



Decision and Reasons for Decision

Citation:	<i>H76 and Brisbane City Council [2022] QICmr 24 (27 April 2022)</i>
Application Number:	316412
Applicant:	H76
Respondent:	Brisbane City Council
Decision Date:	27 April 2022
Catchwords:	<p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST INFORMATION - personal information of another individual - personal information and privacy - whether disclosure of information would, on balance, be contrary to the public interest - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - whether agency has conducted reasonable searches - whether access to further documents may be refused on the basis they are nonexistent or unlocatable - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(e) and 52(1) of the <i>Right to Information Act 2009</i> (Qld)</p>

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 between 1 January 2014 and 1 August 2014 that were 'on or about' the applicant. The applicant identified three areas of Council that she considered would likely hold responsive documents.

¹ Council refused to process the applicant's original access application on the basis that the work involved in processing it would substantially and unreasonably divert Council's resources (see section 60 of the IP Act). The applicant applied for external review of that decision. Following negotiations between OIC, the applicant and Council, the applicant agreed to reduce the scope of her application. Council agreed to process the reduced scope on 15 July 2021.

2. Council located 44 responsive pages. It decided² to give access to some information and to refuse access to the remaining information on the ground that its disclosure would, on balance, be contrary to the public interest.³
3. The applicant applied for internal review of Council's decision.⁴ On internal review, Council affirmed its decision in respect of the initial 44 responsive pages. However, it also located an additional 48 responsive pages. Council decided to give the applicant full access to 28 of those additional pages, and part access to the remaining 20 pages. Again, Council refused access to information on the ground that its disclosure would, on balance, be contrary to the public interest.⁵
4. The applicant then applied⁶ to the Office of the Information Commissioner (**OIC**) for external review. On external review, the applicant raised a sufficiency of search issue, as well as other issues that fall outside the jurisdiction of OIC.
5. For the reasons set out below, I affirm Council's internal review decision. I also find that the searches and inquiries that Council conducted in an effort to locate all responsive documents have been reasonable in all the circumstances of this case and that access to any additional documents may be refused on the ground that they are nonexistent or unlocatable under section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.

Background

6. The applicant has made a number of access applications to Council arising out of her interactions with Council occurring either on her own behalf, or while acting as an agent for another person in relation to multiple access applications made to Council by that person.

Reviewable decision

7. The decision under review is Council's internal review decision dated 15 October 2021.

Evidence considered

8. Significant procedural steps relating to the external review are set out in the Appendix.
9. 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.⁷
10. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.⁸ 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 IP Act and the RTI Act.⁹ I have acted in this way in

² Decision letter dated 23 August 2021. The decision incorrectly stated that full access was given to 28 pages and part access to 17 pages. The internal review decision clarified that the correct position was full access to 26 pages and part access to 18 pages.

³ Section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.

⁴ On 16 September 2021.

⁵ Decision dated 15 October 2021.

⁶ On 10 November 2021.

⁷ Including the external review application and the submission dated 25 March 2022.

⁸ Section 21(2) of the HR Act.

⁹ *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].

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:¹⁰ *‘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.’*¹¹

Information in issue

11. The information in issue consists of one sentence contained on page 43, which is an email dated 17 July 2014 from a Council officer sent to an email address shared by the applicant and another person (**Information in Issue**).

Issues for determination

12. The issues for determination are:
 - whether access to the Information in Issue may be refused because its disclosure would, on balance, be contrary to the public interest; and
 - whether Council has taken all reasonable steps to locate documents applied for by the applicant.

Matters outside OIC’s jurisdiction

13. In her external review application, and in submissions lodged during the review,¹² the applicant raised complaints 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, or absence, of footers and watermarks on released documents.
14. As noted above, the applicant has been advised in this review,¹³ and in numerous previous reviews involving her either as the applicant,¹⁴ or as agent for another applicant,¹⁵ of the limits of OIC’s jurisdiction regarding complaints made 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 continues to make submissions and complaints about irrelevant matters, or about matters falling outside OIC’s jurisdiction.
15. 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. OIC does not have jurisdiction under the IP Act to deal with the applicant’s complaints about Council’s record-keeping practices, including the use of footers or watermarks on released documents.

¹⁰ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹¹ XYZ at [573].

¹² Dated 25 March 2022.

¹³ For example, the applicant received an information sheet at the commencement of the review 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 record-keeping practices. This was again reiterated in OIC’s preliminary view letter dated 18 January 2022.

¹⁴ See, for example, *U24 and Brisbane City Council* [2021] QICmr 61 (22 November 2021).

¹⁵ See, for example, *Q30 and Brisbane City Council* [2022] QICmr 4 (25 January 2022).

Contrary to the public interest information

Relevant law

16. 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
17. 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.
18. 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

Discussion

19. Council refused access to the Information in Issue on public interest grounds. As the email in question was sent to an email address used by the applicant, she is aware of the contents of the Information in Issue.
20. Council decided that the Information in Issue comprised the personal information²³ of a third party and that its disclosure to the world at large under the IP Act would, on balance, be contrary to the public interest.
21. The applicant argues that the redaction of the whole sentence is not justified and that only two words comprise the personal information of another person. I do not agree. I consider that the sentence as a whole can reasonably be characterised as comprising the personal information of another person. Furthermore, even if the applicant were correct in her contention, none of the sentence can be characterised as comprising her

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 sections 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, 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 'Personal information' is defined in section 12 of the IP Act as '*information or an opinion ... whether true or not ... about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.*'

personal information such as to give rise to the personal information public interest factor favouring disclosure.²⁴ Additionally, given the nature of the Information in Issue, none of it comprises information which gives rise to any accountability or transparency factors favouring disclosure.²⁵

22. As the Information in Issue comprises the personal information of another person, a public interest harm in disclosure automatically arises.²⁶ There is also an associated prejudice to the protection of that person's right to privacy.²⁷ I acknowledge that the weight to be applied to these nondisclosure factors may be reduced where an applicant is already aware of the information. However, it must also be remembered that disclosure under the IP Act is to be regarded as disclosure to the world at large.²⁸ In these particular circumstances, I am satisfied that the privacy and personal information nondisclosure and harm factors warrant moderate weight.

Finding

23. As mentioned above, I am unable to identify any public interest factors favouring disclosure of the Information in Issue to the applicant. I therefore find that the moderate weight of the privacy and personal information nondisclosure and harm factors is sufficient to support a finding that disclosure of the Information in Issue would, on balance, be contrary to the public interest. Access may be refused on that basis.

Sufficiency of search

Relevant law

24. Access to a document may be refused if the document is nonexistent or unlocatable.²⁹
25. To be satisfied that documents are nonexistent, a decision-maker must rely on their particular knowledge and experience and have regard to a number of key factors, including:³⁰
- the administrative arrangements of government
 - the agency's structure
 - the agency's functions and responsibilities
 - the agency's practices and procedures (including but not exclusive to its information management approach); and
 - other factors reasonably inferred from information supplied by the applicant including the nature and age of the requested document/s and the nature of the government activity to which the request relates.

²⁴ Schedule 4, part 2, item 7 of the RTI Act.

²⁵ Such as, for example, schedule 4, part 2, items 1, 3 or 11 of the RTI Act.

²⁶ Schedule 4, part 4, section 6 of the RTI Act.

²⁷ Schedule 4, part 3, item 3 of the RTI Act.

²⁸ Noting that 'there is no provision of that Act which contemplates any restriction or limitation on the use which that person can make of that information, including by way of further dissemination' – see *FLK v Information Commissioner* [2021] QCATA 46 at [17] per McGill J.

²⁹ Section 67(1) of the IP Act and sections 47(3)(e) and 52 of the RTI Act. A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist—section 52(1)(a) of the RTI Act. 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 the document but it cannot be found—section 52(1)(b) of the RTI Act.

³⁰ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) ('Pryor') at [19] which adopted the Information Commissioner's comments in *PDE and the University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009).

26. If searches are relied on to justify a decision that the documents do not exist, all reasonable steps must be taken to locate the documents. What constitutes reasonable steps will vary from case to case, as the search and enquiry process an agency will be required to undertake will depend on the particular circumstances.
27. To determine whether a document exists, but is unlocatable, the RTI Act requires consideration of whether there are reasonable grounds for the agency to be satisfied that the requested document has been or should be in the agency's possession; and whether the agency has taken all reasonable steps to find the document. In answering these questions, regard should again be had to the circumstances of the case and the key factors listed in paragraph 25.³¹
28. The Information Commissioner's external review functions include investigating and reviewing whether agencies have taken reasonable steps to identify and locate documents applied for by applicants.³² Generally, 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.³³ However, where an external review involves the issue of missing documents, the applicant has a practical onus to establish reasonable grounds to be satisfied that the agency has not discharged its obligation to locate all relevant documents. Suspicion and mere assertion will not satisfy this onus.

Discussion

29. In its internal review decision, in response to the applicant's general assertion that additional responsive documents ought to exist, Council stated:

Significant search requests were made to the relevant work/business areas identified in items 2, 3 and 4 of your Revised Application and responses provided by all areas. Searches to locate documents included use of Council's electronic record management and archival email systems such as e-discovery using appropriate search terms.

30. In her external review, the applicant repeated her sufficiency of search concerns, again simply asserting that a greater volume of responsive documents ought to exist, and querying whether Council had searched for responsive documents across its electronic email system.³⁴
31. In OIC's letter to the applicant dated 18 January 2022, the Assistant Information Commissioner (**AIC**) referred the applicant to the confirmation in Council's internal review decision that a *SourceOne* search of Council's email system had been conducted. The AIC also stated:

You have not identified any missing documents, nor identified any additional searches that it would be reasonable to request that Council undertake in an effort to locate missing documents. As you are aware, an applicant bears the practical onus of establishing that the searches and inquiries that an agency has conducted have not been sufficient to identify and locate all responsive documents. The information contained in your external review application does not discharge this onus. As you have been advised, suspicion and mere assertion is not sufficient.

³¹ Pryor at [21].

³² Section 137(2) of the IP Act. The Information Commissioner also has power under section 115 to require additional searches to be conducted during an external review.

³³ Section 87(1) of the RTI Act.

³⁴ Council initially referred to this search tool as 'e-discovery' but later advised that it should correctly be referred to as 'SourceOne'. See the decision in *T74 and Brisbane City Council* [2021] QICmr 54 (21 October 2021) for a discussion of *SourceOne* searches and the issues involved.

Accordingly, on the information presently before me, it is my preliminary view that the searches and inquiries conducted by Council in an effort to locate responsive documents have been reasonable in the circumstances, and I am unable to identify any further searches or inquiries that it would be reasonable to ask Council to undertake.

32. If she did not accept the AIC's preliminary view, the applicant was invited to provide a written submission in support of her position.
33. After requesting and being granted several extensions of time, the applicant provided a submission on 25 March 2022.³⁵ She identified 23 emails from her own records that had either been sent to, or received from, Council. The applicant contended these emails fell within the scope of her access application but had not been located by Council.
34. The applicant provided a copy of one of those emails – that is, email number 21 as listed by her – as an example. Having reviewed its contents, I am satisfied that it cannot properly be regarded as being '*on or about*' the applicant and that it therefore does not fall within the scope of her access application. While the applicant may have sent the email to Council, she clearly did so on behalf of another person. The information in the email is not about the applicant but is about the other person.
35. While the applicant did not provide copies of the other 22 emails she had identified from her own records, her submissions set out various types of information about each email, including when it was sent, its subject line and, where relevant, any attachments to it.
36. The applicant's submission states that email number 23 (as listed by her) was sent on 8 August 2014. This falls outside the date range of the access application. Council cannot be said to have failed to locate a document which does not fall within the terms of the access application.
37. In regard to the remaining 21 emails specified in the applicant's submission,³⁶ none of the subject lines or file names of attachments includes any information about the applicant. To the contrary, the subject line of and/or attachments to 20 of the 21 remaining emails include the name of a person other than the applicant. Based on the information provided by the applicant, and also noting that the practical onus rests with her, I am satisfied that it is reasonable to regard the content of these emails as concerning the other person, and not information that is '*on or about*' the applicant. The fact that the applicant may have sent the emails on behalf of that other person, or that they were sent from a shared email address, is an insufficient connection to the applicant for the information to be '*on or about*' her.

³⁵ The applicant was initially given over three weeks – until 11 February 2022 – to provide a response to OIC's preliminary view. On 3 February 2022, the applicant requested an extra three weeks – until 4 March 2022 – to provide a response. On 8 February 2022, OIC agreed to this extension. Then, on 1 March 2022, the applicant requested another three week extension – until 25 March 2022. In support of this request, the applicant provided a medical certificate which advised that she would be '*unfit for prolonged computer work from 28/02/2022 to 18/03/2022 inclusive*'. On 2 March 2022, I agreed to this extension, as requested, but advised that I did not intend to agree to any more extensions of time (in this regard, I noted that although the applicant had been in possession of the released documents since 15 October 2021, she had not provided any evidence regarding sufficiency of search concerns in her external review application dated 10 November 2021, nor in the six weeks since she had received OIC's preliminary view. I also observed that the work required to respond to this discrete issue did not appear to necessitate 'prolonged computer work', and confirmed that the practical onus rested with her). The applicant provided a response on the due date nominated by her – that is, 25 March 2022 (over nine weeks after receiving OIC's preliminary view). When doing so, however, she voiced her objection to my advice on 2 March 2022 regarding further extensions. Taking into account the applicant's personal circumstances, as evident from the material provided by her, I am satisfied that the time she has been given to respond to OIC's preliminary view has been reasonable in all the circumstances and has fulfilled procedural fairness requirements.

³⁶ That is, emails numbered 1 to 20 and 22.

38. According to the applicant's submission, neither the subject line of, nor the attachment to, the last of the remaining emails – that is, email number 22 – includes the name of the other person. However, having had the benefit of considering this particular subject line and attachment in light of the content of email number 21 (which, as noted at paragraph 34 above, I have reviewed, and which, according to the applicant's submission, has the same subject line and was sent three minutes earlier), I am satisfied that it is again reasonable to regard the content of email number 22 as concerning the other person, and not containing information that is 'on or about' the applicant.
39. Even if the emails identified by the applicant could be regarded as falling within the scope of her access application, I am satisfied that the searches and inquiries that Council has conducted in an effort to locate all responsive documents were reasonable in the circumstances. Council advised that search requests were made of the relevant areas of Council identified by the applicant, and searches were also conducted of Council's electronic management system. Additionally, a *SourceOne* search of Council's email system was carried out. I am unable to identify any other searches that I consider would be reasonable to ask Council to conduct in an effort to locate copies of emails that are now over eight years old, and of which the applicant already has copies in any event.

Finding

40. The applicant bears the practical onus of establishing reasonable grounds to be satisfied that the agency has not discharged its obligation to locate all relevant documents and that further searches and inquiries ought reasonably be required. I do not consider the applicant has discharged this onus in this review. As noted above, where a sufficiency of search issue is raised on external review, the issues for OIC to determine are:
- whether there are reasonable grounds for believing that additional responsive documents exist in the agency's power or possession; and, if so,
 - whether the searches and inquiries conducted by the agency in an effort to locate the additional responsive documents have been reasonable in all the circumstances.
41. I have considered the applicant's submissions about emails already in her possession and upon which she relies to argue that Council should be required to conduct additional searches to locate those same emails. I am satisfied that these emails fall outside the terms of her access application.³⁷ I have also considered the searches conducted by Council, and am unable to identify any other searches that I consider it would be reasonable to ask Council to conduct in an effort to locate copies of responsive emails.
42. I therefore find that access to any additional documents may be refused on the basis that they are nonexistent or unlocatable under section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.

DECISION

³⁷ Even if I am wrong in characterising the emails as falling outside the terms of the access application (despite the subject lines and attachments which indicate otherwise), I note that progressing this part of the application would require Council to conduct further searches for emails which are already in the applicant's possession. This may warrant a decision not to deal further with this part of the application on the grounds that it is lacking substance under section 107(1)(a) of the IP Act.

43. For the reasons set out above, I affirm the decision under review by finding that access to the Information in Issue 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.
44. In addition, I find that the searches and inquiries conducted by Council in an effort to locate all responsive documents have been reasonable in all the circumstances and that access to further documents may be refused on the basis they are nonexistent or unlocatable under section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.
45. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

A Rickard
Acting Right to Information Commissioner

Date: 27 April 2022

APPENDIX

Significant procedural steps

Date	Event
10 November 2021	OIC received the application for external review.
11 November 2021	OIC requested preliminary documents from Council.
18 November 2021	OIC received the preliminary documents.
23 November 2021	OIC accepted the application and requested copies of the Information in Issue from Council.
14 December 2021	OIC received copies of the Information in Issue.
18 January 2022	OIC conveyed a preliminary view to the applicant and requested submissions in response.
3 February 2022	The applicant requested an extension of time.
1 March 2022	The applicant requested a further extension of time.
25 March 2022	OIC received the applicant's submissions.