



Decision and Reasons for Decision

Application Number: 310211

Applicant: Roue

Respondent: Moreton Bay Regional Council

Decision Date: 24 February 2011

Catchwords: ADMINISTRATIVE LAW – RIGHT TO INFORMATION – APPLICATION FOR ACCESS TO INFORMATION - REFUSAL OF ACCESS – Grounds on which access may be refused – section 47(3)(b) of the *Right to Information Act 2009* (Qld) – to the extent the document comprises information the disclosure of which would, on balance, be contrary to the public interest under section 49 of the *Right to Information Act 2009* (Qld)

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REASONS FOR DECISION

Summary

1. The original access applicant seeks:
 - all correspondence between Moreton Bay Regional Council (**MBRC**) and third parties relating to the removal of a retaining wall on an adjoining property; and
 - all internal council file notes, site inspection reports and memos relating to that matter.
2. MBRC located documents responding to the application and advised the relevant third parties of its decision to release the documents in full.
3. After reviewing the documents, the third parties objected to their release and sought internal review of MBRC's decision based on privacy concerns.
4. On internal review, MBRC decided that:
 - it would be contrary to the public interest to give access to some of the relevant information,¹ and
 - access to this information can be refused under sections 47(3)(b) and 49 of the *Right to Information Act 2009 (RTI Act)* .
5. The third parties maintain their objection to release of any information and specifically seek external review of MBRC's decision based on:
 - the scope of the original access application, and
 - concerns about their privacy.
6. Taking into account the evidence available to me, relevant legislation, case law and the parties' submissions, I am satisfied that:
 - disclosure of certain personal information would, on balance, be contrary to the public interest (including the first names of the third parties, their personal contact details and a statement of a sensitive and personal nature)
 - access to this personal information can be refused under sections 47(3)(b) and 49 of the RTI Act, and
 - the remaining information should be released.

Decision under review

7. The decision under review is MBRC's internal review decision dated 14 April 2010 (**Third Party Decision**) issued to the third parties (**External Review Applicants**).

Background

8. The External Review Applicants and original access applicants own adjoining properties.

¹ Including the third parties' names, personal email addresses, telephone numbers, residential address and post office box number.

9. In February 2009, the External Review Applicants removed a boulder retaining wall on their property with the intention of installing an efficient drainage system and then reinstating the wall.
10. After receiving a notification of concern about removal of the relevant wall, an MBRC Development Compliance Officer inspected the site and advised the External Review Applicants in respect of various matters related to the wall.
11. Subsequent communications between the parties comprise the information sought by the original access applicants.

Issues in the review

12. There are two issues for determination in this external review:
 - The first issue is whether the documents located by MBRC fall within the scope of the access application.
 - If the documents do fall within scope, then the second issue for determination is whether the disclosure of the information in the documents is, on balance, contrary to public interest.
13. In reaching this decision, I have taken the following into account:
 - original access application
 - the MBRC's Third Party Decision
 - internal and external review application
 - the information sought
 - submissions made by the parties
 - relevant decisions, and
 - provisions of the RTI Act as referred to in this decision.

Scope

14. The original access applicants seek various documents '*...relating to the removal of the retaining wall...*' (my emphasis).
15. In their request for external review, the applicants state that:

... the information [sought] is in relation to the removal of retaining wall ... The documents that were sent to us by Moreton Bay Regional Council, had no such information about the removal of retaining wall but the new plans and correspondence for the replacement of the wall, including ... owner builder licence details and pool plans.
16. After carefully considering the content of all relevant documents, I am satisfied that they record:
 - actions taken by Council as a result of the removal of the retaining wall
 - action required as a consequence of the wall's removal
 - information concerning issues relevant to the reinstatement of the wall as required by Council.

17. While I acknowledge the External Review Applicants' concern about scope, in the circumstances, I am satisfied that the word 'relating' is intended to capture information related to the removal of the retaining wall including the matters set out in the dot points above.
18. Accordingly, I am satisfied that the documents identified by MBRC fall within the scope of the original access application as the information contained in them relates to the removal of the retaining wall.

Contrary to public interest

Relevant Law

19. Under section 23 of the RTI Act, a person has a right to be given access to documents of an agency. However, this right is subject to a number of exclusions and limitations, including grounds for refusal of access. These grounds are contained in section 47 of the RTI Act.
20. Relevantly, sections 47(3)(b) and 49 of the RTI Act provide a ground for refusal of access where disclosure of information would, on balance, be contrary to public interest. In determining whether disclosure of the documents would, on balance, be contrary to public interest, I must:
 - identify and disregard irrelevant factors
 - identify factors favouring disclosure of the information in the public interest
 - identify factors favouring nondisclosure of the information in the public interest
 - balance the relevant factors favouring disclosure and nondisclosure and decide whether disclosure of the information would, on balance, be contrary to public interest.

External Review Applicants' submissions

21. In their application for external review, the External Review Applicants state that:

[We] have a huge concern [about] this disclosure ... for the following reasons:-

- ***... [submissions regarding scope – see paragraph 4 of this decision]***
- ***The [original access applicants are] using this information to better their chances in court against us. We have attempted mediation with them and they seem unwilling to resolve the matter amicably and they have made accusations [regarding] physical violence. ...***
- ***The [original access applicants] ha[ve] made threats against us. The day of removal of wall [they] gave us a letter of trespass ... He was dressed in a ... police uniform including hat while not on duty and did not show us any ID ... and more recently [the original access applicants'] father, [stated] that "we will do anything they can to stop you from doing this work" and on both occasions, we have had a witness to these threats.***
- ***Every time someone from our family and/or friends/sub-contractors enters our backyard, the [original access applicants] stand at their window to see what we are doing. [They have] taken photos of us as well as contractors we have employed to do work.***

As you can read the [original access applicants] like to wind us up and to cause us stress. They have never [spoken to us regarding] when the works will be started and completed. All they seem to do is make many phone calls to council and if

they are not satisfied with the answer from council they hang up ... and then try and ring someone else, two weeks ago they were ringing the mayors office over the long weekend to stop our progress. They have also got a solicitor to write ... 3 page letters on many occasions.

I respect their privacy and in the return, I wish they would respect mine ...

22. I also note the External Review Applicants' comments² that:

...

We feel your decision is not looking at our concerns to privacy, as our names, address and phone numbers are on the 18 pages of paperwork you provide us to view and we feel that it gives someone the access to commit identity fraud ...

You state under the [RTI Act] you are unable to release the identity of the [original access applicants] and likewise for us, we refuse the right to information to the applicant.

All works conducted on our property are within our boundary ... so to what physical harm are you referring ..., as our rear neighbour has 2 other properties with a similar sort of drop to adjoining neighbours properties with no safety fence into the other 2 properties.

...

Original access applicants' submissions

23. In the course of trying to informally resolve this external review, an original access applicant advised this Office that:

...

I understand that the [External Review Applicants are] appealing the RTI/FOI process, at every stage, on the grounds that they do not want their personal details made public.

It is my opinion that this is simply a tactic ... to delay or deny my access to the information, as the information ... has been made available to me, by them via previous correspondence and in official court documents in relation to a civil suit we have filed against them.

I attach for your information electronic copies of documents in my possession that shows I have lawful possession of this information. It may also be pertinent ... to note that myself and the third party share a common property boundary so taking steps to protect their residential address is apparently pointless.

As you may be aware, I hope to be able to use some of the information I expect to find in the file ... in preparation for a civil suit. ...

Agency submissions

24. Relevantly, I note MBRC's view³ that:

- the relevant documents concern MBRC's dealings with the External Review Applicants about a matter of alleged non-compliance with building and planning legislation
- the matter may also involve issues of public safety

² In their application for internal review dated 17 March 2010.

³ Set out in the Third Party Decision.

- the documents provide insight into how the MBRC has dealt with the matter and decisions it has made
- the documents contain contrary to public interest information
- it would be entirely practical to give access to the documents with this information deleted.

Application of the law

Balancing the public interest

Irrelevant Factors

25. The External Review Applicants' concerns about the original access applicants "... *using this information to better their chances in court against us...*" and the assertion that they "... *like to wind us up and to cause us stress ...*" are irrelevant factors.⁴

Factors favouring disclosure

26. MBRC raises the following factors favouring disclosure in the public interest:
- Disclosure of the information could reasonably be expected to inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by the Government in its dealings with members of the community.⁵
 - Disclosure of the information could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official.⁶
 - Disclosure of the information could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision.⁷
27. After careful consideration of all the information available to me, I am satisfied that release of the documents could reasonably be expected to:
- reveal the manner in which MBRC investigated concerns about a matter of alleged non-compliance with building and planning legislation which may involve issues of public safety
 - allow or assist inquiry into possible deficiencies in the conduct of MBRC in relation to these matters, and
 - reveal the reason for MBRC's actions and decisions including background or contextual information.
28. In the circumstances, I afford these factors significant weight.

⁴ Schedule 4, part 1, item 3 of the RTI Act.

⁵ Schedule 4, part 2, item 3 of the RTI Act.

⁶ Schedule 4, part 2, item 5 of the RTI Act.

⁷ Schedule 4, part 2, item 11 of the RTI Act.

Factors favouring non-disclosure

29. MBRC also raises the following factors favouring non-disclosure in the public interest:
- Disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy.⁸
 - Disclosure of the information could reasonably be expected to cause a public interest harm if disclosure would disclose personal information of a person.⁹
30. Personal information is '*information or an opinion... whether true or not ... about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.*'¹⁰
31. I note that in its Third Party Decision, MBRC found that disclosure of the External Review Applicants' personal information¹¹ was, on balance, contrary to the public interest.
32. In isolation, a person's name is not personal information. However, if a name links an identifiable person to information about a private aspect of their life, for example, their health information, their name in that context will comprise personal information.
33. In many cases, deletion of a person's name and other identifying information will allow the rest of a document to be disclosed without affecting that person's privacy and the RTI Act allows deletion of parts of documents in such cases.¹²
34. In the circumstances of this particular review, taking into account relevant submissions and the conduct of the parties in relation to the removal of the retaining wall, I am satisfied that:
- disclosure of the External Review Applicants' personal information (comprising their first names, personal contact details and a statement of a sensitive and personal nature contained in the last sentence of document 5)(**Personal Information**) could reasonably be expected to prejudice the protection of the External Review Applicants' right to privacy
 - the privacy interest in the Personal Information has not been reduced in the manner suggested by the original access applicant
 - significant weight should be afforded to the public interest favouring non-disclosure of the Personal Information.

Conclusion

35. Having identified and examined the public interest factors, I consider that:
- the public interest favouring non-disclosure of the Personal Information outweighs the public interest favouring its disclosure, and
 - the public interest favouring disclosure of the remaining information outweighs the public interest favouring its non-disclosure.

⁸ Schedule 4, part 3, item 3 of the RTI Act.

⁹ Schedule 4, part 4, section 6 of the RTI Act.

¹⁰ See section 12 of the *Information Privacy Act 2009* (Qld).

¹¹ Including the third parties' names and personal contact details.

¹² Section 75 RTI Act.

36. I also note that in the circumstances of this review, release of the relevant information with the Personal Information omitted, will not impact on the public interest in:
- informing the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by the Government in its dealings with members of the community
 - allowing or assisting inquiry into possible deficiencies in the conduct or administration of an agency or official, and/or
 - revealing the reason for a government decision and any background or contextual information that informed the decision.

DECISION

37. I vary the Third Party Decision under review by deciding that:
- disclosure of the Personal Information is, on balance, contrary to the public interest and access to this information can be refused under sections 47(3)(b) and 49 of the RTI Act, and
 - the remainder of the information should be released.
38. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Jenny Mead
Right to Information Commissioner

Date: 24 February 2011