and Sufficiency of Search

29. Prior to addressing the substance of the Applicant's claims in relation to the existence of further responsive documents it is necessary to consider what documents are properly within the scope of the application. In order to do this it is useful to review the legislative context of the relevant development applications.

Legislative context relating to the relevant development applications

30. IPA provides for coordinated and integrated planning across all levels of government. It provides for the management of the processes by which development occurs with a view to managing the effects of development on the environment.

31. For local Councils, IPA provides the framework and procedures for the application, information and referral, notification and decision stages for their approval and assessment processes for development within their jurisdiction.

32. Development proposals may be either assessable (impact or code assessable), exempt or self-assessable (Schedule 10 Dictionary IPA). In summary:

    a. Impact assessment requires an assessment of the environmental effects (physical, social and economic) of the proposed development and the ways of dealing with the effects;
    b. Code assessment requires an assessment by the assessment manager (in this case, the Council) of the proposal against any applicable code;
    c. Self assessment requires that the applicant ensures the proposal complies with any applicable code or standards; and
    d. Exempt development is where the proposal is not required to comply with any codes or standards.

33. Generally, a Council will assess development applications in accordance with the provisions of a local government planning scheme, so long as its provisions are not inconsistent with the provisions of IPA.

34. In circumstances where a Council has implemented a new planning scheme, a development applicant may propose to carry out development under a superseded planning scheme (Schedule 10 Dictionary IPA) if the development application is made within two years of the implementation of the new planning scheme.

35. The Queensland Government's *IDAS Guideline 1: Implementing the Integrated Development Assessment System, March 2001, Version 2.1* clarifies that if the proposed development would not have required a development permit under the superseded planning scheme but requires one under the scheme in force at the time the application was made, the applicant may notify its intention to carry out development under the superseded planning scheme. If the proposed development would have required a permit (i.e. if it would have been assessable) under the superseded scheme and is assessable under the new planning scheme, the applicant may make a 'development application (superseded planning scheme)' requesting assessment under the superseded planning scheme.

36. If a development application (superseded planning scheme) is made, Council has the discretion to:
    a. agree to apply the superseded planning scheme; or
    b. refuse to apply the superseded planning scheme so that the new planning scheme would apply to the development application (section 3.2.5 and section 3.5.27 IPA).

37. If a Council exercises its discretion to refuse to apply the superseded planning scheme, under certain circumstances, it may be liable to pay compensation to an applicant if in applying the new planning scheme the value of the interest in the land is reduced (section 5.4.2 IPA).

38. In this case, on 30 April 2004 the Council received from the relevant developer (the **Development Applicant**):

    a. Notification of the intention to carry out development that was self-assessable or exempt under the superseded planning scheme (**use component**);
    b. Application for development permit for reconfiguration of a lot in stages (**ROL component**);
    c. Application for preliminary approval for building work (building height) (**building component**);
    d. Application for preliminary approval for operational work (**operational components**):
        i. Tree clearing;
        ii. Road layout and grading; and
        iii. Water and sewerage infrastructure.

39. In 2003 the Council implemented a planning scheme that was compliant with the provisions of IPA. However, as the Development Applicant proposed to carry out development under the superseded planning scheme, the source of development rights for the subject land was the 1995 Albert Shire Planning Scheme (the **Superseded Scheme**) (section 3.1.1 Superseded Scheme).

40. The Council's City Planning Committee (the **Committee**) considered the application under the Superseded Scheme in a meeting on 4 June 2004. The relevant agenda (that is publicly available on the Council's website – see below) states in part:

> *Assessment of the ROL application against the existing planning scheme is likely to result in council facing a claim for compensation, and therefore it is recommended that assessment of the ROL application proceed under the superseded scheme.*

41. The relevant land was located in the Special Facilities Zone of the Superseded Scheme in which 'permitted development' (i.e. development that could be carried out without consent of Council) could in effect only be carried out in accordance with the red or black lettering on the relevant zoning map (section 8.1.2 Superseded Scheme). As the proposed development exceeded 2 storeys in height and therefore did not comply with section 8.1.3.1 of the Superseded Scheme, such development could only be undertaken with the consent of Council (in other words, would have required a permit to carry out development).

42. The Committee resolved to:

    a. assess the relevant components of the application under the Superseded Scheme (except for the 'operational component – trees' which was to be assessed against the current planning scheme, i.e. 2003 Living City Scheme); and
    b. advise the Development Applicant that the 'notification of the intention to carry out development that was self-assessable or exempt under a superseded planning scheme' was misconceived because the proposed development was impact assessable development under the Superseded Scheme.

43. It is my understanding that once the Council had made a decision about which planning scheme to apply to a particular development application, the planning scheme's provisions determine whether an application is to be effectively assessable or not (so long as its provisions are not inconsistent with IPA). In this case, Council consent (or assessment) was required to carry out the proposed development under the Superseded Scheme.

44. Under IPA, schedule 8 and the *Integrated Planning Regulation 1998* or a planning scheme determines the 'level of assessability' for development (sections 3.1.2 and 6.1.1 of IPA). In this case, as the Superseded Scheme was implemented prior to the introduction of IPA, section 6.1.28(2) of IPA specifies that the application will be processed as if it were impact assessable if, under the repealed *Local Government (Planning and Environment) Act 1990*, the proposal would have required public notification (i.e. a consent or rezoning application). If public notification would not have been required, the application is to be processed as if it were code assessable (section 6.1.28(3) IPA).

45. Under IPA, if any part of a development application requires impact assessment (even if code assessment is required for another part of the application), the process for impact assessment must be followed on the whole application (section 3.4.2 IPA).

46. Therefore, the assessment of the original development application under the Superseded Scheme (and the current scheme in the case of the operational component – 'trees') meant that *automatically* under IPA:

    a. the use and building components were impact assessable;
    b. the ROL and operational components were code assessable; and
    c. therefore the whole application was impact assessable.

47. The Development Applicant subsequently lodged an amended development application in January 2005 and a second amended development application in March 2005 so that the application no longer contained a proposal to build greater than 2 storeys. This triggered an *automatic* change under IPA in the assessment status for the application's components so that:

    a. The building component became self-assessable; and
    b. The ROL and operational components remained code assessable.

48. On the material available to me, it appears that the Council did not have the discretion to determine whether the development application was impact or code assessable; it was an automatic consequence of the consideration of the development proposal under the Superseded Scheme. The only decision the Council was required to make was which planning scheme to apply.

49. Further, I have no reason to doubt the Council's assertions that there was no need to submit the amended development applications to the City Planning Committee for a decision as to which planning scheme to apply because it was considered to be an amendment to the original development application under the Superseded Scheme. Accordingly, once the Council had made the initial decision that the development application was to be assessed under the Superseded Scheme, it had no discretion to determine which planning scheme should apply to the amended development application.

Scope of the FOI application

50. In his FOI application and later submissions the Applicant requested documents relating to the Council's 'decision' to make the application 'code assessable'. As noted in the section above, I am satisfied that there was no Council decision to make the application code assessable. Accordingly, there can be no documents responsive to this aspect of the Applicant's application.

51. I note however, that in my view the FOI application can be interpreted to relate to documents concerning how it exercised its discretion to determine that the Superseded Scheme applied to the relevant development applications.

52. During the review, the Applicant provided submissions about the sufficiency of Council's searches relating to both the determination of the assessment procedure to be applied to the development application and the assessment of the original and amended development applications.

53. The Council argued that documents relating to the assessment of the development applications (i.e. the original application and the amended applications) did not fall within the scope of his application. I note, however that the Council FOI officer who processed the application advised that while she did not agree to increase the scope of the Applicant's FOI request to include the assessment of the development applications, in order to facilitate the resolution of his application, she in fact released

some documents relating to the assessment of the amended development application.

54. The general rule is that an applicant is not permitted to unilaterally expand the terms of an access application (see *Re Robbins and Brisbane North Regional Health Authority* (1994) 2 QAR 30 at paragraph 17). Expansion of the scope of an access application can be done with the consent of the agency, but an agency that is not prepared to so consent is within its rights to insist that the access applicant lodge a fresh access application for any document that falls outside the terms of an existing access application.

55. Having reviewed the wording of the Applicant's initial application to the Council dated 19 April 2005, his summary of the 1 July 2005 telephone conversation with the Council clarifying scope issues (outlined in his application for external review) and the 'list', I advised the Applicant of my preliminary view that the scope of his application is limited to documents concerning the determination of the assessment procedure that would apply to the development applications. I expressed my view that documents concerning the actual assessment of the development applications are not within the scope of his application. I noted that he has the right to make a fresh application to the Council for documents concerning the assessment of the relevant development application/s.

56. In his response of 30 December 2006, the Applicant said that he generally concurred that the FOI application does not extend to the assessment of the development applications but said:

> *However, I was not seeking material showing how Council actually assessed the Development Application, rather, how Council (via both officer and Councillors) assessed/decided/interpreted how the Development Application would be assessed. This 'process' would involve 'deciding' the legislative parameters, the parties needing to be involved, and the issues/grounds/criteria that will come into play…So, in the 'process' of 'deciding' how this Development Application would be assessed, the Council would not only determine how it as 'assessment manager' would 'translate' the applicable legislative criteria but proceed to so do, decide the extent of external parties, and determine the geophysical/social, economic &/or environmental material that would form the basis of assessment.*

57. He said that he had not yet received information regarding:

    a. how Council ascertained the external parties to be part of the 'assessment' process; and
    b. the various inputs that could reasonably be expected in the evolution of the 'Information Request'.

58. According to my understanding of the IPA process, once an application has been received and an assessment manager (in this case, the Council) notifies the applicant against which planning scheme the application will be assessed, the 'information and referral' stage commences. Among other things this stage gives a Council the opportunity to ask the applicant for further information needed to assess the application and receive advice about the application from referral agencies (section 3.3.1 IPA).

59. The referral agencies (concurrence and advice agencies) are listed in Schedule 2 of the *Integrated Planning Regulation 1998*. The characteristics of a development application in the context of a planning scheme and/or IPA processes determines which referral agencies are involved. In other words, the Council does not ascertain the external parties to be part of the assessment process; IPA does.

60. Ordinarily it is the responsibility of the applicant to notify the relevant referral agencies of the development application and provide the relevant information (the **Information Request**) (section 3.3.3 IPA). However, referral coordination is required where there are 3 or more concurrence agencies, in which case the information is given to the Department of Local Government Planning, Sport and Recreation which contacts the relevant referral agencies and compiles a single Information Request for the applicant's response (section 3.3.5 IPA). In this case, referral coordination was required for the relevant development applications.

61. On the material available to me, I am satisfied that:
    a. the determination of referral agencies and the Information Request process concern the actual assessment of the development application once the assessment procedure as to the applicable planning scheme (and consequently, the level of assessment under IPA) has already been determined; and
    b. therefore the information sought in paragraph 57 does not fall within the scope of the FOI application.

Principles applicable to sufficiency of search cases

62. Information Commissioner Albietz explained the principles applicable to 'sufficiency of search' cases in *Re Shepherd and Department of Housing, Local Government & Planning* (1994) 1 QAR 464 (pp. 469-470, paragraphs 18 and 19) as follows:

> *18. It is my view that in an external review application involving 'sufficiency of search' issues, the basic issue for determination is whether the respondent agency has discharged the obligation, which is implicit in the FOI Act, to locate and deal with (in accordance with Part 3, Division 1 of the FOI Act) all documents of the agency (as that term is defined in s.7 of the FOI Act) to which access has been requested. It is provided in s.7 of the FOI Act that:*
>
> "'document of an agency' or 'document of the agency' means a document in the possession or under the control of an agency, or the agency concerned, whether created or received in the agency, and includes –
>
> (a) a document to which the agency is entitled to access; and
>
> (b) a document in the possession or under the control of an officer of the agency in the officer's official capacity;"
>
> *19. In dealing with the basic issue referred to in paragraph 18, there are two questions which I must answer:*
>
> *(a) whether there are reasonable grounds to believe that the requested documents exist and are documents of the agency (as that term is defined in s.7 of the FOI Act); and if so*

> *(b) whether the search efforts made by the agency to locate such documents have been reasonable in all the circumstances of a particular case.*

Application of sufficiency of searches principles to this case

63. During the review, the Applicant raised the following grounds as to why he believes the Council is in the possession or control of additional documents responsive to his FOI application:

    a. His request included documents in the possession of persons contracted to undertake work for Council and he claimed proper searches have not been conducted for consultant's documents;
    b. A legal firm was engaged by Council to manage a routine assessment of a land-use development application on behalf of the Council and therefore any documents generated by the firm should have been provided to him;
    c. He claims it "*would be unlikely that the 'process' of arriving at the 'decision' to make the application 'code assessable' was undertaken without extensive consultation, deliberation and/or feedback*." He claims to have personally viewed 19 boxes of the relevant documentation during Planning and Environment Court proceedings on a similar matter.

64. Regarding grounds (a) and (b), by letter dated 5 September 2006 I advised the Council that the documents sought in the Applicant's 'list' (and falling within his FOI application generally) should not be narrowed by focusing on 'officer documents', but rather should encompass documents falling within the ambit of documents in the Council's possession or control, even if originated by a third party contractor.

65. In response, the Council advised that all documents responsive to the FOI application (including any documents that may have been generated by third parties) had been identified and either released to the Applicant or exempted pursuant to section 43(1) of the FOI Act on the grounds of legal professional privilege.

66. As noted earlier, in March 2006 the Applicant accepted this Office's preliminary view that the matter in issue was exempt from disclosure under section 43(1) of the FOI Act and agreed to withdraw this component of the review. However, in his submissions of 30 December 2006, he argued that the relevant legal firm was engaged by Council to manage a routine assessment of a land-use development application on behalf of the Council and therefore these types of documents should be provided to the Applicant.

67. On the material available to me I am satisfied that:

    - the documents concerning the alleged management by a legal firm of the assessment of the development application as sought in (b) do not relate to the determination of the assessment procedure and therefore do not fall within scope of this review (see scope section); and
    - there are no reasonable grounds to believe additional documents exist and the search efforts by the Council for third party documents within the control of the Council and responsive to the FOI application have been reasonable.

68. Regarding ground (c), the Applicant claimed that there should be material provided to him that addresses:

- "*how the legislative material was assessed to arrive at the 'decision' to make the application code assessable*";
- "*input by Council staff and/or Councillors to a draft decision to make the application code assessable*", including Councillor Robbins' emails; and
- "*discussion with other parties in relation to a draft decision to make the application code assessable*".

69. The Council provided evidence that having sought legal advice, the decision about which planning scheme to apply was made by Council resolution. It claims there are a limited number of documents in existence that relate to the decision that the development would be assessed under the Superseded Scheme, which are not exempt under section 43 of the FOI Act. The Council submitted that the non-exempt documents simply record the applicable planning scheme and the level of assessment that the planning scheme prescribes. It claims that all non-exempt documents within the scope of the application have been released to the Applicant (this Office has viewed the documents that were released to the Applicant).

70. The Council advised that when it receives an application to carry out development pursuant to a superseded planning scheme, the Council's Development Assessment Review Team (DART) ordinarily discusses the application and makes recommendations to the City Planning Committee about whether Council should agree or refuse to apply the superseded planning scheme to that particular development application. The Council advised that minutes are not taken at DART meetings and I have not been provided with any evidence to suggest otherwise.

71. The Council advised that reports are not always produced from DART considerations, particularly if DART agreed with the development applicant to assess the application under a superseded scheme. However, if there is a report, it would go to Council for Council consideration.

72. The Council advised that DART would have met to discuss the relevant development application. The former Senior Strategic Planning Officer who would have attended the DART meeting drafted a report that constituted the agenda for the City Planning Committee's consideration about which planning scheme to apply. The agenda was released to the Applicant, however, the Applicant claims that he has not received the minutes or attachment to the minutes for the relevant Council meeting. The Council refused access to the minutes and attachment under section 22 of the FOI Act (see below).

73. This Office requested a search of the former Senior Strategic Planning Officer's files to determine whether there are any other non-privileged documents that were produced before the Council's deliberations. The staff member no longer works at the Council however a box of her work was found and Council confirmed that the box contained no documents in relation to the relevant development application.

74. A large part of the review focused on the Applicant's claims that the Council holds emails to and from Councillor Robbins who was allegedly vocal about the proposed development. The Applicant claimed that while he has not actually seen her emails which allegedly relate to the development application, during the Crime and Misconduct Commission (CMC) hearing into Gold Coast Council electoral matters her emails were discussed. He suggests that "*someone had collated Cr Robbins' emails. Given this, it would appear reasonable to expect that this 'database' could be reviewed for reference to this development application*."

75. This Office asked the Council to search Council records and the relevant CMC collation for Councillor Robbins' emails with reference to the assessment procedure for the relevant development application.

76. The Council advised:

    a. Regarding the search of Council records:
        i. to retrieve the emails from archives would involve rebuilding a 'test lab backup' and a new exchange server which would be extremely labour and resource intensive;
        ii. to find emails relating to the assessment procedure of the development application among hundreds or thousands of day-to-day emails would be extremely labour intensive and time consuming;
        iii. Councillor Robbins passed away in November 2004 so the Council made enquiries of the Assistant Manager in relation to the relevant development applications for any relevant emails;
        iv. No emails responsive to the FOI application were located; and
    b. Regarding the search of the CMC collation:
        i. The Councillor's emails dated between 1 March 2004 and 30 April 2004 were collated for a specific purpose regarding Council elections and none of the key words in searching for the emails related to the development application.

77. I have taken into account the fact that the Applicant provided no firm evidence that there are any emails with reference to the assessment procedure for the relevant development application. He claimed to have viewed 19 boxes of relevant information (during a similar matter) but was unable to confirm or provide evidence that the relevant documents related to the assessment procedure as opposed to the actual assessment (the latter of which falls outside the scope of this review). Further, the relevant development application was lodged with Council on 30 April 2004 and Council's determination of which planning scheme to apply was made at the Council meeting on 4 June 2004, which is outside the dates of the emails collated for the CMC matter.

78. On the material available to me, I am satisfied that:

    a. The only documents that would reasonably be expected to relate to the Applicant's grounds under (c) that are within the scope of the FOI application are:
        i. The documents that are exempt under section 43(1) of the FOI Act;
        ii. The documents that were released to the Applicant; and
        iii. The agenda, minutes and attachment for the Council meeting on 4 June 2004;
    b. It would be unreasonable to request the Council to review Councillor Robbins' emails in the possession of the CMC;
    c. There are no reasonable grounds to believe that further documents responsive to the FOI application exist in the control or possession of the Council; and
    d. The Council's search efforts to locate documents responsive to the Applicant's FOI application have been reasonable in all the circumstances of the case.

Section 22 of the FOI Act

79. Section 22(a) of the FOI Act provides:

> ***22 Documents to which access may be refused***
>
> *An agency or Minister may refuse access under this Act to –*
> *(a) a document the applicant can reasonably get access to under another enactment, or under arrangements made by an agency, whether or not the access is subject to a fee or charge…*

80. The Applicant argued that the Council has not correctly exercised its discretion under section 22(a) of the FOI Act to refuse access to:
    a. 1992: Sheets 52/16 and 80/3 of the Planning Scheme Maps (**1992 Maps**); and
    b. The minutes, agenda and attachments to the Council meeting dated 4 June 2004 (**Council meeting documents**).

1992 Maps

81. In the course of the review the Council was asked to undertake further searches to locate the relevant maps and/or make submissions as to why the maps had not been provided.

82. The Council argued that:

    a. Such maps were not within the scope of the FOI application;
    b. If they were within scope, they could be accessed by the Applicant through the:
        i. the Planning and Environment Court Registry; or
        ii. Council's website and/or Technical Advice Counter; and
        iii. therefore, the Council refuses access to the maps pursuant to section 22(a) of the FOI Act.

83. I note that while the FOI application relates to "*the way Council has acted to determine the assessment procedure for a development application by the* [relevant developer]", it contains the following 'ancillary component':

> *Sections of parts of the Planning Scheme of the Council of the Albert Shire applicable to the decision by the Council of the Albert Shire to approve the development application lodged in the late 1980's…for the subject land.*

84. The Council raised concerns in its letter dated 25 May 2006 that the Applicant was attempting to unilaterally extend the scope of his FOI application, stating that it could not:

> *…..see any relationship between his requirement to be provided documents that explain "the reason/s behind council's decision in 2004 to code assess the application in question" and* [Council] *being required to provide the Planning Scheme Maps for a 1992 gazettal and the Albert Shire Planning Scheme Maps of 1995.*
>
> *As* [Council has] *advised previously, Dr Moon was quite adamant after receipt of* [the] *initial decision that* [Council] *had completely*

misunderstood his application and he did not require access to any historical documentation. And now these documents form part of his review application.

85. Dr Moon claims that the 1992 Maps have always fallen within the scope of his application.

86. On the material available to me, I am satisfied that the 1992 Maps fall within the scope of the 'ancillary component' of the FOI application (see paragraph 2).

87. Thus a question for this review is whether the Council correctly exercised its discretion to refuse access to the 1992 Maps under section 22(a) of the FOI Act.

88. In *JM and Queensland Police Service (**'Re JM'**)* (1995) 2 QAR 516 the Information Commissioner said at paragraphs 21 and 28-29 that if:

a. the terms of the other enactment or other arrangements made by the agency contemplated by section 22 place restrictions on the extent of access available to certain kinds of information under the particular specialised scheme of access; and
b. those restrictions would operate to deny access to all or part of a particular document requested by an applicant for access under the FOI Act; then
c. section 22 would not be available.

89. *Re JM* was decided prior to the amendment of section 22 of the FOI Act in 2005, however I am satisfied that the statements above remain relevant to section 22(a) of the FOI Act in its current form.

90. Rule 980 in conjunction with rule 981 of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPRs**), provide as follows:

980 Copies of documents

(1) A person may ask the registrar for a copy or a certified copy of a document filed under these rules.
(2) The person asking for a copy must pay any prescribed fee for the copy or certified copy.
(3) The registrar must give to the person a copy or certified copy of the document as the case may be.
(4) The copy must have the seal and the word 'copy' stamped on it.

981 Searches

(1) A person may ask the registrar to search for and permit the person to inspect a document in a court file.
(2) If the person is not a party or a representative of a party, the person asking for the search or inspection must pay any prescribed fee for the search or inspection.
(3) Subject to any court order restricting access to the file or document or the file or document being required for the court's use, the registrar must comply with the request, unless there is not enough information for the registrar to be able to comply with it.

91. Rule 3(2) of the *Planning and Environment Court Rules 1999* (Qld) (P & E Court Rules), provides:

> *3 Application of rules*
> *…*
> *(2) If these rules does not provide for a matter in relation to a proceeding, or proceedings, in the Planning and Environment Court and the rules applying in the District Court would provide for the matter in relation to a proceeding, or proceedings, in the District Court, the rules applying in the District Court apply for the matter in the Planning and Environment Court with necessary changes.*

92. Rule 3(1) of the UCPRs, provides:

> *3 Application*
>
> *(1) Unless these rules otherwise expressly provide, these rules apply to civil proceedings in the following courts –*
> - *the Supreme Court*
> - *the District Court*
> - *Magistrates Courts.*

93. Therefore as there are no rules in the P & E Court Rules dealing with public access to court documents, rules 980 and 981 UCPR apply.

94. Section 7 of the FOI Act provides that "enactment means an Act or a statutory instrument". A Rule of Court is a statutory instrument (sections 7 and 12 *Statutory Instruments Act 1992*).

95. This Office's search of the Planning and Environment Court Registry revealed that a copy of the 1992 Maps is attached to document number 10 (attachment 21) which was filed during the course of the Planning and Environment Court matter number 2992/04.

96. On the material available to me, I am satisfied that:
    a. The UCPRs are an 'enactment' for the purposes of the FOI Act and provide public access to Planning and Environment Court material;
    b. The UCPR's place no restrictions that would operate to deny access to all or part of the 1992 Maps requested by the Applicant;
    c. The 1992 Maps are available in their entirety to the Applicant from the Planning and Environment Court Registry, subject to search and photocopying fees; and
    d. The Council has correctly exercised its discretion under section 22 of the FOI Act to refuse access to the 1992 Maps.

Council meeting documents

97. In my letter to the Applicant on 11 December 2006, I provided my preliminary view that the Council correctly exercised its discretion under section 22(a) of the FOI Act to refuse access to the Council meeting documents because they are available for public access on the Council's website (in the case of the agenda and minutes) and from the Council's Meeting Support Unit, Community Relations Branch (in the case of the attachment to the minutes).

98. The Applicant responded in his letter of 30 December 2006 saying that a search of the website and enquiries made to the Council "revealed that no material is available." A case officer from this Office searched the website and found the publicly available minutes and agenda. She telephoned the Minutes Support Secretary at the Council and found that the minutes' attachment is available to the public for a reasonable fee. I note that as part of the FOI release, the Applicant was provided a copy of the relevant Council agenda.

99. I am satisfied that the Council meeting documents are reasonably available to the Applicant under the Council's administrative access regime and the Council correctly exercised its discretion under section 22(a) of the FOI Act to refuse access to the Council meeting documents.

Decision

100. I affirm the decision under review (being the decision dated 19 December 2005 by Mr C Martins) by finding that:
    a. the Council correctly exercised its discretion under section 22(a) of the FOI Act to refuse access to the 1992 Maps and the Council meeting documents; and
    b. there are no reasonable grounds for believing that there exists, in the possession or under the control of the Council, any further documents responsive to the FOI application. The searches and inquiries conducted by the Council in an effort to locate any further responsive documents have been reasonable in all the circumstances of the case.

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

_____

V Corby
Assistant Information Commissioner

Date: 13 February 2007