



Decision and Reasons for Decision

Citation:	<i>Y39 and Brisbane City Council</i> [2021] QICmr 51 (13 October 2021)
Application Number:	316181
Applicant:	Y39
Respondent:	Brisbane City Council
Decision Date:	13 October 2021
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - INFORMATION AS TO EXISTENCE OF PARTICULAR DOCUMENTS - request for complaint information involving a named individual - whether requested information is prescribed information - whether existence of requested information may be neither confirmed nor denied under section 55 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant is an employee of Brisbane City Council (**Council**). He applied¹ to Council under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to documents recording complaints made about him and other residents of his residential unit block by a particular neighbour (whom the applicant named), and for any complaints made against that neighbour.
2. Council advised² the applicant that it was unable to confirm or deny the source of complaints or the identity of complainants under its privacy obligations, and that it would therefore conduct a broader search on the scope of the access application for any complaints made during the specified time period.
3. Council subsequently decided³ to give the applicant access to some material, reiterating that it was neither able to confirm nor deny the existence of documents identifying the applicant's neighbour as a source of complaints against the applicant.
4. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review.⁴ He stated that Council had not given him access to the information that he was

¹ Application dated 7 May 2021.

² Email of 14 June 2021.

³ Decision dated 17 June 2021.

⁴ On 6 July 2021.

most concerned to receive, namely, information concerning a particular complaint that he alleged his neighbour had made to Council about him.

5. For the reasons set out below, I affirm Council's decision to neither confirm nor deny the existence of such documents under section 55 of the RTI Act. I am satisfied that, if the requested documents were to exist in Council's possession or under its control, they would contain 'prescribed information', that is, personal information the disclosure of which would, on balance, be contrary to the public interest, under section 47(3)(b) and section 49 of the RTI Act.

Reviewable decision

6. The decision under review is Council's decision dated 17 June 2021.

Evidence considered

7. Significant procedural steps relating to the external review are set out in the Appendix.
8. The evidence, submissions, legislation and other material I have considered in reaching my decision are set out in these reasons (including footnotes and the Appendix). I have taken account of the applicant's submissions to the extent that they are relevant to the issues for determination in this review.⁵
9. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.⁶ I consider a decision-maker will be '*respecting, and acting compatibly with*' that right, and others prescribed in the HR Act, when applying the law prescribed in the RTI Act and the *Information Privacy Act 2009* (Qld) (**IP Act**).⁷ I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between equivalent pieces of Victorian legislation:⁸ '*it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act.*'⁹

Issue for determination

10. It is apparent from his external review application that the applicant does not seek review of Council's decision to refuse him access to parts of the released documents.
11. Accordingly, the only issue for determination is whether, if they exist, the documents sought by the applicant concerning a particular complaint that he alleges his neighbour made to Council about him would contain prescribed information under section 55 of the RTI Act, thereby permitting a decision to be made to neither confirm nor deny the existence of such documents.

Relevant law

12. Section 55 of the RTI Act is appropriately used where there is something about the way in which, whether by accident or design, an access application is framed which will mean that the agency acknowledging the existence or non-existence of the particular kind of

⁵ Including the external review application and emails received on 29 July 2021, 14 August 2021, 24 August 2021 and 1 September 2021.

⁶ Section 21(2) of the HR Act.

⁷ *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

⁸ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

⁹ *XYZ* at [573].

information requested is liable to cause the detriment that key grounds for refusal prescribed in the RTI Act are intended to avoid.

13. Before applying the exception contained in section 55, a decision-maker must be satisfied that if the requested documents existed, they would contain 'prescribed information'.¹⁰ Prescribed information includes personal information,¹¹ the disclosure of which would, on balance, be contrary to the public interest.¹²
14. Determining this issue essentially requires a decision-maker to conduct a hypothetical public interest balancing exercise, as prescribed in section 49 of the RTI Act,¹³ by identifying public interest factors that would operate to favour disclosure and nondisclosure, and making a judgment as to where the balance of the public interest would lie, were the requested documents to exist.
15. In this case, Council submits that the appropriate response to the relevant part of the applicant's request is a 'neither confirm nor deny' response because, given the way in which the applicant worded the request (by naming his neighbour and seeking access to documents confirming that they had made a complaint to Council about him), confirmation of the existence of responsive documents would confirm the applicant's contentions, and would disclose prescribed information to the applicant: that is, personal information the disclosure of which would, on balance, be contrary to the public interest.
16. On external review, a 'neither confirm nor deny' response presents procedural challenges as the decision-maker is unable to confirm the existence of information. As the Information Commissioner explained in *EST and Department of Family Services and Aboriginal Affairs*:¹⁴

In a review of an ordinary refusal of access decision, the applicant for access is necessarily disadvantaged, in the extent to which meaningful submissions can be made about the exempt status of matter in issue, by a lack of precise knowledge as to the nature of the matter in issue. That disadvantage is exacerbated in a review of a decision to invoke a ... "neither confirm or deny" response. The review must largely proceed in private between the Information Commissioner and the respondent ...

Applicant's submissions

17. During the review, OIC wrote to the applicant on several occasions¹⁵ to express the view that a 'neither confirm nor deny' response was appropriate, given the way in which he had framed his access application.
18. The applicant did not accept OIC's views and sent a number of emails¹⁶ in support of his position.

¹⁰ Defined in schedule 5 to the RTI Act.

¹¹ Personal information comprises 'information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion': section 12 of the *Information Privacy Act 2009* (Qld).

¹² 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, although there are some recognised public interest considerations that may apply for the benefit of an individual: Chris Wheeler, 'The Public Interest: We Know It's Important, But Do We Know What It Means' (2006) 48 AIAL Forum 12, 14.

¹³ In summary terms, section 49 of the RTI Act requires a decision maker to identify any irrelevant factors and disregard them; identify relevant public interest factors favouring disclosure and nondisclosure of subject information; balance relevant factors favouring disclosure and nondisclosure; and decide whether disclosure of subject information would, on balance, be contrary to the public interest. I have taken no irrelevant factors into account.

¹⁴ (1995) 2 QAR 645 at [20].

¹⁵ Letter dated 22 July 2021, and emails on 16 August 2021 and 30 August 2021.

¹⁶ On 29 July 2021, 14 August 2021, 1 September 2021 and 4 October 2021.

19. In summary, the applicant contends that he knows that his neighbour made the complaint about him because he says his manager at Council told him about the complaint. The applicant therefore argues that a neither confirm nor deny response is not appropriate in these circumstances because he knows that responsive documents must exist. He submits that he requires access to these documents to support his application to obtain a Peace and Good Behaviour Order against his neighbour:¹⁷

I am requesting a [sic] external review and do not understand why this process is being so complicated. How can you say you can not confirm or deny the information exists when my depot Manger [name deleted] said it did. He requested to see me and informed me that my neighbour had said I had verbally abused him while wearing my council uniform. I believe he made the complaint between the 28th April and the 14th of May.

I know who made the complaint because he has made many malicious false complaints to council and the police in the past about me. I get on with everyone in the neighbourhood except him and his wife. I have never spoken to them in my life I just ignore them. He makes these complaints because he doesn't like me parking my car outside his place and I refuse to be bullied by him.

I have worked for council for over thirteen years and am a loyal and honest hard working person, This person [name deleted] is trying to destroy my name and standing in the community and I have the right to defend myself from this person's false complaints. I am currently in the process of doing a 'Peace and Good Behaviour Order' against this person and this information would be greatly beneficial to add to the other false complaints and things he has done to me and my property. The other false complaints he has made to council have not been as personal as this because this one intruded on my employment and caused unwarranted stress in my life.

If you refuse to give me the compliant [sic] from [name deleted] because there [sic] name is on the document then surly [sic] at the very least you could provide it to me with there [sic] name blanked out.

20. The last paragraph of the applicant's submission evidences a misunderstanding about the purpose of a neither confirm nor deny response. If responsive documents were to exist, and if Council were to give the applicant access to them with the complainant's details redacted, Council would nevertheless be confirming the identity of the complainant to the applicant because of the way in which the applicant worded his access request.

Application of the public interest balancing test

21. In order for section 55 of the RTI Act to apply, I must be satisfied, on the face of the applicant's access application, that the requested information would, if it exists, contain personal information the disclosure of which would, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act.
22. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision maker must:¹⁸
- identify factors irrelevant to the public interest and disregard them
 - identify factors in favour of disclosure of information
 - identify factors in favour of nondisclosure of information; and
 - decide whether, on balance, disclosure of the information would be contrary to the public interest.

¹⁷ Email of 29 July 2021.

¹⁸ Section 49(3) of the RTI Act.

Findings

Irrelevant public interest factors

23. I have not taken any irrelevant factors into account in reaching my decision.

Public interest factors favouring disclosure

24. I have considered the application of the following disclosure factors to the requested information were it to exist:

- access by the applicant to his own personal information;¹⁹ and
- disclosure could reasonably be expected to contribute to the administration of justice for a person.²⁰

25. It is reasonable to assume that responsive documents would refer to the applicant as the subject of the complaint and therefore contain his personal information. I recognise a strong public interest in persons accessing their own personal information as held by government agencies.

26. The applicant has submitted that he requires access to the information to assist him to obtain a Peace and Good Behaviour Order against his neighbour. In his most recent email,²¹ he stated that the hearing of this matter has been adjourned '*while we await this information as will [sic] as other information from the defendant.*'

27. If the requested information were to exist, and applying the principles set out in *Willsford and Brisbane City Council*,²² I would afford the administration of justice factor moderate weight in balancing the public interest in view of the fact that the hearing of the applicant's application for a Peace and Good Behaviour Order has already commenced.

28. Having considered the remaining factors set out in schedule 4, part 2 of the RTI Act, I have not identified any further relevant factors in favour of disclosure.

Public interest factors favouring nondisclosure

29. I have considered the application of the following nondisclosure factors to the requested documents were they to exist:

- disclosure of the personal information of another person
- prejudice to the protection of that person's right to privacy
- prejudice to the flow of information to a regulatory authority; and
- prejudice to an agency's ability to obtain confidential information.

30. Where disclosure of information would disclose the personal information of another person, a public interest harm automatically arises. Schedule 4, part 4, section 6 of the RTI Act provides that disclosure of information could reasonably be expected to cause a public interest harm if disclosure would disclose personal information of a person, whether living or dead.

¹⁹ Schedule 4, part 2, item 7 of the RTI Act.

²⁰ Schedule 4, part 2, item 17 of the RTI Act.

²¹ Email of 4 October 2021.

²² (1996) 3 QAR 368.

31. In addition, schedule 4, part 3, item 3 recognises an associated factor that favours nondisclosure of personal information of others – where disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy.
32. If the requested information were to exist, it is reasonable to assume that it would contain the complainant's name and other personal information in connection with the making of a complaint to Council. I would afford significant weight to both the personal information harm factor and nondisclosure factor in recognition of the strong public interest in protecting the personal information and right to privacy of members of the community who seek to provide complaint information to government agencies to assist them to exercise their functions.
33. I would also afford significant weight to both the public interest in protecting the flow to Council of information that assists it to discharge its regulatory functions,²³ and the public interest in protecting Council's ability to obtain confidential information.²⁴
34. Regulatory agencies such as Council rely upon information provided by members of the community which enables and assists it to administer and enforce its local laws. I am satisfied that routinely disclosing the type of complaint information to which the applicant seeks access would, if it exists, tend to discourage individuals from coming forward with information and cooperating with Council, as they may consider that their identity and other personal information could be released to other individuals, including to the person who is the subject of the complaint.²⁵ This, in turn, could reasonably be expected to negatively impact Council's ability to obtain this type of information in future. Complainants reasonably expect that complaint information they provide to an agency to assist it to discharge its functions will be held in confidence unless and until it becomes necessary to disclose it for the purposes of an investigation.

Balancing the public interest

35. After weighing the public interest factors favouring disclosure and nondisclosure, I find that those favouring nondisclosure outweigh those favouring disclosure such that disclosure of the information that the applicant seeks, were it to exist, would, on balance, be contrary to the public interest.

DECISION

36. I affirm Council's decision, made under section 55 of the RTI Act, to neither confirm nor deny the existence of the documents requested by the applicant. I am satisfied that, if the requested documents were to exist in Council's possession or under its control, they would contain 'prescribed information', that is, personal information the disclosure of which would, on balance, be contrary to the public interest, under section 47(3)(b) and section 49 of the RTI Act.

²³ Schedule 4, part 3, item 13 of the RTI Act.

²⁴ Schedule 4, part 3, item 16 of the RTI Act.

²⁵ See *Suskova and Council of the City of Gold Coast* [2015] QICmr 31 (27 November 2015).

37. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

K Shepherd
A/Right to Information Commissioner

Date: 13 October 2021

APPENDIX

Significant procedural steps

Date	Event
6 July 2021	OIC received the applicant's application for external review. OIC requested preliminary information from Council.
13 July 2021	OIC received the requested information from Council.
22 July 2021	OIC advised the applicant and Council that the application for external review had been accepted. OIC conveyed a preliminary view to the applicant.
29 July 2021	OIC received submissions from the applicant.
14 August 2021	OIC received submissions from the applicant.
16 August 2021	OIC conveyed a further preliminary view to the applicant.
24 August 2021	OIC received submissions from the applicant.
30 August 2021	OIC conveyed a further preliminary view to the applicant.
1 September 2021	OIC received submissions from the applicant.
28 September 2021	OIC requested confirmation of whether the applicant required a formal decision to finalise the review.
4 October 2021	OIC received submissions from the applicant.