



## Decision and Reasons for Decision

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**Application Number:** 210609

**Applicant:** Ms L Rolfe

**Respondent:** Banana Shire Council

**Decision Date:** 9 October 2009

**Catchwords:** **FREEDOM OF INFORMATION – section 28A(1) of the *Freedom of Information Act 1992* – documents nonexistent – whether there are reasonable grounds for the agency to be satisfied the documents do not exist**

**FREEDOM OF INFORMATION – section 25 of the *Freedom of Information Act 1992* – how applications for access are made – whether documents the applicant submits should exist fall within the scope of the request**

**FREEDOM OF INFORMATION – section 44(1) of the *Freedom of Information Act 1992* – matter affecting personal affairs – information concerning employees' courses of study – whether matter would disclose information concerning the personal affairs of a person – whether disclosure would, on balance, be in the public interest**

**FREEDOM OF INFORMATION – section 45(1)(c) of the *Freedom of Information Act 1992* – matter relating to business affairs – information provided during a tender process – whether the matter in issue concerns the business, commercial or financial affairs of another person – whether disclosure could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to government – whether disclosure would, on balance, be in the public interest**

## Contents

REASONS FOR DECISION .....	3
Summary .....	3
Background.....	3
Decision under review .....	4
Steps taken in the external review process .....	4
Issues for determination .....	7
Part A – Refusal of access .....	7
Matter in issue .....	7
Information about employees’ courses of study.....	8
Relevant law.....	8
Personal Affairs Question .....	8
Public Interest Question.....	9
The applicant’s submissions .....	9
Findings and application of the law.....	9
Personal Affairs Question .....	9
Public Interest Question.....	10
Information relating to the tenderers’ business systems and service standards .....	10
Relevant law.....	11
The applicant’s submissions .....	12
Council’s submissions.....	13
The tenderer’s submissions .....	13
Findings and application of the law.....	13
Information concerning business affairs .....	14
Whether disclosure of the matter in issue could reasonably be expected to have a prejudicial effect on the tenderers’ business affairs.....	14
Public interest considerations .....	15
Part B - Sufficiency of search .....	15
Whether the requested documents exist .....	15
Relevant law.....	16
The applicant’s submissions .....	17
Council’s submissions.....	17
Findings and application of the law.....	17
Scope of the FOI Application .....	19
The applicant’s submissions .....	19
Relevant law.....	19
Findings and application of the law.....	19
DECISION .....	21

## REASONS FOR DECISION

### Summary

1. The applicant requested information from Banana Shire Council (**Council**) under the *Freedom of Information Act 1992 (Qld)* (**FOI Act**) relating to various Council tender processes.
2. A number of issues have been informally resolved during the course of this external review. This decision relates to the remaining issues for determination.
3. For the reasons set out below, I vary the decision under review by finding that:
  - information relating to employees' courses of study as it appears in tender submissions is exempt from disclosure under section 44(1) of the FOI Act<sup>1</sup>
  - information relating to the tenderers' business systems and service standards as it appears in the tender submissions is exempt from disclosure under section 45(1)(c) of the FOI Act
  - access to the requested letters of acceptance and contracts can be refused under section 28A(1) of the FOI Act
  - the additional documents the applicant has requested on external review fall outside the scope of the applicant's request.

### Background

4. By letter dated 14 April 2008, the applicant requested information from Council under the FOI Act relating to various Council tender processes (**FOI Application**). The terms of the FOI Application were as follows:
  - A. *All tenders called for and all contracts awarded to these tenders from 1<sup>st</sup> January 2004 to 4<sup>th</sup> April 2008 to these tenders: For the Supply only or supply and delivery of Roadbase.*
  - B. *All documents, correspondence and contracts awarded, pertaining to Tender QT07/08-005 Advertised on the 16<sup>th</sup> November 2007.*
  - C. *All documents, correspondence and contracts awarded, pertaining to the Tender For 21000 ton Roadbase for the Thomlinson Road project. (off the Burnett Highway near Jambin)*
5. By letter dated 2 May 2008, Council wrote to the applicant seeking clarification of part of the FOI Application. This resulted in further correspondence between the parties until the applicant provided the requested information by email on 30 May 2008.
6. By letter dated 19 June 2008, the applicant wrote to the Office of the Information Commissioner (**Office**) to advise that she had not received any response from Council to the FOI Application.
7. By email on 20 June 2008, the Acting Information Commissioner provided a response to the applicant about Council's processing of the FOI Application.

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<sup>1</sup> The specific information referred to in this and the following bullet point is identified in redacted documents which the Office has provided to Council. Some of the matter in issue in this review has also been dealt with in external review 210545.

8. By letter dated 11 July 2008, the Chief Executive Officer (**CEO**) of Council issued a considered decision<sup>2</sup> in relation to the FOI Application and provided the applicant with a copy of a number of documents which Council described as:
  - *the tender documents called for by Banana Shire Council from 1 January 2004 to 4 April 2008*
  - *the tenders called for by Council for QT07/08-0010 and QT06/07-0024.*
9. Council also provided the applicant with information about who the relevant tenders were awarded to and Council's procedures in relation to standing offer arrangements.
10. As Council's CEO made the decision, the applicant was not entitled to apply for internal review of the decision.<sup>3</sup>
11. By letter dated 8 August 2008, the applicant applied to the Information Commissioner for external review of Council's decision. The applicant applied for external review on the basis that Council had not provided all of the documents requested in the FOI Application.

### **Decision under review**

12. The decision under review is the considered decision dated 11 July 2008 referred to at paragraph 8 above.

### **Steps taken in the external review process**

13. On 24 September 2008, a staff member of the Office contacted Council to make preliminary enquiries in relation to Council's processing of the FOI Application.
14. By email on 29 September 2008, Council was asked to provide certain documents relevant to the external review.
15. By letter dated 8 October 2008, Council provided the requested documents.
16. By letter dated 18 November 2008, I wrote to Council to clarify certain issues relevant to the external review.
17. By letter dated 20 November 2008, Council provided a response to my letter of 18 November 2008.
18. By email on 24 November 2008, I advised Council that its decision would be reviewed.
19. By letter dated 25 November 2008, I advised the applicant that Council's decision would be reviewed.
20. By letter dated 26 November 2008, Council provided further information relevant to the external review.
21. By letter dated 10 December 2008, I wrote to the applicant in relation to the sufficiency of search issues she raised in her application for external review and confirmed the scope of this external review.

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<sup>2</sup> Section 27B(4) of the FOI Act.

<sup>3</sup> Section 52(3)(b) of the FOI Act.

22. By letter dated 11 December 2008, I asked Council to conduct searches for a number of documents the applicant claimed should have been provided to her and to provide submissions to the Office in relation to those searches.
23. By letter dated 15 January 2009, Council provided various documents to the Office which were located as a result of further searches and provided submissions in support of its case. Council claimed that some of the documents it had located were exempt from disclosure under section 45 of the FOI Act or contained '*irrelevant matter*' which should be deleted under section 27(3) of the FOI Act.
24. By letters dated 20 April 2009, I consulted four of the parties who had provided tender submissions to Council in relation to the possible release of documents under the FOI Act to the applicant. Those tenderers were invited to provide submissions in support of their cases if they wished to object to disclosure of the documents. I indicated that if I did not hear from them by 6 May 2009, I would assume they had no objection to the documents being released.
25. On 22 April 2009, one of the tenderers telephoned the Office and advised a staff member that they objected to release of the documents and provided submissions in support of their case.
26. By letter dated 26 April 2009, a second tenderer advised that they objected to release of the documents and provided submissions in support of their case. On 27 April 2009, that tenderer telephoned a staff member of the Office and confirmed their objection to the release of documents and reiterated their submissions.
27. On 28 April 2009, a staff member of the Office contacted one of the tenderers to clarify a number of issues raised in their submissions.
28. On 5 May 2009, a third tenderer telephoned the Office and advised a staff member that they objected to release of the documents and provided submissions in support of their case.
29. The fourth tenderer did not contact the Office and was therefore taken to have no objection to the relevant documents being released to the applicant.
30. By letter dated 6 May 2009, one of the tenderers provided written submissions in support of their case.
31. By letters dated 4 June 2009 and 5 June 2009, I provided two of the tenderers with a preliminary view in relation to the relevant documents and invited them to provide submissions in support of their cases if they did not accept my preliminary view. I advised that if I did not hear from them by 19 June 2009, I would assume that they accepted my preliminary view and no longer maintained their objections to release of the relevant documents in accordance with the preliminary view. Those tenderers did not provide further submissions in response to my preliminary view.
32. By letter dated 5 June 2009, I provided the applicant with a preliminary view in relation to the relevant documents and invited her to provide submissions in support of her case if she did not accept my preliminary view.
33. By letter dated 18 June 2009, the applicant requested an extension of time to respond to the preliminary view. I agreed to extend the period of time as requested.

34. On 26 June 2009, the Office received a partial facsimile of six pages from the applicant in response to the preliminary view. A staff member of the Office telephoned the applicant to advise that only six pages of the facsimile had been received. The applicant indicated the remaining pages would be faxed to the Office by 29 June 2009. On 29 June 2009, a staff member of the Office left a message for the applicant to contact the Office.
35. On 14 August 2009, the Office received a facsimile from the applicant which contained her full response to the preliminary view.
36. By letter dated 31 August 2009, I provided the applicant with a further preliminary view. I invited her to provide submissions in support of her case by 14 September 2009 if she did not accept my preliminary view. I advised that if I did not hear from her by 14 September 2009, I would assume that she did not wish to pursue access to certain information. The applicant did not provide submissions in response to my further preliminary view.
37. By letter dated 31 August 2009, I provided a third tenderer with a preliminary view in relation to the relevant documents and invited them to provide submissions in support of their case if he did not accept my preliminary view. I advised that if I did not hear from them by 14 September 2009, I would assume that they accepted my preliminary view and no longer maintained their objections to release of the relevant documents. That tenderer did not provide further submissions in response to my preliminary view.
38. By letters dated 12 June 2009 and 17 September 2009, I provided Council with copies of the preliminary view letters I had provided to the relevant parties and invited Council to provide submissions in support of its case by 29 September 2009 if it did not accept my preliminary view. I advised that if I did not hear from Council by 29 September 2009, I would assume that it accepted my preliminary view.
39. By letter dated 22 September 2009, Council advised that it accepted the preliminary view and did not wish to make any further submissions. As Council did not provide further submissions to this Office in relation to its initial claim that some of the matter in issue was exempt under section 45 of the FOI Act or contained '*irrelevant matter*' which should be deleted under section 27(3) of the FOI Act, Council is deemed to have accepted my preliminary view and to have withdrawn its claim in relation to the application of sections 45<sup>4</sup> and 27(3) of the FOI Act.
40. On 23 September 2009, a staff member of the Office telephoned a staff member of Council to request further information relevant to the review.
41. On 24 September 2009, a staff member of Council telephoned the Office to provide the information requested at paragraph 40 above.
42. On 25 September 2009, a staff member of the Office contacted a staff member of Council to discuss matters relevant to the review.
43. The FOI Act was repealed by the *Right to Information Act 2009 (RTI Act)*<sup>5</sup> which commenced on 1 July 2009.<sup>6</sup> However, because the FOI Application was made under the FOI Act and has not yet been finalised, for the purposes of making a decision in

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<sup>4</sup> Except in relation to matter which I indicated in my preliminary view qualified for exemption under section 45(1)(c) of the FOI Act.

<sup>5</sup> Section 194 of the RTI Act.

<sup>6</sup> With the exception of sections 118 and 122 of the RTI Act.

this review, I am required to consider the application of the FOI Act (and not the RTI Act) to the matter in issue.<sup>7</sup>

44. In making my decision in this review, I have taken into account the following:
- the FOI application dated 14 April 2008
  - Council's considered decision dated 11 July 2008
  - the applicant's letter to the Office dated 19 June 2008 and external review application dated 19 June 2008
  - the applicant's submissions received by the Office on 26 June 2009 and 14 August 2009
  - file notes of conversations with the applicant on 25 May 2008, 13 May 2009 and 19 June 2009
  - Council's submissions dated 8 October 2008, 15 January 2009 and 22 September 2009
  - file notes of conversations with Council staff on 24 September 2008, 24 September 2009 and 25 September 2009
  - file notes of conversations with the tenderers on 22 April 2009, 27 April 2009, 28 April 2009, 5 May 2009 and 5 June 2009
  - information provided by the tenderers dated 26 April 2009 and 6 May 2009
  - the matter in issue
  - relevant provisions of the FOI Act and previous decisions of the Information Commissioner, as referred to in this decision.

#### **Issues for determination**

45. The remaining issues for determination in this review are:
- Part A – Refusal of access:
    - whether information about employees' courses of study is exempt from disclosure under section 44(1) of the FOI Act
    - whether information about the tenderers' business systems and service standards is exempt from disclosure under section 45(1)(c) of the FOI Act
  - Part B – Sufficiency of search:
    - whether access to the requested contracts can be refused under section 28A(1) of the FOI Act
    - whether the additional documents the applicant has requested on external review fall outside the scope of the FOI Application.

#### **Part A – Refusal of access**

##### ***Matter in issue***

46. The relevant matter in issue in this review is comprised of tender submissions provided to Council.

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<sup>7</sup> Section 199 of the RTI Act.

### **Information about employees' courses of study**

47. This issue relates to whether information relating to employees' courses of study as it appears in tender submissions is exempt from disclosure under section 44(1) of the FOI Act.

#### **Relevant law**

48. Section 44(1) of the FOI Act provides:

#### **44 Matter affecting personal affairs**

- (1) *Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.*

49. Section 44(1) therefore requires me to consider the following questions in relation to the matter in issue:

- Firstly, does the matter in issue concern the personal affairs of person/s (other than the applicant)? (**Personal Affairs Question**) If so, a public interest consideration favouring non-disclosure of the matter in issue is established.
- Secondly, are there public interest considerations favouring disclosure of the matter in issue which outweigh all public interest considerations favouring non-disclosure of the matter in issue? (**Public Interest Question**)

#### **Personal Affairs Question**

50. In *Stewart and Department of Transport (Stewart)*<sup>8</sup> the Information Commissioner discussed in detail the meaning of the phrase 'personal affairs of a person' (and relevant variations) as it appears in the FOI Act. In particular, he said that information concerns the 'personal affairs of a person' if it concerns the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase 'personal affairs', that phrase has a well accepted core meaning which includes:

- family and marital relationships
- health or ill-health
- relationships and emotional ties with other people
- domestic responsibilities or financial obligations.

51. Whether or not matter contained in a document comprises information concerning an individual's personal affairs is essentially a question of fact, to be determined according to the proper characterisation of the information in question.

52. The Information Commissioner also noted in *Stewart* that:

- for information to be exempt under section 44(1) of the FOI Act, it must be information which identifies an individual or is such that it can readily be associated with a particular individual<sup>9</sup>
- information, such as a person's name, must be characterised according to the

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<sup>8</sup> (1993) 1 QAR 227. See in particular paragraphs 79 – 114.

<sup>9</sup> At paragraph 81.



context in which it appears.<sup>10</sup>

### **Public Interest Question**

53. The 'public interest' refers to considerations affecting the good order and functioning of community and governmental affairs, for the well-being of citizens. In general, a public interest consideration is one which is common to all members of the community, or a substantial segment of them, and for their benefit. The public interest is usually treated as distinct from matters of purely private or personal interest. However, some recognised public interest considerations may apply for the benefit of individuals in a particular case.
54. In *Fox and Department of Police*,<sup>11</sup> the Information Commissioner indicated that:

*Because of the way that section 44(1) of the FOI Act is worded and structured, the mere finding that information concerns the personal affairs of a person other than the applicant for access must always tip the scales against disclosure of that information (to an extent that will vary from case to case according to the relative weight of the privacy interests attaching to the particular information in issue in the particular circumstances of any given case), and must decisively tip the scales if there are no public interest considerations which tell in favour of disclosure of the information in issue. It therefore becomes necessary to examine whether there are public interest considerations favouring disclosure, and if so, whether they outweigh all public interest considerations favouring non-disclosure.*

### **The applicant's submissions**

55. The applicant made the following submissions on the Public Interest Question:

*The employees are required by law to have specific training and specific licences to work in a quarry and on and beside roads. EPA Act 1994 WH&S REGs 2008 Integrated Planning Act 1997 Banana shire council own occupational health and safety requirements. The relevant licence is of public interest, if the required training and licence are not in place then the general public are at risk along with business associated with any council tenders or quarry operations.*

### **Findings and application of the law**

#### **Personal Affairs Question**

56. In *Griffiths and Building Services Authority (Griffiths)*<sup>12</sup>, the Information Commissioner said:<sup>13</sup>

*In my view, the decision to undertake a course of study at a public or private educational institution, the time and effort expended in its pursuit, and the subject results thereby obtained, fall within the realm of an individual's personal affairs (notwithstanding that the study may have been undertaken as a step towards acquiring trade, professional or employment qualifications).*

57. For the reasons set out in *Griffiths*, I am satisfied that the relevant matter in issue:

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<sup>10</sup> At paragraph 90. See also paragraphs 21 – 23 of *Pearce and Queensland Rural Adjustment Authority; Various Landowners (Third Party)* (1999) 5 QAR 242.

<sup>11</sup> (2001) 6 QAR 1 at paragraph 19.

<sup>12</sup> (Unreported, Queensland Information Commissioner, 31 August 1998).

<sup>13</sup> At paragraph 17.

- relates to the employees' courses of study and is therefore characterised as concerning the personal affairs of those individuals
- is *prima facie* exempt from disclosure under section 44(1) of the FOI Act.

### **Public Interest Question**

58. Where matter is *prima facie* exempt from disclosure under section 44(1) of the FOI Act, it is exempt 'unless its disclosure would, on balance, be in the public interest'.
59. The matter in issue appears in tender documents, that is, documents that are submitted prior to contracts being awarded. Public interest arguments such as those raised in the applicant's submissions do not arise in these circumstances because the relevant documents do not disclose information about work being performed.
60. Tenderers are not accountable to the public for the contents of their tenders. Rather, it is a consequence of the fact that those documents are in the possession of Council means that any person has a right to obtain access to them under the FOI Act, except to the extent that they contain matter which qualifies for exemption under the FOI Act. However, local government authorities are accountable to the public regarding the decisions they make to award tenders for the performance of work that is to be paid for from public funds. Government agencies must be able to demonstrate that tender processes have been carried out fairly and equitably, and that the successful tenderers were the best candidates, in terms of efficiency, effectiveness and economy in the delivery of services to be paid for from public funds.<sup>14</sup>
61. I am satisfied that:
- the public interest in Council being accountable for the tender process in this matter is met by disclosure of a significant amount of the information in the tender documents
  - disclosure of this particular information does not advance the public interest in Council's accountability.
62. Where information is *prima facie* exempt from disclosure under section 44(1) of the FOI Act, there is a strong public interest in protecting the personal privacy of the individual to whom the information relates. The public interest in persons having access to information held by government and promoting the ideals of accountable and transparent government generally carries less weight when the matter in issue constitutes personal information concerning private individuals (as is the case in this review), rather than information held by the government about the government.
63. Having considered the above, I am satisfied that there are no public interest considerations favouring disclosure of this information and the matter is exempt from disclosure under section 44(1) of the FOI Act.

### **Information relating to the tenderers' business systems and service standards**

64. This issue relates to whether information relating to the tenderers' business systems and service standards as it appears in the tender submissions is exempt from disclosure under section 45(1)(c) of the FOI Act.

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<sup>14</sup> *Wanless Wastecorp and Caboolture Shire Council; JJ Richards & Sons Pty Ltd (Third party)* (2003) 6 QAR 242 (**Wanless**) at paragraph 145.

## Relevant law

65. Section 45(1)(c) of the FOI Act provides:

**45 Matter relating to trade secrets, business affairs and research**

(1) *Matter is exempt matter if—*

...

(c) *its disclosure—*

- (i) *would disclose information (other than trade secrets or information mentioned in paragraph (b)) concerning the business, professional, commercial or financial affairs of an agency or another person; and*
- (ii) *could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to government;*

*unless its disclosure would, on balance, be in the public interest.*

66. The Information Commissioner explained the application of section 45(1) of the FOI Act in *Cannon and Australian Quality Egg Farms Ltd*<sup>15</sup> (**Cannon**) and observed that section 45(1) is the primary vehicle for reconciling the main objects of the FOI Act (i.e. promoting open and accountable government administration, and fostering informed public participation in the processes of government) with legitimate concerns for protecting commercially sensitive information.<sup>16</sup> The basic object of the provision is to provide a means whereby the general right of access to documents in the possession or control of government agencies can be prevented from causing unwarranted commercial disadvantage to:

- persons carrying on commercial activity who supply information to government, or about whom government collects information
- agencies which carry on commercial activities.

67. To be *prima facie* exempt under section 45(1)(c) of the FOI Act:

- the matter in issue must be properly characterised as information concerning the business, professional, commercial or financial affairs of an agency or another person
- it must be determined that disclosure of the matter in issue could reasonably be expected to have either of the prejudicial effects contemplated by section 45(1)(c)(ii), namely:
  - an adverse effect on the business, professional, commercial or financial affairs of the agency or other person, which the information in issue concerns or
  - prejudice to the future supply of such information to government.

68. If these requirements are established, the information will qualify for exemption, unless disclosure would, on balance, be in the public interest.

<sup>15</sup> (1994) 1 QAR 491.

<sup>16</sup> *Cannon* at paragraph 27.

69. The common link between the words 'business, professional, commercial or financial' in section 45(1)(c) is to activities carried on, at least to some degree, for the purpose of generating income or profits.
70. In *Cannon* the Information Commissioner made the following observations:<sup>17</sup>
- An adverse effect under section 45(1)(c) will almost invariably be financial in nature, whether directly or indirectly (e.g. an adverse effect on an entity's 'business reputation or goodwill ... is feared ultimately for its potential to result in loss of income or profits, through loss of customers').
  - If information is already in the public domain or is common knowledge in the industry, it would ordinarily be difficult to show that disclosure of the information could reasonably be expected to have an adverse effect.
  - In most instances the question of whether disclosure of information could reasonably be expected to have an adverse effect will turn on whether the information is capable of causing competitive harm to the relevant entity – a relevant factor in this is whether the entity enjoys a monopoly position or whether it operates in a commercially competitive environment.

### **The applicant's submissions**

71. By letter received by the Office on 14 August 2009, the applicant made the following submissions in relation to this issue:

*Tenders called for by BSC require certain documents to be supplied by the all contractor for delivery of materials. Anyone could have obtained the requirements of the council as they were in public tender papers. Not a negotiated system.*

*Any council also require delivery dockets for supplies from any supplier for any goods. All quarries have to keep delivery records to be compliant with their EPA quarry licence.*

*Council are required by law to raise purchase orders for all purchases.*

*The release of these documents could not benefit any competitor for the above reasons and also as the tenderer has already completed the jobs.*

*All councils require delivery dockets to accompany any loads of materials carted or purchased.*

*In the case of tender so the council are receiving the correct amounts of material to which the tender calls for.*

*Also so they are not being charged for the wrong quantity of materials.*

*Also so the correct amount of material is used on the specific project, i.e. build the roads to the required legal standards for the safety of the general public.*

*Also 99% of all business provide purchase orders and delivery dockets as a standard practice.*

*Material testing reports are a requirement of all quarries that supply materials for the use on any roads especially for shire roads and main roads. This is so the correct standard of material is used in the building of roads. Thus the general public are not put at risk of accidents due to poor or substandard road quality.*

*These requirements are required by the Local Government Act and the Main Roads and Traffic act.*

*The business systems used by any of the relevant business in regards to gravel tenders*

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<sup>17</sup> At paragraphs 82-84.

*and the BSC quarry would not benefit any other quarry or business as they are standard legal requirements for all business in the field of quarries and cartage of materials.*

*Disclosure of tender prices would not benefit any other business as these projects have long since finished.*

*The tendered prices would be of no benefit to another business as the materials can vary greatly in price from supplier to supplier due to material specifications, distance to cart materials and even the quality of the materials supplied. Some tendered prices put in may be relying on third party suppliers. Hence if the information is release a competitor could not work out how the tenderer came up with his/her pricing.*

*Tenderers are won on too many factors not just on the price tendered.*

*The market for the supply of quarry materials to the Banana Shire council is made up of approximately 5 suppliers. Only 2 are in the close proximately to the council and they produce different materials to each other.*

*The other competitors have a large distance to cart materials and freight is a bigger costing to them.*

*These factors cannot be changed. Also as freight for the quantities required in these tenders is mainly third party supplied, again the inner workings of the tendered prices could not be determined or taken advantage of by competitors.*

*99% of quarries supply: Trucks (for delivery) and water trucks  
50% or more quarries supply earthmoving equipment.*

*All quarries who deliver materials have to have a weighing system and delivery docket system.*

*All have to comply with main road standards for sales of their products used in road building. Ie Main roads jobs.*

*All test results for material supplied must fall within a particular range (set by Gov). If material is supplied and does not fall within this range, inferior roads could cause accidents. This is of public interest.*

*Government department are supposed to be as transparent as possible. The public have a right to know that their money is being spent properly and that the tenders are not being given to a company for the wrong reasons, when it is available for supply at a more competitive rate, whilst still supplying the same service and to the same standards.*

### **Council's submissions**

72. By letter dated 15 January 2009, Council submitted that if the tender submissions were disclosed to the applicant, the applicant would have an advantage with tendering for future jobs by knowing the business operations of the company.

### **The tenderer's submissions**

73. By letter dated 6 May 2009, the solicitor for one of the tenderers made the following submission on behalf of his client:

*If the documents are disclosed to the applicant, it is reasonable to expect that she will use them to gain an unfair advantage when competing with my client (and others) in future tenders.*

### **Findings and application of the law**

74. In her submissions to the Office, which are set out above at paragraph 71, the applicant addresses why Council should have certain documents and release them to her under the FOI Act. For example, a large part of the submissions relates to the existence of delivery dockets and records, purchase orders, material testing reports

and tender prices. That information does not form part of the information I have described as information relating to the tenderers' business systems and service standards. Accordingly, the applicant's submissions relating to those documents are not relevant to this issue and will not be considered further in this decision.

***Information concerning business affairs***

75. I am satisfied that information relating to the tenderers' business systems and service standards as it appears in the tender submissions concerns the business affairs of the tenderers.

***Whether disclosure of the matter in issue could reasonably be expected to have a prejudicial effect on the tenderers' business affairs***

76. In *Wanless* the Information Commissioner considered whether information in tender documents about the tenderers' business systems and service standards was exempt under section 45(1)(c) of the FOI Act. The Information Commissioner decided that the information was *prima facie* exempt from disclosure under section 45(1)(c) of the FOI Act, subject to the public interest test, for the following reasons:<sup>18</sup>

- the information detailed how the tenderer would propose to implement some significant aspects of service delivery under the contract and comprised a detailed description of business systems and service standards
- the information was designed to appeal to prospective customers and was intended for repeated use in tender situations
- there was a reasonable basis for expecting that its disclosure could confer a competitive advantage on the tenderer's competitors (with a corresponding adverse effect on the tenderer) by enabling a competitor to match or exceed the detailed business systems and service standards contained in the documents.

77. The applicant relevantly submits that the *[t]he business systems used by any of the relevant business in regards to gravel tenders and the BSC quarry would not benefit any other quarry or business as they are standard legal requirements for all business in the field of quarries and cartage of materials*'.

78. I do not accept the applicant's submissions on that issue. The relevant information does not relate to the standard legal requirements for businesses operating in the field of quarrying and cartage of materials. Rather, the information details how the tenderer would propose to implement some significant aspects of service delivery under the contract and what the tenderer had the capability to offer.

79. I have carefully considered the submissions made by Council and on behalf of the relevant tenderer. I am satisfied that disclosure of the matter in issue in this review could reasonably be expected to confer a competitive advantage on the tenderers' competitors (with a corresponding adverse effect on the tenderer) by enabling a competitor to match or exceed the detailed business systems and service standards contained in the documents. Accordingly, I am satisfied that the matter in issue is *prima facie* exempt from disclosure under section 45(1)(c) of the FOI Act, subject to any relevant public interest considerations.

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<sup>18</sup> At paragraph 134.

### ***Public interest considerations***

80. In relation to the public interest test, the Information Commissioner in *Wanless* said:<sup>19</sup>
- the information was indicative of what the tenderer had the capability to offer, rather than being service standards and performance indicators that the tenderer was contracted to deliver
  - the tender specifications indicated that the Council and the successful tenderer would negotiate to develop key performance indicators and benchmarks to measure the contractor's performance, and which would become agreed terms of the contract
  - information about standards of service, and performance indicators, in the contract eventually concluded with the successful tenderer, and information about performance standards achieved by the contractor, is the kind of information which attracts a strong public interest consideration favouring disclosure
  - as the information in this instance was as described at bullet point 1 above, the public interest considerations favouring disclosure of the information were not sufficiently strong to warrant a finding that disclosure would, on balance, be in the public interest.
81. The applicant relevantly submits and I concur that *'[g]overnment departments are supposed to be as transparent as possible. The public have a right to know that their money is being spent properly and that the tenders are not being given to a company for the wrong reasons, when it is available for supply at a more competitive rate, whilst still supplying the same service and to the same standards'*.
82. In relation to the public interest question, I refer to my findings above at paragraphs 60 to 61 and note that:
- the public interest in Council being transparent and accountable for the tender process in this matter is met by disclosure of a significant amount of the information in the tender documents
  - disclosure of this particular information does not advance the public interest in Council's accountability or transparency.
83. I am satisfied that the relevant information in this review is analogous to the information considered by the Information Commissioner in *Wanless*. For the reasons provided in that decision, and as set out above, I am satisfied that the information about the tenderers' business systems and service standards is exempt from disclosure under section 45(1)(c) of the FOI Act.

### **Part B - Sufficiency of search**

#### ***Whether the requested documents exist***

84. This issue relates to whether access to the relevant contracts for each tender given out by Council can be refused under section 28A(1) of the FOI Act.

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<sup>19</sup> At paragraph 149.

## Relevant law

85. Section 28A(1) of the FOI Act relevantly provides:

**28A Refusal of access—document nonexistent or unlocatable**

(1) *An agency or Minister may refuse access to a document if the agency or Minister is satisfied the document does not exist.*

*Example—  
documents that have not been created*

86. In *PDE and the University of Queensland*<sup>20</sup> (*PDE*) the Acting Information Commissioner indicated that:<sup>21</sup>

*Sections 28A(1) and (2) of the FOI Act address two different scenarios faced by agencies and Ministers from time to time in dealing with FOI applications: circumstances where the document sought does not exist and circumstances where a document sought exists (to the extent it has been or should be in the agency's possession) but cannot be located. In the former circumstance, an agency or Minister is required to satisfy itself that the document does not exist. If so satisfied, the agency or Minister is not required by the FOI Act to carry out all reasonable steps to find the document. In the latter circumstance an agency or Minister is required to satisfy itself that the document sought exists (to the extent that it has been or should be in the agency's possession) and carry out all reasonable steps to find the document before refusing access.*

87. In *PDE* the Acting Information Commissioner also considered how an agency is to satisfy itself as to the non-existence of documents sought by an applicant and found that to be satisfied that a document does not exist, it is necessary for the agency to rely upon its particular knowledge and experience with respect to various key factors including:

- the administrative arrangements of government
- the agency structure
- the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it)
- the agency's practices and procedures (including but not exclusive to its information management approach)
- other factors reasonably inferred from information supplied by the applicant including:
  - the nature and age of the requested document/s
  - the nature of the government activity the request relates to.

88. Section 28A(1) is silent on the issue of how an agency is to satisfy itself that a document does not exist. When proper consideration is given to the key factors discussed above and a conclusion reached that the document sought does not exist, it may be unnecessary for the agency to conduct searches. However, where searches are used to substantiate a conclusion that the document does not exist, the agency must take all reasonable steps to locate the documents sought.

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<sup>20</sup> (Unreported, Queensland Information Commissioner, 9 February 2009).

<sup>21</sup> At paragraph 34.



### **The applicant's submissions**

89. The applicant made the following general submissions on this issue:

*The completed contracts for the winning tenders are required and have not been supplied. These projects are long since finished. No one could gain financially from viewing them.*

### **Council's submissions**

90. Council indicates that letters of acceptance to the contractor were not drafted as the contractors were advised verbally.

91. In a conversation with a staff member of the Office on 24 September 2009, Council confirmed that:

- The procedures set out in the General Conditions of Contract and Conditions of Tender indicate that Council would issue a letter of acceptance to the successful tenderer and require it to execute a contract.
- Despite this, Council did not issue letters of acceptance or create contracts with the successful tenderers and therefore, did not follow the procedures set out in the General Conditions of Contract or Conditions of Tender.

92. In its considered decision Council provided the following explanation in relation to tender process QT07/08-0005:

*Tender number QT07/08-0005 is a standing offer arrangement. Council's procedure in relation to standing offer arrangements is as follows:*

1. *Contract called*
2. *Tenders assessed and ranked in order of preference in accordance with weighing factors*
3. *Selection of appropriate contractor based on rank and availability by Project Manager*
4. *The next appropriate contractor on the list is approached if initial selection is unavailable to*

### **Findings and application of the law**

93. As I have indicated above, during the processing of the FOI Application, Council provided a number of documents to the applicant. Some of these documents include:

- the General Conditions of Contract for the Supply of Services by Tender
- the Conditions of Tender for the Supply of Goods and Services by Tender
- the Specification for the Provision of Supply of Goods and Services by Tender.

94. Clause 4 of the General Conditions of Contract for the Supply of Services by Tender relevantly provides:

#### **4. EVIDENCE OF CONTRACT**

4.1 *The Contract between the Principal and the Contractor is constituted by the following documents:*

- (a) *Order;*
- (b) *Letter of Acceptance;*

- (c) *Specification;*
- (d) *Special Conditions of Contract;*
- (e) *General Conditions of Contract*
- (f) *Offer; and*
- (g) *correspondence passing between the Principal and the Contractor clarifying any aspect of the Request for Tender.*

...

- 4.3 *After formation of the Contract, the Principal may deliver a completed Contract to the Contractor. Within 14 days after the date of delivery of the completed Contract to the Contractor, the Contractor must execute and return the completed Contract to the Principal for execution by the Principal, The Principal may extend the period for execution of the completed Contract by giving written notice to the Contractor.*

95. Clause 14 of the Conditions of Tender for Supply of Goods and Services by Tender relevantly provides:

**14. ACCEPTANCE OF TENDER**

...

- 14.2 *The Principal may accept a Tender from a Tenderer by giving written notice in the form of a Letter of Acceptance to the Tenderer who submitted the Tender to the Principal.*

- 14.3 *The Contract will not come into existence until the Principal has given written notice in the form of a Letter of Acceptance to the Tenderer.*

...

96. I have carefully considered the information provided by Council on this issue, the documents already provided to the applicant (including the Tender Specification, the Conditions of Tender and the General Conditions of Contract) and the relevant tender submissions.

97. I am satisfied that tender process QT07/08-0005 was a standing offer arrangement and due to the nature of Council's procedures in relation to standing offer arrangements, Council did not create a written contract with any one of the tenderers or provide them with a letter of acceptance in relation to that process.

98. In relation to the other tender processes, I am satisfied that:

- The General Conditions of Contract and Conditions of Tender indicate that Council would issue a letter of acceptance to the successful tenderer and, after formation of the contract, the tenderer must execute a completed contract and return it to Council.
- However Council did not run the tender process in accordance with those conditions and did not provide letters of acceptance or contracts to the successful tenderers.
- Council advised the tenderers of the outcome of the process verbally.

99. Accordingly, I find that:

- there are reasonable grounds for Council to be satisfied that the letters of acceptance and contracts do not exist

- access to the requested documents can be refused under section 28A(1) of the FOI Act.

### **Scope of the FOI Application**

100. This issue relates to whether the additional documents the applicant has requested on external review fall outside the scope of the FOI Application.

#### **The applicant's submissions**

101. During the course of this external review, the applicant made submissions stating that she considers Council has not provided her with all the relevant documents. The documents the applicant claims should be provided to her are as follows:

- various purchase orders for crushing and screening, the supply of material, cartage of material to site and the supply of material extra to contract
- various documents relating to test results including material test results for each lot crushed and screened and authorisation for each tested lot
- other documents including works docket for cartage of this material, daily work sheets for cartage of materials, diesel supply sheets, plant inspection sheets for all contract equipment, completed measure up forms, weight docket, delivery docket for each load delivered, variations, amendments or deviations to contract conditions and communications in relation to this contract with the contractor.

102. On 14 August 2009, the applicant provided further submissions relating to these documents. The submissions set out why the requested documents are important in terms of what they will demonstrate and why they should be provided. However those submissions do not relate to the question of whether the requested documents fall within the scope of the FOI Application. Therefore those submissions are not relevant to the issues for determination in this decision.

#### **Relevant law**

103. Section 25 of the FOI Act relevantly states:

##### **25 How applications for access are made**

(1) *A person who wishes to obtain access to a document of an agency or an official document of a Minister under this Act is entitled to apply to the agency or Minister for access to the document.*

(2) *The application must—*

...

(b) *provide sufficient information concerning the document to enable a responsible officer of the agency or the Minister to identify the document; and*

...

#### **Findings and application of the law**

104. Under section 25(2)(b) of the FOI Act an applicant must, at the time of making the FOI application, provide sufficient information concerning the documents sought to enable a responsible officer of an agency to identify the documents. There are sound practical reasons for the documents sought in an FOI application being clearly and unambiguously identified. On this point the Information Commissioner has previously

said:<sup>22</sup>

*The terms in which an FOI access application is framed set the parameters for an agency's response under Part 3 of the FOI Act, and in particular set the direction of the agency's search efforts to locate all documents of the agency which fall within the terms of the FOI access request. The search for relevant documents is frequently difficult, and has to be conducted under tight time constraints. Applicants should assist the process by describing with precision the document or documents to which they seek access. Indeed the FOI Act itself makes provision in this regard with s.25(2) not only requiring that an FOI access application must be in writing, but that it must provide such information concerning the document to which access is sought as is reasonably necessary to enable a responsible officer of the agency to identify the document.*

105. It is not uncommon for documents released under the FOI process to suggest new or parallel avenues of inquiry involving a different set of documents. However, even though a new avenue has been suggested, if the new documents do not fall within the terms of the FOI application they must be sought through a fresh FOI application. On this issue, the Information Commissioner has previously indicated:<sup>23</sup>

*It is not possible for an applicant to unilaterally extend the terms of an FOI access application at the external review stage. The terms in which the FOI access application was framed will already have set the parameters for an agency's response under Part 3 of the FOI Act, and in particular set the direction of the agency's search efforts to locate all documents of the agency which fall within the terms of the FOI access application (see *Re Cannon* at paragraph 8). ... (There would appear to be no impediment to the terms of an FOI access application being extended by agreement, and there is, of course, nothing to prevent an applicant from making a fresh application for access to matter which falls outside the scope of an earlier FOI access application.)*

106. The applicant's FOI Application was relatively specific. The terms of the FOI Application are set out above at paragraph 4.
107. I am satisfied that the FOI Application is broadly worded in terms of the types of documents to which the applicant seeks access but it is specifically confined to documents created during the tender process up until the formation of the relevant contract with the successful tenderer.
108. I am not satisfied that the FOI Application extends to documents that were created after the formation of the contract, that is, documents created as a result of the performance of the contract. For example, I consider that documents relating to test results are documents that do not fall within the scope of the FOI Application because they would have been created as a result of the performance of the contract.
109. I am satisfied that the parameters of the FOI Application cannot reasonably encompass the other documents the applicant has requested on external review which are listed at paragraph 101 above. Accordingly, I find that the additional documents the applicant has requested on external review fall outside of the scope of the FOI Application.

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<sup>22</sup> *Cannon* at paragraph 8.

<sup>23</sup> *Robbins and Department of Health* (1994) 2 QAR 30 at paragraph 17.

## **DECISION**

110. For the reasons set out above, I vary the decision under review by finding that:

- information relating to employees' courses of study as it appears in tender submissions is exempt from disclosure under section 44(1) of the FOI Act
- information relating to the tenderers' business systems and service standards as it appears in the tender submissions is exempt from disclosure under section 45(1)(c) of the FOI Act
- access to the requested letters of acceptance and contracts can be refused under section 28A(1) of the FOI Act
- the additional documents the applicant has requested on external review fall outside the scope of the FOI Application.

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

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**Suzette Jefferies**  
**Acting Assistant Commissioner**

**Date: 9 October 2009**