



Decision and Reasons for Decision

Citation:	<i>Smith and Sunshine Coast Regional Council; Diamond Energy Pty Ltd (Third Party) [2017] QICmr 42 (5 September 2017)</i>
Application Number:	313064
Applicant:	Smith
Respondent:	Sunshine Coast Regional Council
Third party:	Diamond Energy Pty Ltd ACN: 107 516 334
Decision Date:	5 September 2017
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - application for information held by Council about contract for supply of retail electricity services - mobile phone numbers - financial information of private sector company - whether disclosure would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the <i>Right to Information Act 2009 (Qld)</i>

REASONS FOR DECISION

Summary

1. The applicant applied to Sunshine Coast Regional Council (**Council**) under the *Right to Information Act 2009 (Qld)* (**RTI Act**) for access to the complete contract between Council and Diamond Energy Pty Ltd (**Diamond**) for the Supply of Retail Electricity Services. The contract relates to a large scale solar generation facility (solar farm) on the Sunshine Coast.
2. Council located 206 pages and decided to grant access to all but 25 part pages, which were refused on the basis that they were exempt or because their disclosure would, on balance, be contrary to the public interest.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of Council's decision, seeking full disclosure of the information to which access had been refused.
4. During the external review, the applicant confirmed that he no longer sought access to certain information and Council and Diamond agreed to release some of the information to which access had initially been refused. The remaining information is limited to mobile phone numbers and some financial information appearing on 20 part pages.
5. For the reasons set out below, I vary Council's decision and find that access to the remaining information may be refused under section 47(3)(b) of the RTI Act on the basis that its disclosure would, on balance, be contrary to the public interest.

Background

6. Significant procedural steps taken by OIC in conducting the external review are set out in the appendix to these reasons.

Reviewable decision

7. The decision under review is Council's original decision dated 27 October 2016.

Evidence considered

8. Evidence, submissions, legislation, and other material considered in reaching this decision are referred to in these reasons (including footnotes and appendix).

Issue for determination

9. The information in issue appears on 20 part pages¹ and comprises mobile phone numbers and some financial information (**Information in Issue**). The issue for determination in this review is whether access to the Information in Issue may be refused under section 47(3)(b) of the RTI Act on the basis that its disclosure would, on balance, be contrary to the public interest.²

Relevant law

10. The RTI Act confers a right of access to documents of an agency,³ subject to limitations, including grounds for refusal of access.⁴ Access may be refused to a document where disclosing the information would, on balance, be contrary to the public interest.⁵ The RTI Act identifies various factors for and against disclosure that may be relevant to deciding the balance of the public interest⁶ and explains the steps that a decision-maker must take⁷ 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 would, on balance, be contrary to the public interest.

Findings

11. No irrelevant factors arise in the circumstances and I have not taken any into account.

Mobile phone numbers

12. The mobile phone numbers belong to a Council officer and an employee of Diamond and appear on six pages.⁸

¹ Pages 24, 25, 30, 32, 35, 40, 41, 43, 134, 148-151 and 163-169. As noted above, a number of the issues were informally resolved on external review as the applicant agreed to exclude certain information and Council and the third party agreed to release certain information.

² Council initially decided that some of the Information in Issue comprised exempt information under sections 47(3)(a) and schedule 3, section 8 of the RTI Act, as its disclosure would found an action for breach of confidence. However, OIC formed the view that this exemption did not apply but that access to the information could instead be refused on the grounds that its disclosure would, on balance, be contrary to the public interest.

³ Section 23(1)(a) of the RTI Act.

⁴ Grounds for refusal of access are set out in section 47 of the RTI Act.

⁵ Sections 47(3)(b) and 49 of the RTI Act.

⁶ 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, these lists of factors are not exhaustive; in other words, factors that are not listed may also be relevant in a particular case.

⁷ Section 49(3) of the RTI Act.

⁸ Pages 24, 25, 30, 40, 41 and 134.

13. The applicant continues to seek access to these numbers and relevantly submits that:⁹
- employees in both the public and private sector regularly give out their mobile phone numbers on letters, business cards and in email signature blocks as part of normal business activities and this enables the public to contact them during working hours¹⁰
 - the fact that these individuals may choose to keep their phone on after business hours is not a relevant consideration in the review; and
 - the Council employee's mobile phone is funded by the public and is not for private use.
14. I have considered whether there are any public interest factors which favour disclosure of mobile phone numbers, other than the general public interest in furthering access to government-held information and the RTI Act's pro-disclosure bias.¹¹ I have been unable to identify any factors in the circumstances, and the applicant's submissions do not assist. I acknowledge that both private sector employees and local council staff are often provided with mobile phones to perform work related to their employment and the associated costs are likely to be paid by their employers.¹² However, this does not lead to the conclusion that disclosing the *mobile phone numbers* would promote any public interest factors relating to accountability or transparency or ensuring the effective oversight of the expenditure of public funds.¹³
15. I am satisfied that the mobile numbers comprise the personal information of these individuals, even though they appear in an employment context.¹⁴ Accordingly, I have considered whether disclosing this information could reasonably be expected to:
- prejudice the protection of an individual's right to privacy;¹⁵ and
 - cause a public interest harm through disclosure of another individual's personal information.¹⁶
16. A mobile phone number is different to other contact details (such as email addresses or office phone numbers) in that it allows an individual to be contacted directly and potentially outside of working hours.¹⁷ I agree with the applicant's submission that employees in both the public and private sector regularly give out their mobile phone numbers on letters, business cards and in email signature blocks as part of normal business activities so that they can be contacted during working hours. However, in these circumstances, the number is provided to specified recipients and voluntarily. I do not accept that this also means a mobile phone number should be routinely released under the RTI Act, where there can be no restriction on its use, dissemination or republication. Disclosing mobile phone numbers permits potential contact with an employee when off duty and/or engaged in private activity, which gives rise to a reasonable expectation of

⁹ Submission received on 31 July 2017.

¹⁰ As an example, the applicant submitted that the number of the Diamond employee is available online and provided a link to that information. However, the number which appears in the Information in Issue is not the same as the number which is publicly available and therefore I have not been persuaded to release the particular number as a result of this submission.

¹¹ Section 44 of the RTI Act.

¹² It is not necessary, nor relevant, for me to investigate the arrangements between the employee and employer in relation to the use of these mobile phones.

¹³ Schedule 4, part 2, items 1, 4 and 11 of the RTI Act.

¹⁴ Personal information is defined in section 12 of the *Information Privacy Act 2009* (Qld) as 'information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion'. See *Kiepe and The University of Queensland* (Unreported, Queensland Information Commissioner, 1 August 2012) (*Kiepe*) at [18]-[21]; and *Underwood and Minister for Housing and Public Works* [2015] QICmr 27 (29 September 2015) (*Underwood*) at [66]-[68].

¹⁵ Schedule 4, part 3, item 3 of the RTI Act.

¹⁶ Schedule 4, part 4, item 6 of the RTI Act.

¹⁷ *Kiepe* at [20].

intrusion into the officer's private life or 'personal sphere'.¹⁸ I afford moderate weight to both of these nondisclosure factors.

17. I have not identified any factors favouring disclosure of these mobile phone numbers which carry sufficient weight to override the factors favouring nondisclosure. In the circumstances, I find that disclosing the mobile phone numbers would, on balance, be contrary to the public interest and access to this information is refused under section 47(3)(b) of the RTI Act.

Fee and other financial information

18. The fee information appears on page 43 and comprises the Pool Price Pass Through management fee, the solar farm Large Generation Certificate management fee, and other monetary figures from which those fees can be calculated. The financial information appears on 13 pages and comprises:

- figures in Diamond's statement of comprehensive income and management profit and loss statement for the first half of 2014¹⁹
- figures and dividend information appearing in Diamond's financial statements;²⁰ and
- an explanation about aspects of Diamond's financial statements.²¹

19. In relation to this information, the applicant relevant submits that:²²

- the public has a right to know how public money is being spent and to hold Council accountable for its statements and choices
- the information which has been released to him is without substance and without the fee and other financial information, it has no value
- disclosing the fee information would not disadvantage Diamond as it simply reveals how much the company will be paid; and
- disclosing this information would provide background information about Diamond and satisfy the public's right to know whether Diamond has the financial backing to handle a substantial amount of Council's funds.

Factors favouring disclosure

20. Council is accountable to the public for the performance of services that are paid from ratepayer funds. Private sector companies performing work for Council must also accept an appropriate level of scrutiny in their dealings with Council. This means that in some cases, information they provide to Council during the tender process or in performing the contract may be available under the RTI Act, particularly where this reveals information that would enhance Council's accountability or transparency. However, this does not mean that all of the information which a company provides about its operations will be released. Rights of access are subject to limitations and the RTI Act recognises that disclosing some information may adversely impact a company's affairs.

21. In this review, the solar farm project to which the contract relates is significant. The contract between Council and Diamond comprises various parts which total around 206 pages. As noted above, the applicant submits that the information which has been released to him is without substance and without the fee and other financial information, has no value. The basis for the applicant's submission is unclear – Council has released

¹⁸ Underwood at [67].

¹⁹ Page 35.

²⁰ Pages 148-151 and 163-169.

²¹ Page 32.

²² Submission received on 31 July 2017.

the contract to the applicant with the exception of the small amount of information identified above.²³ The released information notably includes:²⁴

- Council's invitation to tender and Diamond's tender response which includes its terms and conditions for the retail supply of energy, retail authority issued under the *Electricity Act 1994* (Qld), evidence of insurance and an auditor's report on its financial reports
 - correspondence between Council and Diamond which sets out various conditions of the contract imposed by Council; and
 - Diamond's response to specific queries raised by Council.
22. I am satisfied that the release of this information significantly advances a number of public interest factors under the RTI Act²⁵ and is the type of information to which the applicant seeks access.
23. In relation to the fee information, Council has provided the applicant with information revealing the general basis for calculating the fees but has redacted the applicable rates. I acknowledge that this prevents the applicant from identifying the total fee applicable but I consider the released information still furthers a number of public interest considerations to some degree.²⁶
24. The other financial information appears to have been provided to Council so that it could assess the strength of Diamond's financial position. Council has released the category headings (e.g. a breakdown of revenue, assets, liabilities and equity) and reporting time periods for the financial statements. Again, I acknowledge that this does not enable the applicant to scrutinise the figures himself, but it does generally reveal the type of financial information which was made available to Council for its consideration during the tender process. In my view, the release of this information also furthers public interest considerations to some degree.²⁷
25. The fee and other financial information which remains in issue is limited. I accept that the release of this information would provide the applicant with a complete understanding of the company's financial position as presented to Council and the applicable rates for calculating some of Diamond's management fees. However, I do not consider that this necessarily gives rise to public interest factors favouring disclosure which carry significant weight.
26. I have considered whether disclosing this information could reasonably be expected to:
- enhance Council's accountability in respect of the tender process²⁸
 - contribute to positive and informed debate on important issues or matters of serious interest²⁹
 - inform the community of Council's operations³⁰
 - ensure effective oversight of expenditure of public funds;³¹ and
 - reveal the reason for a government decision and any background or contextual information that informed the decision.³²

²³ The information which has not been released to the applicant comprises the Information in Issue which is the subject of this decision and the information to which the applicant no longer seeks access.

²⁴ This information appears within the 206 pages which Council located and released to the applicant.

²⁵ Including, for example, those set out in schedule 4, part 2, items 1, 2, 3, 4 and 11 of the RTI Act.

²⁶ As identified in footnote 25.

²⁷ As identified in footnote 25.

²⁸ Schedule 4, part 2, item 1 of the RTI Act.

²⁹ Schedule 4, part 2, item 2 of the RTI Act.

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

³¹ Schedule 4, part 2, item 4 of the RTI Act.

³² Schedule 4, part 2, item 11 of the RTI Act.

27. Given that this information would have been considered by Council in deciding to award the contract to Diamond, I accept that these factors are relevant. However, as this information is limited, and does not directly reveal any information about Council's decision-making process, I consider these factors carry low weight, particularly in view of the other information which has already been released to the applicant which significantly promotes these factors. In the circumstances, I am unable to identify any other relevant factors favouring disclosure which may justify the release of this information to the applicant.

Factors favouring nondisclosure

28. The fee and other financial information relates to a private sector company which operates in a competitive market. As this information is not publicly available, I have taken into account the impact release of this information under the RTI Act would have— i.e. where there can be no restriction on its use, dissemination or republication. I have considered whether its disclosure could reasonably be expected to:
- prejudice Diamond's business, commercial or financial affairs;³³ or
 - cause a public interest harm because disclosure of the information:
 - would disclose information concerning Diamond's business, commercial or financial affairs; and
 - could reasonably be expected to have an adverse effect on those affairs or prejudice the future supply of information of this type to government.³⁴
29. I am satisfied that the fee and other financial information clearly concerns Diamond's business, commercial or financial affairs. I must then be satisfied that disclosing this information could reasonably be expected to have an adverse effect on, or cause prejudice to, those affairs.
30. I am satisfied that disclosing the fee information could reasonably be expected to prejudice Diamond's business and commercial affairs by giving a competitive edge to its competitors in formulating future tenders or in competing in the marketplace generally. Disclosing this information could reasonably be expected to impact negatively on Diamond's ability to negotiate future agreements on similar projects with other entities. I consider that, in view of the novel character of the project, the pricing in this industry would not have changed to such an extent in the last three years as to substantially diminish the commercial sensitivity of the fee information.
31. The other financial information is relatively current and gives detailed information about Diamond's financial position at the relevant time. I am satisfied that its disclosure would put Diamond at a commercial disadvantage. This is because when other businesses in comparable situations are competing with Diamond for projects with other entities, those other businesses may not be required to disclose information to the same extent as already revealed in the financial information.
32. For these reasons, I find that disclosing this information could reasonably be expected to have an adverse effect on, or cause prejudice to, those affairs and both of these factors carry significant weight in the circumstances.

³³ Schedule 4, part 3, items 2 and 15 of the RTI Act.

³⁴ Schedule 4, part 4, item 7(1)(c) of the RTI Act.

Balancing the relevant public interest factors

33. I have identified a number of factors which favour disclosure of this information, in addition to the general public interest in furthering access to government-held information. However, the weight to be given to these factors is low as the information is limited in nature and does not directly reveal any information about Council's decision-making process. The weight of these factors favouring disclosure is not sufficient to override the two non-disclosure factors which apply and which carry significant weight in the circumstances. For these reasons, I find that disclosing the fee and other financial information would, on balance, be contrary to the public interest and access to this information is refused under section 47(3)(b) of the RTI Act.

DECISION

34. I vary Council's decision and find that access to the Information in Issue may be refused under section 47(3)(b) of the RTI Act as its disclosure would, on balance, be contrary to the public interest.
35. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Tara Mainwaring
Acting Assistant Information Commissioner

Date: 5 September 2017

APPENDIX

Significant procedural steps

Date	Event
9 November 2016	OIC received the external review application. OIC notified Council that the external review application had been received and requested procedural documents.
14 November 2016	OIC received the requested procedural documents from Council.
28 November 2016	OIC notified the applicant and Council that the external review application had been accepted. OIC asked Council to provide correspondence with the consulted third party and the documents located in response to the access application.
12 December 2016	OIC received the requested information from Council.
20 December 2016	OIC discussed the review with the applicant. The applicant notified OIC that he did not seek access to certain information.
4 May 2017	OIC asked Council to provide further information relevant to the review. OIC received the requested information from Council.
22 May 2017	OIC conveyed a preliminary view to the third party and invited the third party to provide submissions supporting its case.
31 May 2017	OIC discussed the preliminary view with the third party.
5 June 2017	OIC received a submission from the third party.
13 June 2017	OIC discussed the review with the third party. OIC wrote to the third party to request submissions.
21 June 2017	The third party confirmed to OIC that it accepted OIC's preliminary view and did not wish to become a participant.
22 June 2017	OIC discussed the preliminary view with Council.
28 June 2017	OIC conveyed a preliminary view to Council and invited Council to provide submissions supporting its case.
4 July 2017	Council confirmed to OIC that it accepted OIC's preliminary view.
13 July 2017	OIC conveyed a preliminary view to the applicant and invited him to provide submissions supporting his case. OIC asked Council to release agreed information to the applicant.
19 July 2017	OIC discussed the preliminary view with the applicant.
31 July 2017	OIC received a submission from the applicant.