



Your Ref:
Our Ref: 314376

28 March 2019

Mr Greg Smith
PO BOX 105
COOLUM BEACH QLD 4573

Email: president@oscar.org.au

Dear Mr Smith

**External review of decision under the *Right to Information Act 2009* (Qld)
Applicant: Organisation Sunshine Coast Association of Residents**

I refer to this Office's (**OIC**) letter dated 29 January 2019, and your telephone conversation with OC's Jim Forbes on 6 March 2019.

The purpose of this letter is to convey a preliminary view on the issues in this review.¹

At this stage my view is that access to the information you seek may be refused. My reasons for this view are explained in this letter. However, after reading this letter you may have more information that you would like me to consider. If you provide further relevant information, I will take this into account before reaching a final decision.

As noted in the attachment to OIC's letter dated 29 January 2019, as an independent statutory body, OIC's role on external review is limited to merits review² of specific government decisions about access to, and amendment of, government held information. As an independent body, we review access and amendment issues in a fair and unbiased way.

Background

As I understand, Sunshine Coast Regional Council (**Council**) proposes to develop the 'Brisbane Road Carpark' site in Mooloolaba. Tentative agreement had been reached with a developer for such development, including as to a range of financial variables, however that arrangement was ended last year. Council has therefore 'gone back to the drawing board', with a fresh procurement process, and is once again exploring development options for the Carpark site.

Information in issue

I confirm your advice to Mr Forbes that you do not seek access to information concerning an unsuccessful tenderer involved in the last procurement process conducted by Council, and to residential addresses. Thank you for your assistance in this regard – that information³ is not in issue.

¹ A preliminary view may assist in resolving a matter or provide any party adversely affected an opportunity to put forward their views. A preliminary view is not a decision. If you provide additional information supporting your case, this will be considered and may influence the final outcome.

² Which is an administrative reconsideration of a case that can be described as 'stepping into the shoes' of the primary decision-maker, to determine the correct and preferable decision.

³ Appearing on pages 46, and 50-66.

The information in issue in this review therefore comprises

- information to which Council refused access, on the grounds its disclosure would, on balance, be contrary to the public interest and/or that it comprises exempt information, as information brought into existence in the course of Council budgetary processes; and
- information deleted as irrelevant.

Preliminary View

Irrelevant information

Council deleted information from pages 276-287, a 'Fair Value Report', on the basis this deleted information was irrelevant to your application. Deleted information concerns sites and locales other than that the subject of your access application, and Council was therefore entitled, in my preliminary view, to delete this information.⁴

Balance of the information in issue

The remaining information in issue consists in the main of dollar figures, together with some additional text discussing information such as potential development options, investment scenarios and contractual clauses. There is a considerable amount of repetition and duplication within this information – relevant figures, for example, having been duplicated from one of the various Agenda papers to the other.

My preliminary view at this stage is that Council may refuse access to this information, on the grounds that its disclosure would, on balance, be contrary to the public interest.⁵

Relevant law

The RTI Act gives people a right to access documents of government agencies such as the Department.⁶ This right is subject to other provisions of the RTI Act, including grounds on which access may be refused. Access may be refused to information the disclosure of which would, on balance, be contrary to the public interest.⁷

The RTI Act lists factors which may be relevant to deciding the balance of the public interest⁸ and sets out the following steps⁹ for a decision-maker to take in deciding where the public interest lies in relation to disclosure of information:

- identify any irrelevant factors and disregard them¹⁰
- identify relevant public interest factors favouring disclosure and nondisclosure

⁴ Section 73(2) of the RTI Act. Under section 73(3) of the RTI Act, an agency may give access to a document with irrelevant information deleted, if it considers from the terms of the application or after consultation with the applicant, that the applicant would accept the copy and it is reasonably practicable to give access to the copy. The agency is entitled to make the decision to delete irrelevant information based on the access application itself (i.e., without consulting the applicant) where the information clearly falls outside the scope of the access application: see *8U3AMG and Department of Communities* (Unreported, Queensland Information Commissioner, 15 September 2011) at [15].

⁵ As you know, Council also argued that all of this information comprised exempt information, as information brought into existence in the course of Council's budgetary processes, under sections 47(3)(a) and 48, and schedule 3, section 4B of the RTI Act. As my preliminary view is that disclosure of this information would, on balance, be contrary to the public interest, I have not at this stage considered this additional ground for refusing access.

⁶ Section 23 of the RTI Act.

⁷ Section 47(3)(b) and section 49 of the RTI Act. The term *public interest* refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that, in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests.

⁸ In schedule 4 of the RTI Act. This is not an exhaustive list and therefore, other considerations not listed in the schedule may be relevant in a particular case.

⁹ In section 49(3) of the RTI Act.

¹⁰ I have taken no irrelevant factors into account in forming my preliminary view.

- balance the relevant factors favouring disclosure and nondisclosure; and
- decide whether disclosure would, on balance, be contrary to the public interest.

Discussion

There are undoubtedly important public interest considerations favouring disclosure of the information in issue, of the kind identified in your submissions to Council and OIC, and Council's decisions.

The difficulty in this case is that disclosing that information – including financial parameters to which Council had agreed and/or based its position in the earlier negotiations, and advice, modelling and deliberation as to investment and revenue options – could reasonably be expected to prejudice Council's current bargaining position, by revealing key financial particulars directly relevant to an ongoing or 'live' procurement process.

Unconditional release under the RTI Act would arm prospective tenderers or developers with a clear insight into what Council had previously, and relatively recently, agreed to offer and/or the information on which such offer was based. Such disclosure would allow those proponents to 'bargain Council down', commensurately weakening Council's position in the current negotiations and potentially constraining the options open to it. This could, in my preliminary view, reasonably be expected to result in negative public interest consequences of the kind identified in Council's decision, including, significantly:

- prejudicing Council's business and financial affairs, and causing a public interest harm by adversely affecting those affairs;¹¹
- prejudicing the current deliberative process¹² concerning future development of the Brisbane Street site, and, as regards some of this information, causing a public interest harm, by disclosing an opinion, advice or recommendation that has been obtained, prepared or recorded or a consultation or deliberation that has taken place, in the course of, or for, the deliberative processes involved in the functions of government.¹³

These are important public interest considerations, that also warrant substantial weight and which, in the particular context of this case, tip the balance of the public interest in favour of nondisclosure of the information in issue.

As I have noted, there is a strong public interest in enhancing Council accountability, promoting open discussion of public affairs, and ensuring effective oversight of public funds. There is, however, a clear public interest in ensuring local governments can participate in the commercial property market on a level playing field – that they are able to undertake real property negotiations and consider investment decisions on a commercial footing, without having their 'hand tipped' by premature disclosure of financial information of the kind in issue.

Next steps

If you agree to resolve the external review informally on the basis of OIC's preliminary view, you do not need to do anything further. If I do not hear from you by **11 April 2019**, OIC will finalise the review under section 90(4) of the RTI Act and no formal decision will be issued.¹⁴

¹¹ Schedule 4, part 3, items 2 and 15, and schedule 4, part 4, section 7(1)(c) of the RTI Act.

¹² Schedule 4, part 3, item 20 of the RTI Act. 'Deliberative processes' involved in the functions of government have been defined as '...thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action': *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 (*Eccleston*) at paragraphs 28-30 citing with approval the definition given in *Re Waterford and Department of Treasury* (No.2) (1984) 5 ALD 588 at 606.

¹³ Schedule 4, part 4, item 4 of the RTI Act.

¹⁴ If this matter is resolved informally, that is, without a formal decision being issued, there will be no right of appeal under the RTI Act.

If you do not agree to resolve the review informally, please provide a submission supporting your case by **11 April 2019**. **Enclosed** is the OIC guide on providing submissions in an external review.

If you have any questions, please contact OIC by emailing administration@oic.qld.gov.au or telephoning Mr Forbes on 07 3234 7373.

Yours sincerely



Louisa Lynch

Right to Information Commissioner

Encl External review – a guide for making a submission to OIC

A guide for making a submission on external review

During an external review, the Office of the Information Commissioner (**OIC**) may invite you to provide a submission supporting your case.

What is a submission?

A submission is any information you give to OIC during the external review which you want OIC to consider. A submission does not have to be in writing. OIC staff will make a note of any information you provide over the phone which is relevant to the review and this information may be treated as a submission.

You may only get one opportunity during the external review to make a written submission supporting your case. It is important that your submission is detailed and complete. It does not need to be long or use legal terms. It is an opportunity for you to express your views in your own words and to provide OIC with information which might change OIC's view.

It is an offence to give information to OIC that is false or misleading.

Will anyone else be able to see my submission?

The external review process is open and transparent. As a general rule the submissions from external review participants are not treated as confidential. If an external review submission contains information relevant to the issues being decided, and will negatively affect another external review participant, that information contained in the submission will be communicated to other participants.¹⁵

OIC is not permitted to reveal information which may be exempt or contrary to the public interest to release. If a submission contains this type of information, OIC is not permitted to disclose that information.¹⁶

If all of the issues on external review are not resolved informally, OIC will make a formal written decision to finalise the review. Formal decisions are published on OIC's website and generally contain:

- the names of participants to the external review
- all the facts relied on
- details of the law used
- details of a submission made by the participants; and
- reasons for the decision.

When is my submission due?

OIC will tell you when your submission is due. Your submission must reach OIC by the due date. If OIC does not receive your submission by this time, we will take that to mean that:

- you accept the preliminary view (OIC may then close the file or resolve a particular issue); or
- you do not object to information being disclosed if you are a third party (OIC may then ask the agency to give access to the relevant information).

If you are unable to meet the timeframe, you must contact OIC as soon as possible to request an extension of time to provide your submission. A request must be made in writing and before the due date for submission. You must also provide reasons for requesting the extension.

OIC will then consider your request and decide whether to allow you further time. It is in the interests of all participants that external reviews are resolved quickly and OIC will not grant an extension of time in all cases.

¹⁵ This is a matter of procedural fairness. Procedural fairness requires that parties to the external review whose interests would be adversely affected by specific information be given the opportunity to assess and respond to that information.

¹⁶ Section 108(1) RTI Act.