



Decision and Reasons for Decision

Citation: *Barling and Brisbane City Council* [2017] QICmr 47
(15 September 2017)

Application Number: 313009

Applicant: Barling

Respondent: Brisbane City Council

Decision Date: 15 September 2017

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - file note - whether information is exempt due to legal professional privilege - schedule 3, section 7 of the *Right to Information Act 2009* (Qld) - whether access may be refused under section 67(1) of the *Information Privacy Act 2009* (Qld) and section 47(3)(a) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - pay rates and calculations - statement concerning Council's liability - whether disclosure of information would, on balance, be contrary to the public interest - whether access may be refused under section 67(1) of the *Information Privacy Act 2009* (Qld) and section 47(3)(b) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - IRRELEVANT INFORMATION - statement about other Council matters - whether information may be deleted under section 88 of the *Information Privacy Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - ONUS ON EXTERNAL REVIEW - whether Council has established that its decision was justified - section 100(1) of the *Information Privacy Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant was previously employed, through a labour hire company, to perform work for Brisbane City Council (**Council**) as a plant operator in the cemeteries. After ceasing employment, the applicant applied to Council under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to information relating to the underpayment of his wages and superannuation. The applicant has been involved in negotiations with Council and the labour hire company regarding the underpayment issue since 2015.¹
2. Council located more than 1000 pages in response to the application, of which 400 were released to the applicant in their entirety. Access to the remaining pages was refused on the basis of legal professional privilege or public interest grounds.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of Council's decision. OIC managed to resolve most of the issues between the parties informally during the review, with Council agreeing to release some further information, and the applicant accepting OIC's preliminary view that much of the refused information was either exempt or, on balance, contrary to the public interest to disclose.
4. Council however, maintained that access to parts of 33 pages should be refused. Council submitted that one category of information attracts legal professional privilege, one category is irrelevant to the terms of the access application, and disclosing two categories would, on balance, be contrary to the public interest, primarily due to the significant prejudice which Council considers would result to its deliberative processes regarding the quantum of backpay to the applicant.
5. For the reasons outlined below, I have decided to set aside Council's decision refusing access to the information remaining in issue in this review.

Background

6. Significant procedural steps taken by OIC in conducting the external review are set out in the Appendix to these reasons.

Reviewable decision

7. The decision under review is Council's original decision dated 14 September 2016.

Evidence considered

8. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and Appendix).

Information in issue

9. The information remaining in issue in this review appears in 33 pages² and can be described as follows:

¹ Documents released by Council confirm the applicant was underpaid, however, the quantum of backpay to be awarded to the applicant remains the subject of dispute between the parties as at the date of this decision.

² Some of the information is duplicated within these pages.

- a file note of a telephone call between a Council solicitor and the applicant's union representative (**Call Note**)³
- information relating to the applicant's pay rates, including Council's backpay estimations and calculations (**Pay Information**)⁴
- one sentence in an internal Council email setting out a Council officer's view on Council's potential liability regarding the applicant's matter (**Potential Liability Statement**)⁵
- one sentence in an internal Council email, regarding the applicant's matter, which also refers to other Council matters (**Other Matter Details**).⁶

Issues for determination

10. The issues for determination in this review are whether:
- access to the Call Note may be refused on the basis that it is exempt information
 - access to the Pay Information and Potential Liability Statement may be refused on the basis that disclosure of that information would, on balance, be contrary to the public interest; and
 - the Other Matter Details are relevant to the terms of the access application.
11. Council's submissions in support of nondisclosure are examined below. As the access applicant has accepted OIC's view in resolution of the refusal of access issues adverse to him, those issues are not addressed in this decision.

Relevant law

12. Section 100 of the IP Act provides:

On an external review, the agency or Minister who 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.

13. Accordingly, in this review, Council bears the onus of establishing that its refusal of access decision should be upheld.⁷
14. The IP Act confers on an individual a right to access documents of an agency, to the extent they contain the individual's personal information.⁸ However, this right of access is subject to some limitations, including grounds for refusing access.⁹ The grounds relied on by Council and considered in these reasons for decision are where the requested information comprises exempt information¹⁰ and where disclosure would, on balance, be contrary to the public interest.¹¹

³ Brisbane City Legal Practice (BCLP) File Part 3, p 86.

⁴ 28 part pages: A Hastie File Part 2, pp 49, 60, 109, 113, 118, 122, 125, 128, 130, 135, 136; LA McNeill File, pp 57, 94, 97, 99, 122, 125, 138, 141, 143, 144, 145, 146, 147, 148, 149; and BCLP File Part 4, pp 139, 143.

⁵ A Hastie File Part 1, pp 21, 55.

⁶ A Hastie File Part 2, p 98; and LA McNeill File, p 115.

⁷ Council did not advance alternative grounds for refusing access to information, other than those addressed in these reasons for decision.

⁸ Section 40(1)(a) of the IP Act. Section 12 of the IP Act defines 'personal information' as *information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.*

⁹ Grounds for refusal of access are set out in section 47 of the RTI Act. Section 67(1) of the IP Act provides that access to information may be refused under the IP Act on the same grounds as in section 47 of the RTI Act.

¹⁰ Sections 47(3)(a) and 48 of the RTI Act. Schedule 3 of the RTI Act sets out the categories of exempt information.

¹¹ Sections 47(3)(b) and 49 of the RTI Act.

15. The IP Act is to be administered with a pro-disclosure bias, which means that an agency must decide to give access to a document unless giving access would, on balance, be contrary to the public interest.¹²
16. Information is exempt information if it would be privileged from production in a legal proceeding on the ground of legal professional privilege (**Privilege**).¹³ This exemption reflects the requirements for establishing Privilege at common law.¹⁴ Privilege attaches to confidential communications between a client and their lawyer, made for the dominant purpose of giving or obtaining legal advice or for use in existing or reasonably anticipated litigation. When these requirements are met, Privilege is established. Qualifications and exceptions¹⁵ may, in particular circumstances, affect whether information attracts or remains subject to Privilege.
17. In determining whether disclosure of information would, on balance, be contrary to the public interest, the RTI Act identifies various factors that may be relevant to deciding the balance of the public interest,¹⁶ and explains the steps that a decision-maker must take¹⁷ in deciding the public interest as follows:
 - identify any irrelevant factors and disregard them¹⁸
 - identify relevant public interest factors favouring disclosure and nondisclosure
 - balance the relevant factors favouring disclosure and nondisclosure; and
 - decide whether disclosure of the information would, on balance, be contrary to the public interest.
18. The final provision relevant in this case is section 88 of the IP Act which provides that an agency may give access to a document subject to the deletion of information it reasonably considers is not relevant to the access application, ie. irrelevant information. This is not a ground for refusing access, but a mechanism to allow irrelevant information to be deleted from documents which are identified for release to an applicant. 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 access application.¹⁹

Findings

Call Note

19. Council submits that the Call Note attracts Privilege because its dominant purpose was to record a conversation that is relevant to and forms part of the ongoing negotiations occurring between the parties upon which the solicitor is providing legal advice to her clients within Council.²⁰ Council further submits that the Call Note forms part of the solicitor's file utilised in providing legal advice, and is not a transcript of the conversation, but rather the solicitor's notes on her recollection of the call, the dominant purpose of which was to record information as part of her role in providing legal advice to Council.²¹

¹² Section 64(1) of the IP Act.

¹³ Schedule 3, section 7 of the RTI Act.

¹⁴ *Ozcare and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 13 May 2011) at [12].

¹⁵ Such as waiver or improper purpose.

¹⁶ Schedule 4 of the RTI Act sets out the factors for deciding whether disclosing information would, on balance, be contrary to the public interest. However, these lists are not exhaustive; in other words, factors that are not listed may also be relevant in a particular case.

¹⁷ Section 49(3) of the RTI Act.

¹⁸ I consider that no irrelevant factors arise in the circumstances of this review, and I have not taken any into account in making my decision.

¹⁹ *O80PCE and Department of Education and Training* (Unreported, Queensland Information Commissioner, 15 February 2010) at [52].

²⁰ Submissions received by OIC on 19 June 2017 and 14 August 2017.

²¹ Submission received by OIC on 14 August 2017.

20. Council's submissions focus on establishing the 'advice' limb of Privilege. Legal advice has been broadly interpreted to extend to all '*professional advice as to what a party should prudently or sensibly do in the relevant context*'.²² Relevantly, Privilege attaches to communications rather than documents, ie. it is not the documents as such that attract Privilege, it is the communication to and by the lawyer.²³
21. I accept that the Call Note forms part of the Council's solicitor's file. I also acknowledge that the solicitor may have taken the content of the Call Note into account in later providing her client with advice in relation to the underpayment negotiations.²⁴ However, I am not satisfied that the Call Note constitutes a privileged communication which attracts the 'advice' limb of Privilege, for two reasons. Firstly, I am not satisfied that the Call Note comprises a *confidential communication* between the solicitor and her client. I find the Call Note is a contemporaneous record of a communication between Council's solicitor and the applicant's union representative. I am satisfied that confidentiality of the communication cannot be established against the applicant because his representative was the other party to the telephone call.
22. Secondly, I consider that the dominant purpose of the Call Note was to create a contemporaneous record of a telephone discussion between the solicitor and the applicant's union representative. While I accept that the solicitor may have later taken the content of the Call Note into account in providing legal advice to her client, and I am conscious that the ambit of legal professional privilege is broad²⁵, I am unable to accept Council's argument with respect to dominant purpose.
23. Accordingly, I find that the Call Note does not attract Privilege and does not comprise exempt information under schedule 3, section 7 of the RTI Act.

Pay Information

24. Council submits that disclosing its calculations as to the quantum of estimated backpay payable to the applicant would prejudice Council's deliberative processes in ongoing negotiations and that the relevant deliberative process factor²⁶ should be afforded significant weight.²⁷
25. The Pay Information comprises the applicant's personal information as he is the subject of the relevant discussions, he is identified in the documents and the rates reveal information about him, being details about what he was and/or should have been paid for the work he performed for Council.²⁸ I am satisfied that there is a strong public interest in disclosing the applicant's personal information to him under the IP Act.²⁹
26. Council is accountable to the public for its decisions involving the expenditure of public funds. The Information Commissioner has previously held that the balance of the public interest lies in ensuring that government processes should be as transparent as possible for an affected citizen, who should be permitted access to information that would assist them in assessing whether fair compensation is paid to them.³⁰ While this case does not concern compensation as such, the applicant has performed services for Council for

²² *ABW Ltd v Cole (No 5)* (2006) 155 FCR 30 at page 45.

²³ *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at page 585.

²⁴ Hypothetically speaking, if such legal advice was prepared, the advice itself would be very likely to attract Privilege. However, that is not an issue for determination in this review.

²⁵ See *Pluta and Queensland Rail* [2017] QICmr 4 (16 February 2017).

²⁶ Schedule 4, part 3, item 20 of the RTI Act.

²⁷ Submissions received by OIC on 19 June 2017 and 14 August 2017.

²⁸ See the definition of '*personal information*' in section 12 of the IP Act set out at footnote 8 above.

²⁹ Schedule 4, part 2, item 7 of the RTI Act.

³⁰ *Little; Cantoni and Department of Natural Resources* (1996) 3 QAR 170 (**Little**) at [47]. *Little* concerned valuation calculations relating to the acquisition of private property by Government.

which he has not been remunerated at the appropriate level. Accordingly, I consider that the following principles³¹ apply to disclosure of the Pay Information:

- the extent of the applicant's knowledge will be enhanced if the applicant knows what Council has taken into account in its calculations
- the granting of access to information which shows the factual basis on which Council officers have proceeded is likely to advance the negotiation process;³² and
- there appears to be no valid reason why the applicant should not have an opportunity to critically analyse Council's calculations.³³

27. For these reasons, I am satisfied that disclosure of the Pay Information could reasonably be expected to enhance Council's accountability³⁴, ensure effective oversight of expenditure of public funds³⁵, and reveal the reason for a government decision and any background or contextual information that informed the decision.³⁶ I accept that the weight to be attributed to these disclosure factors should be somewhat reduced on account of the fact that the Pay Information is specific only to the applicant and his employment, rather than the broader community. While there may be other similar cases considered by Council/government in the future, it is not a scenario which raises a broader public interest which could be considered common to all citizens.³⁷ Accordingly, I consider the weight of the public interest factors is somewhat reduced, and therefore, afford them moderate weight.

28. The public interest will favour nondisclosure of information which could reasonably be expected to:

- prejudice a deliberative process of government (**Prejudice Factor**);³⁸ or
- cause a public interest harm through disclosure of an opinion, advice or recommendation that has been obtained, prepared or 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 (**Harm Factor**).³⁹

29. Deliberative processes involved in the functions of government have been defined as '*... thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action*' and '*careful consideration with a view to decision*'⁴⁰.

30. I accept that the Pay Information comprises Council's deliberations in terms of its calculations and determination of applicable pay rates. However, I find that the Harm Factor does not apply to the Pay Information, because one of the exceptions applies—namely, the Pay Information consists of factual information.⁴¹ Accordingly, I consider only the Prejudice Factor is relevant in this review.

³¹ Adapted from the Information Commissioner's findings in *Little* and see also *Murtagh v Federal Commissioner of Taxation* (1984) 54 ALR 313 at 329 (Davies J), cited in *Little* at [46].

³² *Little* at [46].

³³ *Little* at [49].

³⁴ Schedule 4, part 2, item 1 of the RTI Act.

³⁵ Schedule 4, part 2, item 4 of the RTI Act.

³⁶ Schedule 4, part 2, item 11 of the RTI Act.

³⁷ As was the case in *Little* which considered the disclosure of a valuation report relating to the acquisition of private property for public purposes.

³⁸ Schedule 4, part 3, item 20 of the RTI Act.

³⁹ Schedule 4, part 4, item 4 of the RTI Act.

⁴⁰ *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 (**Eccleston**) at [28]-[30] citing with approval the definition given in *Re Waterford and Department of Treasury (No.2)* (1984) 5 ALD 588 at 606.

⁴¹ Schedule 4, part 4, item 4(3)(b) of the RTI Act.

31. In *Little*, disclosure of a valuation report was found not to be, on balance, contrary to the public interest. In reaching that decision, the Information Commissioner had regard to the equivalent deliberative process provision under the repealed *Freedom of Information Act 1992* (Qld), and rejected the agency's argument that the greater public interest would be served through nondisclosure as it would maximise the agency's negotiating advantage against an applicant.⁴² I consider that reasoning can be applied in this case and serves to reduce the weight of the Prejudice Factor.
32. The Information Commissioner has also previously recognised that prejudice to a deliberative process can arise where releasing a document would cause disruptive public debate, reallocation of resources to deal with the disruption (resources which would otherwise be involved in finalising the deliberative process) and interference with the ability of an agency to objectively consider its options and reach a decision.⁴³ However, it is rare for the level of anticipated disruption to be sufficient to amount to an injury to the public interest.⁴⁴ Also, the fact that a relevant process is ongoing, does not, of itself, permit a conclusion that disclosure would, on balance, be contrary to the public interest.⁴⁵
33. Council submits that while the backpay negotiations are ongoing, it would be prejudicial and detrimental to disclose Council's calculations to the applicant. Council has not however, particularised how disclosing the Pay Information could interfere with its ability to objectively consider the outstanding options and reach a final decision on the payment to the applicant. Accordingly, I am unable to see how its disclosure could reasonably be expected to lead to any of the adverse public interest consequences as argued by Council.
34. As recognised earlier in these reasons, the weight of the disclosure factors is somewhat lessened in this case due to the Pay Information being particular to the applicant's individual case.⁴⁶ Equally, I consider that any injury to Council's deliberative processes and disruptive public debate that may arise from disclosure of the Pay Information, would be relatively limited. Accordingly, I afford the Prejudice Factor low weight in favour of nondisclosure.
35. On balance, I find that the public interest in the applicant having full access to his personal information held by Council, ensuring transparency in government processes and effective oversight of public funds outweigh the prejudice to Council's deliberative process.⁴⁷ Accordingly, I am satisfied that disclosure of the Pay Information would not, on balance, be contrary to the public interest and therefore, access may not be refused to it on that basis.

⁴² *Little* at [48].

⁴³ *Pallara Action Group Inc and Brisbane City Council* (Unreported, Queensland Information Commissioner, 21 September 2012) at [42]-[43] and *Johnston and Brisbane City Council* (Unreported, Queensland Information Commissioner, 6 December 2013) at [39] and [42].

⁴⁴ *Eccleston* at [179].

⁴⁵ *Johnson and Department of Transport; Department of Public Works* (2004) 6 QAR 307 at [39]. While this decision was made under the FOI Act, the comments remain relevant to the objects of the RTI Act. See also the Commonwealth Administrative Appeals Tribunal's observations in *Re Boehm and Department of Industry, Technology and Commerce* (1985) 7 ALN 186 at 189 that 'submissions ... that final decisions only, and not earlier discussions, should be disclosed, seem to us to be inconsistent with the very existence of the [Commonwealth FOI] Act.'

⁴⁶ However, I recognise that the Pay Information is of great personal significance to the applicant and do not intend to trivialise its importance.

⁴⁷ I have carefully considered all factors listed in schedule 4, part 3 and part 4 of the RTI Act, and can identify no other prejudice or harm telling in favour of nondisclosure of the Pay Information. I cannot see how disclosure of the Pay Information could, for example, prejudice the competitive commercial activities of an agency in schedule 4, part 3, item 17 of the RTI Act or prejudice the management function of an agency in schedule 4, part 3, item 19 of the RTI Act, or raise the harm factor in schedule 4, part 4, item 7 of the RTI Act.

Potential Liability Statement

36. The Potential Liability Statement appears in email correspondence between staff of Council's Workplace Relations Unit and the remainder of the email has been disclosed to the applicant. Council has not advanced the argument that the Potential Liability Statement attracts Privilege and in any event, this could not be established as the communication does not involve Council's solicitor.
37. Council has submitted that disclosure of the Potential Liability Statement could prejudice the ongoing negotiations regarding the applicant's matter and the financial affairs/interests of Council, as it may be potentially exposed to future actions by the applicant. Council also submits that disclosure would not assist in the ongoing negotiations between the parties and there is little or no public interest in it being released.
38. As set out earlier in these reasons, the IP Act is to be administered with a pro-disclosure bias. Accordingly, the starting point in considering the Potential Liability Statement is disclosure. In addition, I consider the public interest in ensuring transparent government processes and revealing contextual information for government decisions⁴⁸, raise relevant disclosure factors which should be afforded moderate weight in this case.
39. I have had regard to the deliberative process public interest factors outlined at paragraph 28 of these reasons. Given the very limited nature of the Potential Liability Statement, ie. one sentence, comprising 23 words, and in the absence of any specific submissions from Council particularising the prejudice to its deliberative processes, I am unable to find that these factors apply in favour of nondisclosure.
40. With respect to Council's argument that disclosure would prejudice its financial affairs⁴⁹, I am not satisfied that a reasonable expectation of prejudice can be established in this regard. As set out above, the Potential Liability Statement is a view expressed by a Council officer in an email communication with another colleague—it is not legal advice and nor does it bind Council to any particular legal position. Given the volume of information already released to the applicant and the applicant's resulting level of knowledge about Council's involvement in the underpayment of wages matter, I consider Council's concerns about future actions by the applicant are unfounded. Accordingly, I find that these factors do not apply and even if they were found to apply, I would afford them only minimal weight.
41. On balance, I find that the public interest favours disclosure of the Potential Liability Statement as there is minimal, if any, weight to be afforded to the nondisclosure factors.⁵⁰ I am therefore, satisfied that disclosure would not, on balance, be contrary to the public interest, and that access may not be refused on this basis.

Other Matter Details

42. Council submits that the Other Matter Details are irrelevant to the applicant's case, as the relevant sentence is about other matters Council became aware of after the applicant's case.⁵¹

⁴⁸ Schedule 4, part 2, items 1 and 11 of the RTI Act.

⁴⁹ Schedule 4, part 3, item 2 of the RTI Act is the key factor to consider here. Schedule 4, part 3, item 15 and part 4, item 7 of the RTI Act, also raise nondisclosure factors concerning prejudice to an agency's business and financial affairs.

⁵⁰ I have carefully considered all factors listed in schedule 4, part 3 and part 4 of the RTI Act, and can identify no other prejudice or harm telling in favour of nondisclosure of the Potential Liability Statement.

⁵¹ Submission received on 14 August 2017.

43. The applicant applied for access to documents about the underpayment of his wages and superannuation. The Other Matter Details appear within a series of emails between Council officers discussing the applicant's case. In the course of the discussions, reference is made to other comparable cases, ie. the Other Matter Details. I consider it would be illogical to sever a particular sentence on the basis of irrelevance given that the only reason the Other Matter Details appear is because the writer is using them to make reference to cases that have some comparison to the applicant's. I am satisfied that the Other Matter Details have some bearing on the applicant's case and are therefore, relevant to the terms of the access application.
44. Accordingly, I find that the Other Matter Details may not be deleted under section 88 of the IP Act.

DECISION

45. I set aside Council's decision refusing access to the Information in Issue. As Council has not discharged the onus of establishing that a decision refusing access was justified, I find instead that the applicant may be granted access to the Information in issue.
46. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

K Shepherd
Assistant Information Commissioner

Date: 15 September 2017

APPENDIX**Significant procedural steps**

Date	Event
12 October 2016	OIC received the external review application.
13 October 2016	OIC notified Council that the external review application had been received and requested various procedural documents.
17 October 2016	OIC received the requested procedural documents from Council.
20 October 2016	OIC notified Council and the applicant that the external review application had been accepted and requested further documents from Council.
24 October 2016	OIC received the requested documents from Council.
29 November 2016	OIC received oral submissions from the applicant.
8 December 2016	OIC clarified the scope of the application with the applicant.
9 December 2016	OIC requested further documents from Council.
13 December 2016	OIC received the requested documents from Council.
15 December 2016	OIC received submissions from Council and requested further documents. OIC received the requested documents from Council.
21 February 2017	OIC requested further information from Council.
28 March 2017	OIC provided the applicant with an update on the status of the review.
31 March 2017	OIC received the requested information from Council.
16 May 2017	OIC conveyed a preliminary view to Council, requested submissions in response and provided the applicant with an update on the status of the review.
19 May 2017	OIC received the requested submissions from Council.
13 July 2017	OIC conveyed a preliminary view to the applicant and a further preliminary view to Council and requested submissions in response.
14 August 2017	OIC received the requested submissions from the applicant and Council.
15 August 2017	OIC contacted the applicant to clarify his submissions and confirm the issues remaining in the review.
21 August 2017	OIC contacted Council to update them on the status of the review and request they release additional information to the applicant. Council released additional information to the applicant.
15 September 2017	Council confirmed to OIC that its deliberations regarding the applicant's underpayment of wages matter were ongoing.