



## Decision and Reasons for Decision

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<b>Citation:</b>	<b><i>Queensland Newspapers Pty Ltd and Ipswich City Council [2015] QICmr 30 (26 November 2015)</i></b>
<b>Application Numbers:</b>	<b>312354 and 312421</b>
<b>Applicant:</b>	<b>Queensland Newspapers Pty Ltd</b>
<b>Respondent:</b>	<b>Ipswich City Council</b>
<b>Decision Date:</b>	<b>26 November 2015</b>
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – NONEXISTENT DOCUMENTS – DOCUMENTS OF AN AGENCY – refusal of access to a document because the document is nonexistent – whether agency has taken all reasonable steps to locate documents – sections 47(3)(e) and 52(1)(a) of the <i>Right to Information Act 2009</i> (Qld) – whether requested documents are documents of an agency – section 12 of the <i>Right to Information Act 2009</i> (Qld)</b>

### REASONS FOR DECISION

#### Summary

1. By application dated 17 November 2014,<sup>1</sup> the applicant applied to the Ipswich City Council (**the Council**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to documents concerning '[t]ravel arrangements for transport for trip involving Ipswich City Properties or council agents, for a trip to the US in September 2010. ...' (**First Application**).<sup>2</sup>
2. The applicant lodged a further RTI access application with the Council on 12 February 2015 (**Second Application**),<sup>3</sup> requesting documents:

*...showing travel itineraries and any other documentation relating to travel taken by Ipswich City Properties and its directors to Europe and the Middle East in 2012, including accommodation bookings/reservations, and flights/other transport arrangements. This is to include searches of any other email accounts used for these arrangements external to official council email addresses, emails to/from [a nominated Council officer] and any travel arrangement details emailed either to or from [another named officer]. This should also include a search of diary entries relating to the trip in the diaries of Crs Paul Pisasale and Paul Tully. ...*
3. The Council located no information in relation to the First Application,<sup>4</sup> and a small amount<sup>5</sup> of relevant information in response to the Second. The Council:

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<sup>1</sup> The terms of which were subject to minor variation agreed between the participants on 18 November 2014.

<sup>2</sup> The First Application is the application ultimately giving rise to external review no. 312354.

<sup>3</sup> The application giving rise to external review no. 312421.

<sup>4</sup> And therefore refused access to requested information under sections 47(3)(e) and 52(1) of the RTI Act, on the grounds the information was nonexistent: decision dated 9 January 2015. This 9 January 2015 decision refers to the *Information Privacy Act 2009* (Qld); this appears to have been an administrative oversight.

<sup>5</sup> 13 pages.

- as regards the First Application, refused access to requested information under sections 47(3)(e) and 52(1)(a) of the RTI Act, on the grounds the information was nonexistent; and
  - as regards the Second Application, decided to disclose the information located.<sup>6</sup>
4. As noted, the Council only located a relatively limited number of documents in processing the applicant's RTI access applications. The decision on the Second Application did, however, suggest that Ipswich City Properties Pty Ltd (**ICP**), a Council-owned company,<sup>7</sup> might hold further relevant documents, but that any such document would not be a 'document of agency'<sup>8</sup> (ie, the Council) subject to the RTI Act.
  5. The applicant's case on external review is that any potentially relevant documents that may be held by ICP should be regarded as documents of an agency – the Council – for the purposes of each of the applicant's access applications.
  6. I agree with the Council's view. Any documents that may be held by ICP are not documents of an agency for the purposes of the RTI Act and are therefore not subject to the Act.
  7. Accordingly, the Council is not required to undertake search inquiries of ICP for potentially relevant documents in relation to either application. It may therefore refuse access to any additional information in relation to both the First Application and the Second Application, on the basis that such information is, as regards the Council, nonexistent.

## Background

8. Significant procedural steps relating to each of the applications and external reviews are set out in the appendix to this decision.

## Reviewable decisions

9. The decisions under review are the Council's decisions dated 9 January 2015 and 19 March 2015.

## Evidence considered

10. Evidence, submissions, legislation and other material considered in reaching this decision are disclosed in these reasons (including footnotes and appendix).

## Issue for determination

11. The issue for my determination in each of these reviews is whether any relevant documents that may be held by ICP can be regarded as Council documents for the purposes of the RTI Act – that is, are ICP documents 'documents of an agency' (ie, the Council) within the meaning of section 12 of the RTI Act?
12. If the answer to this question is yes, then by not having made enquiries of ICP, Council will not have taken all reasonable steps to locate all relevant information,<sup>9</sup> and thus failed to have discharged the search obligations imposed on it by the RTI Act. The Council would not, therefore, be entitled to refuse access to ICP information on the basis of nonexistence as it did in relation to the First Application. The Council would, in relation to both access applications, need to carry out further searches; that is, by making enquiries of ICP.

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<sup>6</sup> Subject to the deletion of information found to be personal information appearing on several pages, disclosure of which the Council decided would on balance, be contrary to the public interest under sections 47(3)(b) and 49 of the RTI Act. The applicant does not seek review of the Council's decision in this regard.

<sup>7</sup> The Council's 4 March 2015 submissions note that ICP '*has one fully paid up ordinary share which is held beneficially by the Council.*'

<sup>8</sup> Under section 12 of the RTI Act.

<sup>9</sup> As it is required to do in accordance with the principles explained in *PDE and The University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009), concerning provisions in the repealed *Freedom of Information Act 1992* (Qld) equivalent to sections 47(3)(e) and 52 of the RTI Act.

13. If the answer to the above question is no, then Council will only be obliged to search for and deal with records that the Council holds directly – which it appears to have done in this case. There will be no obligation to make any additional inquiries of ICP in either review.

## Relevant law

14. A document of an agency:

*means a document, other than a document to which this Act does not apply, in the possession, or under the control, of the agency whether brought into existence 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.*<sup>10</sup>

15. Mere physical possession of a document by an agency is sufficient to meet the above requirements and subject the document to the operation of the RTI Act.<sup>11</sup> Physical possession is not, however, the sole test as to whether a document is a document of an agency subject to the RTI Act. A document not in the physical possession of an agency will nevertheless be a 'document of an agency' for the purposes of the RTI Act, if it is 'under the control' of the relevant agency.<sup>12</sup> The Information Commissioner has previously explained that a document will be under the control of an agency<sup>13</sup> where the agency has a present legal entitlement to take physical possession of the document.<sup>14</sup>

## Discussion and findings

### Possession

16. The Council has explained that searches for relevant documents in relation to each application involved various lines of enquiry, including interrogation of the Council's electronic document management databases. I have summarised these below as regards each of the access applications.
17. As regards the First Application, relevant searches were undertaken by both the Governance Branch and the Strategic Client Branch (Travel Requests) of the Council's Finance and Corporate Services Department, and involved searching spreadsheets concerning travel purchase orders and querying the Council's 'ECM' records management database – including by way of search terms such as 'travel' and the relevant traveller's name.<sup>15</sup> The decision on the First Application explained that these searches were undertaken as '*...the type of information requested...is all stored in the same location*'.<sup>16</sup>
18. The Council further explained on external review that the Ipswich City Mayor and a Councillor – both of whom, as I understand, participated in relevant travel – assisted in search efforts relevant to the First Application,<sup>17</sup> and that searches of the offices of the Chief Executive

<sup>10</sup> Section 12 of the RTI Act.

<sup>11</sup> *Kalinga Woolloowin Residents Association Inc. and Department of Employment, Economic Development and Innovation; City North Infrastructure Pty Ltd (Third Party)* (Unreported, Queensland Information Commissioner, 21 December 2011) and *Kalinga Woolloowin Residents Association Inc and Brisbane City Council and Ors* (Unreported, Queensland Information Commissioner, 9 May 2012), each applying *Holt and Reeves and Education Queensland and Ors* (1998) 4 QAR 310. As noted above, the Council was in physical possession of several documents relating to the Second Application.

<sup>12</sup> Or under the control of an officer of the agency in the officer's official capacity, and includes documents to which the agency is entitled to access.

<sup>13</sup> Or one which it is entitled to access.

<sup>14</sup> *Price and the Nominal Defendant* (1999) 5 QAR 80, at [18] (**Price**). The Information Commissioner went on in *Price* to explain that the '*...ruling test imposed by the definition of "document of an agency" is comprised in the words "in the possession or under the control of an agency". The remaining words of the definition illustrate, rather than extend, the ruling test.*' (At [33].)

<sup>15</sup> Decision dated 9 January 2015, and Council's submissions and enclosures dated 4 March 2015.

<sup>16</sup> Decision dated 9 January 2015.

<sup>17</sup> Submissions dated 19 May 2015, including enclosed emails dated 13 January 2015 relevantly advising of the lack of any responsive information. In this regard, in correspondence to solicitors for the Council dated 10 September 2015, I asked the Council to clarify whether any individual officers/ICP directors had possession of potentially responsive documents. I made this request on my own initiative, having inadvertently overlooked the material referred to in the preceding sentence (and the fact that, as regards the Second Application, the responsive documents located and released to the applicant were indeed documents of this very kind; ie email and calendar entries from the personal account of the Mayor).

Officer and Chief Financial Officer were also undertaken.<sup>18</sup> All search efforts were fruitless.<sup>19</sup> On this basis, the Council decided, as noted, to refuse the applicant access to requested information on the basis of nonexistence.

19. Similar searches were undertaken in processing the Second Application. The ECM was again interrogated,<sup>20</sup> and searches were also undertaken of an 'Oracle' electronic data management system and Council email systems – reflecting, as I understand, the particular terms of the Second Application. These searches were undertaken by Council units including the Mayor's office, the Travel Requests unit, and personal assistants of those named in the Second Application.<sup>21</sup>
20. Search efforts as regards the Second Application located, as I have noted, various pages, which were released to the applicant subject to deletion of certain segments of information. Additionally, the Council's decision as regards the Second Application observed that:

*[a]s the travel [targeted by the applicant in the Second Application] was undertaken on behalf of Ipswich City Properties Pty Ltd, that entity may hold other information concerning this travel. That is a separate legal entity to the Council. It has separate premises and information systems as well as document storage. The documents of Ipswich City Properties Pty Ltd are not documents to which council has access and are therefore not documents of an agency...the information/documents of Ipswich City Properties Pty Ltd are not within the possession or control of Council.*

21. The Council elaborated on the physical division between the Council and ICP in submissions lodged during these reviews which, while relatively lengthy, merit setting out in full:

*21. The status of Ipswich City Properties, as a separate legal entity has several practical implications which are relevant in the current circumstances including:*

- (a) Ipswich City Properties has its own separate licensed premises within the Council Building premises. This level of separation between Ipswich City Properties and the Council has been in operation for some time. The area which Ipswich City Properties occupies is specifically identified and the Council has granted a license to Ipswich City Properties for a nominated licence fee to use the premises. The rights and obligations of the parties have been agreed and include that Ipswich City Properties is entitled to occupy the licensed premises without unreasonable interference from the Council (other than access for inspection and maintenance related purposes).*
- (b) Ipswich City Properties has its own separate information management and storage systems. In this regard:*
  - (i) Hardcopy documents of Ipswich City Properties are generated, stored and maintained within the licensed premises;*
  - (ii) Ipswich City Properties uses a separate information system, including document management and storage systems, a separate server for documents such as emails and separate photocopy systems. This level of separation is also reflected in the use of Ipswich City Properties email addresses; and*
  - (iii) Directors of Ipswich City Properties are responsible for ensuring that all documents, emails and other information that are generated in relation to Ipswich City Properties' business and operations are appropriately stored within the Ipswich City Property files.*

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<sup>18</sup> See also email from the Council's Chief Operating Officer to the applicant, annexed to the applicant's application for external review of the Council's decision on the First Application, stating that searches had been undertaken of the offices of relevant Council officials and/or personnel.

<sup>19</sup> As above.

<sup>20</sup> Using similar search terms, and/or involving inquiry of relevant travel management documents and spreadsheets stored in the ECM – see enclosures to correspondence from the solicitors for the Council dated 1 May 2015.

<sup>21</sup> Decision dated 19 March 2015. See also Council's submissions and enclosures dated 4 March 2015.

(c) *While Council employees do provide select and discrete services to Ipswich City Properties, these services are provided under specific secondment arrangements.*

22. *Ipswich City Properties and the Council are separate legal entities which do operate separately and independently of each other. Relevantly, the separate and independent nature of the Council and Ipswich City Properties extends to the separate management, handling, storage and use of information and documentation.*

22. Having carefully reviewed the Council's accounts of its search efforts in relation to both applications, I am satisfied that those efforts were reasonable in the circumstances of each case. I consider that relevant searches and lines of enquiry were directed toward appropriate officers and information repositories within the Council, sufficient to locate any relevant documents the Council may hold. There is nothing before me to suggest that the Council is itself in possession of any further<sup>22</sup> relevant information.

23. The applicant, however, is not so satisfied. While I do not understand the applicant to be querying the reasonableness or adequacy of the Council's searches of its own records in relation to either application,<sup>23</sup> it does challenge the extent of the division between the Council and ICP, and seeks to ascertain whether requested information may ever have been in the Council's possession. In its submissions dated 26 October 2015, the applicant argued that:

*Given the Information Commissioner has previously ruled "mere physical possession" of documents is sufficient to make records documents of an agency, we wish to understand more about council's submission that refers to ICP having separate premises and systems.*

*We submit that council needs to detail when this separation occurred and who actually has possession of the documents.*

*Council in their submission has referred to separate servers and non-council emails, and we wish to address this issue to look at the idea of physical possession. Again, we point to instances where council staff handled queries via council email addresses. Any postal mail must presumably be handled at council given ICP's official address on company documents is given as council.*

*Council via Clayton Utz say the documents are kept on a separate email system and computer system. However, it appears from the email correspondence/press releases to date that the organisation is using the council email system/computer system/staff. All email responses to date regarding ICP inquiries have been sent from council email addresses, including Mr Lindsay's council email address.*

*The critical issue is whether ICP is using/sharing the council email server, internet router, internet connection or any other council owned devices (computers, hard drives) for the sending/receiving of communications and storage of documents. It would also be pertinent if the ICP emails passed through any council mail servers or shared the council domain. This has two issues, first going to the concept that ICP is in reality an arm of council, and also to possession.*

*To satisfy itself the documents were not in possession of the council, QN asks that the OIC request further information such as what email addresses were being used by ICP, details of the email server (such as was it council owned) and the use of any council IT equipment. If ICP used a council-owned email server/systems, then this would support the case that the documents were in council's possession, whether they had a legal entitlement to them or not, by way of the fact they were transmitted on council equipment.*

*Also, Clayton Utz states that council staff members were being used on secondment and that ICP had a licenced room in council where ICP activities took place. We again seek clarification about this arrangement to address issues of ownership. Where was the room located, how long the lease has been in place, and how much does ICP pay for the room? Do council staff do ICP work*

<sup>22</sup> I.e., information beyond the 13 pages located in response to the Second Application.

<sup>23</sup> Noting that in my letter dated 18 June 2015, I advised the applicant of my view that searches by the Council of its own records appear to have been appropriate, reasonable and sufficient in the circumstances of these reviews; the applicant has not contested that view.

"on secondment" in the ICP room only or at their council desks, and how does council determine when staff are performing council work and ICP work (for instance in handling media requests)?

24. I acknowledge that if any ICP information is stored on Council-owned information infrastructure or within Council premises or repositories, then it will be in the physical possession of the Council and subject to the RTI Act.
25. The Council's position, however is that the circumstances canvassed in the preceding paragraph do not apply in this case. The Council's account is clear: the Council and ICP operate '*separately and independently of each other*', a division which '*extends to the separate management, handling, storage and use of information and documentation.*' I accept that account,<sup>24</sup> and do not consider it necessary to descend further into the particulars of the physical, legal and operational arrangements the Council and ICP have in place so as to differentiate their business and affairs. To repeat what I stated in paragraph 22, there is nothing before me to suggest that the Council is itself in possession of any additional relevant information.
26. I also accept that the applicant may have received emails from Council officers concerning ICP affairs. That does not, however, establish that specific documents of the kind requested by the applicant in either of its applications are currently in the physical possession of the Council.
27. As canvassed in paragraph 23 above, the applicant further seeks to query as to whether requested information may at some point in time have been in the Council's physical possession.
28. The submissions excerpted in paragraph 23, for example, note that ICP and the Council share a postal address, the inference being, I assume, that post directed to the former must pass through the possession of the latter. More directly, the applicant queries whether '*...ICP emails passed through any council mail servers...*', and goes on to request that OIC '*...satisfy itself the documents were not in possession of the council...*', by seeking information as to whether requested documentation may have been transmitted through Council-owned IT infrastructure, on the basis that if this did occur, '*...this would support the case that the documents were in council's possession*'.
29. The submissions summarised above appear intended to develop a line of argument initiated by the applicant in submissions dated 29 June 2015:

*We wish to clarify that whether any of the documents have ever been in Ipswich council offices, or communicated or paid for via council technology (email, phones, use of spreadsheets etc). ...*

*... we wish to test the idea that the documents might have been in council possession. If council facilities (email addresses etc) were used in preparing, sending or receiving invoices, or paying for travel expenses, or in preparation of paperwork, or printing of paperwork, or even storage of paperwork in offices etc, they should be deemed to have been in possession of council.*

*If council has possessed the documents, then the Information Commissioner's reasoning, in Kalinga Wooloowin Residents Association Inc and Brisbane City Council; City North Infrastructure Pty Ltd (Third Party); Treasury Department (Fourth Party)..., is also critical.*

*That is because the Information Commissioner found: "the correct interpretation of 'possession' is as I have stated in paragraph 14 above: mere physical possession by an agency is sufficient to render a document subject to the RTI Act".<sup>25</sup>*

30. In additional submissions dated 30 June 2015, the applicant stated:

*It is inconceivable that the mayor, deputy mayor and senior executives did not have possession of documents such as travel itineraries, hotel booking information and plane tickets when*

<sup>24</sup> Noting that it is an offence to knowingly give false or misleading information to OIC: section 177(1) of the RTI Act.

<sup>25</sup> Email submissions dated 29 June 2015, received at 5:08PM.

*travelling around the US, Europe and the Middle East. Those documents must have been in the possession of those council representatives/staff, and by extension, the council.*

...

*The fact that multiple council representatives/staff would have had possession of travel documentation...makes it difficult to argue council did not have possession of such documents.*

31. The above arguments are complemented by a further submission, received from the applicant on 27 October 2015:

*Section 27 (1) of the RTI Act states that "an access application is taken only to apply to documents that are, or may be, in existence on the day the application is received". We respectfully submit that given the wording of the act, the OIC determines not just the current situation, but if documents also had been in physical possession of council.*

32. There is nothing before me establishing that the Council has ever had any temporary possession of the kind the applicant speculates may have occurred in the submissions summarised in paragraph 28. While I accept that it is likely that the officials nominated in the submissions extracted in paragraph 30 were in possession of documents of the kind specified during the course of their travels,<sup>26</sup> I have not pursued either this issue or the question of any temporary possession, for both are ultimately irrelevant. As I advised the applicant in my letter dated 13 October 2015, I am required to have regard to relevant facts and circumstances as they now stand.<sup>27</sup> The test under section 12 of the RTI Act is not, relevantly, whether a document ever *has been* in the possession of an agency, but whether it is presently.<sup>28</sup> There is no evidence that any documents of the kind requested by QN are presently in the Council's possession.
33. In this regard, the applicant's reliance on section 27(1) of the RTI Act is misconceived. That section does not operate to qualify or extend the test imposed by section 12 of the RTI Act, but exists simply to establish a temporal limit to the right of access conferred by section 23 of the RTI Act; it confines the scope of that right to documents in existence on the day a valid application is fielded by a Minister or agency. This is to avoid any suggestion that an applicant might lodge an 'open ended' access application capturing not only requested documents in existence at the time of the application's lodgment, but those that might subsequently come into an agency's possession or under its control.
34. On the basis of its search inquiries and explanations as canvassed above, I am satisfied that the Council is not itself in possession of any further<sup>29</sup> documents as requested by the applicant.

### **Control**

35. As noted above,<sup>30</sup> a document not in the physical possession of an agency will nevertheless be a 'document of an agency' for the purposes of the RTI Act, if it is under the control of the relevant agency: if the agency has a present legal entitlement to take physical possession of the document. As the Information Commissioner stated in the key decision concerning this issue, '*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.*'<sup>31</sup>

<sup>26</sup> Noting that this would not of itself bring such documents within section 12 of the RTI Act, as pursuant to section 12(b), it would also be necessary to show that such possession was in the officers' official capacity (as opposed, say, to their capacity as a director of ICP, an issue on which it is unnecessary for me to make any finding). It should also be remembered that the Council did actually have in its possession some documents of this kind – itineraries – which were disclosed in response to the Second Application.

<sup>27</sup> *Woodyat and Minister for Corrective Services* (1995) 2 QAR 383, at [35]; *Beanland and Department of Justice and Attorney-General* (1995) 3 QAR 26, at [58]. The applicant's submission as extracted in paragraph 31 was made in direct response to this advice.

<sup>28</sup> In this regard, see the discussion in *Holt and Reeves* of the nature of the materially equivalent right of access conferred by section 21 of the RTI Act's predecessor, the *Freedom of Information Act 1992* (Qld), at paragraphs [24]-[27]. The Information Commissioner in that case specifically noted that an applicant's right to access a document in an agency's physical possession might be legitimately defeated by a third party enforcing any superior proprietary interest in the document and compelling its return prior to a decision being made or access being granted: [24].

<sup>29</sup> That is, beyond the 13 pages located and disclosed in response to the Second Application.

<sup>30</sup> At [15].

<sup>31</sup> *Price*, at [18].

36. In this case, I am not satisfied that the Council enjoys a present legal entitlement to take physical possession of documents held by ICP.
37. While the Council, as sole shareholder, essentially owns ICP,<sup>32</sup> as an incorporated entity, ICP has a separate legal existence<sup>33</sup> and any property – including records and documents it creates – belong to ICP.<sup>34</sup> I can identify nothing in ICP's constitution<sup>35</sup> or the applicable law<sup>36</sup> that gives the Council a right of access to ICP documents of the kind requested by the applicant, and nothing that would amount to a present legal entitlement to possession of such documents.
38. It may be that Council – as ICP's sole shareholder – would be able to put itself in a position to take possession of any relevant ICP documents, by way of a shareholder resolution.<sup>37</sup> I do not, however, consider that this method of acquiring possession would be sufficiently immediate to amount to a present legal entitlement of the kind required under section 12 of the RTI Act. As the Information Commissioner has previously stated:

*I accept that it was the legislature's intention that an agency should take steps to bring into its physical possession, for the purpose of dealing with a valid FOI access application, any requested document in respect of which the agency has a present legal entitlement to possession. However, I do not accept that it was the legislature's intention that an agency should have to take some additional step in order to put itself into a position where it has a legal entitlement to take possession of a document, in order to respond to an FOI access application for that document.*<sup>38</sup> (My emphasis.)

39. Formulating an appropriate resolution and then securing its passage<sup>39</sup> would, in my view, comprise an 'additional step' of the kind the Information Commissioner has identified as being insufficient to amount to a present legal entitlement to possession.
40. The applicant resists any conclusion that the Council does not have control of ICP documents. The applicant's main line of argument in support of this contention is that the circumstances obtaining in these reviews are sufficient to justify a 'lifting' or 'piercing' of the corporate veil separating ICP from the Council. In the first of two sets of submissions emailed on 29 June 2015,<sup>40</sup> the applicant advised that it did not accept any:

*...contention that ICP is a separate entity and the council is not in possession of the documents. We base this on several well-established legal principles in which the corporate veil can be pierced. If this argument is successful, any documentation with ICP is under control of council and therefore subject to the RTI Act.*

41. Insofar as the above submission comprises an argument that ICP is not a 'separate entity' from the Council, it cannot, as I advised the applicant in my letter dated 13 October 2015, be sustained. As an incorporated body it is clearly a separate legal entity distinct from the Council.

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<sup>32</sup> As noted above, and see page 16 of the 'City of Ipswich Annual Financial Statements for the Year Ended 30 June 2013,' (2012-13 Financial Statements), where it is recorded that 'Council has 100% ownership of ICP.'

<sup>33</sup> 'The effect of incorporation is to establish that the company or association exists as a separate legal entity distinct in law from those persons who from time to time are its members': Australian Corporations Law Principles and Practice (Australian Corporations Law), May 2015, [2.1.0140], citing *Salomon v A Salomon and Co Ltd* [1897] AC 22; [1895-99] All ER Rep 33; *Lee v Lee's Air Farming Ltd* [1961] AC 12; *Hobart Bridge Co Ltd v FCT* (1951) 82 CLR 372 at 384-6; 25 ALJR 225.

<sup>34</sup> 'Company property belongs to the company as an entity and not to the shareholders individually. The shareholder has no legal interest in company property.': Australian Corporations Law, [2.1.0155].

<sup>35</sup> A copy of which was supplied by the Council, and provided to the applicant.

<sup>36</sup> The Corporations Act 2001 confers on shareholders (and directors) limited rights of access to company information, many of which are themselves conditional or contingent (eg, shareholder right to apply for court order authorising inspection of company books: section 247A(1); shareholder's right to minutes under section 251B; and a director's right to inspect financial records: section 290), none of which, in any event, relate to documents requested by QN.

<sup>37</sup> Power over a company's affairs '[u]ltimately...rests with the shareholders': Australian Corporations Law, [3.3.0005], citing O'Loughlin J in *Paringa Mining & Exploration Co Plc v North Flinders Mines Ltd* (1988) 52 SASR 22: '...shareholders...control the destiny of their company'.

<sup>38</sup> Price, at [27].

<sup>39</sup> In the case of a single-shareholder company such as ICP, a resolution may be passed without holding a meeting if the shareholder records the resolution, signs the resolution and records the resolution in the company's minute books: sections 249B(1) and 251A of the Corporations Law 2001.

<sup>40</sup> Received by OIC at 10:16AM.



42. In support of its more general argument that the circumstances in this case justify a lifting of the corporate veil, the applicant relies on an academic study quantifying decisions in which courts have done just so.<sup>41</sup> Relying on authorities cited in this paper, the applicant contends that I should 'lift' ICP's corporate veil and conclude that the Council has a present legal entitlement to – and thus control of – any relevant documents that may be held by ICP.

### ICP as agent for/alter ego of the Council

43. The applicant's principal argument appears to be that ICP should be seen as indistinguishable from and/or agent for/alter ego' of the Council.<sup>42</sup> The applicant points to the fact that the Council is the sole beneficial shareholder of ICP,<sup>43</sup> and that all of ICP's directors are elected Council representatives or senior Council officials.<sup>44</sup> The applicant's key contention is, as I understand, that the Council has '*such a degree of effective control that the company is held to be an agent of the shareholder, and the acts of the company are deemed to be the acts of the shareholder.*'<sup>45</sup>
44. I have given the applicant's submissions in this regard close consideration. I am not, however, persuaded that I should adopt them.
45. As a starting point, I cannot see that the main authority relied on by the applicant in its initial submissions<sup>46</sup> on this issue – *Taylor v Santos Ltd (Taylor v Santos)*<sup>47</sup> – actually assists the applicant. The Full Court of the South Australian Supreme Court in that case found (in the context of a dispute as to disclosure obligations) that a parent company did not have an immediate right to inspect documents held by a subsidiary, and that the documents were not within the parent's power. As noted in a later case which considered this issue in a similar context, and which arrived at the same conclusion:<sup>48</sup>

*Doyle CJ said [in Taylor v Santos] that documents of a subsidiary company are, prima facie, not in the power of the controlling company and that it will not usually be appropriate to engage in a lifting of the corporate veil.*

46. Nevertheless, the applicant's initial submissions as summarised in paragraph 43 and its citation of *Taylor v Santos* did cause me to undertake a careful review of potentially relevant authorities derived from the law concerning disclosure/discovery, including:
- *B v B*<sup>49</sup>
  - *Lonrho Ltd v Shell Petroleum Co Ltd (Lonrho)*<sup>50</sup>

<sup>41</sup> Ian M Ramsey and David B Noakes, 'Piercing the Corporate Veil in Australia' (2001) 19 *Company and Securities Law Journal* 250. OIC accessed a digital version of this paper for the purposes of these reviews, available at SSRN: <http://ssrn.com/abstract=299488>. Page number references in these reasons refer to the numbering used in this digital version.

<sup>42</sup> Concepts I have treated as one – Ramsey and Noakes note that '[a]gency has also been used interchangeably by the courts with the term "alter ego", citing *Brewarrana v Commissioner for Highways* (1973) 4 SASR 476 at 480 ('Piercing the Corporate Veil', p. 8). Another decision referred to in that paper and cited by the applicant – *Heys and Barrow v CSR Ltd* (Supreme Court of Western Australia, 4 August 1988, unreported) – also appears to lend support for the view that the concepts may be viewed singly. In finding that a parent company was liable for injuries suffered by individuals in the employee of a subsidiary, Rowland J stated that '[w]hether one defines all of the above in terms of agency, and in my view it is, or control, or whether one says that there was a proximity between CSR and the employees of ABA, or whether one talks in terms of lifting the corporate veil, the effect is, in my respectful submission, the same.' It is perhaps relevant to note that OIC has previously found that documents held by a company the shares of which were owned by a state agency subject to the application of the RTI Act could be regarded as documents in the possession or under the control of that agency: *Maurice Blackburn Lawyers and Department of Transport and Main Roads; City North Infrastructure Pty Ltd (Third Party)* [2014] QICmr [6]. The distinguishing feature of that case, however, was the existence of an instrument expressly appointing the company's CEO as the agent of the state.

<sup>43</sup> Admitted by the Council: paragraph 20(a) of its submissions received 4 March 2015.

<sup>44</sup> The applicant also points to the fact that ICP is a 'controlled entity' for the purposes of the *Auditor-General Act 2009* (Qld) – a fact recorded at page 16 of the 'City of Ipswich Annual Financial Statements for the Year Ended 30 June 2013' ('Notes to and Forming Part of the Financial Statements, Summary of Significant Accounting Policies', item 1(g)).

<sup>45</sup> Ramsey and Noakes, 'Piercing the Corporate Veil', p. 8.

<sup>46</sup> Email submissions dated 29 June 2015, received 10:16AM.

<sup>47</sup> (1998) 71 SASR 434. The applicant raised this case under a heading 'Group enterprises principle'; I am not certain there is such a principle; in any event, I am satisfied I have fairly divined and engaged with the applicant's case as to 'control'. I put my understanding of the applicant's case to it during the course of this review (letter dated 13 October 2015, and enclosures); it has not sought to correct or contradict that understanding.

<sup>48</sup> *Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi Energia S.R.L. (No 8)* [2014] FCA 376, per Besanko J (at [18]).

<sup>49</sup> [1979] 1 All ER 801.

<sup>50</sup> [1980] 1 WLR 627.

- *Marriage of Barro*;<sup>51</sup> and
- *Schweitzer v Schweitzer* (**Schweitzer**).<sup>52</sup>

47. I approached these cases with a degree of caution, in view of the fact that they concern questions of inspection, disclosure and production of documents in curial settings, and in the main involve consideration of whether documents could be said to have been in the 'possession, custody or power' of a person or entity (despite their being in the physical possession of another), rather than being 'in the possession, or under the control', as section 12 of RTI Act requires.
48. Of particular interest, however, was O'Reilly J's decision in *Schweitzer*, for the reason that the duty of disclosure prescribed in Rule 13.07 of the *Family Law Rules 2004* is framed in very similar terms to the words used in section 12 of the RTI Act.<sup>53</sup> O'Reilly J was guided by older authorities dealing with questions of 'power' over documents, when contemplating what was meant by the phrase 'in the possession or under the control'. Specifically, O'Reilly J gave consideration to the observations of Lord Diplock in *Lonrho*, where:
- ...his Lordship left open the question whether in respect of "one-man" companies of which "a natural person and/or his nominees" are the sole shareholders and directors (alter ego companies) in effect, documents of the company may be held to be in the possession or power of such persons:*
- ... In particular, I say nothing about one-man companies in which a natural person and/or his nominees are the sole shareholders and directors. It may be that, depending on their own facts, different considerations may apply to these.
49. O'Reilly J was not satisfied that the relevant entities in *Schweitzer* were, on the facts, the alter ego of the individual against whom disclosure was sought.<sup>54</sup> However, I did give considerable thought as to whether the judgment in that case may support 'lifting the veil' in these reviews, particularly given that the decision dealt with a statutory formulation substantially similar to that used in section 12 of the RTI Act, concerning questions of 'control', rather than 'power'.
50. In considering whether to 'lift the veil' in the present context, I also had regard to the Victorian Supreme Court decision in *Linha Pty Ltd v Citibank Ltd* (**Linha**).<sup>55</sup> In that case, Hedigan J looked through the distinction between subsidiary companies and a parent, finding that the subsidiaries were not acting as separate legal entities but on behalf of the parent. Documents in the possession of the subsidiaries were therefore held to be in the 'power' of the parent.
51. The judgment in *Linha* has been the subject of some doubt.<sup>56</sup> Nevertheless, for the purposes of my preliminary deliberations in these reviews, I was prepared to entertain the idea that Hedigan J's judgment could be read as extending the comments of Lord Diplock in *Lonrho*,<sup>57</sup> that alter ego considerations might not necessarily be confined to situations involving 'one-man' companies acting on behalf of a natural person, but may be relevant as between related bodies corporate, when assessing whether one entity could be said to control documents in the possession of another.
52. I wrote to the solicitors for the Council by letter dated 10 September 2015, setting out my thinking as outlined in paragraphs 44-51 and inviting its submissions in reply. The Council replied, relevantly,<sup>58</sup> that:

<sup>51</sup> (1983) 47 ALR 338.

<sup>52</sup> [2012] FAMCA 445.

<sup>53</sup> The rule relevantly provides that the duty of disclosure in Family Court proceedings '*...applies to each document that is...in the possession, or under the control, of the party disclosing the document*'.

<sup>54</sup> At [55].

<sup>55</sup> [1995] 1 VR 643.

<sup>56</sup> See *Psalidis and Another v Norwich Union Life Australia Ltd* (2009) 29 VR 123, Cavanough J observing that *Linha* '*needs to be read with caution*', before noting that the Full Court of the Supreme Court in *Taylor v Santos* had expressed '*serious reservations about certain aspects of the reasoning*' in *Linha* (at [31]).

<sup>57</sup> Extracted in paragraph 48.

<sup>58</sup> The Council also argued that it was, essentially, impermissible for me to even have regard to authorities such as *Schweitzer* in seeking to ascertain the correct interpretation of section 12 of the RTI Act. I do not accept such submissions; I consider it to be not only appropriate, but incumbent upon me to consider judicial interpretations of identical or substantially similar words and phrases as those used in the RTI Act, notwithstanding they may appear in legislation intended to achieve purposes other than promoting access to government-held information.

19. ... there is no settled "agency" or "alter ego" principle that can be applied in the present circumstances.
  20. It is a fundamental rule of law that Council and Ipswich City Properties are to be treated as separate legal entities, notwithstanding their shareholding relationship. The same fundamental rule applies with respect to directors of Ipswich City Properties. While isolated cases exist where limited exceptions to this rule have been recognised - some of which were described as "agency" or "alter ego" exceptions in [my letter dated 10 September 2015], there is no consistent line of authority or identifiable principle unifying those decisions. It has recently been stated that the various decisions lack "a firm basis in principle and policy" and that this area of law is beset by a "conceptual fog". The application of "agency" or "alter ego" principles with respect to disclosure obligations in Court proceedings is no exception. The decisions selected for reference in [my letter dated 10 September 2015, and listed in paragraph 45 above] are drawn from a variety of other jurisdictions and were made under wholly unrelated procedural regimes. They also reflect the doctrinal inconsistency that exists in this area of law.
  21. Furthermore the majority of the cases referred to did not involve a finding that documents held by a corporate entity related by shareholding or directorship to a party to the proceedings should be disclosed under the relevant procedural rules. Council notes that the only decision referred to in [my letter dated 10 September 2015] where an order for disclosure by a parent company of documents held by a subsidiary was made is *Linfa Pty Ltd v Citibank Ltd*. However, that case was doubted in another decision referred to in the Letter, *Taylor v Santos Ltd*. In that case, *Olsson J*, with whom *Doyle CJ* agreed, stated that *Linfa* was "the product of a very special set of facts", and was not intended to challenge the "core concepts" of the law in this area, which are that documents held by a subsidiary are not treated in law as documents held by the parent. To do otherwise, *Olsson J* remarked, would "turn long settled principles of corporate law, established by courts of the highest authority, on their head".
  22. As the OIC is aware, obiter dicta comments have been made in some cases, such as *Lornho Ltd v Shell Petroleum Co Ltd* and *Taylor v Santos Ltd*, that the emphatic rejection of arguments that a parent company has documents of a subsidiary in its possession or under its control simply as a result of their shareholding relationship does not preclude the recognition of some exceptions in other, extreme cases.
  23. However, as discussed above, no generally accepted set of principles has emerged. Given the fragmented and inconsistent state of the law in this area, Council submits that there is no clearly defined "agency" or "alter ego" principle that could be applied in this matter. Attempting to discern some form of unifying principle from a small number of decisions from a variety of jurisdictions is simply inappropriate. (Footnotes and citations omitted.)
53. For its part, the applicant now urges that I adopt the approach taken in *Linfa*, particularly in view of what it contends are various factual similarities between that case and the present, including a shared postal address,<sup>59</sup> allocation of ICP profit to the Council, and the 'intertwining' of Council/ICP roles by various personnel, the latter which in its view justifies 'the conclusion that often people working at ICP are actually also working for council.' In support of this latter assertion, the applicant points to:
- a Council officer and ICP director answering questions about ICP through his Council email account,
  - a testimonial letter from the Mayor of New York City addressed to the Ipswich City Mayor, despite the latter having apparently met the former whilst travelling on ICP business,
  - Council staff fielding ICP-related media queries, and
  - the 'handling' by Council of phone charges incurred by a Councillor and ICP director during overseas travel.<sup>60</sup>

<sup>59</sup> And the fact that ICP's registered office and principal place of business address is the Council's: ASIC company search enclosed with the applicant's 26 October 2015 submissions.

<sup>60</sup> See generally the applicant's submissions and enclosures dated 26 October 2015.

The applicant submits that, taking all the above into account, *'the ... factors in Linfa are significant and similar enough [in the present reviews] to conclude that ICP is not operating on its "own behalf but on behalf of the parent...[entity]"'*.<sup>61</sup>

54. As the foregoing discussion indicates, I have given the applicant's submissions on these matters very careful consideration. While I think the issue is finely balanced, ultimately I agree with and accept the Council's submissions as extracted in paragraph 52.
55. The precise nature of the alter ego concept and the circumstances in which it may apply appear to be the subject of considerable judicial uncertainty. As noted, the cornerstone of the applicant's alter ego argument – the judgment in *Linfa* – has been treated cautiously in later decisions, and I do not think that I would be justified in relying upon it as establishing some set of universal criteria or 'factors' satisfaction of which might permit a lifting of the corporate veil when considering questions of documentary control.<sup>62</sup> This is particularly so, given the dissimilar factual and legal contexts (adversarial litigation in *Linfa* as opposed to administrative review here, and involving interpretation of a rule of court framed differently to section 12 of the RTI Act), and the general reluctance of the courts<sup>63</sup> to 'pierce the veil' or regard separate entities as indistinguishable: particularly in cases where, as in the present, the controller of a purported alter ego company is an entity or body corporate.
56. 'Piercing' or 'lifting' the corporate veil is a significant step that runs contrary to conventional legal principle. In the absence of a decision by a court of record or senior administrative tribunal lifting the veil in a sufficiently similar context to that I am considering in these reviews,<sup>64</sup> I am of the view that I am bound to observe the notion of corporate personhood – to have regard to *'long settled principles of corporate law, established by courts of the highest authority...'*<sup>65</sup> ICP's corporate personhood means that, in the present context, ICP documents are not documents in the possession or under the control of the Council.

#### **Fairness/justice considerations and miscellaneous submissions**

57. The applicant sought to complement the alter ego argument discussed above with a further contention that piercing the veil separating ICP from the Council would be justifiable in the circumstances of this case, on the basis that to do so would achieve a 'fair and just' result. The applicant submitted that *'parties might seek to pierce the corporate veil on grounds that to do so would bring about a fair or just result. We argue this is relevant as the RTI Act takes into account factors favouring disclosure in the public interest.'*<sup>66</sup>
58. Whether a finding that ICP documents are under the Council's control would comprise a 'fair or just result' or otherwise, matters of the kind cited by the applicant do not allow me to simply set aside longstanding legal principle. Further, the enumeration of public interest factors in the RTI Act have no bearing on the threshold question I must decide in these reviews; i.e. whether a document actually is a 'document of an agency' subject to the RTI Act. Public interest factors and considerations<sup>67</sup> are only of relevance in determining whether disclosure of a document of an agency ought to be released.

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<sup>61</sup> As above.

<sup>62</sup> And for that reason, I do not think it necessary to pursue the precise nature of ICP's staffing arrangements.

<sup>63</sup> As evidenced by many of the cases discussed in the paper relied upon by the applicant, and identified earlier above.

<sup>64</sup> For example, a decision finding that documents held by the subsidiary company of a body corporate or a government-owned company are documents *'in the possession, or under the control'* of the parent company or government shareholder. In this regard, I am unable to see how another of the authorities relied upon by the applicant in its initial submissions – the decision in *Bluecorp Pty Ltd vs ANZ Executors and Trustee Co Ltd* (1995) 18 ACSR 566 – assists me in determining relevant issues. The court in that case was analysing the relationship between various interrelated companies, for the purposes of determining where proper title to a vessel should lie. It was decided upon matters specific to the circumstances of that case, which involved contemplation of complex factual and legal issues quite distinct from those I am called to decide in this external review. As I advised the applicant in my letter dated 13 October 2015, it is not clear to me that a decision concerning questions of property, corporations, bankruptcy and trust law is relevant to a determination as to whether the Council can be said to have a present legal entitlement to possession of ICP documents. The applicant has not sought to press any case as based upon *Bluecorp*.

<sup>65</sup> *Taylor v Santos*, 449 (per Olsson J).

<sup>66</sup> Raised in the first of the applicant's email submissions dated 29 June 2015, received at 10:16AM.

<sup>67</sup> Raised in both the first of the applicant's 29 June 2015 email submissions (ie, the email received at 10:16AM), and email submissions dated 30 June 2015.

59. Similarly misconceived in this context is the applicant's citation<sup>68</sup> of *Kalinga Wooloowin Residents Association Inc. and Department of Employment, Economic Development and Innovation; City North Infrastructure Pty Ltd (Third Party) and Kalinga Wooloowin Residents Association Inc and Brisbane City Council; City North Infrastructure Pty Ltd (Third Party); Treasury Department (Fourth Party) (Kalinga Decisions)*,<sup>69</sup> two OIC decisions concerning documents of an agency said to comprise exempt information,<sup>70</sup> as information subject to an obligation of confidence owed to a government-owned company. The principles identified and applied in these decisions are only of relevance where a document can first be said to be a 'document of an agency' subject to the RTI Act. The *Kalinga Decisions* involved documents which, unlike here, were clearly in the physical possession of the respondent agency; the agency had then sought to claim that the documents were exempt, on the basis that the agency owed an obligation of confidence to a third party company fully owned and funded by government.
60. Critically, the *Kalinga Decisions* were *not*, as the applicant's submissions appear to misapprehend,<sup>71</sup> cases in which OIC found that a government-owned company analogous to ICP was an agency subject to the operation of the RTI Act.<sup>72</sup> OIC's decision was simply that more onerous requirements<sup>73</sup> for establishing exemption under schedule 3, section 8 of the RTI Act<sup>74</sup> obtain in relation to documents communicated by such companies, than would ordinarily be the case as regards information communicated by a third party entity genuinely independent of government.
61. While not entirely clear to me, it may be that the applicant relies on the *Kalinga Decisions* because those cases involved considerations as to government 'control' of the company to which public agencies claimed they owed an obligation of confidence. This, however, is an issue distinct from that I am considering in this review – while the distinction may be fine, assessing whether an agency has control of a company (as the Council undoubtedly has over ICP)<sup>75</sup> is in my view to be distinguished from assessing whether an agency has a present legal entitlement to and thus control of documents, within the meaning of section 12 of the RTI Act.
62. Further misplaced is the applicant's reliance upon the state government's position in relation to a recommendation by the FOI Independent Review Panel<sup>76</sup> that entities like ICP be subject to the RTI Act:

*The State Government-commission Right to Information review in June 2008 states the Government intended for corporations established by Government for public purposes should be subject to freedom of information legislation. It states: "The Government's intention is that generally, bodies established on Government initiative and for a public purpose should fall within the ambit of the FOI Act, unless expressly excluded by the Act." ICP fits this category, and this shows that the intent of the 2008 changes was for such organisations to be captured by RTI legislation.*

63. The problem with this submission is that, as noted above,<sup>77</sup> I am not in these reviews considering whether ICP is 'captured' by the RTI Act – that is, whether it comprises an 'agency' subject to the Act – but only whether documents it may hold can be said to be in the

<sup>68</sup> Second set of email submissions dated 29 June 2015 (received at 5:08PM), and email submissions dated 30 June 2015.

<sup>69</sup> See note 11 for citations.

<sup>70</sup> Under sections 47(3)(a) and 48 of the RTI Act.

<sup>71</sup> The applicant arguing in the second of its 29 June 2015 email submissions that '*ICP thereby features the exact same characteristics... [as the government-owned companies considered in relevant decisions] and thereby should be subject to the RTI Act.*'

<sup>72</sup> Which, it must be remembered, is **not** the question I am actually called to determine in this case, the applicant not having lodged any RTI access application with ICP itself.

<sup>73</sup> Of the kind identified by Mason J in *Commonwealth of Australia v John Fairfax & Sons Limited and Others* (1980) 147 CLR 39.

<sup>74</sup> Which, in conjunction with section 48 of the RTI Act, provides that information is exempt information if its disclosure would found an action for a breach of confidence.

<sup>75</sup> Reflected, not least, in the fact that it is a 'controlled entity' for the purposes of the *Auditor-General Act 2009* (Qld) – note 42.

<sup>76</sup> In its June 2008 report, *The Right to Information: Reviewing Queensland's Freedom of Information Act* (commonly known as the 'Solomon Report'). The relevant recommendation is Recommendation 24: '*The definition of 'public authority' in s. 9 of the Act should be extended to include bodies established for a public purpose under an enactment of Queensland, the Commonwealth or another State or Territory.*'

<sup>77</sup> Note 72.

possession or under the control of the Council. It is therefore unnecessary to address this submission further.<sup>78</sup>

### ICP constitution and 'beneficiary/trustee' relationship

64. The applicant further argues that:

*... article 56 of ICP's constitution creates a relationship akin to a beneficiary and trustee between council and ICP.*

*The constitution states that: "If the company is wholly-owned by a local government entity, a director is authorised to act in the best interests of that local government entity provided that the director acts in good faith in the best interests of that local government entity and the company is not insolvent at the time the director acts and does not become insolvent because of the director's act".*

*ICP's sole shareholder is council, thereby giving ICP directors authority to act in council's best interests. This further indicates an obligation on directors to act in council's best interests. Therefore we submit that this reinforces the argument that ICP is an agent of council, and thereby subject to RTI laws.*

65. Article 56 of IPC's constitution is intended to do no more than permit ICP directors to avail themselves of the concession granted by section 187 of the *Corporations Act 2001* (Cth) – to allow them to act in the interests of the 'parent' entity, the Council, when undertaking ICP business. Neither article 56 nor the statutory presumption of good faith it is purporting to enliven go any way, on my understanding, to establishing a relationship of principal and agent, and/or beneficiary and trustee as suggested by the applicant, but merely operate to modify the general obligations of good faith owed by directors in certain limited contexts.

66. Article 56, then, has no bearing on the question as to whether ICP documents can be said to meet the requirements of section 12 of the RTI Act.

### Conclusion

67. There is nothing before me to suggest the Council is in possession of ICP documents relevant to the First or Second Application. Further, for the reasons explained at paragraphs 35-66, the Council does not in my view have a present legal entitlement to possession of any such ICP documents. Accordingly, any relevant document that may be held by ICP is not under the control of the Council and is therefore not a 'document of an agency' for the purposes of the RTI Act. The Council otherwise appears to have discharged its obligation to search for and deal with all documents it does possess or control, and has therefore taken all reasonable steps to locate relevant documents in each review. The Council may therefore refuse access to any additional information in both reviews, on the basis that it is nonexistent.

68. I acknowledge that this may on its face appear a somewhat incongruous conclusion, in light of the fact that Council is the sole shareholder of ICP, all of ICP's directors are elected officials or Council employees, and the stated reasons for the company's incorporation.<sup>79</sup> My findings, however, flow from ICP's status as a separate legal entity possessed of distinct corporate personhood, a long-standing concept of the general law. I am bound to observe this concept. In the present context, its effect is that ICP documents are not documents in the possession or under the control of the Council.

<sup>78</sup> Noting that even if it were, the recommendation and government response on which this submission is premised are not reflected in the law enacted by Parliament. As Applegarth J noted in rejecting a substantially similar argument, '...the Queensland government's adoption of Recommendation 24 of the report of the FOI Independent Review Panel chaired by Dr Solomon AM did not find expression in the language of the statute [ie, the RTI Act]': *Davis v City North Infrastructure Pty Ltd* [2011] QSC 285, at [26] (Footnote omitted).

<sup>79</sup> The Council's 2013-14 Annual Report recording that ICP was '...formed to provide a business vehicle to support the commercial activities of Council in generating revenue additional to traditional fees and charges including rates revenue' (page 51). In passing, I note that as a 'controlled entity' within the meaning of the *Auditor-General Act 2009* (Qld), ICP is directly subject to the mandate of the Auditor-General. The definition of 'public authority' as contained in section 16 of the RTI Act would not, however, presently appear sufficiently broad to encompass entities such as ICP (again bearing in mind that this is not an issue I am called to determine in these reviews).

## DECISIONS

69. In review no. 312354, I affirm the Council's decision dated 9 January 2015. Access to information requested in the First Application may be refused under section 47(3)(e) of the RTI Act, on the basis that it is nonexistent under section 52(1)(a) of the RTI Act.
70. In review no. 312421, I vary the Council's decision, by finding that access to any additional information may be refused under section 47(3)(e) of the RTI Act, on the basis that it is nonexistent under section 52(1) of the RTI Act.
71. I have made these decisions as a delegate of the Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

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**Clare Smith**  
**Right to Information Commissioner**

**Date: 26 November 2015**

## APPENDIX

### Significant procedural steps

Date	Event
17 November 2014	The Council received the First Application.
18 November 2014	The applicant requested a minor variation to the terms of the First Application, which was accepted by the Council.
9 January 2015	The Council issued a decision refusing access to information requested in the First Application, on the basis that the information was nonexistent.
16 January 2015	OIC received the applicant's application for external review of the Council's decision on the First Application.
19 January 2015	OIC advised the Council of the applicant's application for external review of the decision on the First Application. OIC requested preliminary documentation from the Council.
28 January 2015	The Council supplied requested documentation.
6 February 2015	OIC informed the applicant and the Council that the application for external review of the Council's decision on the First Application had been accepted (review no. 312354). OIC asked the Council to provide submissions on several issues, including details as to searches undertaken and the relationship between the Council and ICP.
12 February 2015	The Council received the Second Application.
4 March 2015	The Council (through its solicitors) lodged submissions in review no.312354, as requested by OIC on 6 February 2015.
19 March 2015	The Council issued a decision in response to the Second Application, granting access to 10 and partial access to three pages located.
30 March 2015	OIC received the applicant's application for external review of the Council's decision on the Second Application.
31 March 2015	OIC advised the Council of the applicant's application for external review of the decision on the Second Application. OIC requested preliminary documentation from the Council.
2 April 2015	OIC requested additional submissions from the Council in review no. 312354.
9 April 2015	The Council supplied preliminary documentation concerning the Second Application, as requested by OIC on 31 March 2015.
17 April 2015	OIC informed the applicant and the Council that the application for external review of the Council's decision on the Second Application had been accepted (review no. 312421). OIC asked the Council to provide additional information concerning searches undertaken.
1 May 2015 & 5 May 2015	The Council (through its solicitors) supplied the additional information requested in review no. 312421.
19 May 2015	The Council's solicitors provided additional information in review no. 312354, as requested by OIC on 17 April 2015.
18 June 2015	OIC issued a preliminary view to the applicant in both reviews (312354 and 312421) that any information possessed or controlled by ICP was not a 'document of an agency' subject to the RTI Act. OIC invited the applicant to provide submissions in the event it did not accept that preliminary view.
29 June 2015 & 30 June 2015	The applicant provided submissions (by way of three emails) in response to OIC's preliminary view.
4 August 2015	OIC forwarded the applicant's submissions to solicitors for the Council, and invited submissions in reply.
18 August 2015	The Council's solicitors provided submissions.



10 September 2015	OIC wrote to solicitors for the Council, raising various issues and requesting additional submissions as regards the relationship between the Council and ICP.
25 September 2015	The Council's solicitors provided further submissions, as requested.
13 October 2015	OIC forwarded the Council's submissions to the applicant and issued a further preliminary view, reiterating OIC's initial preliminary view that documents of ICP were not documents of an agency for the purposes of the RTI Act. OIC again invited the applicant to provide submissions in support its case.
23 October 2015	OIC forwarded a copy of the constitution of ICP to the applicant.
26 October 2015 & 27 October 2015	The applicant provided submissions (by way of two emails) in response to OIC's reiterated preliminary view.