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Our Reference: RTI17/046-INT & F2018/48125

4 December 2018

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

Dear Mr Smith

**Re: Internal review decision under *Right to Information Act 2009***

I refer to your correspondence dated 6 November 2018 requesting an internal review of decision RTI17/046. The purpose of this letter is to advise you of Council's internal review decision pursuant to section 83(3) of the *Right to Information Act 2009* (RTI Act). As the Integrity Management Officer I am in a more senior role than the original decision maker pursuant to section 80(3) of the RTI Act.

**Scope of the original application**

As was confirmed by email on 9 July 2018, your original 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.

### **The original decision**

In the original decision dated 24 September 2018 it was 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

### **Scope of internal review**

As part of your internal review request I note in your submission that:

1. There is an acceptance that much of the material that has been redacted is duplicated material from other parts of the released materials;
2. There is recognition that some redacted material has been correctly withheld under the RTI Act as it relates to budgetary information for local government or is deemed to be a breach of confidence (eg Jesob Group material).

You state however, that ‘there are number of factors that relate to our request for review’ including:

- An over reliance on section 47(3)(b) of the RTI Act on the basis of being contrary to public interest. In summary you felt that there was insufficient weight to the factors favouring disclosure and too much emphasis to those factoring nondisclosure.

- The release of financial figures relating to the valuation of the land (referred to as Option C in the Savills report and subsequent references to it) and the costs to Council of this project are completely within the realm of public interest as it is the ratepayers of the SCRC that would have been funding this project directly or through the financing of debt associated with the project.
- Content provided as part of the original decision letter (on pages 3 and 4) are central to your review request. You asked, ‘how can the community judge whether “this project would deliver substantial benefits to ratepayers” if the key financial material is withheld?’ You also stated that “this relevance of the “ability to negotiate on competitive terms” should be disregarded in the interests of transparency.”
- The statement (contained in folio 253) that “aspects of the commercial terms negotiated with Abacus are known in the marketplace” in your view suggests that “release of these figures to ratepayers would not jeopardise Council’s ability to obtain good financial outcomes for a similar project...and should not be used as a justification for overriding the legitimate rights of the community to know how its funds would have been expended on this project or will be in future projects”.
- That Council, on page 4 of the decision letter, acknowledge the “contract which did not eventuate” however, that more weight was given to factors favouring nondisclosure rather than transparency.
- That you seek to know why information referred to in the released material was not included<sup>1</sup>.

Your views, and basis for internal review, are noted.

### **Internal review decision**

The relevant documents comprise 289 pages relating to the Brisbane Road Carpark development.

I have considered your internal review request and the ‘factors’ relevant to forming that request. Below I have set out the reasons for my decision. The RTI Act does not enable an

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<sup>1</sup> A telephone conversation with you on 12 November 2018 clarified Council’s responsibilities with respect to scope confirmation which you were satisfied with.

applicant to increase the scope of their original application on review. The written advice by the probity advisor was not attached to any valuation and was not provided to Council as an attachment to any staff reports you identified, therefore the document is not a consideration in this internal review.

Although it is evident that the 'Abacus deal' is not proceeding, I am sufficiently satisfied that Council is preparing to engage in an open market process for the subject site, to:

- a. Proceed with the calling of tenders for the design and construction of a 700 bay/spaces Council owned multi deck car park; and
- b. Proceed with the calling of Expressions of Interest for the southern parcel of the lot.<sup>2</sup>

As such, the decision I have reached is, for all intents and purposes, reaffirming the original 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

### **Deletion of irrelevant information**

Section 73 of the RTI Act states:

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<sup>2</sup> Council resolution OM18/191 – 8 November 2018.

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 – reasons for decision**

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:** Addresses of private residences and birth information of company officers, plus names of former company officers and shareholders. 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 whether disclosure of the relevant documents 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 Act.

For the Category A information I have noted that you generally accepted the redacted content related to the Jesob Group and the fact that it was not material to your needs.

However, pursuant to s80(2) of the RTI Act, I must make a new decision as if the reviewable decision had not been made.

I accept that there is a public interest in disclosing information about contracts in terms of enhancing transparency and accountability in government expenditure and operations<sup>3</sup>. 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); and,
- Disclosing personal information (schedule 4, part 4, section 6)

Information pertaining to the Jesob Group was supplied as part of the procurement process for the Mooloolaba Road Car Park. The firm was 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.

Under the current circumstances, on balance, the category A information pertaining to the Jesob Group is considered to disclose personal information and/or prejudice protection of an individual's right to privacy.

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.

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<sup>3</sup> Schedule 4, part 2, items 1, 2, 3 and 4 of the RTI Act.

- 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)

While it is acknowledged that the 'Abacus deal' is not progressing, other recent events in Council support the internal review decision to be reached. On 8 November 2018 Council resolved to 'call tenders' and 'call expressions of interest' pertaining to the subject site. More specifically however, part of that resolution was to 'allow Council to call for a variety of development proposals with a view to identifying the solution that best aligns with the interest of the public and Council'. In summary this means that Council is not expressly ruling out the

opportunity for an entity to submit to this process with a proposal similar to, or exactly the same as, the Abacus development proposal<sup>4</sup>.

It remains that the underlying information pertaining to detailed figures and terms could be material to any entity seeking to lodge a tender or expression of interest for 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.

While the parameters associated with the subject site have changed Council remains unquestionably within a deliberative process to maximise the use and value of the site. Consequently publishing the category B information at this point in time undermines Council's negotiating position and ability to strive for the best overall deal and on balance, is contrary to the public interest under section 49 of the RTI Act.

In response to some of the points you raised as part of your internal review request, I do not consider that there is an over reliance on s47(3)(b) of the RTI Act. The factors identified and considered are reasonable. Additionally, when assessing the overall public benefit to be derived from a key asset, such as the subject site, non-disclosure of details that erode the Council's competitive advantage weighs greater than disclosure.

To that end, the counter argument to the notion that the public interest is not being served is to reiterate that full disclosure of the relevant financial details will inevitably undermine Council's position. Not obtaining the maximum value for the subject site (or any other valuable asset) is also arguably contrary to the public interest. Balancing the public interest with maximising broader community outcomes is complex and in instances such as this applying caution to the release of certain details is considered to benefit the public interest.

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

I have noted that you generally accepted the redacted content related refusal of information pursuant to the abovementioned exemption. However, pursuant to s80(2) of the RTI Act, I must make a new decision as if the reviewable decision had not been made.

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<sup>4</sup> Bearing in mind development approval and architectural drawings are already in place

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

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.

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.

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, which reveals information about a key area for possible resource allocation.

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.<sup>5</sup>

I am satisfied that a similar situation exists in relation to the subject site, 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 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.

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<sup>5</sup> *North Queensland Conservation Council Inc and Queensland Treasury* [2016] QICmr 21 (10 June 2016), p.34

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

I have noted that you generally accepted the redacted content related refusal of information pursuant to the abovementioned exemption. However, pursuant to s80(2) of the RTI Act, I must make a new decision as if the reviewable decision had not been made.

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
3. 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.

Under this provision, access is refused to details submitted by Jesob Group Pty Ltd as part of the procurement process for the subject site. 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 maintained in a respectful and confidential manner.

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.

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.

### **Review rights**

If you are not satisfied with this decision (or any part of it), you may apply for external review. An external review must be made within 20 business days from the date of this notice.

You can apply to the Information Commissioner in one of the following ways:

In person:	Level 8, 160 Mary Street, Brisbane
Post:	PO Box 10143, Adelaide Street, Brisbane, QLD, 4000
Email:	<a href="mailto:administration@oic.qld.gov.au">administration@oic.qld.gov.au</a>
Online:	<a href="https://www.oic.qld.gov.au/apply-for-external-review">https://www.oic.qld.gov.au/apply-for-external-review</a>

Yours sincerely



Michael Köhne  
**INTEGRITY MANAGEMENT OFFICER**