

PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Nucrush Pty Ltd v Gold Coast City Council & Ors* [2023]
QPEC 46

PARTIES: **NUCRUSH PTY LTD ACN 010 119 981**
(Appellant)

v

GOLD COAST CITY COUNCIL
(Respondent)

AND

GWENDA FELMINGHAM
(First Co-Respondent by Election)

AND

ANTHONY MICHAEL POTTER
(Second Co-Respondent by Election)

AND

BARBARA MONTEATH
(Twelfth Co-Respondent by Election)

AND

JACQUELINE BROADBRIDGE
(Twentieth Co-Respondent by Election)

AND

GLENDA BRAITHWAITE
(Twenty-First Co-Respondent by Election)

AND

HILARY J STUBBS
(Twenty-Fifth Co-Respondent by Election)

AND

**CHIEF EXECUTIVE, DEPARTMENT OF STATE
DEVELOPMENT, INFRASTRUCTURE, LOCAL
GOVERNMENT AND PLANNING**
(Twenty-Seventh Co-Respondent by Election)

FILE NO/S: 3086 of 2021

DIVISION: Planning and Environment

PROCEEDING: Application in Pending Proceeding

ORIGINATING COURT: Planning and Environment Court, Brisbane

DELIVERED ON: 7 November 2023 (*ex tempore*)

DELIVERED AT: Brisbane

HEARING DATE: 7 November 2023

JUDGE: Kefford DCJ

ORDER: **The Council's application for a confidentiality order is dismissed.**

CATCHWORDS: PLANNING AND ENVIRONMENT – APPLICATION IN PENDING PROCEEDING – where the respondent seeks a confidentiality order – whether the nature of the information is sufficiently confidential – whether the case involves exceptional circumstances – whether the terms of the proposed confidential order strikes a fair balance between a party's confidentiality concerns and the needs of other litigants to have access to certain information – whether the order should be granted

LEGISLATION: *Local Government Regulation 2012* (Qld) s 222
Right to Information Act 2009 (Qld)

CASES: *Adani Mining Pty Ltd & Anor v Pennings* [2021] QSC 162, applied
Ex Parte Fielder Gillespie Ltd [1984] 2 Qd R 339, applied
Harman v Secretary of State for Home Department [1983] 1 AC 280, applied
Hearne & Anor v Street & Ors [2008] HCA 36; (2008) 235 CLR 125, applied
Riddick v Thames Board Mills Ltd [1977] QB 881, applied
Seeker Aircraft America Inc v Seabird Aviation Australia Pty Ltd [2013] QSC 121, cited
Tri-Star Petroleum Company v Australia Pacific LNG Pty Ltd [2017] QSC 136, applied

COUNSEL: B Job KC for the Appellant
R Litster KC and K Wylie for the Respondent
K Buckley for the 27th Co-Respondent by Election

SOLICITORS: Connor O’Meara Solicitors for the Appellant
 McCullough Robertson for the Respondent
 HopgoodGanim Lawyers for the 27th Co-Respondent by
 Election
 Second Co-Respondent appeared self-represented as agent for
 the 1st, 12th, 20th, 21st and 25th Co-Respondents by Election

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Introduction

- [1] This is an appeal about Gold Coast City Council’s decision to refuse a development application made by Nucrush Pty Ltd. The application seeks a development permit for material change of use to facilitate an extension to its existing quarry operation at 33 Maudsland Road, Oxenford. The Oxenford Quarry has been operating since approximately 1992.
- [2] In preparation for the hearing of the appeal, various experts have met and produced joint expert reports.
- [3] In a preliminary joint expert report about economic need dated 16 November 2022, the economic experts requested that Gold Coast City Council (*“the Council”*) provide:
- “Details of any purchases of / tenders for quarry materials by Council over the past 5 years, including amounts, prices, types of products and supplier”.
- [4] In response to the request, the Council’s procurements and contracts team has reviewed information held by the Council and produced a series of spreadsheets that identify each type of product purchased in each year dating back to 2018 from each supplier of quarry product to the Council (apart from Nucrush Pty Ltd). For each purchase, the spreadsheet identifies:
- (a) the date of purchase;
 - (b) the delivery address;
 - (c) the type of quarry product;
 - (d) the quantity of product;

- (e) the unit rate; and
- (f) the total price paid.

- [5] The Council has not yet provided the spreadsheets, or other information that accords with the request, to the economic experts.
- [6] The Council now applies for an order to protect an asserted confidentiality of the information.

What are the relevant principles?

- [7] In *Ex Parte Fielder Gillespie Ltd* [1984] 2 Qd R 339, McPherson J explained at 341:

“Confidentiality is not itself a valid basis for resisting inspection. Prima facie a party is entitled to production for inspection and copying of documents disclosed in the affidavit of documents unless some recognised claim of privilege is available and taken. Nevertheless, in cases such as this the courts have sought to strike a balance between the right to discovery for the purpose of the litigation and the interest in maintaining confidentiality in secret processes that may be used for purposes of competition: ... A practice has developed of permitting inspection by a specific person only, who has sometimes been an independent expert but more commonly a senior officer of the applicant party, on terms designed to restrict communication and the use (or abuse) of the information obtained by that inspection for purposes other than the litigation: ...”

- [8] Since that case, the obligations of parties and third parties who receive documents or information from another party by reason of a litigious process were considered by the High Court in *Hearne & Anor v Street & Ors* [2008] HCA 36; (2008) 235 CLR 125. The High Court has previously identified that the ordinary mechanism to ensure that documents provided in the course of proceedings are not misused is an implied undertaking given by parties, including third parties, to not use those documents or other information from a party that is received by reason of a litigious process for a purpose unrelated to the conduct of the litigation.¹
- [9] In considering the purpose of the implied undertaking or obligation placed upon litigants and their consultants and experts, Hayne, Heydon and Crennan JJ observed:²

[107] ...In *Riddick v Thames Board Mills Ltd*³ Lord Denning MR said:

“Compulsion [to disclose on discovery] is an invasion of a private right to keep one’s documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. The courts should, therefore,

¹ *Hearne & Anor v Street & Ors* [2008] HCA 36; (2008) 235 CLR 125, 159 [107].

² *Hearne & Anor v Street & Ors* [2008] HCA 36; (2008) 235 CLR 125, 159 [107].

³ [1977] QB 881 at 896.

not allow the other party – or anyone else – to use the documents for any ulterior or alien purpose. Otherwise the courts themselves would be doing injustice.”

In *Harman v Secretary of State for Home Department*⁴ Lord Diplock said:

“The use of discovery involves an inroad, in the interests of achieving justice, upon the right of an individual to keep his own documents to himself; it is an inroad that calls for safeguards against abuse ...”⁵

[10] The High Court also observed that it would be an exceptional case that a supplementary express obligation would be required.⁵

[11] Circumstances where such exceptions have been recognised mostly relate to whether commercial information ought to be revealed to trade rivals. That said, in *Adani Mining Pty Ltd & Anor v Pennings*,⁶ Brown J observed:

“the jurisdiction to restrict access does not depend upon the existence of the parties being trade rivals, but rather upon the risk of a breach of an implied undertaking in relation to the use of disclosed material, and an abuse of the Court’s process.”⁷

[12] In *Tri-Star Petroleum Company v Australia Pacific LNG Pty Ltd*,⁸ Bond J summarised the relevant legal principles as follows:

“the result is that a court may impose a more onerous obligation than the implied obligation if it is persuaded by the party asserting the need for that course that the case involves exceptional circumstances such that the implied obligation provides insufficient protection. If it is so persuaded, the court will then consider whether the course proposed by that party will strike the fair balance between its confidentiality concerns and the needs of the other litigant to have access to the documents concerned.”⁹

[13] In deciding whether to make an order to protect confidentiality of documents, it is appropriate to consider:

- (a) whether the nature of the information is sufficiently confidential; and, if so
- (b) whether the case involves exceptional circumstances such that the implied obligation provides insufficient protection; and
- (c) whether the terms of the proposed confidential orders strike a fair balance between a party’s confidentiality concerns and the needs of other litigants to have access to certain information.

⁴ [1983] 1 AC 280 at 300.

⁵ *Hearne & Anor v Street & Ors* [2008] HCA 36; (2008) 235 CLR 125, 162 [116].

⁶ [2021] QSC 162.

⁷ *Adani Mining Pty Ltd & Anor v Pennings* [2021] QSC 162, 8-9 [20] citing *Seeker Aircraft America Inc v Seabird Aviation Australia Pty Ltd* [2013] QSC 121 at [13].

⁸ [2017] QSC 136.

⁹ *Tri-Star Petroleum Company v Australia Pacific LNG Pty Ltd* [2017] QSC 136, 14 [60].

What is the basis on which the Council contends that the confidentiality orders are appropriate?

- [14] In support of its application for an order protecting confidentiality of the document, the Council relies on an affidavit of Mr Broc Smith. Mr Smith is a senior town planner employed by the Council of the City of Gold Coast.
- [15] With reference to Mr Smith's affidavit, the Council submits that the Appellant is one of multiple suppliers of quarry material to Council, and that the supply of quarry product to the Council involves a competitive tender process.
- [16] In that context, the Council notes that s 222 of the *Local Government Regulation 2012* provides as follows:

“222 Contract manual

- (1) A local government must make and adopt a contract manual.
- (2) A *contract manual* is a document that sets out the procedures for how the local government is to carry out all contracts.
- (3) The contract manual must –
 - (a) apply the sound contracting principles; and...

- [17] In reliance of the evidence of Mr Smith, the Council says that pursuant to s 222 of the *Local Government Regulation 2012*, the Council made the Procurement Policy and Contract Manual, which includes obligations of confidentiality relevant to the dissemination of the type of information contained in Council's response to the economic experts' request.

- [18] In support of its application, the Council's submissions quote parts of the Procurement Policy and Contract Manual. Relevantly, the submissions assert that:

“(a) in Section 1.5 of the Manual, one of the “*contracting principles*” is “*Ethical behaviour and fair dealing*”, which includes the following requirements:

“Ethical behaviour and fair dealing will be promoted in accordance with Council's *Code of Conduct*, working with sound ethics and ensuring Council:

- ...
- protects the commercially confidential information and/or intellectual property of suppliers'
- ...”

(b) in Section 4 of the Manual, which includes procedures Council must follow to carry out all contracts:

a) part 4.2.7 “*Evaluation Plan*” requires:

“Officers acting as part of an evaluation team will be required to sign conflict of interest declarations and confidentiality agreements at the start of the procurement process, the establishment of the evaluation team, as required by the evaluation process or as advised by Contracts & Procurement (see section 2.10)”

b) part 4.2.15 “*Evaluation of offers*” requires:

“Evaluation of offers will:

- ...
- ensure that all supplier information in response to an invitation to offer is regarded as confidential.”

c) part 4.2.16 “*Post offer negotiations*” requires:

“Probity considerations for negotiations include the following.

- ...
- During a negotiation, the identities or commercial-in-confidence information of any other supplier with whom negotiations are taking place must not be disclosed to another supplier. Commercial-in-confidence information includes (but is not limited to) prices, value-adds, operational methodology or other information identified by a supplier as being commercial-in-confidence.”

[19] The Council submits that the request from the economic experts in the preliminary joint expert report about economic need dated 16 November 2022 requires the provision of information as to the amounts, prices and types of products Council purchased from quarry material suppliers. It states that absent a confidentiality order, the information would be available to employees and officers of Nucrush Pty Ltd, which is a competitor to other quarry material suppliers who supply the Council. Council also states that the information would be available to multiple non-represented co-respondence by election. It considers that the provision of such information without additional protection would be inconsistent with the confidentiality of obligations prescribed by the Procurement Policy and Contract Manual.

[20] The Council indicates that its concerns about that are threefold.

[21] First, the Council submits that, notwithstanding any of Nucrush Pty Ltd’s good intentions relating to the implied undertaking, a real risk remains that knowledge of the quantity and price of products sold by commercial competitors would influence Nucrush Pty Ltd’s employees and business practices to the detriment of the Council

or commercial competitors. Second, the Council submits that Nucrush Pty Ltd's commercial competitors would have a reasonable concern that its officers and employees had visibility of commercially sensitive information. Third, the Council states that the commercially sensitive and confidential information about the supply of quarry material is of a character recognised in the Procurement Policy and Contract Manual, which is publicly accessible, and with which Nucrush Pty Ltd's commercial competitors would be entitled to expect the Council to comply with.

- [22] The Council also seeks to justify its application on the basis that the Court has recognised the confidential nature of commercial information regarding quarry operations in this appeal already. The Council notes that an order was made on 30 September 2022 to protect Nucrush Pty Ltd's commercially sensitive information, which included weighbridge records of the volume of quarry material removed from its quarry.
- [23] The Council's final submissions in support of its application was that the proposed confidentiality order permits the use of information provided in response to the economic experts' information request while preventing Nucrush Pty Ltd from gaining direct access to avert the risk of intentional or inadvertent misuse of the information. This, the Council submits, strikes the appropriate balance described in *Tri-Star Petroleum Company v Australia Pacific LNG Pty Ltd*¹⁰ and *Adani Mining Pty Ltd & Anor v Pennings*.¹¹ Council further states that the proposed confidentiality order permits provision of the relevant information to one of the self-represented co-respondents by election, such that he is then able to consider the evidence adduced by the parties' need experts on behalf of all other co-respondents.

Is the proposed confidentiality order appropriate?

- [24] Even though the evidence of Mr Smith was unchallenged, I am not prepared to rely on it to make the order sought, for several reasons.
- [25] I am not prepared to accept Mr Smith's assertions about the contents of the Procurement Policy and Contract Manual. A copy of it was not provided. The manual is said to be developed to comply with s 222 of the *Local Government Regulation 2012*. Neither the affidavit of Mr Smith nor the submissions from Council provide any further context about the *Local Government Regulation 2012*.
- [26] Section 222 appears in chapter 6, part 2, of the *Local Government Regulation 2012*. Consideration of chapter 6 of the *Local Government Regulation 2012* reveals a somewhat different picture than that portrayed by Mr Smith's affidavit and the submissions on behalf of the Council.
- [27] Chapter 6, part 2 of the *Local Government Regulation 2012* does not contain the default procedure for contracting. As is described in the *Local Government Regulation 2012*, the default procedure is in chapter 6, part 3. Part 2 only applies if a local government passes a resolution that it will apply part 2. A separate resolution with respect to the application of part 2 is required each year.

¹⁰ *Tri-Star Petroleum Company v Australia Pacific LNG Pty Ltd* [2017] QSC 136.

¹¹ *Adani Mining Pty Ltd & Anor v Pennings* [2021] QSC 162.

- [28] The Council's submissions do not confront this issue. They do not even draw the issue to my attention. In fact, they provide a completely different impression of the contractual arrangements of the Council.
- [29] The affidavit does not depose to whether the information was collected at a time when a resolution to apply part 2 had been passed. It does not disclose whether the manual has been amended and, as such, does not address whether the referenced parts of the manual reflects that which existed at the relevant time.
- [30] The affidavit material does not disclose whether the information sought to be protected by way of confidentiality order was obtained under contractual arrangements under chapter 6, part 2 of the *Local Government Regulation 2012* or whether it was obtained under part 3.
- [31] In addition, neither the affidavit material nor the submissions refer to s 237 of the *Local Government Regulation 2012*, which requires publication of relevant details of contractual arrangements on the local government's website in particular scenarios. Whether those scenarios apply to the information that is claimed to be confidential is not apparent. It is a matter that is not canvassed in the submissions nor in the affidavit material. That may well be explained by the fact that the deponent for the affidavit appears to be someone who does not have any day-to-day responsibility about such matters. Mr Smith is a senior town planner employed with day-to-day responsibility for the appeal under the supervision of a Planning Appeal and Research team. He deposes to matters about the Council's procurement and contract arrangements by referring to discussions that he had with unidentified individuals who are apparently in the Council's Procurements and Contracts team. To the extent that Mr Smith purports to depose to matters on information and belief, he does not disclose why he verily believes those matters told to him by the undisclosed individuals.
- [32] As I have mentioned, the submissions by the Council also rely on the fact that I have made an order of this nature already in this appeal. That is a matter of which I am cognisant. However, it is not a matter that demonstrates that such an order should be made now. The previous order relates to documents possessed by Nucrush Pty Ltd. The Council's submissions do not confront the appreciable difference between a private individual, such as Nucrush Pty Ltd, and the situation that pertains to a local government authority. A local government authority does not enjoy the same level of privacy with respect to its information as that enjoyed by a private individual. A local government authority is the subject of legislative regimes that erode the degree of privacy that might ordinarily be expected, such as the regime under the *Right to Information Act 2009* (Qld).
- [33] As I have mentioned, given the absence of details about the applicability of chapter 6, part 2 as compared to chapter 6, part 3 of the *Local Government Regulation 2012* to the information in question, the affidavit of Mr Smith does not persuade me that the relevant information is confidential.
- [34] In addition, given the less than forthright approach of Mr Smith, and the Council in its submissions, I am not persuaded that Mr Smith, or the Council in its submissions, have reliably informed me of all relevant matters in the Council's Procurement and Policy Manual. My concern in that regard is heightened given the election not to provide a copy of the manual.

[35] In the circumstances, I am not persuaded that it is appropriate to make an order in the terms sought.

Conclusion

[36] The Council's application is dismissed.