



Decision and Reasons for Decision

Citation:	<i>N43 and Brisbane City Council [2022] QICmr 43 (20 September 2022)</i>
Application Number:	316536
Applicant:	N43
Respondent:	Brisbane City Council
Decision Date:	20 September 2022
Catchwords:	<p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - IRRELEVANT INFORMATION - information falling outside the scope of the applicant's request - whether deleted information is irrelevant to the terms of the access application - section 88 of the <i>Information Privacy Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST INFORMATION - deliberative process information - public interest harm in disclosure - 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>

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:

... my personal information held by/with Council, under the relevant privacy legislation (Queensland).

*This is predominately [sic] information regarding **Ethical Standards Unit** (ESU) and associated information from when I lodged an email complaint with ESU on 23 August 2021. However ESU may have sought information/advice from areas outside of their Unit regarding my complaint of 23 August 2021, so I also seek access to copies and any and all such information.*

...

Dates are 23 August 2021 to 2 December 2021 (inclusive).

[Applicant's emphasis]

¹ Application dated 2 December 2021.

2. Council located 88 responsive pages and decided to give the applicant full access to 60 pages, partial access to eight pages, and to refuse access in full to the remaining 20 pages.² Council refused access to information on the grounds that its disclosure would, on balance, be contrary to the public interest, or because it was irrelevant information.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of Council's decision.³ She also contended that Council had not located all documents responding to her application, thereby raising a 'sufficiency of search' issue.
4. Council located additional responsive information during the external review process, thereby disposing of the sufficiency of search issue. Council gave the applicant access to some of that information, but refused access to the remainder on the grounds that its disclosure would, on balance, be contrary to the public interest.
5. For the reasons explained below, I vary Council's decision by finding that access to the information in issue (including the additional information located by Council during the external review) may be refused either because it is irrelevant information, or because its disclosure would, on balance, be contrary to the public interest.

Background

6. The applicant has made numerous 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 decision dated 16 December 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.⁴
10. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.⁵ 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 *Right to Information Act 2009* (Qld) (**RTI Act**).⁶ 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:⁷ '*it is perfectly compatible with the scope of that*

² Decision dated 16 December 2021.

³ Application dated 16 January 2022.

⁴ Including the external review application and the submission dated 30 August 2022.

⁵ Section 21(2) of the HR Act.

⁶ *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].

⁷ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

*positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act.*⁸

Information in issue

11. The information remaining in issue mainly comprises working drafts of memoranda or correspondence, or other information recording or referring to Council's deliberations, in deciding how to deal with, and respond to, a complaint that the applicant made to Council about the conduct of certain Council staff. Council decided that this information was deliberative process information and that its disclosure would, on balance, be contrary to the public interest (**DP Information**).⁹
12. There is also a small amount of information which Council decided was irrelevant to the terms of the applicant's access application and which it deleted on that basis (**Irrelevant Information**).¹⁰

Issues for determination

13. The issues for determination are:
 - whether access to the Irrelevant Information may be refused on the basis that it is not relevant to the terms of the access application; and
 - whether access to the DP Information may be refused on the basis that its disclosure would, on balance, be contrary to the public interest.

Relevant law – irrelevant information

14. Section 88 of the IP Act provides that an agency may give access to a document subject to the deletion of information it reasonably considers is not relevant to an application. This is a mechanism to allow irrelevant information to be deleted from documents which are identified for release to an applicant.
15. In deciding whether information is irrelevant, it is necessary to consider whether the information has any bearing upon, or is pertinent to, the terms of the application.¹¹
16. Council decided that the Irrelevant Information was irrelevant to the terms of the applicant's access application and deleted it on that basis.

Applicant's submissions

17. The applicant made no submission addressing the issue of irrelevant information.

Finding

18. I am satisfied that Council was entitled to delete the Irrelevant Information on the grounds that it either falls outside the date range specified in the access application, or because it does not concern or relate to the complaints that the applicant made to Council's Ethical Standards Unit (**ESU**) within the terms of her access application.

⁸ XYZ at [573].

⁹ Pages 4, 43, 54 and 75 (part only); pages 57-60, 62-66, 69-70, 73-74, 76, and 84-88 (full); and relevant documents/parts of documents located by Council during the external review (partly released to the applicant on 13 July 2022).

¹⁰ Pages 26, 38, 49 and 78 (part only), and page 77 (full).

¹¹ *O80PCE and Department of Education and Training* (Unreported, Queensland Information Commissioner, 15 February 2010) at [52] which was a decision made under the equivalent provision in the repealed *Freedom of Information Act 1992* (Qld).

Relevant law – contrary to the public interest information

19. Under the IP Act, a person has a right to be given access to documents of an agency.¹² 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.¹³ An agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.¹⁴
20. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision maker must:¹⁵
 - 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.
21. 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,¹⁶ together with all other relevant information, in reaching my decision. I have kept in mind the IP Act's pro-disclosure bias¹⁷ and Parliament's requirement that grounds for refusing access to information be interpreted narrowly.¹⁸ I have taken no irrelevant factors into account in making my decision.

Council's decision

22. In deciding that disclosure of the DP Information would, on balance, be contrary to the public interest, Council relied upon the application of the harm factor contained in schedule 4, part 4, section 4 of the RTI Act: *'disclosure could reasonably be expected to cause a public interest harm through disclosure of an opinion, advice or recommendation that has been recorded, or a consultation or deliberation that has taken place, in the course of, or for, the deliberative processes involved in the functions of government.'*
23. Council decided that the DP Information comprised internal consultations/deliberations about how to deal with/respond to the applicant's complaints, and that disclosure could reasonably be expected to cause the requisite public interest harm to Council's deliberative processes.

Applicant's submissions

24. The applicant's relevant arguments in favour of disclosure of the DP Information can be summarised as follows:¹⁹

¹² Section 40 of the IP Act.

¹³ 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.

¹⁴ 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 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.

¹⁵ Section 49(3) of the RTI Act.

¹⁶ I have considered each of the public interest factors outlined in schedule 4 of the RTI Act, and any relevant factors are discussed below.

¹⁷ Section 64 of the IP Act.

¹⁸ Section 67(2) of the IP Act and section 47(2) of the RTI Act.

¹⁹ Submission dated 30 August 2022.

- Council has given her access to draft documents in response to previous access applications that she had made
- she requires access to the information in order to pursue/substantiate complaints she has made to the Queensland Ombudsman (QO) and Queensland Human Rights Commission (QHRC) and her rights in that regard are being prejudiced by Council's refusal to provide her with the DP Information
- disclosure could reasonably be expected to enhance the accountability and transparency of Council in its interactions with the applicant and the discharge of its complaint-handling functions; and
- it is unfair that a complainant is not given access to information about how an agency undertook a complaint process.

25. The applicant relied upon the following public interest factors favouring disclosure:

- disclosure could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability²⁰
- disclosure could reasonably be expected to inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by the Government in its dealings with members of the community²¹
- disclosure could reasonably be expected to advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies;²² and
- disclosure could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision.²³

Discussion

26. I am satisfied that the DP Information comprises an opinion that has been recorded, or a consultation or deliberation that has taken place, in the course of, or for, Council's deliberative processes, namely, its deliberations about how to handle and respond to the applicant's complaints about Council officers. A public interest harm in disclosure therefore automatically arises.

27. In terms of the weight to be afforded to that public interest harm factor, while I acknowledge that Council's complaint process has been finalised, I nevertheless recognise a public interest in protecting the ability of agencies to freely discuss, and deliberate about, options for handling and responding to complaints made about staff, including deliberating about the contents of responses to complaints. The bulk of the DP Information comprises drafts of correspondence containing suggested amendments and comments made by Council officers involved in the complaint-handling process. I consider that it is reasonable to expect that harm will be caused to an agency's ability to engage in full and frank discussions and deliberations about a particular course of action, if its 'thinking processes' were to be disclosed. In this case, the deliberations in question concerned the handling of sensitive complaints made by the applicant about the performance and conduct of individual Council officers. In those circumstances, I afford the public interest harm factor moderate weight when balancing the public interest.

²⁰ Schedule 4, part 2, item 1 of the RTI Act.

²¹ Schedule 4, part 2, item 3 of the RTI Act.

²² Schedule 4, part 2, item 10 of the RTI Act.

²³ Schedule 4, part 2, item 11 of the RTI Act.

28. In terms of the applicant's submission concerning what has occurred in other access applications she has made to Council, whether or not Council has previously given the applicant access to draft documents is irrelevant to my consideration, in this review, of Council's decision to refuse access to the DP Information.
29. As regards the application of the public interest factors favouring disclosure, I note that Council has provided the applicant with several detailed, formal responses to her various complaints, and to the subsequent issues she raised. Those responses clearly state the outcome of Council's investigation into the complaints and the reasons for the outcome, including providing the applicant (as per her request) with information about Council's investigative methodologies, processes and timeframes. She has also been given access to the bulk of the final version of a memorandum dated 21 October 2021 from ESU to the Disputes Commissioner that sets out a chronology of events relating to her complaint, Council's response, and her interactions with Council. Given Council's comprehensive responses, I do not consider that disclosure of the DP Information could reasonably be expected to:
- advance the applicant's fair treatment
 - reveal the reason for a government decision; or
 - inform the community of Council's operations.
30. Similarly, in circumstances where a complainant has received comprehensive responses to their complaints from an agency, I am not satisfied that disclosure of internal drafts could reasonably be expected to enhance the agency's accountability or transparency to any significant extent. The agency's final and formal position is as stated in the signed correspondence that is sent to the complainant. I therefore afford this factor only low weight in the circumstances of this case.
31. The applicant states that she requires access to the DP Information in order to pursue/substantiate complaints that she has made to the QO and QHRC, and that her rights in that regard are being prejudiced by Council's refusal of access. I do not agree. Firstly, the applicant is merely speculating as to the nature of the information contained in the DP Information and any relevance to complaints she has made about Council. However, in any event, if those agencies require relevant information from Council in order to consider/investigate the applicant's complaints, they are able to request it from Council. But I would simply observe that I consider it unlikely that either agency would regard Council's draft correspondence/memoranda as being of relevance, given that it may not reflect Council's formal position.

Balancing the public interest

32. For the reasons discussed, I afford moderate weight to the nondisclosure harm factor concerning Council's deliberative processes. I afford low weight to the public interest in enhancing Council's accountability/transparency. I do not consider that any of the other public interest factors favouring disclosure identified by the applicant apply in the circumstances of this case.
33. I am satisfied that the nondisclosure harm factor outweighs the public interest in disclosure, such that disclosure of the DP Information would, on balance, be contrary to the public interest.

DECISION

34. For the reasons explained above, I vary Council's decision by finding that access to the information in issue (including the additional information located by Council during the external review) may be refused either because it is irrelevant information, or because its disclosure would, on balance, be contrary to the public interest.
35. 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: 20 September 2022

APPENDIX**Significant procedural steps**

Date	Event
16 January 2022	OIC received the application for external review.
17 January 2022	OIC asked Council to provide preliminary documents. Council provided preliminary documents.
2 February 2022	OIC advised the participants that the application for external review had been accepted. OIC asked Council to provide copies of the information in issue and its search records. Council provided some requested information.
4 February 2022	Council provided further requested information.
14 February 2022	Council provided additional documents following further searches.
18 May 2022	OIC requested Council's views on release of additional documents.
8 June 2022	Council advised OIC of its position on release of additional documents.
17 June 2022	OIC asked Council to provide the applicant with access to the relevant additional documents. OIC expressed a preliminary view to the applicant about the information remaining in issue. The applicant requested an extension of time to 31 August 2022 to provide her response due to health concerns.
13 July 2022	Council provided the applicant with access to the relevant additional documents.
14 July 2022	OIC granted the applicant's requested extension of time.
30 August 2022	The applicant provided a submission.