



Decision and Reasons for Decision

Citation: *V42 and Brisbane City Council [2024] QICmr 21 (30 May 2024)*

Application Number: 317613

Applicant: V42

Respondent: Brisbane City Council

Decision Date: 30 May 2024

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - EXEMPT INFORMATION - LEGAL PROFESSIONAL PRIVILEGE - whether information would be privileged from production in a legal proceeding - whether access may be refused under section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(a) and 48 and schedule 3, section 7 of the *Right to Information Act 2009* (Qld)

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 *Information Privacy Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST INFORMATION - legal costing information - prejudice to business, commercial or financial affairs - 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)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to Brisbane City Council (**Council**) for access under the *Information Privacy Act 2009* (Qld) (**IP Act**) to all documents between 21 March 2023 and 3 July 2023 concerning a complaint that the applicant had made against Council to the Queensland Human Rights Commission (**QHRC**), and that was subsequently referred to the Queensland Civil and Administrative Tribunal (**QCAT**).

¹ Application received by Council on 3 July 2023.

2. In its initial decision,² Council decided to give the applicant full access to four pages, partial access to three pages, and to refuse access to 253 pages in full.
3. The applicant applied for internal review.³ In its internal review decision,⁴ Council noted a page count discrepancy in its initial decision,⁵ but otherwise affirmed the initial decision.
4. The applicant applied⁶ to the Office of the Information Commissioner (**OIC**) for external review of Council's decision.
5. For the reasons explained below, I affirm the decision under review.

Reviewable decision

6. The decision under review is Council's internal review decision dated 19 September 2023.

Evidence considered

7. Significant procedural steps relating to the external review are set out in the Appendix.
8. The evidence, submissions, legislation and other material I have considered in reaching my decision are set out in these reasons (including footnotes and the Appendix). I have taken account of the applicant's submissions to the extent that they contain information that is relevant to the issues for determination in this review.⁷
9. 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 *Right to Information Act 2009* (Qld) (**RTI Act**).⁹ 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: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

10. A significant volume of information was released to the applicant during the course of the review. The information remaining in issue (**Information in Issue**) is as follows:
 - pages 250-255 comprising an email and attachment dated 3 July 2023 from Council's external lawyers to Council; and
 - parts of pages 256-259 comprising a Matter Cost Summary Report for Brisbane City Legal Practice (**BCLP**) between 23 December 2021 and 22 August 2023.

² Dated 29 August 2023.

³ On 29 August 2023.

⁴ Dated 19 September 2023.

⁵ Partial access was granted to four pages rather than three, and access in full was refused to 251 pages rather than 253.

⁶ On 16 October 2023.

⁷ Contained in the external review application dated 16 October 2023, and in an email on 19 December 2023.

⁸ Section 21 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].

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

¹¹ *XYZ* at [573].

Issues for determination

11. The issues for determination are as follows:

- a) whether access to pages 250-255 may be refused because they attract legal professional privilege and are therefore exempt information; and
- b) whether access to the relevant parts of pages 256-259 may be refused because those parts comprise:
 - (i) irrelevant information
 - (ii) exempt information; or
 - (iii) information the disclosure of which would, on balance, be contrary to the public interest.

Findings

Issue a) - pages 250-255

12. Schedule 3 of the RTI Act specifies the types of information Parliament has determined are exempt because release would be contrary to the public interest.¹² Relevantly, information is exempt information if it would be privileged from production in a legal proceeding on the ground of legal professional privilege (**LPP**).¹³ This exemption reflects the requirements for establishing LPP at common law.¹⁴
13. Establishing whether LPP applies to information at common law requires that the information must comprise a communication:
 - made in the course of a lawyer-client relationship
 - that was and remains confidential; and
 - that was made for the dominant purpose of seeking or providing legal advice or for use in existing or reasonably anticipated legal proceedings.¹⁵
14. When each of these requirements is met, LPP is established.¹⁶
15. I have considered pages 250-255 and am satisfied that they comprise a confidential communication between Council and its external lawyers made for the dominant purpose of providing legal advice in connection with the QCAT proceedings.
16. I am further satisfied that the lawyer who provided the advice or assistance in question is suitably qualified and of a sufficiently independent character.¹⁷ There is nothing before me to suggest that the qualification or exceptions to privilege apply.
17. Accordingly, I find that pages 250-255 attract LPP and are therefore exempt information.¹⁸ Access under the IP Act may be refused on that basis.

¹² Section 67(1) of the IP Act provides that an agency or Minister may refuse access in the same way and to the same extent as under section 47 of the RTI Act. Section 47(3)(a) of the RTI Act allows refusal of access to exempt information.

¹³ Schedule 3, section 7 of the RTI Act.

¹⁴ The doctrine of legal professional privilege is both a rule of evidence and a common law right. The High Court in *Daniels Corporation International Pty Ltd v Australian and Consumer Commissioner* (2002) 213 CLR 543 (**Daniels**) at [552] relevantly noted 'It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings' (footnotes omitted). See also *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 (**Esso**).

¹⁵ *Esso and Daniels*.

¹⁶ However, qualifications and exceptions to privilege (such as waiver and improper purpose) may, in particular circumstances, affect the question of whether information attracts or remains subject to it, and therefore is exempt under the RTI Act.

¹⁷ *Waterford v Commonwealth* (1987) 163 CLR 54 at [62].

¹⁸ Section 67(1) of the IP Act and section 47(3)(a) and schedule 3, section 7 of the RTI Act.

Issue b) - parts of pages 256-259

Irrelevant information

18. Parts of these pages fall outside the scope of the application because the relevant entries either pre-date 21 March 2023 or post-date 3 July 2023, or because they do not concern the QHRC or QCAT matters referred to in the access application. Section 88 of the IP Act provides that an agency may give access to a document subject to the deletion of information it considers is not relevant to an access application. This is a mechanism to allow irrelevant information to be deleted from documents which are identified for release to an applicant. I am satisfied that Council was entitled to delete, under section 88 of the IP Act, all entries that do not fall within the terms stated in the access application.

Exempt information

19. I am also satisfied that Council was entitled, pursuant to schedule 3, section 7 of the RTI Act, to refuse access to those entries that describe the nature of confidential legal advice or assistance provided to Council by lawyers employed in BCLP.¹⁹ I am satisfied that the lawyers who provided the confidential legal advice or assistance in question were suitably qualified and of a sufficiently independent character. There is nothing before me to suggest that the qualification or exceptions to LPP apply. The information in question therefore attracts LPP and is exempt information under the IP Act.

Public interest considerations

20. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision-maker must:²⁰
- 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 the public interest lies in a particular case. I have considered these lists,²¹ together with all other relevant information, in reaching my decision. I have kept in mind the IP Act's pro-disclosure bias²² and Parliament's requirement that grounds for refusing access to information be interpreted narrowly.²³
22. The remaining Information in Issue consists of references to the charge-out rates of individual lawyers employed in BCLP, as well as associated legal costing information.
23. In respect of this billing information, I note that Council has given the applicant access to the total amounts charged by the lawyers, in accordance with the principles explained by the Information Commissioner in previous decisions dealing with these

¹⁹ See paragraph 13 for the required elements to establish LPP.

²⁰ Section 49(3) of the RTI Act.

²¹ I have considered each of the public interest factors outlined in schedule 4 of the RTI.

²² Section 64 of the IP Act.

²³ 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.

types of documents.²⁴ The Information Commissioner has previously decided that disclosing information about the billing structure and hourly rates of a lawyer could reasonably be expected to prejudice the commercial and financial affairs of that entity,²⁵ given the commercially competitive legal services field. In *Price and Department of Justice and Attorney-General*,²⁶ the Information Commissioner found that disclosure of information about lawyers' billing structure and hourly charge-out rates might reasonably be expected to assist the lawyers' competitors to compete with them more effectively in the legal services market generally, and would therefore be contrary to the public interest to disclose. The same principles apply to the fees charged by government lawyers where, as in Council's case, they operate on commercial terms and charge the agency for the legal services provided.

24. I afford these nondisclosure factors moderate weight in balancing the public interest.
25. I am unable to identify factors favouring disclosure of this information beyond the general public interest in accessing information held by government, and in the accountability of Council for its expenditure of public funds.²⁷ However, I do not accept, as argued for by the applicant,²⁸ that the latter public interest extends beyond disclosure of the total amounts expended by Council on legal fees. I therefore afford these factors low weight in balancing the public interest.
26. After balancing the factors weighing both for and against disclosure of the billing Information in Issue, I am satisfied that the factors favouring nondisclosure outweigh those favouring disclosure, such that access to this information contained in pages 256-259 may be refused because its disclosure would, on balance, be contrary to the public interest.

DECISION

27. I affirm the decision under review by finding that:
- access to pages 250-255 may be refused under section 67(1) of the IP Act and sections 47(3)(a) and 48 and schedule 3, section 7 of the RTI Act; and
 - access to the Information in Issue on pages 256-259 may be refused pursuant to:
 - section 88 of the IP Act as irrelevant information; or
 - section 67(1) of the IP Act and sections 47(3)(a) and 48 and schedule 3, section 7 of the RTI Act as exempt (LPP) information; or
 - section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act as information the disclosure of which would, on balance, be contrary to the public interest.
28. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

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²⁴ See *Murphy and Treasury Department* (1998) 4 QAR 446 at [20]; *Ellis and Department of Environment* (Unreported, Queensland Information Commissioner, 20 October 1998) at [20]-[32] and *VSC and Public Trustee of Queensland* (Unreported, Queensland Information Commissioner, 30 June 2008) at [49]-[51].

²⁵ Schedule 4, part 3, items 2 and 17 of the RTI Act.

²⁶ (Unreported, Queensland Information Commissioner, 12 March 2002) at [44].

²⁷ Schedule 4, part 2, items 1 and 4 of the RTI Act.

²⁸ Email of 19 December 2023.

Principal Review Officer

Date: 30 May 2024

APPENDIX**Significant procedural steps**

Date	Event
16 October 2023	OIC received the application for external review.
24 October 2023	OIC received preliminary documents from Council.
10 November 2023	OIC advised the parties that the application for review had been accepted.
28 November 2023	OIC received copies of the Information in Issue from Council. OIC communicated a preliminary view to the applicant.
19 December 2023	OIC received a submission from the applicant.
20 December 2023	OIC sought further information from Council.
15 February 2024	OIC received a response from Council.
5 March 2024	OIC communicated a preliminary view to Council.
22 April 2024	OIC received advice from Council that it was prepared to release additional documents to the applicant. OIC requested that Council release the documents to the applicant as soon as possible.
14 May 2024	OIC received advice from Council that it had released the additional documents to the applicant.
22 May 2024	OIC received advice from the applicant that she required a formal decision in order to finalise the review.