



Decision and Reasons for Decision

Citation: *F66 and Brisbane City Council [2021] QICmr 53 (20 October 2021)*

Application Number: 315939

Applicant: F66

Respondent: Brisbane City Council

Decision Date: 20 October 2021

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST INFORMATION - personal information of other individuals - personal information and privacy - whether disclosure of information would, on balance, be contrary to the public interest - section 67(1) of the *Information Privacy Act 2009 (Qld)* and sections 47(3)(b) and 49 of the *Right to Information Act 2009 (Qld)*

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - applicant submits agency did not locate all relevant documents - whether agency has conducted all reasonable searches - whether access to further documents may be refused on the basis they are nonexistent or unlocatable - section 67(1) of the *Information Privacy Act 2009 (Qld)* and sections 47(3)(e) and 52(1) of the *Right to Information Act 2009 (Qld)*

REASONS FOR DECISION

Summary

1. The applicant applied¹ to Brisbane City Council (**Council**) under the *Information Privacy Act 2009 (Qld)* (**IP Act**) for access to documents in the following terms:

*Under the relevant Information Privacy Act (IP) and/or Right to Information Act (RTI), I hereby formally request access to **any and all information, in any format, including, but not limited to** - written correspondence/ notes / documentation/ emails / letters, verbal/ recorded/ taped communications, phone calls/notes, photos, manager's notes, certificates, statements and/or reports, paysheets, training/certification information and meeting notes on or about me, ... , held within/by Brisbane City Council for dates [1 June 2013](#) to [31 December 2013](#) (inclusive).*

¹ On 4 November 2020.

...
Such information does not necessarily need to be in, or mention, my actual name, but may merely refer to me....

[Applicant's emphasis]

2. The applicant identified nine areas of Council that he considered would likely hold documents about him, but went on to state that he requested a '*general broad search*' of Council '*outside of just the above*'.
3. Council located 320 responsive pages and released 244 pages in full, and 76 pages in part. Council decided² to refuse access to some information on the grounds that it comprised the personal information of persons other than the applicant, and its disclosure would, on balance, be contrary to the public interest.
4. The applicant applied for internal review of Council's decision to refuse access to information, and also raised a sufficiency of search issue about missing documents.³ On internal review, Council varied its initial decision and gave the applicant access to an additional 36 pages in full, but refused access to the remaining information on the grounds that its disclosure would, on balance, be contrary to the public interest.⁴ It also decided that, given the searches and inquiries that Council had conducted for responsive documents, the documents identified by the applicant as missing could reasonably be regarded as unlocatable or no longer in existence.
5. The applicant then applied⁵ to the Office of the Information Commissioner (**OIC**) for external review.
6. For the reasons set out below, I affirm Council's internal review decision.

Background

7. This is another in a series of access applications that the applicant has made to Council seeking access to his personal information held by Council across various timeframes. The applicant was employed by Council between 2013 and 2020.

Reviewable decision

8. The decision under review is Council's internal review decision dated 17 February 2021.

Evidence considered

9. Significant procedural steps relating to the external review are set out in the Appendix.
10. 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.⁶
11. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.⁷ I consider a decision-maker will be '*respecting and acting compatibly with*' that right and others prescribed in the HR Act, when applying

² Decision dated 9 December 2020.

³ On 25 January 2021.

⁴ Decision notice issued on 17 February 2021.

⁵ On 12 March 2021.

⁶ Including the external review application and emails received on 14 June 2021 and 13 August 2021.

⁷ Section 21 of the HR Act.

the law prescribed in the IP Act and the *Right to Information Act 2009* (Qld) (**RTI Act**).⁸ 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:⁹ *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.*¹⁰

Information in issue

12. The information in issue (hereinafter referred to as **Third Party Information**) comprises information about other persons, including their email addresses, signatures, employee and payroll numbers, sharefile reference numbers and mobile telephone numbers etc. This information is contained in general Council emails covering a variety of topics, including enterprise bargaining, payroll, information technology etc, as well as in a number of responsive documents located within Council's Urban Amenities division relating to the applicant's employment registration.

Issues for determination

13. The issues for determination are:
 - whether access to the Third Party Information may be refused because disclosure would, on balance, be contrary to the public interest;
 - whether Council has taken all reasonable steps to locate responsive documents; and
 - whether access to documents may be refused because they are nonexistent or unlocatable.
14. I note that these issues are the same as, or similar to, issues arising in various of the other applications that the applicant has made to OIC for external review of Council's decisions. These issues were discussed in detail in OIC's decisions in *P83 and Brisbane City Council*¹¹ and *P90 and Brisbane City Council*.¹² However, despite the findings in those decisions, the applicant has continued to agitate the same or similar issues in subsequent reviews, including raising issues and complaints about Council which OIC has no jurisdiction to investigate or otherwise deal with under the IP Act.

Matters outside OIC's jurisdiction

15. Throughout the review, the applicant (through his agent) raised complaints and procedural issues about Council generally, and about Council's processing of the access application. These ranged from complaints about alleged inconsistencies in Council's handling of information, to complaints about the inconsistent use of headers, footers and watermarks on Council's documents.¹³ The applicant also complained about the manner in which Council had released documents to him.
16. As noted above, the applicant has been advised both in this review,¹⁴ and in other of his external review applications, of the limits of OIC's jurisdiction regarding complaints made

⁸ *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].

⁹ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹⁰ *XYZ* at [573].

¹¹ [2020] QICmr 55 (25 September 2020).

¹² [2021] QICmr 23 (27 May 2021) (**P90**).

¹³ Emails from the applicant's agent on 12 March 2021, 20 June 2021 and 13 August 2021.

¹⁴ For example, in this review, the applicant received an information sheet on 8 April 2021, which outlined OIC's jurisdiction and explained what OIC can and cannot consider on external review. The information specifically confirms that OIC cannot investigate complaints about an agency's recordkeeping practices.

about Council, as well as the fact that any procedural errors that an agency may have made when processing an access application are irrelevant on external review because OIC conducts a merits review of the agency decision. Despite this, the applicant has continued to make submissions and complaints about irrelevant matters, or about matters falling outside OIC's jurisdiction.¹⁵

17. OIC's role under the IP Act in this review is to consider the information to which Council has refused access and decide whether that refusal of access was correct, as well as to consider the sufficiency of search issue raised by the applicant. To the extent that the applicant has made submissions relevant to these issues, I have taken them into account in making my decision.

Contrary to the public interest information

Relevant law

18. Under the IP Act, a person has a right to be given access to documents of an agency.¹⁶ However, this right is subject to provisions of the IP Act and RTI Act including the grounds on which an agency may refuse access to documents.¹⁷ An agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.¹⁸
19. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision maker must:¹⁹
- 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.
20. Schedule 4 of the RTI Act contains non-exhaustive lists of factors that may be relevant in determining where the balance of public interest lies in a particular case. I have considered these lists,²⁰ together with all other relevant information, in reaching my decision. I have kept in mind the IP Act's pro-disclosure bias²¹ and Parliament's requirement that grounds for refusing access to information be interpreted narrowly.²²

Third Party Information

21. I have reviewed the Third Party Information.²³ I consider there is little to no public interest favouring disclosure of this personal information of other persons, beyond the general

¹⁵ The bulk of the submissions made by the applicant's agent in the email of 13 August 2021 are irrelevant to the issues for determination in this review and complain about matters over which OIC has no jurisdiction.

¹⁶ Section 40 of the IP Act.

¹⁷ Section 67(1) of the IP Act provides that an agency may refuse access to a document in the same way and to the same extent it could refuse access to the document under section 47 of the RTI Act were the document to be the subject of an access application under the RTI Act.

¹⁸ Section 67(1) of the IP Act and section 47(3)(b) and 49 of the RTI Act. The term public interest refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that, in general, a public interest consideration is one which is common to all members of, or a substantial segment of the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.

¹⁹ Section 49(3) of the RTI Act.

²⁰ I have considered each of the public interest factors outlined in schedule 4 of the RTI Act, and any relevant factors are discussed below (in relation to each category of documents).

²¹ Section 64 of the IP Act.

²² Section 67(2) of the IP Act and section 47(2) of the RTI Act. In deciding whether disclosure of the information in issue would, on balance, be contrary to the public interest, I have taken no irrelevant factors into account in making my decision.

²³ Emails – pages 2, 10, 19, 27, 30, 35, 37, 48, 51, 62, 74, 77, 90, 92, 93, 96, 103, 105, 121, 128, 132, 143, 145, 153, 158, 164, 167, 180, 183, 192, 195, 205, 207, 220, 225, 233, 239, 243, 247-249, 259, 277, 291; Urban Amenities documents – pages 2-4, 6-10.

public interest in accessing information held by government. The applicant has not identified any specific factors favouring disclosure in his submissions.

22. In contrast, I would afford moderate to significant weight to the public interest nondisclosure and harm factors that seek to protect the personal information and privacy of other individuals.²⁴
23. I acknowledge the applicant's submissions (made in this and in other reviews)²⁵ that mobile numbers and signatures of Council officers have previously been released to him, and that redaction of this type of information has been applied inconsistently by Council across a number of his access applications. I also acknowledge the applicant's submissions that, as he considers mobile numbers to be Council information, it would not be contrary to the public interest to disclose them. However, these submissions do not raise relevant factors in favour of disclosure under the IP Act aside from (as acknowledged above) the general public interest in facilitating access to government-held information.
24. In contrast, release of this information would disclose personal information of other persons. In terms of mobile telephone numbers, the Information Commissioner has previously held that *'a mobile phone number is different to other contact details (such as email addresses or office phone numbers) in that it allows an individual to be contacted directly and potentially outside of working hours...[and] permits potential contact with an employee when off duty and/or engaged in private activity, which gives rise to a reasonable expectation of intrusion into the officer's private life or 'personal sphere'.*²⁶
25. As regards the weight to be attributed to the nondisclosure and harm factors concerning personal information and privacy, I accept that, where an applicant has had previous access to the same information, this may reduce the weight to be afforded to these factors. The applicant has submitted that he had access to the mobile numbers of other Council officers when he was employed by Council. However, he is no longer employed by Council and there is nothing before me to suggest that he currently has authorised and ongoing access to this information. He has also submitted that inconsistent redactions applied by Council across his access applications have resulted in the disclosure of this type of information to him on occasions. However, such disclosure is inadvertent and occurs through administrative oversight and cannot be used as a justification to require further disclosure of the same personal information. I am not satisfied that either of these circumstances of disclosure operate to lessen, to any substantial degree, the moderate to significant weight that I attribute to the personal information nondisclosure and harm factors.

Finding

26. After balancing the public interest factors favouring disclosure and nondisclosure of the Third Party Information, I find that the factors favouring nondisclosure outweigh the general public interest in accessing information held by government, such that disclosure would, on balance, be contrary to the public interest and access may be refused.

²⁴ Schedule 4, part 3, item 3 and schedule 4, part 4, section 6 of the RTI Act.

²⁵ Email of 13 August 2021. See also the discussion about disclosure of mobile telephone numbers in *P90*.

²⁶ *Smith and Sunshine Coast Regional Council; Diamond Energy Pty Ltd (Third Party)* [2017] QICmr 42 (5 September 2017) at [16]. See also *Underwood and Minister for Housing and Public Works* [2015] QICmr 27 (29 September 2015) at [66] to [68].

Sufficiency of search

Relevant law

27. The IP Act provides citizens with a right to be given access to documents of an agency, to the extent they contain the individual's personal information.²⁷ This right is subject to certain limitations including grounds for refusal of access.²⁸ One such ground is where the requested information is nonexistent or unlocatable.²⁹
28. A document will be *nonexistent* if there are reasonable grounds to be satisfied it does not exist.³⁰ To be satisfied that a document does not exist, the Information Commissioner has previously had regard to various key factors including the agency's record keeping practices and procedures (including, but not limited to, its information management approaches).³¹ By considering the relevant factors, the decision maker may conclude that a particular document was not created because, for example, the agency's processes do not involve creating that specific document. In such instances, it is not necessary for the agency to search for the document. Rather, it is sufficient that the relevant circumstances to account for the nonexistent document are adequately explained by the agency.
29. The Information Commissioner may also take into account the searches and inquiries conducted by an agency, in determining whether a document is nonexistent. The key question then is whether those searches and inquiries amount to '*all reasonable steps*'.³² What constitutes reasonable steps will vary from case to case as the search and inquiry process an agency will be required to undertake will depend on which of the key factors are most relevant in the particular circumstances. Such steps may include inquiries and searches of all relevant locations identified after consideration of relevant key factors.³³
30. A document is *unlocatable* if it has been or should be in the agency's possession and all reasonable steps have been taken to find it, but it cannot be found. In determining whether a document is unlocatable, it is necessary to consider the specific circumstances of each case,³⁴ and in particular whether:
- there are reasonable grounds for the agency to be satisfied that the requested documents have been or should be in the agency's possession; and
 - the agency has taken all reasonable steps to find the document.³⁵
31. The agency that made the decision under review has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant.³⁶ Where the issue of missing documents is raised on external review, the agency must demonstrate that reasonable steps have been taken to identify

²⁷ Section 40 of the IP Act.

²⁸ Section 67(1) of the IP Act states that an agency may refuse access to a document of an agency in the same way and to the same extent the agency could refuse access to the document under section 47 of the RTI Act, were the document to be the subject of an access application under the RTI Act.

²⁹ Sections 47(3)(e) and 52(1) of the RTI Act.

³⁰ Section 52(1)(a) of the RTI Act. For example, a document has never been created.

³¹ *Isles and Queensland Police Service* [2018] QICmr 27 (7 June 2018) at [15] which adopted the Information Commissioner's comments in *PDE and University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*) at [37]-[38]. *PDE* addresses the application of section 28A of the now repealed FOI Act. Section 52 of the RTI Act is drafted in substantially the same terms as the provision considered in *PDE* and, therefore, the Information Commissioner's findings in *PDE* are relevant.

³² As set out in *PDE* at [49]. See also section 137(2) of the IP Act.

³³ As set out in *PDE* at [38].

³⁴ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at [21]. See also, *F60XCX and Office of the Queensland Parliamentary Counsel* [2016] QICmr 42 (13 October 2016) at [84] and [87], and *Underwood and Minister for Housing and Public Works* [2015] QICmr 27 (29 September 2015) at [33]-[34] and [49].

³⁵ Section 52(1)(b) of the RTI Act.

³⁶ Section 100(1) of the IP Act.

and locate relevant documents.³⁷ If the applicant maintains further documents exist, the applicant bears a practical onus of demonstrating that the agency has not discharged its obligation. Suspicion and mere assertion will not satisfy this onus.³⁸

Submissions of the applicant

32. The applicant first raised a sufficiency of search issue in his application for internal review. He contended that certain documents that responded to the terms of his access application, and that Council should have in its possession, had not been located and dealt with by Council in its decision. These missing documents comprised:
- the applicant's work rosters for the relevant period
 - a summary of his employment conditions
 - a welcome letter from the Lord Mayor and CEO that the applicant stated he had received when he commenced employment with Council; and
 - a Role Statement that the applicant stated he had signed on 17 June 2013.
33. Later in the review,³⁹ the applicant also queried whether Council had conducted a *SourceOne*⁴⁰ search for responsive emails.

Submissions of Council

34. In its internal review decision, Council stated:

Having considered the significant search requests made and the responses provided, I am satisfied that all reasonable steps have been taken to locate the documents sought. Those steps included the original decision-maker making enquiries and undertaking wide ranging searches of relevant and appropriate locations including:

- *conducting searches of Council's electronic record management and archival email systems using appropriate search terms*
- *identifying relevant Council work areas and employees likely to hold documents and conducting searches of those areas and with those officers of their records; and*
- *interrogating Council's recordkeeping and retention practices as they relate to the types of documents sought by the applicant.*

I am further satisfied that the specific documents identified by you in your internal review submission as missing may reasonably be considered to be un-locatable or no longer in existence.

35. On external review, Council confirmed⁴¹ that it had conducted a *SourceOne* search when processing the access application that had resulted in identifying 308 responsive pages.⁴²
36. Council also confirmed that targeted search requests for responsive documents had been sent to the following divisions of Council:
- Urban Amenity Branch, Field Services Group
 - Payroll and Employee Services
 - Human Resources

³⁷ Section 137(2) of the IP Act.

³⁸ *Dubois and Rockhampton Regional Council* [2017] QICmr 49 (6 October 2017) at [36].

³⁹ On 13 August 2021.

⁴⁰ This is a search tool used to search Council's email system using specified search terms/parameters. Council initially referred to the tool as *eDiscovery*, however, it later clarified that its correct title is *SourceOne*.

⁴¹ Email of 11 October 2021.

⁴² See footnote 23 which lists those of the responsive emails that contain information in issue.

- Asset Management Branch
- Corporate Security
- City WorkCover
- Ethical Standards Unit
- Chief Executive Officer's Office
- Library Services; and
- City Legal.

Finding

37. I accept that it is reasonable to expect that the documents that the applicant identified as missing should be in Council's possession.
38. However, having regard to the searches and inquiries conducted by Council, and the nature and age of the documents that the applicant contends are missing, I am unable to identify any further searches or inquiries that I consider it would be reasonable to ask Council to undertake in an effort to locate these documents. Council has conducted targeted and broad ranging searches of all locations which, in its experience of its relevant record keeping processes, it considers reasonable. I am unable to identify any further locations that Council could reasonably be asked to search. I note that the applicant has not identified any such further searches or inquiries in his submissions, aside from *SourceOne*, which Council has confirmed that it has searched.
39. Given the nature of the documents, it is reasonable to expect that they would be held either by Council's Human Resources division, or, in respect of work rosters, by his work unit. Given that Council has advised that searches of both of those areas of Council were conducted, as well as searches of Council's electronic records (including email accounts) generally, I am satisfied that Council has taken all reasonable steps to locate the missing documents, and that they can therefore reasonably be regarded as unlocatable under section 52(1)(b) of the RTI Act.

DECISION

40. For the reasons explained, I affirm the decision under review by finding that:
- access to the Third Party Information may be refused under section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act because its disclosure would, on balance, be contrary to the public interest; and
 - access to the missing documents may be refused under section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(b) of the RTI Act because all reasonable steps have been taken by Council to find the documents but they cannot be located.
41. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

S Martin
Assistant Information Commissioner
Date: 20 October 2021

APPENDIX

Significant procedural steps

Date	Event
12 March 2021	<p>OIC received the application for external review.</p> <p>OIC requested preliminary documents and information from Council.</p>
15 March 2021	<p>OIC received the requested documents and information from Council.</p>
8 April 2021	<p>OIC notified the applicant and Council that the external review had been accepted.</p> <p>OIC requested copies of the documents in issue from Council.</p>
12 April 2021	<p>OIC received the requested documents from Council.</p>
27 May 2021	<p>OIC conveyed a preliminary view to the applicant.</p>
14 June 2021	<p>OIC received submissions from the applicant; a request for a formal decision; and a request that each current review involving the applicant be dealt with separately.</p>
20 June 2021	<p>OIC received an email from the applicant indicating that he would provide a response to OIC's preliminary view by 13 August 2021.</p>
21 June 2021	<p>OIC re-issued its preliminary view to the applicant and confirmed the timetable for submissions.</p>
13 August 2021	<p>OIC received the applicant's submissions.</p>
20 August 2021	<p>OIC requested further search information from Council.</p>
7 and 27 September 2021, and 7 October 2021	<p>OIC contacted Council requesting its response to OIC's search request sent on 20 August 2021.</p>
11 October 2021	<p>Council provided the requested information.</p>