



Decision and Reasons for Decision

Citation:	<i>W41 and Logan City Council [2021] QICmr 56 (28 October 2021)</i>
Application Number:	315787
Applicant:	W41
Respondent:	Logan City Council
Decision Date:	28 October 2021
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL TO DEAL WITH APPLICATION - SUBSTANTIAL AND UNREASONABLE DIVERSION OF RESOURCES - request for information relating to the applicant and the applicant's property - whether dealing with the application would substantially and unreasonably divert the agency resources from their use in performing its functions - sections 41 and 42 of the <i>Right to Information Act 2009 (Qld)</i>

REASONS FOR DECISION

Summary

1. The applicant applied¹ to Logan City Council (**Council**) under the *Right to Information Act 2009 (Qld)* (**RTI Act**) for access to various documents about himself and his property.
2. Council decided² to refuse to deal with the access application on the basis that dealing with it would substantially and unreasonably divert the resources of Council from their use in the performance of its functions.
3. The applicant applied³ to the Office of the Information Commissioner (**OIC**) for external review of Council's decision refusing to deal with the access application.
4. For the reasons set out below, I affirm Council's decision refusing to deal with the access application on the basis that to do so would result in a substantial and unreasonable diversion of resources.

¹ Access application dated 12 November 2020.

² Decision dated 14 December 2020.

³ External review application dated 14 December 2020.

Reviewable decision

5. The decision under review is Council's decision dated 14 December 2020.

Background

6. The **Original Scope** of the applicant's access application sought:

1. *Documents that contain my personal information ... and that were created or assessed by [a named Council officer] from 1 August 2020 until current date 20 November 2020.*
2. *Documents created, sent or received by [seven named Council officers] between 1 January 2018 through to current date 20 November 2020 regarding [the applicant] and [the applicant's property].*
3. *Internal and External reports that contain my personal information ... or relate to [the applicant's property] held by Development Assessment, Organisational Services Directorate, People & Culture between 1 January 2018 through to current date 20 November 2020.*
4. *All customer Requests that relate to [the applicant's property] from 1 June 2015 - 12 November 2020.*
5. *Emails, reports, text messages, meeting requests, Microsoft team information and discussions.*

7. Council notified⁴ the applicant (**Notice**) that Council intended to refuse to deal with the Original Scope of the access application under section 41 of the RTI Act and invited the applicant to consult with Council with a view to making the application in a form that would remove this ground as a basis for refusing to deal with the application.

8. In response to the Notice, the applicant and Council engaged in emailed communications regarding the scope of the application,⁵ which is described as follows by Council's decision-maker:⁶

During the consultation period I note the following;

1. *In a series of consecutive emails sent to me on 4 December 2020, you confirm that you will reduce the officers named in the application to [two named Council officers] and to exclude duplicates. However, in another email later that day at 2:56pm, you stated:*

"I don't wish to name fewer officers in my request. I am simply trying to reduce your workload as per your request."

It is therefore unclear whether you are agreeing to reduce the officers named or whether you are still at the stage of making suggestions.
2. *By email on 7 December 2020, you decline my suggestion to reduce the class of documents to those where [the applicant] or the ... property are the subject.*
3. *By email on 10 December 2020 at 4:18pm, you state that "I have reduced the scope of my request substantially...". Such a comment would tend to confirm that you have agreed to reduce the officers named to the two noted above.*
4. *Your email of 10 December 2020 at 4:18pm requests I make an assessment of your access application and to make a final decision given you requested the details for external review.*

⁴ By letter dated 4 December 2020.

⁵ Various emails between Council and the applicant dated between 4 December 2020 and 12 December 2020.

⁶ At pages 1-2 of Council's decision.

5. *On 11 December 2020, I provided to you an opportunity to confirm the scope of your access application, I have not received such confirmation from you. In your reply dated 12 December 2020, I note you are requesting assistance and concurrently for me to make a final decision.*
 6. *I am no clearer on the scope of your access application and on balance consider you have engaged in consultation and make your access application with the amendment to reduce the application to the two officers noted above.*
 7. *My obligations as the delegated decision-maker under the RTI Act are not to persuade you to amend the scope of your application or to amend the scope on your behalf. Rather, I am required to consult with you for the purpose of assisting you to make an application in a form that would remove the grounds for refusal.*
9. As a result of these emailed communications, Council understood⁷ that the applicant had narrowed the scope of the access application to:
1. *Documents created, sent or received by [two named Council officers] between 1 January 2018 through to current date 20 November 2020 regarding [the applicant] and [the applicant's property].*
 2. *Internal and External reports that contain [the applicant's] personal information ... or relate to [the applicant's property] held by Development Assessment, Organisational Services Directorate, People & Culture between 1 January 2018 through to current date 20 November 2020.*
 3. *All customer Requests that relate to [the applicant's property] from 1 June 2015 - 12 November 2020.*
 4. *Emails, reports, text messages, meeting requests, Microsoft team information and discussions.*
 5. *Excluding duplicates (**Narrowed Scope**)*
10. Nevertheless, Council decided to refuse to deal with the Narrowed Scope on the basis that to do so would result in a substantial and unreasonable diversion of resources.
11. On external review, a preliminary view was conveyed to the applicant that Council was entitled to refuse to deal with the Narrowed Scope on the basis that dealing with it would substantially and unreasonably divert Council's resources from their use in its functions.⁸
12. In response, the applicant proposed to further narrow the scope of the application to:⁹
- Documents that contain [the applicant's] personal information ... that were created or assessed by [two names Council officers] from 1 June 2020 until 20 June 2021. This will include all related emails excluding duplicates. (**Further Narrowed Scope**)*
13. In an attempt to informally resolve the external review,¹⁰ Council was asked¹¹ to advise whether it agreed to process the Further Narrowed Scope. In response, Council submitted¹² that processing the Further Narrowed Scope¹³ would still be a substantial and unreasonable diversion of Council's resources.

⁷ As set out in Council's decision.

⁸ Letter dated 15 June 2021.

⁹ Submission to OIC dated 29 June 2021.

¹⁰ Under section 90(1) of the RTI Act, the Information Commissioner must identify opportunities and processes for early resolution of the external review application and promote settlement of the external review application.

¹¹ Letter dated 6 July 2021.

¹² Submission to OIC dated 21 July 2021.

¹³ Council also submitted that as the access application was made valid on 20 November 2020, the Further Narrowed Application should be for the period 1 June 2020 until 20 November 2020.

Evidence considered

14. Significant procedural steps relating to the external review are set out in the Appendix.
15. Evidence, submissions, legislation and other material I have considered in reaching this decision are set out in these reasons (including footnotes and Appendix).
16. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.¹⁴ 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.¹⁵ I have acted in this way in making this decision.¹⁶ I also note the observations made by Bell J on the interaction between equivalent pieces of Victorian legislation:¹⁷ '*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*'.¹⁸

Issue for determination

17. The issue for determination is whether Council was entitled to refuse to deal with the Narrowed Scope of the access application under section 41 of the RTI Act.

Relevant law

18. Parliament intends that an agency receiving an access application will deal with that application unless dealing with the application would, on balance, be contrary to the public interest.¹⁹ The limited circumstances in which dealing with an access application will be contrary to the public interest are set out in sections 40, 41 and 43 of the RTI Act.
19. Relevantly, section 41 of the RTI Act permits an agency to refuse to deal with an access application if the agency considers the work involved in dealing with the application would, if carried out, *substantially and unreasonably* divert the resources of the agency from their use by the agency in the performance of its functions.²⁰
20. Section 42 of the RTI Act sets out the prerequisites before an agency can refuse to deal with an access application.²¹ I am satisfied that Council complied with those prerequisites.
21. The phrase '*substantially and unreasonably*' is not defined in either the IP Act, the RTI Act or the *Acts Interpretation Act 1954* (Qld) (**AIA**). It is therefore appropriate to consider the ordinary meaning of these words.²² The dictionary definitions²³ of those terms relevantly provide:
 - '*substantial*' means '*of ample or considerable amount, quantity, size, etc*'

¹⁴ Section 21 of the HR Act.

¹⁵ *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].

¹⁶ In accordance with section 58(1) of the HR Act.

¹⁷ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹⁸ *XYZ* at [573].

¹⁹ Section 39 of the RTI Act.

²⁰ Section 41(1) of the RTI Act.

²¹ Section 42(1) provides that an agency must give the applicant written notice; give the applicant a reasonable opportunity to consult with the agency; and, as far as reasonably practicable, give the applicant any information that would help the making of an application in a form that would remove the ground for refusal.

²² Section 14B of the AIA.

²³ Macquarie Dictionary (accessed at www.macquariedictionary.com.au on 28 October 2021).

- ‘unreasonable’ means ‘exceeding the bounds of reason; immoderate; exorbitant’.
22. In relying on this ground, an agency must have regard to the resources that would be used for:²⁴
- identifying, locating or collating the documents
 - making copies, or edited copies of any documents
 - deciding whether to give, refuse or defer access to any documents, including resources that would have to be used in examining and editing documents
 - conducting third party consultations; or
 - notifying any final decision on the application.
23. While each agency's and each application's circumstances will vary, general factors that are relevant when deciding whether the diversion of resources or interference with normal operational functions is unreasonable include:
- the size of the agency²⁵
 - the ordinary allocation of RTI resources
 - the other functions of the agency,²⁶ and
 - whether and to what extent processing the application will take longer than the legislated processing period of 25 business days.
24. In determining whether the work involved in dealing with an application is unreasonable, it is not necessary to show that the extent of the unreasonableness is overwhelming. Rather, it is necessary to weigh up the considerations for and against, and form a balanced judgement of reasonableness, based on objective evidence.²⁷ Factors that have been taken into account in considering this question include:²⁸
- whether the terms of the request offer a sufficiently precise description to permit the agency, as a practical matter, to locate the documents sought
 - the public interest in disclosure of the documents
 - whether the request is a reasonably manageable one, giving due, but not conclusive, regard to the size of the agency and the extent of its resources usually available for dealing with access applications
 - the agency's estimate of the number of documents affected by the request, and by extension the number of pages and the amount of officer time
 - the reasonableness or otherwise of the agency's initial assessment and whether the applicant has taken a cooperative approach in re-scoping the application
 - the timelines binding on the agency
 - the degree of certainty that can be attached to the estimate that is made as to the documents affected and hours to be consumed; and in that regard, importantly whether there is a real possibility that processing time may exceed to some degree the estimate first made; and
 - whether the applicant is a repeat applicant to that agency, and the extent to which the present application may have been adequately met by previous applications.

²⁴ Section 41(2) of the RTI Act.

²⁵ *Middleton and Building Services Authority* (Unreported, Queensland Information Commissioner, 24 December 2010) at [34]-[37].

²⁶ *60CDYY and Department of Education and Training* [2017] QICmr 52A (7 November 2017) at [18].

²⁷ *ROM212 and Queensland Fire and Emergency Services* [2016] QICmr 35 (9 September 2016) at [42] and *F60XCX and Department of the Premier and Cabinet* [2016] QICmr 41 (13 October 2016) at [90], adopting *Smeaton v Victorian WorkCover Authority (General)* [2012] VCAT 1550 (**Smeaton**) at [30].

²⁸ *Smeaton* at [39].

Findings

What work would be required in dealing with the access application?

25. Council's Notice stated that initial searches for documents responding to the Original Scope had located more than 646 emails (excluding attachments) and that the time taken up to that date was more than 14 hours. Based on this, Council estimated that *'the time to process the remainder of [the] request [was] not achievable given Council's ordinary allocation of RTI resources ... when taking into consideration the statutory timeframe for making a decision'* and *'concluded that processing [the] RTI Application would substantially and unreasonably divert the resources of'* Council.
26. In its decision to the applicant that processing the Narrowed Scope would substantially and unreasonably divert Council's resources, Council stated:²⁹

In forming this view, I have had regard to the resources that would need to be applied in undertaking the following actions in dealing with the [Narrowed Scope] being:

- 1. Identifying, locating and collating any documents held by Council that are responsive to the Amended Application;*
- 2. Examining any document;*
- 3. Consulting with a third party under section 37 of the RTI Act;*
- 4. Making or editing a copy of any document; and*
- 5. Notifying you of the final decision on the Amended Application by preparing a decision notice under section 54 of the RTI Act.*

Further to the above, I have also had regard to the matters set out below in forming my view that dealing with the [Narrowed Scope] would substantially and unreasonably divert the resources of Council as follows:

- 1. Despite consultation (the process under section 42 of the RTI Act) being undertaken during the Consultation Period, the [Narrowed Scope] still gives rise to a large volume of responsive documents as the consultations have been unable to narrow the scope of the Application and prevent the triggering of section 41 of the RTI Act.*
- 2. Throughout the period of consultation recorded above, I have provided you with recommendations and options that if adopted, would be likely, in my view, to narrow the scope of the RTI Application.*
- 3. While you have adopted some of these recommendations and options, you have not adopted others. The result of these approaches has been that there has not been a material reduction in the volume of documents responsive to the [Narrowed Scope].*
- 4. Given the likely sensitive nature of a number of the documents falling within the current [Narrowed Scope], I anticipate that the process of collating and, if necessary, applying exemptions and/or redacting the documents would be a labour and time intensive process.*

Accordingly, I have formed the view that the work involved in dealing with your [Narrowed Scope] would, if carried out, substantially and unreasonably divert the resources of Council from the performance of Council's functions within the meaning of section 41 of the RTI Act.

²⁹ Page 3 of the decision.

27. During the external review, a preliminary view was conveyed to Council³⁰ that Council had not at that time established that a decision refusing to deal with the Narrowed Scope under section 41 of the RTI Act was justified or that the Information Commissioner should give a decision adverse to the applicant.³¹
28. In response,³² Council maintained its position that processing the Narrowed Scope would substantially and unreasonably divert Council resources and explained that:
- searches would need to be conducted within eDiscovery 365 Platform (**eDiscovery**), Council's Document Management System and Pathway
 - a search of eDiscovery which was limited to the two named Council officers, confined to the time period of 1 January 2018 to 20 November 2020 and using appropriate search terms³³ located 7987 documents
 - a search of Council's Document Management System, also limited to the two named Council officers, confined to the time period of 1 January 2018 to 20 November 2020, along with a supplementary search of the Development Assessment, Organisation Services Directorate, People & Culture Branch for internal and external reports that contained the applicant's personal information confined to the time period of 1 January 2018 to 20 November 2020, located 1037 documents;³⁴ and
 - a search of Pathway limited to the specified property identified 3 customer requests.
29. After locating all relevant documents, Council submitted that Council's decision-maker processing the narrowed application would then need to assess the located information to determine whether any grounds for refusal apply;³⁵ conduct consultations; redact documents; and prepare a written decision.
30. In conclusion, Council estimated that it would take approximately 452 hours to determine whether any grounds for refusal apply to the already located 9027 documents³⁶ plus an additional 15 hours to conduct third party consultation with an anticipated five third parties.³⁷ This equates to a decision-maker working continuously and solely on this matter for about 58 business days, or almost 12 weeks.³⁸
31. I consider Council's estimate to be reasonable, particularly given that this estimate does not include the time required to:
- conduct additional searches/enquiries to ensure that all information relevant to the Narrowed Scope is located
 - complete its assessment of any additional relevant information that is located by these further searches/enquiries; and
 - conduct any additional required third party consultations.

³⁰ Letter to Council dated 6 May 2021.

³¹ Section 87(2) of the RTI Act.

³² Submission to OIC dated 20 May 2021.

³³ Search terms used included the applicant's first name and surname, the applicant's property street number and name and relevant reference numbers.

³⁴ Locations where these documents were located, and the number of documents for each location, is set out at page 2 of Council's submission to OIC dated 20 May 2021.

³⁵ Grounds for refusal of access are set out in section 47 of the RTI Act and include, for example, where information is exempt (section 47(3)(a) of the RTI Act) and where disclosure of information would, on balance, be contrary to the public interest (section 47(3)(b) of the RTI Act).

³⁶ That is, the 7987 documents, 1037 documents and 3 customer requests noted at paragraph 26 above, based upon the conservative estimate that assessment of each of the more than 9000 documents taking 3 minutes.

³⁷ Based on an average of 3 hours per third party.

³⁸ Based on a 5 day working week, at 8 hours per day.

Would the impact on Council's functions be substantial and unreasonable?

32. I have had regard to the factors listed at paragraph 24 above to the extent that they are relevant to the circumstances of this case.
33. The usual time allowed for processing an application in the RTI Act is 25 business days.³⁹ Whilst this period can be extended in certain circumstances,⁴⁰ it is relevant to have regard to this timeframe when considering whether the time involved in processing a single access application will have a substantial impact on an agency's resources.
34. I also note the observations of Senior Member Puplick of the Administrative Appeals Tribunal, in considering the equivalent Commonwealth test:⁴¹

[82] ...the number of hours involved is not, on its own, sufficient to establish that a practical refusal reason [i.e. that a given application would substantially and unreasonably divert agency resources] has been established.

...
[101] ...Nevertheless for any agency, a burden in excess of 200 hours would almost certainly make the threshold of a rational and objective test. ...burdens as (relatively) small as 74 hours have been so characterised.'

35. Council's 467 hour estimate, being about 58 business days, to finalise processing the Narrowed Scope is 'a burden in excess of 200 hours' and represents more than double the entire processing period usually allowed under the RTI Act for processing an application. I consider that if Council was to finalise processing the Narrowed Scope, the resources required to do so would unreasonably divert Council's resources and interfere with Council's ability to attend to other priorities and such an impact on its functions would be substantial.
36. In summary, having regard to the above factors, I consider that non-performance of Council's RTI Act and *Information Privacy Act* functions for persons other than the applicant over the 58 day period required to finalise processing the Narrowed Scope, with consequent delays in processing other applications and attending to other matters, would have a considerable and telling detrimental impact on Council's functions. On this basis, I am satisfied that such a diversion of Council's resources would be unreasonable.

Conclusion

37. For the above reasons, I consider that the work involved in dealing with the Narrowed Scope would substantially and unreasonably divert Council's resources from their use in Council's functions. Accordingly, I find that Council is entitled to refuse to deal with the access application under section 41(1)(a) of the RTI Act.

DECISION

38. I affirm the decision under review and find that Council may refuse to deal with the applicant's access application⁴² under section 41(1)(a) of the RTI Act.

³⁹ Under section 46 of the RTI Act. See also section 18 which sets out the meaning of *processing period*.

⁴⁰ Such as consultation with third parties which extends the processing period by a further 10 business days: section 37 of the RTI Act.

⁴¹ *VMQD and Commissioner of Taxation (Freedom of information)* [2018] AATA 4619 (17 December 2018). The Commonwealth *Freedom of Information Act 1982* permits an agency to refuse to deal with an application where a 'practical refusal reason' exists. A 'practical refusal reason' exists where the work involved in processing the request would 'substantially and unreasonably divert the agency's resources from its other operations': section 24AA(1)(a) of that Act.

⁴² Narrowed or Further Narrowed Applications.

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

Assistant Information Commissioner Corby

Date: 28 October 2021

APPENDIX**Significant procedural steps**

Date	Event
14 December 2020	OIC received the applicant's application for external review.
17 December 2020	OIC requested preliminary documents from Council. OIC received the requested documents from Council.
18 February 2021	OIC advised the applicant and Council that the application for external review had been accepted.
6 May 2021	OIC conveyed a preliminary view to Council that Council had not at that time established that a decision refusing to deal with the application under section 41 of the RTI was justified or that the Information Commissioner should give a decision adverse to the applicant.
20 May 2021	OIC received Council's submission in response to the preliminary view.
15 June 2021	OIC conveyed a preliminary view to the applicant that Council was entitled to refuse to deal with the access application on the basis that it would substantially and unreasonably divert Council's resources from their use in its functions.
29 June 2021	OIC received the applicant's proposed further reduced scope.
6 July 2021	OIC wrote to Council about the applicant's proposed further reduced scope.
21 July 2021	OIC received Council's submission maintaining that processing the applicant's proposed further reduced scope would substantially and unreasonably divert Council's resources from their use in its functions.