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Our Reference: RTI17/036
Your Reference:

24 September 2018

Mr Greg Smith
President
OSCAR (Organisation Sunshine Coast Association of Residents)
PO Box 105
COOLUM BEACH QLD 4573

Dear Mr Smith

Decision under *Right to Information Act 2009*

I refer to my letter dated 26 July 2018 providing an estimate of charges and your responses by email on 5 and 16 August 2018, confirming that you would like to proceed with your application for access to documents under the *Right to Information Act 2009* ("RTI Act").

I am writing to provide the notice of decision for your application.

Scope of your application

As was confirmed by email on 9 July 2018, your application has sought access to:

1. Any documents for the period of June 2016 to June 2018 which provide a valuation of the lots making up the Brisbane Road Carpark development, including valuations based upon the proposed development being approved.
2. The staff reports for the confidential sessions which are listed in the attached document (Brisbane Road Carpark confidential sessions.pdf), including any attachments or accompanying material considered with the reports, but excluding any which do not relate to the Brisbane Road Carpark (as some may relate to a separate road upgrade).
3. Documents which reveal the financial contribution/s being made to the developer by Council to develop the site, if this information is not included within the relevant documents for item 2.

Searches conducted and documents located

Searches have been conducted to locate all documents relevant to your request. The relevant documents identified comprise 296 pages.

Decision

I have decided to:

- give full access to 220 pages;
- give full access to 5 pages subject to the deletion of irrelevant information under section 73 of the RTI Act;
- refuse access to certain information in 10 pages on the basis that disclosure would, on balance, be contrary to public interest under section 47(3)(b);

- refuse access to certain information in 50 pages under both schedule 3, section 4B of the RTI Act and on the basis that disclosure would, on balance, be contrary to public interest under section 47(3)(b) of the RTI Act;
- refuse access to certain information in 4 pages under schedule 3, section 8 of the RTI Act
- refuse access to 4 pages under schedule 3, section 4B of the RTI Act; and
- refuse access to 3 pages under schedule 3, section 8 of the RTI Act.

I have set out the reasons for this decision below.

Deletion of irrelevant information

Section 73 of the RTI Act states:

- (1) This section applies if giving access to a document will disclose to the applicant information the agency or Minister reasonably considers is not relevant to the access application for the document.*
- (2) The agency or Minister may delete the irrelevant information from a copy of the document and give access to the document by giving access to a copy of the document with the irrelevant information deleted.*

In your application you have specifically requested documents regarding the Brisbane Road car park development. There are some documents authored by Australis Asset Advisory Group which contain some information about other issues which are completely unrelated, as it relates to completely separate locations. I have deleted certain irrelevant information from 5 of the pages from Australis.

Contrary to public interest information

Section 47(3)(b) of the RTI Act provides that access to a document may be refused 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 RTI Act.

The information to which access is refused under this provision is limited to the following categories:

- Category A:** Addresses of private residences and birth information of company officers, plus names of former company officers and shareholders.
- Category B:** Certain financial amounts and figures, plus certain other details such as contractual clauses or potential fees and charges for the car park, which I am satisfied would unreasonably reveal or indicate Council's potential negotiating position for entering into future contracts. This includes one valuation within a valuation report dated 22 November 2016 that contains three valuations – there were three valuation options and access is being given to the remaining two options.

In deciding that disclosure of this particular information would, on balance, be contrary to the public interest, I have undertaken the steps set out in section 49(3)(a) to (g) of the RTI Act.

I have noted and disregarded the irrelevant factors listed in schedule 4 part 1 of the RTI Act, including:

- The person who created the document containing the information was or is of high seniority within the agency.

For the Category A information, I accept that there is a public interest in disclosing information about contracts which Council enters into, in terms of enhancing transparency and accountability in

government expenditure and operations.¹ At the same time I have also identified the following factors as favouring nondisclosure of the Category A information:

- Disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy. (schedule 4, part 3, item 3)
- Disclosing personal information (schedule 4, part 4, section 6)

In balancing the factors for and against disclosure of the Category A information, I have noted the following findings from a decision which refused access to names of employees of contracted private sector companies:

*"In this case, the business names of the Contracted Service Providers and details of the work... have been released to the applicant. In my view, the disclosed information serves the public interest in enhancing transparency and the accountability of government. I do not consider that disclosing the names of individual employees who performed the work would further this public interest. I am satisfied that in this case, a distinction can be drawn between the Contracted Service Providers, as the entities which contracted with government to provide trade/property services, and their individual employees who, while they performed the relevant work, have no direct contractual relationship with government."*²

I am satisfied that the factors favouring disclosure of the limited Category A information will carry little to no weight and are outweighed by the interest in protecting privacy of the information.

With respect to the Category B information and the factors favouring disclosure in schedule 4, part 2 of RTI Act, I have identified that disclosure could reasonably be expected to:

- Promote open discussion of public affairs and enhance the Government's accountability
- Contribute to positive and informed debate on important issues or matters of serious interest
- Inform the community of the Government's operations.
- Ensure effective oversight of expenditure of public funds.
- Reveal the reason for a government decision and any background or contextual information that informed the decision

Here are factors I identified as favouring nondisclosure of the Category B information:

- Disclosure of the information could reasonably be expected to prejudice the private, business, professional, commercial or financial affairs of entities. (schedule 4, part 3, item 2)
- Disclosure of the information could reasonably be expected to prejudice trade secrets, business affairs or research of an agency or person. (schedule 4, part 3, item 15)
- Disclosure of the information could reasonably be expected to prejudice the competitive commercial activities of an agency. (schedule 4, part 3, item 17)
- Disclosure of the information could reasonably be expected to prejudice a deliberative process of government. (schedule 4, part 3, item 20)
- Disclosure of the information is prohibited by an Act. (schedule 4, part 4, item 22)
- Disclosing deliberative processes (schedule 4, part 4, section 4)
- Disclosing trade secrets, business affairs or research (schedule 4, part 4, section 7(1)(c))
- Disclosure of the information could reasonably be expected to cause a public interest harm because disclosure could have a substantial adverse effect on the financial or property interests of the State or an agency. (schedule 4, part 4, section 10)

The nine allotments for the Brisbane Road Car Park site form a key strategic asset owned by Council. The aggregated 6,778 square metre area is one of the single largest key development sites within central Mooloolaba. Mayor Mark Jamieson says Council's priority has always been to ensure this

¹ Schedule 4, part 2, items 1, 2, 3 and 4 of the RTI Act.

² Underwood and Department of Housing and Public Works (310671) 18 May 2012

project would deliver substantial benefits to ratepayers, and Divisional Councillor John Connolly has recognised that the community needs certainty around the site's future.³

In this context I consider that the balance of public interest considerations will favour disclosure of the majority of the information about development of the site, while also protecting information that would impede or prejudice Council's ability to negotiate on competitive terms to gain the best deal for ratepayers. This is effectively a competitive commercial activity.

A published external review decision found that disclosure of financial information and forecasts for projects by the Adani group of companies, would prejudice commercial affairs by impeding the group's ability to negotiate with potential investors and future subcontractors.⁴ Similarly, it is not in the public interest for Council to reveal its hand to potential investors or developers of the site. If such entities were to receive the detailed figures and terms of what Council may be agreeable to, this will no doubt influence their bids, offers and negotiations for entering into a contract with Council. I do not wish to jeopardise Council's ability to obtain the best possible outcome—both financially and in terms of achieving the important place making objectives for Mooloolaba. Such prejudice will amount to a substantial adverse effect on the financial and property interests of Council and its business affairs.

In identifying the above factors favouring nondisclosure I have also noted the following:

- There have been different OIC decisions which refused access to options for an infrastructure project on the basis that disclosure would prejudice an ongoing deliberative process.⁵ Council announced on 5 July 2018 that options for development of the Mooloolaba site are now being re-evaluated as part of ongoing deliberations, and no new contract has been awarded. I consider that disclosure of the Category B information would prematurely reveal aspects that are subject to change or may not proceed at all, and this will adversely impact Council's ability to continue considering its options and to engage in negotiations with potential developers or investors. Council will of course be providing further updates to the community after relevant decisions are made. The deliberative process factors will no longer apply once deliberations have ended, any final contracts have been executed and development is underway or finished.
- Section 275(e) of the *Local Government Regulation 2012* specifically provides for councils to keep information confidential about contracts proposed to be made. The regulation is the subordinate legislation to the *Local Government Act 2009*, and section 200 of that Act provides a maximum penalty of up to two years imprisonment for the release of confidential information.

I accept that the Brisbane Road Car Park project would have a significant impact on the economy and community of Mooloolaba and the wider Sunshine Coast, and I also accept that the factors favouring disclosure will carry strong weight in relation to the Category B information. In considering the weight to be afforded to these factors, I also note the information relates to negotiations for a contract which did not eventuate, so this will somewhat diminish the weight the factors carry. At the same time, I am satisfied that the multiple public interest factors favouring nondisclosure are collectively deserving of significant weight, and will outweigh the pro-disclosure factors for the reasons as discussed above.

In the circumstances, I find that disclosure of the Category B information is, on balance, contrary to the public interest under section 49 of the RTI Act.

Exempt information – budgetary information for local governments (schedule 3, section 4B)

Schedule 3, section 4B of the RTI Act states:

³ *Brisbane Road Car Park site options to be re-evaluated* Council media release dated 5 July 2018 and available online: <https://www.sunshinecoast.qld.gov.au/Council/News-Centre/Brisbane-Road-Car-Park-site-options-to-be-re-evaluated-050718>

⁴ *North Queensland Conservation Council Inc and Queensland Treasury* [2016] QICmr 21 (10 June 2016), p.54

⁵ For example *Johnston and Brisbane City Council* (311305) 6 December 2013; or *Beilby and Brisbane City Council* [2015] QICmr 1 (14 January 2015); or *Metcalf and Maroochy Shire Council*

- (1) *Information brought into existence in the course of a local government's budgetary processes is exempt information for 10 years after the date it was brought into existence.*
- (2) *Subsection (1) does not apply to information officially published by decision of the local government.*

There is an equivalent exemption provision in the RTI Act for information about the State's budgetary processes, which has been found to incorporate various components that make up budgetary processes including information brought into existence for the purpose of advising government on identifying key areas for resource allocation and making key budget decisions.⁶

Under this provision I have refused access to the same information in Category B as described above, except for the certain contractual clauses. It comprises a variety of financial amounts that appear throughout the documents, which I am satisfied relate to preliminary considerations that form a part of Council's budgetary processes. This includes information about potential fees and charges for the car park. An email from Council to OSCAR on 20 June 2018 outlined that the fees are a matter for consideration at a future budget adoption after a car park is constructed.

In addition to the Category B information, under this provision I have also refused access to a four-page confidential report dated 20 July 2017.

In the case of the exemption for the State's budgetary processes, the Information Commissioner was satisfied that information about economic viability of some significant commercial, private-sector projects is exempt. That case dealt with detailed financial data and forecasts that were prepared for consideration prior to making investment decisions. I am satisfied that a similar situation exists in relation to the Brisbane Road Car Park, where the matter in issue includes detailed financial and economic data related to investment decisions and viability, such as the business case as well as other information about potential future revenue or costs. The deliberations that are informed by this data will impact Council's budgetary decisions and are part of Council's budgetary processes.

I have additionally refused access to one of the confidential Council reports requested, which reveals information about a key area for possible resource allocation.

I am satisfied that all of the information to which access is refused under this provision was brought into existence in the course of Council's budgetary processes within the last 10 years.

Exempt information – breach of confidence (schedule 3, section 8)

This provision of the RTI Act states:

Information is exempt information if its disclosure would found an action for breach of confidence.

The Information Commissioner in *Re B v. Brisbane North Regional Health Authority* provided that each of the following requirements must be met in order to establish an equitable obligation of confidence: -

1. it must be possible to specifically identify the information, in order to establish that it is secret, rather than generally available information; and
2. there must be the necessary "quality of confidence" about the information, i.e., it must not be something which is public property or public knowledge; and
3. the information must have been received by this agency in such circumstances as to impart an obligation of confidence; and
4. disclosure to the access applicant must constitute unauthorised use of the confidential information; and
5. it must be established that detriment is likely to be occasioned to the original confider of the confidential information if it were to be disclosed.

⁶ *North Queensland Conservation Council Inc and Queensland Treasury* [2016] QICmr 21 (10 June 2016), p.34

Under this provision, access is refused to details submitted by Jesob Group Pty Ltd as part of the procurement process for the Mooloolaba Road Car Park. The firm was of course unsuccessful with their tender.

Tender submissions or applications are ordinarily made in circumstances that provide the competing firms with an expectation that their submissions will be kept tightly controlled and confidential as far as possible.

In the present case Council has not disclosed details of the submission by Jesob Group, and the staff report to Council which contains the details was designated as confidential under section 275(e)(g) of the *Local Government Regulation 2012*. Council also restricts access to tender submissions internally so that only a small number of authorised officers are able to access the documents.

In the context of an unsuccessful tender, there is case law dating back to 2003 which noted that that:

*"it was difficult to envisage public interest arguments that would favour disclosure to the applicant of information relating to unsuccessful tenderers"*⁷

I am satisfied that disclosure of the information would amount to an unauthorised use, and that Council is obliged to act in good faith and make best endeavours to ensure that the confidentiality of the information from Jesob Group is maintained. The information is not merely generic in nature, but is specifically identifiable information which possesses the necessary quality of confidence.

The decision *Re TSO08G and Department of Health*, has clarified that detriment can be easily established by a non-government plaintiff, as it need not be of a financial nature and may include embarrassment, fear or an indirect detriment.

In the circumstances, I am satisfied that all of the five requirements are established and the information is therefore exempt under schedule 3, section 8 of the RTI Act.

Processing and access charges

The total chargeable time spent on processing your application was more than the estimated 29.25 hours. However, you are only liable to pay the estimated amount of **\$871.65**. This amount is based on processing charges for 29.25 hours at a rate of \$7.45 per 15 minutes, which is the fee applicable before 1 July 2018 (as your application was submitted before that date).

There is no access charge for provision of the documents by email, which I can provide to you once full payment is received for the processing charges. However, access to some information is deferred.

Deferred access to the documents due to third party review rights

It has been decided to give access to the following information, contrary to a third party's views that the information would meet a ground for refusal:

- a) a 60-page valuation report dated 22 November 2016; and
- b) the name and some other information about the individual valuer from a separate firm.

Please note that I have written to the third parties separately about my decision to give access and they now have the right to seek a review of my decision.

As a result, **Council must defer providing access to the disputed information** until the end of the review period. After the review period ends or if the third party advises that they will not apply for review, Council will be able to send you the disputed documents. The third party will have until 19

⁷ *Wanless Wastecorp Pty Ltd and Caboolture Shire Council; JJ Richards and Sons (Third Party)* (2003) 6 QAR 242, [162]

October 2018 to apply for internal or external review. If a third party does seek a review, then access will continue to be deferred and a reviewer may overturn this decision. You will be notified if that occurs.

Advice from Australis Asset Advisory Group (third party)

Please be aware that Australis Asset Advisory Group has advised me as follows:

"We understand that you are required by law to provide documents under an information request, and will be releasing documents which Australis have authored. We have reviewed your request internally and provide the following responses. We recommend you provide the same advice contained below to recipients."

We specifically highlight the 'Fair Value Report 170629' document in reference to Clause 8.1.3 on page 17, in which third parties are unable to rely on the contents of the report and associated valuation figures. Should any third party wish to rely on the report they are required to contact Australis directly. Further, we highlight Clause 8.1.6 of the same report, in which the valuations amounts provided and the associated report have an expiry of 3 months.

*The valuations we have provided for Council are under a specific set of instructions, for Financial Reporting purposes **only** on a whole of portfolio approach. The use of the valuation does not extend to other purposes such as pre-sale advice, finance/lending etc, nor does liability extend to anyone other than Council, and we would like that position to be made clear to any document recipients." [original emphasis]*

Public access to the documents

Under the RTI Act, a document which does not contain the applicant's personal information may be made available to the public through the disclosure log on our website.

Review rights

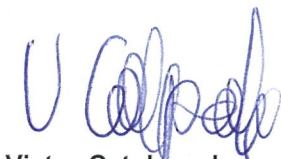
If you are not satisfied with this decision (or any part of it), then you may apply for internal or external review. A review must be made within 20 business days from the date of this notice or within any further time allowed. You do not have to apply for internal review before seeking an external review.

To seek an internal review by a more senior Council officer, please send a written request to Council.

Alternatively, an external review can be sent to the Information Commissioner in one of the following ways:

Online:	https://www.oic.qld.gov.au/apply-for-external-review
Email:	administration@oic.qld.gov.au
Post:	PO Box 10143, Adelaide Street, Brisbane, Qld 4000

Yours sincerely



Victor Catchpoole
Right to Information Officer