



## **Decision and Reasons for Decision**

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**Application Number:** 210532

**Applicant:** Mr R Carter

**Respondent:** Gold Coast City Council

**Decision Date:** 28 August 2008

**Catchwords:** **FREEDOM OF INFORMATION – section 43(1) of the *Freedom of Information Act 1992* – whether matter in issue would be privileged from production in a legal proceeding on the ground of legal professional privilege**

**FREEDOM OF INFORMATION – sufficiency of search – whether there are reasonable grounds to believe that further documents exist in the possession or control of Gold Coast City Council**

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## REASONS FOR DECISION

### Summary

1. For the reasons set out below, I find that:
  - the matter in issue in this review is exempt from disclosure in its entirety under section 43(1) of the *Freedom of Information Act 1992* (**FOI Act**)
  - there are no reasonable grounds to believe that further documents responsive to the applicant's freedom of information application (**FOI Application**) exist in the possession or control of Gold Coast City Council (**Council**).

### Background

2. By letter dated 20 May 2006, the applicant lodged a seven page FOI Application with Council seeking access to certain documents under the FOI Act.
3. By letter dated 26 June 2006, the applicant lodged an amendment to the FOI Application with Council.
4. Due to the size of the FOI Application, Council corresponded with the applicant in July and August 2006 in relation to the processing of the FOI Application and reached an agreement with the applicant to process the FOI Application in various stages.
5. By letter dated 8 April 2008, Council made an initial decision in relation to some parts of the FOI Application. Council advised that it had:
  - located 52 documents responsive to the relevant parts of the FOI Application
  - decided to grant the applicant full access to 44 of those documents and to refuse the applicant access to eight of those documents under section 43(1) of the FOI Act.
6. By letter dated 30 April 2008, the applicant applied for internal review of Council's decision.
7. By letter dated 16 May 2008, Council made an internal review decision affirming the initial decision and advising that in relation to the sufficiency of Council's searches, proper and reasonable efforts had been made to locate the documents sought.
8. By letter dated 11 June 2008, the applicant applied for external review of Council's internal review decision.

### Decision under review

9. The decision under review is Council's internal review decision dated 16 May 2008.

### Steps taken in the external review process

10. By email dated 16 June 2008, this Office requested certain initiating documents from Council.
11. By letter dated 17 June 2008, Council provided this Office with the requested documents.

12. By letter dated 3 July 2008, this Office asked Council to provide a copy of the matter in issue in this review.
13. By letter dated 9 July 2008, Council provided the matter in issue.
14. By letter dated 24 July 2008, I advised the applicant that:
  - based on the wording of the external review application, I assumed that he only sought external review of Council's decision refusing access to the matter in issue under section 43(1) of the FOI Act and that he did not seek external review of the sufficiency of Council's searches for documents responsive to the FOI Application. I asked the applicant to advise me by no later than 8 August 2008 if this was not the case
  - it was my preliminary view that the matter in issue was exempt from disclosure in its entirety under section 43(1) of the FOI Act
  - I invited him to provide submissions to this Office by 8 August 2008 in support of his case if he did not accept the preliminary view.
15. On 8 August 2008, the applicant delivered a number of documents<sup>1</sup> to this Office and indicated that he did not accept the preliminary view.
16. Also on 8 August, the applicant contacted a staff member of this Office by telephone and reiterated certain parts of his submissions.
17. After careful consideration of the applicant's submissions, I advised the applicant by letter dated 14 August 2008 that:
  - it remained my preliminary view that the matter in issue was exempt from disclosure in its entirety under section 43(1) of the FOI Act
  - in relation to the sufficiency of search issue which the applicant raised in his submissions, it was my preliminary view that there are no reasonable grounds to believe that further documents exist in Council's possession which respond to the FOI Application
  - I invited him to provide final and specific submissions in support of his case by 27 August 2008 if he did not accept this preliminary view.
18. The applicant provided further submissions to this Office in support of his case in the form of an affidavit sworn 26 August 2008 and various supporting documents.
19. In reaching a decision in this external review, I have taken the following into account:
  - the FOI Application dated 20 May 2006
  - the applicant's letter to Council dated 26 June 2006 amending the FOI Application
  - various correspondence between Council and the applicant relating to the processing of the FOI Application
  - Council's initial decision dated 8 April 2008

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<sup>1</sup> These documents included an affidavit sworn 7 August 2008 and various supporting documents.

- the applicant's internal review application dated 30 April 2008
- Council's internal review decision dated 16 May 2008
- the applicant's external review application dated 11 June 2008
- the applicant's affidavits sworn 7 August 2008 and 26 August 2008 and various supporting documents provided to this Office
- file notes of conversations between a staff member of this Office and the applicant
- the matter in issue
- relevant provisions of the FOI Act
- relevant case law and previous decisions of this Office.

### Issues on external review

20. In his affidavits<sup>2</sup> and in conversations with staff members of this Office, the applicant made numerous allegations in respect of staff of Council, this Office and the Crime and Misconduct Commission.
21. By letter dated 14 August 2008, I advised the applicant that:
- the issues for determination in this external review are whether:
    - the matter in issue is exempt from disclosure under section 43(1) of the FOI Act
    - there are reasonable grounds to believe that further responsive documents exist in the possession or control of Council, and if so, whether Council's search efforts have been reasonable in the circumstances
  - this Office has no jurisdiction to undertake an investigation or to make enquiries into the allegations referred to above as they are unrelated to this external review.

### Findings

#### A) *Refusal of access*

##### **Matter in issue**

22. The matter in issue in this review comprises eight documents, being correspondence between a Council officer and Council's legal representatives<sup>3</sup> (**Matter in Issue**).
23. Council provided this Office with a copy of the Matter in Issue which I have carefully reviewed.

##### **Council's decision**

24. Council decided that the Matter in Issue was exempt from disclosure in its entirety under section 43(1) of the FOI Act as it contained information provided to and received from Council's legal representatives for the dominant purpose of obtaining legal advice.

##### **Section 43(1) of the FOI Act**

25. Section 43(1) of the FOI Act provides:

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<sup>2</sup> Sworn 7 August 2008 and 26 August 2008.

<sup>3</sup> Council's City Solicitor and an external law firm engaged by Council.

**43 Matter affecting legal proceedings**

(1) *Matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.*

26. The section 43(1) exemption turns on the application of those principles of Australian common law which determine whether matter is subject to legal professional privilege.
27. Legal professional privilege protects confidential communications between a lawyer and client, including communications through their servants or agents, made for the dominant purpose of:
- seeking or giving legal advice or professional legal assistance, or
  - use, or obtaining material for use, in legal proceedings that had commenced, or were reasonably anticipated, at the time of the relevant communication.<sup>4</sup>
28. Legal professional privilege also protects confidential communications between the client or the client's lawyers (including communications through their servants or agents) and third parties, provided the communications were made for the dominant purpose of use, or obtaining material for use, in legal proceedings that had commenced, or were reasonably anticipated, at the time of the relevant communication.<sup>5</sup>

**The applicant's submissions**

29. As set out above, the applicant provided submissions to this Office in the form of affidavits sworn 7 August 2008 and 26 August 2008 and various supporting documents.
30. In his affidavit sworn 7 August 2008, the applicant relevantly submits that:

*[7] wherein the / a GCCC employee [as a 'tool'] provides official documentation to a person, being a solicitor / barrister, the [forced by law] ratepayer, allegedly, has under the principal of Natural Justice, &, Procedural Fairness, the indisputable right, to personally peruse the relevant documents, for inaccuracies.*

*[8] That as the GCCC ratepayers [as individuals] are in effect, the persons paying the solicitor / barrister, that the ratepayers are [being secretly forced to pay] therefore the ratepayer, [unable to trust the GCCC employee] on discovery of this, alleged, documented falsified advise, a 51, 52, 52a, 6, 7, 8, 21, 24, 25, 30, 31, is entitled to peruse the legal advise provided.*

31. I also note that in his affidavit sworn 26 August 2008, the applicant further submits that:
- his previous submissions (a summary of which is set out above) raise the issue of truthfulness which should be taken into consideration
  - there is no reason to withhold the Matter in Issue unless Council employees and their legal advisors have lied.

**Conclusion**

32. Having carefully considered the applicant's submissions, I note that:

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<sup>4</sup> *Esso Australia Resources Ltd v Commission of Taxation* (1999) 74 ALJR 339.

<sup>5</sup> *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217.

- they are largely unrelated to the question of whether the Matter in Issue is exempt from disclosure under section 43(1) of the FOI Act
- as advised to the applicant in my letter dated 14 August 2008, public interest considerations are not able to be taken into consideration in determining whether documents are exempt from disclosure under section 43(1) of the FOI Act.

33. After carefully considering the Matter in Issue, the applicant's submissions<sup>6</sup> and relevant case law, I am satisfied that the Matter in Issue is privileged and exempt from disclosure in its entirety under section 43(1) of the FOI Act on the basis that:

- it constitutes or records communications between Council and its legal representatives
- the communications are confidential in nature
- the dominant purpose of the communications was Council seeking and receiving professional legal assistance in anticipation of legal proceedings.<sup>7</sup>

### **B) Sufficiency of search**

34. The following questions are relevant to the issue of sufficiency of search:<sup>8</sup>

- whether there are reasonable grounds to believe that the requested documents exist and are documents of the agency as that term is defined in section 7 of the FOI Act and if so,
- whether the search efforts made by the agency to locate such documents have been reasonable in all the circumstances of the particular case.

35. The Information Commissioner has previously indicated that:<sup>9</sup>

*... it is a practical consequence of the issues to be determined in 'sufficiency of search' cases) ... that applicants will ordinarily need to explain fully their grounds for believing that the respondent agency holds additional responsive documents, and to disclose any relevant documentary or other evidence which tends to support the existence of reasonable grounds for such a belief. If the information provided to me by the respondent agency supports a finding that the questions posed in paragraph 19 of Re Shepherd should be answered in favour of the agency, and I am unable, independently, to identify any further relevant avenues of search or inquiry that an agency could reasonably be required to undertake, then, in the absence of evidence to the contrary from the applicant, there will be only one course open to me - to answer the aforementioned questions in favour of the agency.*

36. Therefore, where an external review involves sufficiency of search issues, there is a practical onus on the applicant to provide reasonable grounds to believe that documents responding to the request exist and are documents of the agency.

37. In both his written and oral submissions to this Office, the applicant asserts that Council has failed to provide him with thousands of documents.

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<sup>6</sup> Including the supporting documentation.

<sup>7</sup> I note that Section 87(3) of the FOI Act precludes me from disclosing matter claimed to be exempt in the reasons for a decision on review. Consequently, I am unable to provide the applicant with further and specific detail as to the content of the legal advice contained within the Matter in Issue.

<sup>8</sup> *Shepherd and Department of Housing, Local Government and Planning* (1994) 1 QAR 464 at paragraphs 18 and 19 (**Shepherd**).

<sup>9</sup> *Ainsworth; Ainsworth Nominees Pty Ltd and Criminal Justice Commission; A (Third Party); B (Fourth Party)* (1999) 5 QAR 284 at paragraph 46.

## The applicant's submissions

38. In his affidavit sworn 7 August 2008, the applicant submitted that:

*[60] being about **600 pages**, PLUS another expected hundred pages [and another, alleged, 10,000 pages from, a 400 to a 10,400 [exact number unknown] pages of **GCCC official records**] with intent to cause loss of financial commercially due payments to the entity **GCCC**,*

39. By letter dated 14 August 2008, I invited the applicant to provide specific submissions on this point. I also set out the relevant questions which the applicant should address in these submissions.

40. In his affidavit sworn 26 August 2008, the applicant submitted that:

*8b. thereafter these, alleged serial offences [of GCCC specific employees secretly depriving their employer, the GCCC, of "CASH" for alleged they didn't have 14 day GCCC accounts, for services lawfully provided] believed to be officially documented in the GCCC rubbish dump official records, allegedly, **10,000 pages**, conclusively evidencing the fact that the relevant involved contractors, being required to 'ABIDE' are not officially recorded, as entering the GCCC dumps, thereby not officially recorded, as being lawfully provided with a GCCC owned, and regulated, **commercial dumping service**, therefore were not recorded as being officially 'classified' [example, a 20, 21, 25,] and paying the GCCC for commercial dumping services, lawfully provided, and accepted, involving, allegedly, unknown [at present] tens of thousands of unrecorded commercial entries.*

...

*11. You are **wrong**. Council have identified that there are official **Stapylton dump records**, which are / were in storage, originating from about **1995** to the present date.*

*11a. There are, alleged, **5 GCCC controlled rubbish dumps, being, Stapylton Landfill, Suntown Landfill, Tugun Landfill, Reedy Creek Landfill, Molendinar Landfill**, are **GCCC owned**, the **official records** which are / were in storage from about 1995 to the present date.*

...

*[j] My claim is that B Webber of GCCC FOI in about, September 2002, a 19b, **apparently couldn't find** about, alleged, 20,000 pages of **official GCCC dump records**, [also CMC] and **then retrieve the specific relevant GCCC official record**, in effect, **requested by the IC** dated 3-2-01 and **officially notified the IC that, in effect, the official GCCC dump records do not exist**.*

*[k] My claim is that, allegedly, **B Webber** of **GCCC FOI**, doesn't want to provide the **GCCC official dump record** documents, possibly in 6 monthly lots. Is it because this criminally involves, allegedly, **CM, GCCC Local Law, AAS ABN, P&ST,?***

...

*[n] ... I could have **600 pages** of relevant docs, with another **10,000 pages** of **GCCC official dump records** to obtain from **B Webber**. My allegation is that the official GCCC dump records documents contain evidence that specific employees of GCCC, while under specific enforceable contract to the GCCC, and, as private contractors, were commercially entering the dumps, **officially unrecorded**, thereby carrying, '**officially unclassified**,' [a 20, 21, 25,] **material**, [unknown future financial consequences] thereby being **officially unrecorded**, as entering and dumping, that the GCCC private contractors [a 7,] [as GCCC employees] were **secretly** commercially entering, unlawfully commercially, being **unrecorded**, thereby, dumping **free of commercial charge**. A 7.*

## Conclusion

41. I have carefully considered the applicant's submissions in respect of this issue and acknowledge his assertion that additional responsive documents exist.

42. However, I consider that the applicant's submissions on this point are based on his belief that additional responsive documents should exist and that he has not provided relevant documentary or other evidence which supports the existence of reasonable grounds for his belief.
43. Accordingly, on the information available to me, I am unable to identify any reasonable grounds to believe that additional documents responding to the FOI Application exist in the possession or control of Council.
44. As I am unable to identify reasonable grounds to believe that further documents responding to the FOI Application exist in the possession or control of Council, it is unnecessary to make a determination in respect of Council's search efforts.

## **DECISION**

45. For the reasons set out above, I affirm Council's internal review decision dated 16 May 2008 by finding that:
  - the Matter in Issue is exempt from disclosure in its entirety under section 43(1) of the FOI Act
  - there are no reasonable grounds to believe that further documents responsive to the FOI Application exist in the possession or control of Council.
46. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

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**Assistant Commissioner Henry**

**Date: 28 August 2008**