



Decision and Reasons for Decision

Application Number: 2006/F0006 (53630)

Applicant: Dr B Moon

Respondent: Gold Coast City Council

Decision Date: 23 February 2007

Catchwords: Sufficiency of search – scope of FOI application – document of an agency – Council searches reasonable – s.22(b) of the *Freedom of Information Act 1992 (Qld)* – access to documents held in a Council library

Contents

Background	2
Steps taken in the external review process	2
Matter in issue	4
Findings	4
Decision	14

Reasons for Decision

Background

1. Dr Moon (the **Applicant**) seeks review of the Gold Coast City Council's (**Council**) decision that there are no additional documents held by Council responsive to his freedom of information (**FOI**) application.
2. The Applicant's three-paged FOI application dated 29 April 2005 sought documents held by the Council leading up to and including the 'decision' to allow increased density on four specified parcels of land.
3. In its decision dated 24 June 2005, the Council found no documents responsive to the FOI application. On 1 July 2005 the Applicant and Council discussed the scope of the application. On 16 August 2005, the Council rescinded the decision of 24 June 2005, made a new decision and provided the Applicant with 30 documents responsive to his application.
4. On 26 September 2005 the Applicant applied to this Office for external review of the decision. By letter dated 3 October 2005, this Office advised the Applicant that it has no jurisdiction to undertake the review as he had not applied in writing for internal review of the Council's decision (section 73(3) of the FOI Act).
5. By letter dated 10 October 2005 the Applicant applied for internal review, referring to documents (including those from the mid 1980s to mid 1990s) that should be within the control of the Council and should have been provided to him.
6. By letter dated 19 December 2005 the internal review decision-maker decided to accept his application for internal review (which was outside the time limit prescribed by the FOI Act) and affirmed the original decision maker's decision of 26 August 2005.
7. The Applicant applied for external review of the Council's decision on 3 January 2006.

Steps taken in the external review process

8. In a letter dated 5 January 2006, Assistant Commissioner (AC) Barker sought from the Council details of searches undertaken to locate documents responsive to the FOI application. The Council provided evidence of searches undertaken in a letter dated 10 January 2006.
9. In a letter dated 16 February 2006, AC Barker asked the Applicant to clarify the scope of his application.
10. The Applicant replied in a letter dated 26 March 2006 that incorrect search dates had been employed by the Council and provided further grounds as to why he believed additional documents existed.
11. In a letter dated 18 May 2006, responding to the Applicant's assertions as to the existence of further documents, the Council maintained its view that no further documents existed that were responsive to the FOI request.

12. The information was forwarded to the Applicant in a letter dated 30 June 2006 and the preliminary view was conveyed that there were no reasonable grounds to believe that the Council held any further documents responsive to the FOI application.
13. In a letter dated 14 July 2006, the Applicant provided further grounds as to why he believed the Council held additional documents responsive to his FOI request. The Council was advised of the Applicant's further submissions and asked to undertake further searches and advise of the outcome of those further searches.
14. On 11 September 2006 the Council asked this Office to seek further information from the Applicant to clarify one of the grounds in his letter dated 14 July 2006.
15. The Applicant supplied to this Office further information in support of his claims during telephone conversations on 9 October 2006, 10 October 2006 and 23 October 2006 and in a meeting with a case officer from this Office on 25 October 2006. This information was forwarded to the Council in a letter dated 6 November 2006.
16. The Council responded to the Applicant's submissions in a letter dated 14 December 2006 and provided further reasons as to why no additional documents existed within the scope of the FOI application.
17. During telephone conversations on 20 December 2006, 22 December 2006, 4 January 2007 and 9 January 2007, the Council provided further information on searches conducted in the Council's Strategic Planning Branch.
18. On 8 January 2007 the Council was asked to conduct searches of those documents within its control that were in the possession of town planning consultants Brannocks Humphreys.
19. On 18 January 2007 a case officer from this Office attended the Council to:
 - (a) view the process by which Council files are searched; and
 - (b) clarify the changes in density provisions under various planning schemes.
20. In an email dated 25 January 2007 the Council provided further information in support of its submissions.
21. On 31 January 2007 as a result of queries on the sufficiency of the Council's searches the Council refused access to two documents under section 22 of the FOI Act.
22. In a letter dated 10 February 2007, and subsequent telephone conversation on 14 February the Council provided further submissions as to why it considered that it would be unreasonable to require the Council to search records in the possession of consultants Brannock Humphreys.
23. In making my decision I have taken into account the following material:
 - the Applicant's correspondence dated 29 April 2005, 26 September 2005, 10 October 2005, 3 January 2006, 26 March 2006, and 14 July 2006;
 - the Council's correspondence dated 16 August 2005, 19 December 2005, 10 January 2006, 18 May 2006, 14 December 2006, 25 January 2007, 31 January 2007 and 10 February 2007;
 - information provided at the meeting with the Applicant on 25 October 2006;

- information provided at the meeting with the Council on 18 January 2007;
- various telephone conversations with the Applicant and Council each month during the course of the review; and
- the 1988 Albert Shire Planning Scheme (**1988 Planning Scheme**) and the 1995 Albert Shire Council Planning Scheme (the **1995 Planning Scheme**).

Matter in issue

24. The matter in issue relates to the sufficiency of the Council's search efforts to locate documents responsive to the FOI application. During the course of the review, questions arose as to the scope of the applicant's application. These are addressed below. The Council also raised an argument that it may refuse access to particular documents under section 22(b) of the FOI Act.
25. Therefore, in addition to the question whether Council's searches were sufficient in this case, I must also consider whether the Council correctly exercised its discretion to refuse access under section 22(b) of the FOI Act to certain documents falling within the scope of the FOI request.

Findings

26. Before setting out my findings in relation to the sufficiency of Council's searches it is necessary to clarify the scope of the access application.

Scope of FOI application

27. In his initial access application dated 29 April 2005 the Applicant stated *inter alia*:

I, Bruce Moon of, request the Gold Coast City Council to produce to me under the provisions of the Queensland Freedom of Information Act a copy of every piece of paper, tape recording, email, facsimile, computer file, (that is, every page, manuscript, document, &/or report – whether printed on paper or held in another format such as electronic, or tape, or microfiche, et cetera) held by &/or under the supervision &/or control of the Gold Coast City Council which contains words &/or marks that either relate to, or can be deemed to be related to any:

- 1/. intention by Council to determine background information for any assessment undertaken by Council in relation to any development application placed before Council that enabled owner/s of lots known as Lot 1 – RP 163387/1073662; Lot 2 RP 120272/321400; Lot 33 SP 113693/908036; and Lot 340 WP 4267/632190; to gain an increased density from 'minimum 50 acres' to 'minimum 10 acres' on each lot;*
- 2/. undertaking, advice, decision, or interaction by Council with – or between – any parties in the pursuit of background information for any assessment undertaken by Council in relation to any development application placed before Council that enabled owner/s of lots known as Lot 1 – RP 163387/1073662; Lot 2 RP 120272/321400; Lot 33 SP 113693/908036; and Lot 340 WP 4267/632190; to gain an increased density from 'minimum 50 acres' to 'minimum 10 acres' on each lot;*
- 3/. intention by Council to decide for any assessment undertaken by Council in relation to any development application placed before Council that enabled owner/s of lots known as Lot 1 – RP 163387/1073662; Lot 2 RP 120272/321400; Lot 33 SP 113693/908036; and Lot 340 WP 4267/632190; to gain an increased density from 'minimum 50 acres' to 'minimum 10 acres' on each lot;*

- 4/. *(a copy of) the applicable Planning Scheme, and/or supporting material, pertinent to any assessment undertaken by Council in relation to any development application placed before Council that enabled owner/s of lots known as Lot 1 – RP 163387/1073662; Lot 2 RP 120272/321400; Lot 33 SP 113693/908036; and Lot 340 WP 4267/632190; to gain an increased density from ‘minimum 50 acres’ to ‘minimum 10 acres’ on each lot;*
- 5/. *sections or parts of the Planning Scheme known as the ‘Albert Shire Council Planning Scheme’ and considered by Council to any assessment undertaken by Council in relation to any development application placed before Council that enabled owner/s of lots known as Lot 1 – RP 163387/1073662; Lot 2 RP 120272/321400; Lot 33 SP 113693/908036; and Lot 340 WP 4267/632190; to gain an increased density from ‘minimum 50 acres’ to ‘minimum 10 acres’ on each lot; and*
- 6/. *Any material produced during the period 1982 through to 1996 that altered the way the applicable Planning Scheme of the time might be read regarding subdivisional potential for land west (upstream) of the mapped ‘line’ – especially in relation to property known as Lot 1 – RP 163387/1073662; Lot 2 RP 120272/321400; Lot 33 SP 113693/908036; and Lot 340 WP 4267/632190.*

28. Points 1-5 of the Applicant's application are narrowly focused, specifically seeking access to documents relating to any assessment undertaken by Council in relation to any development application before the Council concerning Lot 1 – RP 163387/1073662; Lot 2 RP 120272/321400; Lot 33 SP 113693/908036; and Lot 340 WP 4267/632190 (the **relevant lots**). Point 6 however is more broadly couched and in my view extends the scope of his application to encompass any material pertinent to changes to any planning schemes (in effect between 1982 and 1996) affecting the relevant lots.

29. The Applicant stated in his application that he sought access to:

any material produced during the period 1982 through to 1996 that altered the way the applicable Planning Scheme of the time might be read regarding subdivisional potential for land west (upstream) of the mapping 'line' - especially in relation to [the relevant lots]

and:

The information I seek relates to the ‘decision’ to allow increased density on these parcels of land. However, it is not the ‘decision’ per se that is necessarily of interest. Rather, the focus of interest is the various documents of advice that led up to the ‘decision’ to enable increased density for these sites.

30. In his application the Applicant also stated that he believed that:

- (a) under the 1988 Planning Scheme the Council had designated that no subdivision smaller than Rural C (minimum size 20 hectares or 50 acres) would be entertained in relation to the relevant lots;
- (b) under the 1995 Planning Scheme zoning labels changed but the categorisation of lot size stayed the same; and
- (c) in approximately 2000 the Council approved a development application by one or more of the lot owners to subdivide the lot/s to 10 acres and that this should not have been permitted as the 1995 Planning Scheme did not allow subdivision below 50 acre lots.

31. Therefore, in essence, the Applicant sought access to documents that he believed existed which demonstrated that either:
- in approximately the year 2000 the Council approved an application or applications from one or more owner/s of the relevant lot/s to subdivide the lot/s to 10 acre lots; or
 - the relevant lot/s were somehow rezoned without any documented Planning Scheme changes, so that where they once fell within an area that prohibited subdivision to lots below 50 acres (in the 1988 Planning Scheme and the 1995 Planning Scheme) they were now (in approximately the year 2000) within a zone that permitted subdivision of up to 10 acre (4 hectare) lots.
32. In its decision dated 24 June 2005, the Council advised the Applicant that it had found no documents responsive to the FOI application. On 1 July 2005, based on his belief that the Council had only searched as far back as 1995, the Applicant contacted the Council and advised that in his view the scope of his application encompassed documents as far back as the 1982 Albert Shire Planning Scheme. Consequently, on 16 August 2005, based on this clarification, the Council rescinded its decision of 24 June 2005 and made a fresh decision, this time providing the Applicant with 30 documents responsive to his application and involving searches as far back as 1982.
33. The Applicant was dissatisfied with this result and sought internal review of the decision, claiming that further documents must exist in response to his application. In his internal review application the Applicant referenced date parameters from the mid 1980's to the mid 1990's.
34. The internal reviewer upheld the initial decision and accordingly the Applicant applied for external review, again stating that he was seeking material from between the mid 1980's to the mid 1990's.
35. As the date parameters of the internal review and external review applications appeared to differ from the initial application AC Barker sought clarification from the Applicant as to the scope of his application.
36. In a letter dated 26 March 2006, the Applicant advised that he considered :
- ...the focus should be placed on what occurred from 1995 that somehow justified the four (cited) properties to have the allowable development density altered in around 2000...[however] it is possible that the available material in relation to the density change may reflect views expressed in the 1995 Planning Scheme development. Accordingly, such views will need to be considered part of my information request.*
37. Thus, based on points 1 – 6 of the Applicant's initial application together with the general comments as noted at paragraph 29 above and the clarification of 26 March 2006 it was evident that the Applicant had sought access to documents from 1982 to 2000.
38. The Council was asked to undertake further searches based on the clarification provided by the Applicant. The Council maintained its assertion that no further documents existed that fell within the scope of the FOI request.

39. In a letter dated 14 July 2006, the Applicant raised several grounds supporting his belief that additional documents responsive to his application are within the control of the Council. Two of the grounds raised are relevant to this discussion on scope.
40. Firstly he claimed to have viewed maps produced by the Council which allegedly showed that the Council had formed the intention to allow subdivision of the relevant lots and sought to influence the Office of Urban Management (**OUM**) to alter the density provisions for the relevant lots in the (eventual) South-East Queensland Regional Plan (**SEQ Plan**). He claimed that to form this intention, the Council must have had communications with the relevant lot owners about density.
41. Secondly, the Applicant submitted that in the third revision of the 2003 Gold Coast City Council Planning Scheme (**2003 Planning Scheme**) (by this time Albert Shire Council and Gold Coast City Council had amalgamated) it was proposed that the subject properties be removed from the "Rural" domain and categorised as "*a domain with considerably more residential intensity*". He argued that the effect of such a change was the allowance for higher density development in the area containing the relevant lots. Accordingly, he argued that the Council's searches should encompass submissions and documents made at the time of the third revision of the 2003 Planning Scheme as these could include documents from the owner/s of the relevant lot/s in which submissions were made to alter the density provision for the lot/s.
42. In relation to these two points I note that:
1. in relation to the material submitted to the OUM, the Applicant advised that it would have been drafted and submitted to the OUM in 2005; and
 2. in relation to the third revision of the 2003 Planning Scheme, as the 2003 Planning Scheme was effective from 18 August 2003, the third revision of it would have occurred some time after that date.
43. By letter dated 14 December 2006, the Council submitted that by trying to include documents created after 2000 the Applicant was seeking to extend the scope of his FOI application.
44. I consider that it is clear from the terms of the Applicant's initial FOI application that he sought documents dated between 1982 and 2000 relating to how the Council came to the 'decision' to enable increased density for the relevant lots. Accordingly, the documents the Applicant claims are held by the Council in relation to; alleged lobbying for density redesignation by relevant lot owner/s during the third 2003 Planning Scheme revision and the draft SEQ Plan consultation process; and, the Council's maps and submissions to the draft SEQ Plan; do not fall within the scope of this review as they would have been created after 2000.
45. The general rule is that an applicant is not permitted to unilaterally expand the terms of an access application (see *Re Robbins and Brisbane North Regional Health Authority* (1994) 2 QAR 30 at paragraph 17). Expansion of the scope of an access application can be done with the consent of the agency, but an agency that is not prepared to so consent is within its rights to insist that the access applicant lodge a fresh access application for any document that falls outside the terms of an existing access application.
46. I will now address the issue of the sufficiency of the Council's searches in this case.

Principles applicable to sufficiency of search cases

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

18. *It is my view that in an external review application involving 'sufficiency of search' issues, the basic issue for determination is whether the respondent agency has discharged the obligation, which is implicit in the FOI Act, to locate and deal with (in accordance with Part 3, Division 1 of the FOI Act) all documents of the agency (as that term is defined in s.7 of the FOI Act) to which access has been requested. It is provided in s.7 of the FOI Act that:*

"document of an agency' or 'document of the agency' means a document in the possession or under the control of an agency, or the agency concerned, whether created or received in the agency, and includes –

- (a) a document to which the agency is entitled to access; and
- (b) a document in the possession or under the control of an officer of the agency in the officer's official capacity;"

19. *In dealing with the basic issue referred to in paragraph 18, there are two questions which I must answer:*

- (a) *whether there are reasonable grounds to believe that the requested documents exist and are documents of the agency (as that term is defined in s.7 of the FOI Act); and if so*
- (b) *whether the search efforts made by the agency to locate such documents have been reasonable in all the circumstances of a particular case.*

Application of sufficiency of searches principles to this case

48. In his internal review application and throughout the external review process the Applicant maintained that the following information supported his claim that additional documents existed within the control or possession of the Council that were responsive to his FOI application:

- (a) under the 1995 Planning Scheme the relevant lots were “*considered incompatible for increased land-use density. Given this, one would assume some form of assessment would have been undertaken to ascertain why/how the four specific properties warranted inclusion into a higher density category*” therefore;
 - i. the search in Council locations should be broadened beyond property files to any files associated with the “development of the planning scheme”; and
 - ii. the firm Brannock Humphreys who undertook a planning scheme review for Council may hold the applicable material;
- (b) he personally saw boxes of documents held by the Council’s solicitor “in relation to this matter”; and
- (c) he was aware of the existence of correspondence between Friends of Currumbin and various state agencies that indicated lobbying by the relevant lot owner/s and correspondence between agencies.

49. I will deal firstly with item (a) of the Applicants submissions.

Item (a)

50. As previously noted, it is clear from a reading of the Applicant's FOI application that he believed that in approximately 2000 the Council approved an application or applications from one or more of the owner's of the relevant lots to subdivide to four hectares. It is equally clear that the Applicant believed this was contrary to the 1995 Planning Scheme under which the applications would have been assessed.
51. In this regard I note that between 1982 and 1988, the former Albert Shire Council (which was subsequently amalgamated into the Gold Coast City Council) designated 'Rural A', 'Rural B' and 'Rural C' zonings within the town planning schemes. 'Rural C' zonings (in which the relevant lots are located) only allowed for subdivision to 20 hectares. Then, in around 1992, the Council engaged the firm Brannock Humphreys (**Consultants**) to undertake a review of the 1988 Planning Scheme (**Planning Scheme Review**), which resulted in the development of the 1995 Planning Scheme and the conversion of the 'Rural A' zone to 'Park Residential' and the 'Rural B' and 'Rural C' zones to 'Rural'.
52. The Council advised that in the course of the Planning Scheme Review, and in conjunction with the conversion of 'Rural B' and 'Rural C' to 'Rural', a decision was made to provide 'Rural' properties with the ability to subdivide down to 4 hectares. Thus, the Rural Objective in the 1995 Planning Scheme stated that "*in general, the maximum subdivision density envisaged by Council for these areas is one lot per four hectares*" (section 1.4.7.2).
53. Furthermore, the Council advised that in 1996 Council's Strategic Planning Branch was formed to manage planning scheme matters. In 1999, a review of the **1995 Planning Scheme** commenced (**1995 Planning Scheme Review**) under the control of the Strategic Planning Branch Manager. The Planning Scheme Review Committee (**PSRC**) was responsible for discussing items raised by the Strategic Planning Branch, for example, if changes to density provisions are proposed during the review of a planning scheme.
54. The Council stated that searches were conducted of the PSRC agendas and minutes for 1999 and 2000 (the review period for the 1995 Planning Scheme). Council advised that no references to a change in the density provisions for Rural properties (and particularly the properties in question) could be located. The Council confirmed that there were no changes to the density provisions for any of the properties identified by the Applicant between the adoption of the 1995 Planning Scheme in February 1995 and 2000 (the extent of the FOI request).
55. Based on the information contained in the 1995 Planning Scheme and the information from the Council concerning the 1995 Planning Scheme Review, I am of the view that the Applicant's assertions as to the allowable subdivision are incorrect. Accordingly, it appears that if documents existed in relation to the 'decision' to increase density provisions for the relevant lots (thereby enabling the lot owners to apply for subdivision to 4 hectares) they would have been created prior to the implementation of the 1995 Planning Scheme.
56. The Council was asked to advise what searches it had undertaken to respond to the Applicant's request. The Council advised that it had searched electronic and paper files relating to past and present property numbers and property owners of the relevant lots from their creation until and including 2000. Council advised that no documents were located which fell within the scope of the FOI application, including

any applications for subdivisions by the relevant lot owners and any correspondence relating to density provisions.

57. This information was put to the Applicant who submitted that the search should be broadened to files associated with the “development of the planning scheme”. I note that in his application for internal review, the Applicant wrote:

The ‘draft’ release for public perusal in (around) 1992 generated several comments from interested citizens living in the Currumbin valley. These comments form part of the Fol release. There appears no reference to there having been any review process for the (possible) density intensification of land in the Currumbin valley. Inferred is that the first they knew of the matter was the release of the ‘draft’.

58. The Council was asked whether it had searched for documents relating to the Planning Scheme Review that fell within the scope of the FOI application on its files or the files of the Consultants.

59. The Council provided a copy of what appears to be a Request for Offer (RFO) to which the Consultants would have responded. While only demonstrating the pre-contractual understanding of the parties it is clear from the RFO that the role of the Consultants was to concentrate on data analysis, issue identification, the content of the community consultation process, policy development and assessment and the development of draft and final reports. The Council’s responsibility was to coordinate the consultation process and provide information to the Consultants. The project manager for the review was the Council’s Shire Planner.

60. Thus the types of documents that one could expect to find on the Consultant’s files would include:

- i. correspondence from the Council, including public submissions received during consultation on the Review;
- ii. Consultants’ working papers;
- iii. the draft and final Planning Scheme Review reports; and
- iv. correspondence between the Consultants and third parties.

61. The Council submitted that it should not be obliged to search the Consultants’ files because the documents are not within the Council’s control.

62. For a document to be one which is under the control of an agency (or one in respect of which an agency is entitled to access), the agency must have a present legal entitlement to take physical possession of the document (*Re Price and Nominal Defendant* (1995) 5 QAR 80 at paragraph 18 – **Re Price**).

63. The question of whether the Council is legally entitled to documents within the possession of the Consultants would depend on the express or implied terms of the contract (*Re Price* at paragraph 22).

64. The pre-contractual material provided by the Council demonstrated that all material, technical data, reports etc acquired or produced by the Consultants, their employees or agents in conjunction with the Planning Scheme Review would be the property of the Council.

65. In *Re Price*, Information Commissioner Albietz said that the question of whether documents would be the property of the solicitor or client may turn on whether the predominant purpose of the communication was for the benefit of the solicitor or of

the client. In that case, documents evidencing correspondence between the agency and the solicitors and working notes of the solicitor were kept on the solicitor's file primarily for the benefit of the solicitor and were therefore not considered 'documents of the agency'. However, documents evidencing correspondence between the solicitor and third parties were considered to be for the benefit of the agency and were considered to be 'documents of the agency'.

66. In my view documents under categories (i) and (ii) above would have been kept on the Consultants' files for the benefit of the Consultants and therefore would not be 'documents of an agency' for the purposes of the FOI Act.
67. Documents under category (iii) however, would have been for the benefit of the Council and therefore, documents to which the Council was legally entitled to access (i.e. documents of the agency). In this regard I asked the Council to provide the draft and final Planning Scheme Review reports to the Applicant.
68. In response the Council advised that the draft Planning Scheme Review report was the *Draft Albert Shire Planning Scheme: Public Exhibition Copy: People Pastures Progress Parks and Play prepared by Brannock Humphreys Planning & Environment Consultants in association with Chenoweth & Associates, 1993 (Draft Planning Scheme)* and that the final Report was the 1995 Planning Scheme.
69. The Council went on to state that both the Draft Planning Scheme and the 1995 Planning Scheme were available for public inspection in the Council's Local Studies Library, which is a public library, and accordingly access to them was refused under section 22(b) of the FOI Act.
70. Section 22(b) of the FOI Act provides:

22 Documents to which access may be refused

An agency or Minister may refuse access under this Act to –

...

(b) a document that is reasonably available for public inspection under the Public Records Act 2002 or in a public library;...

71. Under section 7 of the FOI Act, 'public library' is defined to include "a local government library".
72. A representative of this Office contacted the Local Studies Library which is located in Southport and open during normal library hours from Monday to Saturday. The Library confirmed that the Draft Planning Scheme and the 1995 Planning Scheme are available to the general public for inspection and photocopying (subject to copyright restrictions).
73. Therefore I am satisfied that the Draft Planning Scheme and the 1995 Planning Scheme are reasonably available for public inspection in a public library and the Council correctly exercised its discretion under section 22(b) to refuse access to the documents.
74. In relation to the category (iv) documents it is my view that, if the Consultants did hold correspondence between the Consultants and third parties, such documents could be 'documents of an agency'. This is because such communications (if they occurred) would have been for the purpose of gathering and analysing data as part of the

review conducted for the Council and therefore, would have been for the benefit of the Council.

75. In light of the fact that this case concerns the question of whether the Council's searches were sufficient in the circumstances, I must consider whether it is reasonable to believe that the Consultants held correspondence between the Consultants and third parties and that such documents were responsive to the Applicant's application. In this regard the Council stated that:

Upon making enquiries with Mr Jeff Humphreys, formerly a partner in the firm of Brannock Humphreys which dissolved in 1997, Mr Humphreys stated... 'I recall the Shire Planner saying to me that notwithstanding the Rural C provisions, in many people's mind (Councillors, landowners) there was still an expectation that subdivision in rural areas (whether zoned Rural C or Rural B) at densities of 1 per 4 hectares should be permitted, and from recollection, that influenced the starting point for preparing the provisions that eventuated with the 1995 Planning Scheme. Whether any documentation exists for that rationalisation is not a matter that I have investigated, and I really don't know whether we would find anything.

76. Mr Humphrey's statement indicates that the premise of the density changes in the 1995 Planning Scheme was the statements made by staff of the Council.

77. Additionally, the Council advised that it had searched its own files for material relating to the Planning Scheme Review that fell within the scope of the FOI application and had given the Applicant copies of any submissions/objections received during the Planning Scheme Review from anyone in Currumbin. It advised that no submissions by the relevant lot owners at the time were located.

78. Accordingly, it is reasonable to conclude that any material in relation to the density change should be held on the Council's files and that the material on the Consultants' files would be copies of material from the Council or documents that originated in the Council (which, if they exist, should be held by the Council).

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

- there is no evidence to suggest that the Consultants received documents from third parties directly (i.e. from the relevant land owners) which may be considered to be in the control of the Council;
- any other documents that would reasonably be expected to be on the Consultants files are either not in the control of the Council or publicly available (in the case of the Draft Planning Scheme and the 1995 Planning Scheme);
- taking into account the cost to the Council in searching the Consultants' files and the likelihood of finding a document responsive to the application, it would be unreasonable to require the Council to search the Consultants' files; and
- the searches of the Council's Planning Scheme Review files for documents responsive to the FOI request have been reasonable in all the circumstances of this case.

80. Therefore, regarding item (a), I am satisfied that:

- other than documents already released to the Applicant or to which access was refused under section 22 of the FOI Act, there are no reasonable grounds to believe that there are additional documents under the control of the Council (including documents held by the Consultants) concerning the development of the 1995 Planning Scheme that fall within the scope of the FOI application; and

- the Council's searches for documents responsive to the FOI application have been reasonable in all the circumstances of the case.

Item (b)

81. Regarding item (b), the Applicant was not able to provide sufficient evidence to support his claim that he had seen boxes of documents held by the Council's solicitor "in relation to this matter". I am satisfied that the Applicant's claim does not constitute a sufficient ground that additional documents exist.

Item (c)

82. Regarding item (c), the Applicant submitted that correspondence between Friends of Currumbin and various State agencies indicated that some State agencies had been writing to the Council about the alleged lobbying by the relevant lot owners to the Council and the State agencies for the purpose of changing the land density designation.
83. The Applicant was asked to provide details of the alleged letters between the Council and State agencies to enable the Council to carry out a targeted search of its records. During a meeting with the Applicant on 25 October 2006 he advised that he was unable to disclose the details of the letters to this Office or the Council. He provided no further evidence in support of this ground.
84. Accordingly, on the material available to me, I am satisfied that:
- it would be unreasonable to request the Council to search for the alleged letters without any means of identifying them in their records; and
 - there are no reasonable grounds for believing that the relevant correspondence exists in the Council records and that the Council's searches in this regard have been reasonable in the circumstances.

Decision

85. I affirm the decision under review (being the decision dated 19 December 2005 by C Martins) by finding that:
- (a) there are no reasonable grounds for believing that there exists, in the possession or under the control of the Council, any further documents responsive to the FOI application; and
 - (b) the searches and inquiries conducted by the Council in an effort to locate further responsive documents have been reasonable in all the circumstances of the case.
86. In relation to the Draft Planning Scheme and 1995 Planning Scheme I find that the Council correctly exercised its discretion under section 22(b) of the FOI Act to refuse access to those documents.
87. I have made this decision as a delegate of the Information Commissioner, under section 90 of the FOI Act.

V Corby
Assistant Information Commissioner

Date: 23 February 2007