



Decision and Reasons for Decision

Citation:	<i>Toogood and Cassowary Coast Regional Council</i> [2018] QICmr 13 (22 March 2018)
Application Number:	313265
Applicants:	J and S Toogood
Respondent:	Cassowary Coast Regional Council
Decision Date:	22 March 2018
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - EXEMPT INFORMATION - hostile communications, unsubstantiated complaints and voluminous threats of legal action initiated by the applicant - history of acrimony between the applicant and agency - whether disclosure of the information could reasonably be expected to result in a serious act of harassment or intimidation against certain individuals - schedule 3, section 10(1)(d) of the <i>Right to Information Act 2009</i> (Qld) - whether access to information may be refused under section 47(3)(a) of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicants applied to Cassowary Coast Regional Council (**Council**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to certain information¹ about themselves and their digital marketing businesses, connected with the tourism industry.
2. Council released 63 pages² to the applicants with a small amount of information redacted and decided to refuse access to 564 pages on various grounds, including that disclosure would, on balance, be contrary to the public interest and that disclosure of certain information could reasonably be expected to result in a person being subject to a serious act of harassment or intimidation (**Harassment or Intimidation Exemption**).
3. The applicants then applied to the Office of the Information Commissioner (**OIC**) for external review of Council's decision. The applicants have made submissions to OIC alleging wrongdoing by Council and particular Council officers, claiming that they have been unfairly treated by Council, and referring to various court proceedings in which they are currently involved with Council.

¹ The access application sought information '*created sent or received*' by five named individuals, and to board members of two third party entities. To protect the private affairs of those individuals and entities, I have omitted their names from these reasons, as they are not material to my findings on the issues for determination in this review.

² Comprised of 18 documents.

4. For the reasons set out below, I vary Council's decision and find that access to all of the information may be refused under the RTI Act on the basis of the Harassment or Intimidation Exemption.

Background

5. Significant procedural steps taken in the external review are set out in the Appendix.

Reviewable decision

6. Council made a decision refusing access to 564 pages on 14 December 2016.³ The applicants then applied for internal review⁴ but Council did not decide the internal review application within the timeframe prescribed in the RTI Act.⁵ Accordingly, the decision under review is Council's decision taken to have been made under section 83(2) of the RTI Act, affirming the original decision.⁶

Evidence considered

7. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and the Appendix).
8. During the external review, the applicants raised numerous matters extraneous to the issue for determination in this external review under the RTI Act. For example, a large proportion of the applicants' submissions have focused on current civil proceedings in which the applicants are involved with a Council officer.⁷ In these reasons for decision, I have only considered submissions made by the applicants to the extent they raise issues *relevant* to the issue for determination in this review, as set out below.

Information in issue

9. The information in issue in this review consists of the 564 pages to which Council refused full access (**Information in Issue**). Generally, the Information in Issue can be described as email correspondence, extracts from social media, and internal Council records and communications.⁸
10. The applicants do not seek access to the small amount of information redacted from the pages that have been released to them.⁹ Accordingly, this information does not form part of the Information in Issue in this review and is not addressed in these reasons.

Issue for determination

11. In this external review, the only issue for determination is whether access to the Information in Issue may be refused on the basis that it is exempt information.
12. The applicants initially raised concerns about the sufficiency of Council's searches.¹⁰ OIC proceeded to advise the applicants of the number of pages located in response to

³ Although I note that Council's decision notice did not specify the number of pages to which access was refused.

⁴ By letter to Council dated 11 January 2017.

⁵ 20 business days after the internal review application is made. See section 83(2) of the RTI Act.

⁶ Council's original decision dated 14 December 2016.

⁷ By email to OIC dated 15 January 2018. Similar submissions were made by the applicants on 9 March 2018 and 13 March 2018.

⁸ Given the nature of the Information in Issue including a number of email chains, some of the information is comprised of correspondence sent to and by the applicants.

⁹ In a telephone conversation between Mr Toogood and OIC on 13 July 2017, and confirmed by OIC's letter to the applicants dated 25 August 2017.

¹⁰ External review application dated 27 March 2017.

the application¹¹, and indicated that, given the significant volume of pages, the information they believed to be missing likely formed part of the Information in Issue. However, as the applicants did not respond with any further concerns regarding the sufficiency of Council's searches, the external review proceeded on the basis that sufficiency of search was not an issue for determination and therefore, it is not considered in these reasons.

13. To the extent that the applicants appear to contend¹² that OIC relies on defamation as a ground for refusal of access, this is refuted.¹³ The ground for refusal which I have found applies to the Information in Issue is set out below and in making that finding,¹⁴ I have not considered whether any of the Information in Issue is defamatory, as this is not relevant to the requirements of the applicable exemption.
14. During the review, the applicants requested¹⁵ that they be provided with a copy of Council's submissions. To ensure the participants could focus on issues salient to the review, to ensure compliance with section 108 of the RTI Act, and to endeavour to resolve this matter as expeditiously as possible, OIC declined this request.¹⁶ I have however, ensured that the applicants were made aware of the substance of the evidence relied upon,¹⁷ conveyed detailed reasons for OIC's view that the Information in Issue was exempt from disclosure, and afforded the applicants an opportunity to provide submissions in support of their case. Accordingly, I am satisfied¹⁸ that the applicants have been afforded procedural fairness in the circumstances of this review.

Relevant law

15. Under section 23 of the RTI Act a person has a right to be given access to documents of an agency. However, this right is subject to a number of exclusions and limitations, including grounds for refusal of access.¹⁹
16. Access can be refused under the RTI Act where the information sought in an access application comprises exempt information.²⁰ Schedule 3 of the RTI Act specifies the types of information the disclosure of which Parliament has determined is exempt because its release would be contrary to the public interest. Relevantly, under the Harassment or Intimidation Exemption,²¹ information is exempt if its disclosure could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation.

¹¹ In its decision dated 14 December 2016, Council did not specify the number of pages to which access was refused.

¹² In submissions to OIC dated 15 January 2018.

¹³ In its decision dated 14 December 2016, Council refused access to certain information on the basis that it 'may be defamatory'. This is not a ground for refusal under the RTI Act, and it is not a ground on which I have relied in reaching this decision. External review by the Information Commissioner (or delegate) is merits review—ie, an administrative reconsideration of a case which can be described as 'stepping into the shoes' of the primary decision-maker to determine what is the correct and preferable decision. As such, the Information Commissioner has the power to decide any matter in relation to an application that could have been decided by the agency.

¹⁴ In this case, my finding is that the correct and preferable decision is that access to the Information in Issue may be refused under section 47(3)(a), section 48 and schedule 3, section 10(1)(d) of the RTI Act.

¹⁵ By email to OIC dated 7 December 2017, and submissions to OIC dated 15 January 2018.

¹⁶ Under section 95(1)(a) of the RTI Act, the procedure to be followed, subject to the RTI Act, is within the discretion of the Information Commissioner.

¹⁷ By letter from OIC to the applicants dated 5 December 2017.

¹⁸ Applying the principles set out in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88.

¹⁹ As set out in section 47(3) of the RTI Act.

²⁰ Section 47(3)(a) and section 48 of the RTI Act.

²¹ Schedule 3, section 10(1)(d) of the RTI Act. This provision is subject to the exceptions contained in schedule 3, section 10(2). As noted at paragraph 29 below, I am satisfied that none of the exceptions apply in this matter.

17. The RTI Act does not define ‘a serious act of harassment or intimidation’. Therefore, the terms are given their ordinary meanings.²² In this regard, the Information Commissioner has previously accepted the following definitions:²³
- ‘harass’ includes ‘to trouble by repeated attacks, ... to disturb persistently; torment’; and
 - ‘intimidate’ includes ‘to make timid, or inspire with fear; overawe; cow ... to force into or deter from some action by inducing fear’.
18. The expected harassment or intimidation must be ‘serious’ in nature before the Harassment or Intimidation Exemption will apply.²⁴ The exemption is not invoked if the expected harassment or intimidation does not meet the serious threshold. This indicates that it was Parliament’s intention, when passing this provision, that some degree of low level harassment or intimidation would be tolerated before the exemption could be invoked.²⁵ Being competitive, disparaging, unpleasant or ‘irksome and annoying’ is not sufficient to establish the exemption.²⁶
19. The term ‘could reasonably be expected to’ requires that the expectation is reasonably based, that it is neither irrational, absurd or ridiculous,²⁷ nor merely a possibility.²⁸ Whether the expected consequence is reasonable requires an objective examination of the relevant evidence.²⁹ Factors that might be relevant in considering whether an event could reasonably be expected to occur include, but are not limited to:³⁰
- past conduct or a pattern of previous conduct
 - nature of the information in issue
 - nature of the relationship between the parties and/or relevant third parties; and
 - relevant contextual and/or cultural factors.
20. Finally, as identified by the applicants,³¹ the expectation of serious intimidation or harassment must arise as a **result of disclosure**, rather than from other circumstances.³² Accordingly, for the Harassment or Intimidation Exemption to apply, I must be satisfied that the disclosure of the Information in Issue, rather than the nature of the pre-existing relationship between the relevant parties, could reasonably be expected to cause the serious act of harassment or intimidation.

²² *Sheridan and South Burnett Regional Council (and Others)* (Unreported, Queensland Information Commissioner, 9 April 2009) (**Sheridan**) at [188]. The decision in *Sheridan* concerned section 42(1)(ca) of the repealed *Freedom of Information Act 1992* (Qld). Schedule 3, section 10(1)(d) of the RTI Act is drafted in substantially the same terms as this provision, and the reasoning in *Sheridan* has since been cited with approval in relation to the RTI Act, in decisions including *Mathews and Department of Transport and Main Roads* [2014] QICmr 37 (19 September 2014) and *Bowmaker Realty and Department of Justice and Attorney-General; Andrews* [2015] QICmr 19 (17 August 2015) (**Bowmaker**).

²³ *Richards and Gold Coast City Council* (Unreported, Queensland Information Commissioner, 28 March 2012) (**Richards**) at [13], *Ogawa and Queensland Police Service* (Unreported, Queensland Office of the Information Commissioner, 21 June 2012) at [13], applying the Macquarie Dictionary Online (Fourth Edition) definitions referred to in *Sheridan* at [194]-[200].

²⁴ ‘Serious’ relevantly means ‘weighty or important’, ‘giving cause for apprehension; critical’: Macquarie Dictionary Online (accessed 2 March 2018).

²⁵ *Sheridan* at [187] and [294].

²⁶ *Bowmaker* at [31].

²⁷ *Attorney-General v Cockcroft* (1986) 64 ALR 97 at [106].

²⁸ *Murphy and Treasury Department* (1995) 2 QAR 744 (**Murphy**) at [44] citing *Re B and Brisbane North Regional Health Authority* (1994) 1 QAR 279, at 339-341.

²⁹ *Murphy* at [45]-[47]. In reaching a finding, it is not necessary for a decision-maker ‘to be satisfied upon a balance of probabilities’ that disclosing the document will produce the anticipated prejudice, or, in this case, serious harassment or intimidation: see *Sheridan* at [192].

³⁰ *Sheridan* at [193], cited more recently in *Edmestone and Blackall-Tambo Regional Council* [2016] QICmr 12 (15 April 2016).

³¹ In their email to Council dated 14 February 2017 and in their external review application dated 27 March 2017.

³² *Watson v Office of Information Commissioner Qld & Ors* [2015] QCATA 95 per Thomas J at [19].

Findings

21. Having considered the evidence available to OIC in this matter,³³ I am satisfied that there is a demonstrated history of acrimony between the applicants, Council, certain Council officers and third parties. More specifically, I consider the evidence demonstrates that the applicants have engaged in a pattern of:
- hostile correspondence and social media communications with/about certain Council officers and third parties
 - complaints concerning wrongdoing³⁴ in relation to Council and certain Council officers, many of which appear to be unsubstantiated; and
 - voluminous threats of legal action against Council, certain Council officers, and third party individuals and entities, many of which appear to be lacking in substance.
22. In relation to the above, the applicants have submitted³⁵ to OIC that certain complaints and proceedings that they have made or commenced against Council have been substantiated, and have made lengthy submissions concerning their view that Council, Council officers and Councillors have engaged in wrongdoing. In this regard, it is not my role to evaluate every complaint and legal proceeding brought or threatened by the applicants and to make a finding on the merits of each of these matters.³⁶ Nor am I required to consider the totality of the relationship between the applicants and Council, and determine matters of ethics or law as between the parties. Rather, having regard to all of the evidence available to OIC, I am required, under the RTI Act, to determine whether disclosure of the Information in Issue could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation.
23. Having considered the nature of the applicants' complaints and threats of legal action, I am satisfied that a great number of these matters are unsubstantiated, lack substance or are otherwise unreasonable. The allegations concern a very large number of individuals and entities, and a wide range of matters such as corruption, breaches of the *Competition and Consumer Act 2010* (Cth), breach of copyright, perjury and littering.³⁷ When the nature of these complaints and threats are considered, along with the volume and breadth of these matters, and the extent of correspondence and social media communications generated by the applicants, I am satisfied that applicants have engaged in a pattern of unreasonable behaviour that '*persistently disturbs*' and '*torments*' Council, certain Council officers and third parties.
24. The applicants submit³⁸ that their behaviour does not constitute harassment, as they '*have only ever complained through proper and legal channels to [Council] of behaviour from [Council] employees*'. In *Australian Competition and Consumer Commission v Maritime Union of Australia*,³⁹ Hill J considered the meaning of '*undue harassment or*

³³ Some of the information before OIC is sensitive in nature and cannot be set out in detail in these reasons. However, in reaching this finding, I have considered the relevant law, the Information in Issue, the applicants' submissions and Council's submissions dated 12 October 2017 and 16 February 2018.

³⁴ Both to Council and to external complaint bodies.

³⁵ By email to OIC dated 7 December 2017, submissions dated 15 January 2018 and 9 March 2018.

³⁶ I particularly make no finding concerning the privacy complaints brought by the applicants against Council.

³⁷ The evidence available to OIC also includes email correspondence sent by the applicants to Council seeking payment of a large amount of money in return for payment of rates, withdrawal of complaints and settling of legal action. While the applicants deny sending this email, it appears, on its face, to be legitimate, and accordingly, forms part of the evidence available to OIC.

³⁸ Submissions to OIC dated 15 January 2018.

³⁹ (2001) 114 FCR 472 at [60]. This decision concerned section 60 of the now repealed *Trade Practices Act 1974* (Cth), which provided that '*A corporation shall not use physical force or undue harassment or coercion in connection with the supply or possible supply of goods or services to a consumer or the payment for goods or services by a consumer.*'

coercion' in the context of otherwise lawful recovery action for payment for goods or services. His Honour said:

The word "harassment" in my view connotes conduct which can be less serious than conduct which amounts to coercion. The word "harassment" means in the present context persistent disturbance or torment. In the case of a person employed to recover money owing to others, as was the first Respondent in McCaskey, it can extend to cases where there are frequent unwelcome approaches requesting payment of a debt. However, such unwelcome approaches would not constitute undue harassment, at least where the demands made are legitimate and reasonably made. On the other hand where the frequency, nature or content of such communications is such that they are calculated to intimidate or demoralise, tire out or exhaust a debtor, rather than merely to convey the demand for recovery, the conduct will constitute undue harassment (see per French J in McCaskey at [48]). Generally it can be said that a person will be harassed by another when the former is troubled repeatedly by the latter. The reasonableness of the conduct will be relevant to whether what is harassment constitutes undue harassment.

25. The Information Commissioner has previously cited this passage, and held that making a large volume of information access applications may 'torment or wear down' particular agency officers, and if so, when considered in the context of the surrounding circumstances, these otherwise lawful applications may constitute a vehicle through which agency officers are harassed.⁴⁰ Similarly here, I am satisfied that the combined effect of the pattern of complaints and threats of legal action, many of which are unsubstantiated or lack substance, along with hostile communications, has had the effect of tormenting and wearing down particular individuals. Accordingly, I am satisfied that the relevant conduct⁴¹ constitutes harassment.
26. For the Harassment or Intimidation Exemption to apply, the relevant conduct must 'reasonably be expected to occur', in the sense that the expectation must be reasonably based, and not be irrational, absurd or ridiculous, or a merely a possibility. In considering whether the expectation of harassment is reasonably based, I have considered the past pattern of conduct,⁴² the nature of the Information in Issue, and the nature of the relationship between the applicants, Council and certain relevant third parties. It is also relevant to consider that both applicants are charged with criminal offences, including unlawful stalking, in relation to a particular Councillor. While the Information in Issue does not directly relate to these criminal proceedings, and the proceedings are currently ongoing, I consider the nature of the charges against the applicants are such that it is relevant to consider as forming part of the body evidence of a reasonable expectation of future conduct.⁴³ I have also considered the nature of the applicants' conduct in recent court proceedings.⁴⁴ Based on this evidence, I am satisfied that further harassment of particular Council officers and third parties 'could reasonably be expected' to occur.
27. In relation to whether the relevant conduct is 'serious', I note that it is not necessary to demonstrate a likelihood of criminal behaviour such as assault or unlawful stalking in a criminal sense.⁴⁵ In this case, there is evidence before me that the pattern of behaviour engaged in by the applicants is beyond competitive, disparaging, unpleasant or 'irksome or annoying', and is a cause for serious apprehension for particular individuals. I am satisfied, that as a result of this apprehension, the ultimate consequences of the relevant

⁴⁰ *Sheridan* at [295] – [302].

⁴¹ Set out at paragraph 21 above.

⁴² Outlined at paragraph 21 above.

⁴³ In submissions to OIC dated 15 January 2018 and 13 March 2018, the applicants have submitted that they are entitled to a presumption of innocence. However, in considering evidence of a pattern of past conduct, I am not required to be satisfied 'beyond reasonable doubt' or even to a lesser burden of a 'balance of probabilities'. A conviction or finding of a court is not required. Rather, I must consider whether, on all of the evidence before me, the expectation of harassment is reasonably based. See *Sheridan* at [192], citing *Cockcroft* at [106].

⁴⁴ As outlined in attachments to Council's submissions to OIC dated 16 February 2018.

⁴⁵ *Conde and Queensland Police Service* (Unreported, Queensland Information Commissioner, 18 October 2012) at [23].

behaviour have been significant for particular individuals.⁴⁶ Accordingly, I am satisfied that the apprehended harassment is serious in nature.

28. I am satisfied that the serious harassment would arise from disclosure of the Information in Issue, rather than other circumstances. While the acrimony between the applicants and Council/Council officers and particular third parties is pre-existing and relatively longstanding, on the evidence available to OIC,⁴⁷ I consider it could reasonably be expected that disclosure of the Information in Issue will result in *further* similar relevant conduct. In particular, the evidence available to OIC includes a table of legal action proposed by the applicants, against more than 11 different individuals and entities (including Council and Council officers), for matters including defamation, cartel conduct, anti-competitive conduct, misuse of market power, misleading and deceptive conduct, and unconscionable conduct. This table indicates that the applicants intend to rely upon the Information in Issue to institute proposed legal actions.⁴⁸ Accordingly, in this case, I am satisfied that there is the necessary nexus between disclosure of the Information in Issue and the reasonable expectation of serious harassment.
29. I have carefully considered the exceptions to the Harassment or Intimidation Exemption contained in schedule 3, section 10(2) of the RTI Act, and am satisfied that none apply in the circumstances of this case.
30. I therefore find that the Information in Issue comprises exempt information, to which Council is entitled to refuse access.
31. Finally, I note that the applicants have indicated⁴⁹ that they wish to obtain the Information in Issue in order to pursue further legal action, or to use as evidence in existing legal action. This, in effect, is a submission seeking to raise public interest factors favouring disclosure.⁵⁰ However, in this case, I have found that the Information in Issue is exempt information and once the requirements of an exemption have been established, I am precluded from considering any public interest factors, no matter how compelling.⁵¹

DECISION

32. I vary Council's decision by finding that Council is entitled to refuse access to the Information in Issue under sections 47(3)(a), 48 and schedule 3, section 10(1)(d) of the RTI Act.
33. I have made this decision as a delegate of the Information Commissioner under section 145 of the RTI Act.

K Shepherd
Assistant Information Commissioner

Date: 22 March 2018

⁴⁶ Evidence of these consequences is contained in the Information in Issue, and under section 108(3) of the RTI Act, I am unable to set out this evidence in detail.

⁴⁷ Council's submissions to OIC dated 12 October 2017, and Council's submissions dated 16 February 2018.

⁴⁸ The table includes a blank column titled '*Conduct shown in RTI Evidence*'.

⁴⁹ In submissions dated 16 June 2017, and in submissions to OIC on 15 January 2018 and 13 March 2018.

⁵⁰ Schedule 4, part 2, items 10, 16 and 17 of the RTI Act.

⁵¹ *Isles and Queensland Police Service* [2017] QICmr 1 (12 January 2017) at [23].

APPENDIX

Significant procedural steps

Date	Event
27 March 2017	OIC received the external review application.
28 March 2017	OIC asked Council to provide procedural documents relevant to the review. OIC received submissions from the applicants.
7 April 2017	OIC received the requested documents from Council.
13 April 2017	OIC notified the applicants and Council that the external review application had been accepted. OIC asked Council to provide a copy of the documents located in response to the access application.
5 May 2017	OIC received the requested documents from Council.
31 May 2017	OIC requested, and received, further information from Council.
15 June 2017	OIC received submissions from Council.
16 June 2017	OIC received request for information and submissions from the applicants.
13 July 2017	The applicants confirmed that they did not seek review of information redacted from pages released to them by Council.
25 August 2017	OIC clarified with the applicants the matters to be considered on external review, provided an update on the status of the review and addressed procedural concerns. OIC issued a notice to the Crime and Corruption Commission (CCC) requiring information under section 103 of the RTI Act.
6 September 2017	The CCC provided information to OIC in response.
15 September 2017	OIC sought further submissions from Council.
28 September 2017	OIC provided the applicants with an update on the external review and addressed certain procedural issues.
12 October 2017	OIC received further submissions from Council.
20 October 2017	OIC provided the applicants with an update on the external review. OIC received a request for information from the applicants.
25 October 2017	OIC received an email from the applicants setting out procedural concerns.
26 October 2017	OIC addressed procedural concerns raised by the applicants.
5 December 2017	OIC conveyed a preliminary view to the applicants and noted that ' <i>sufficiency of search</i> ' concerns would not be further considered.
7 December 2017	Applicants contacted OIC with concerns regarding the preliminary view and requesting a copy of Council's submissions. OIC received submissions from the applicants and addressed procedural concerns raised by the applicants.
15 January 2018	OIC received submissions from the applicants.
1 February 2018	OIC sought further submissions from Council.
16 February 2018	OIC received further submissions from Council
22 February 2018	OIC addressed procedural concerns raised by Council.
9 March 2018	OIC received further submissions from the applicants.
13 March 2018	OIC received further submissions from the applicants.