



Decision and Reasons for Decision

Citation:	<i>Millar and Brisbane City Council</i> [2019] QICmr 6 (26 February 2019)
Application Number:	314213
Applicant:	Millar
Respondent:	Brisbane City Council
Decision Date:	26 February 2019
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - audio recordings of conversations between complainant/s and/or witness/es and agency officer - accountability - reasons or background for government decision - administration of justice - personal information and protection of an individual's right to privacy - flow of information - whether disclosure would, on balance, be contrary to the public interest - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) - section 47(3)(b) of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to Brisbane City Council (**Council**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to information about the investigation of complaints made about the applicant's dog.
2. Council located 31 pages and 12 audio recordings in response to the access application and decided² to refuse access to parts of 23 pages and 10 audio recordings on the basis that the information was exempt from disclosure under section 67(1) of the IP Act and section 47(3)(a) and schedule 3, section 10(1)(b) of the *Right to Information Act 2009* (Qld) (**RTI Act**) and/or was contrary to the public interest to disclose under section 47(3)(b) of the RTI Act.
3. The applicant sought³ internal review in relation to Council's decision to the extent it refused access to audio recording/s of conversations between the complainant/s and Council officers. Council affirmed the original decision.⁴

¹ Received on 26 June 2018.

² On 31 July 2018.

³ On 16 August 2018.

⁴ On 12 September 2018.

4. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of Council's internal review decision.⁵
5. For the reasons set out below, I vary Council's decision and find that access is refused to the information in issue⁶ solely on the basis that disclosure would, on balance, be contrary to the public interest under section 67(1) of the IP Act and section 47(3)(b) of the RTI Act.

Background

6. The Appendix to these reasons for decision sets out the significant procedural steps taken during the external review.

Reviewable decision

7. The decision under review is Council's internal review decision dated 12 September 2018.

Evidence considered

8. Evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes).

Information in issue

9. The information in issue is 10 audio recordings (**the Recordings**) comprising discussions between Council's investigating officer and complainant/s and/or witness/es relevant to the investigation of complaints made about the applicant's dog.

Relevant law

10. Under the IP Act a person has a right to be given access to documents of an agency to the extent they contain the individual's personal information. However, this right is subject to limitations,⁷ including grounds on which access may be refused.⁸ One ground for refusing access is where disclosure would, on balance, be contrary to the public interest.⁹
11. The term '*public interest*' refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that, in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.
12. The RTI Act identifies various factors that may be relevant to deciding the balance of the public interest.¹⁰ It also explains the steps that a decision-maker must take in deciding the public interest.¹¹

⁵ On 11 October 2018.

⁶ See paragraph 9 for a description of the information in issue in this review.

⁷ Section 67(1) of the IP Act provides that an agency may refuse access to a document in the same way and to the same extent the agency could refuse access to the document under section 47 of the RTI Act.

⁸ As set out in section 47 of the RTI Act.

⁹ Sections 47(3)(b) and 49 of the RTI Act.

¹⁰ These are listed in schedule 4 of the RTI Act, though this list of factors is not exhaustive; in other words, additional factors that are not listed may also be relevant.

¹¹ To decide where the balance of public interest lies, a decision-maker must:

- identify any irrelevant factors and disregard them
- identify any relevant public interest factors favouring disclosure and nondisclosure
- balance the relevant factors favouring disclosure and nondisclosure; and
- decide whether disclosure of the information in issue would, on balance, be contrary to the public interest.

Analysis

Irrelevant factors

13. I have taken no irrelevant factors into account in making my decision in this review.

Factors favouring disclosure

14. Factors favouring disclosure arise where disclosure could reasonably be expected to contribute to Council being open and accountable¹² and the applicant being provided with background or contextual information which informed Council's actions and/or decision-making relating to the complaints.¹³

15. It is evident from the information before me that, following receipt of the complaints about the applicant's dog, Council conducted an investigation and subsequently issued a Proposed Declaration Notice Dangerous Dog (**Proposed Declaration**) under section 90 of the *Animal Management (Cats and Dogs) Act 2008* (Qld) (**AMCD Act**). The Proposed Declaration contained the grounds on which it was made as well as reasons for the decision.

16. I note that, in response to the access application, Council released the following documents to the applicant, which contain details of the complaints made about his dog:¹⁴

- two audio recordings of the applicant's conversations with Council's investigating officer during which the circumstances giving rise to the complaints was explained to the applicant
- email correspondence relating to the complaints, including with the Queensland Police Service (**QPS**)
- a Complaint Details Report for each of the two complaints received by Council, which include the investigating officer's file notes of the conversations with the complainant/s and/or witness/es comprising the Recordings
- relevant photographs of the dogs involved
- a vet report; and
- three QPS witness statements relating to one of the complaints, which details the circumstances giving rise to that complaint.

17. Having carefully considered the above information, I am satisfied that the applicant has been provided with information setting out the substance of the allegations and the information before Council which supports the allegations. The applicant has also been made aware of the grounds on which the Proposed Declaration was made as well as reasons for Council's decision. I also note that the applicant was provided with an opportunity to make written representations in response to the Proposed Declaration. He was invited to make submissions about why Council should not decide to make the proposed declaration final.

18. Further, the applicant was advised by Council of the outcome of the complaints made about the applicant's dog when Council issued a Notice of Regulated Dog Declaration – Dangerous Dog (**Declaration**) under section 95 of the AMCD Act on 13 September 2018.

¹² Schedule 4, part 2, item 1 of the RTI Act.

¹³ Schedule 4, part 2, item 11 of the RTI Act.

¹⁴ Subject to the deletion of information to which access was refused in accordance with Council's decision and internal review decision, comprising names, date of birth and age, signature, occupation, registration numbers, addresses, contact telephone numbers, email addresses and relationship details of other individuals, vehicle registration details, veterinary clinic details (including patient identifying information) and names of the other dogs involved in the incidents the subject of the complaints.

19. On the basis of the above, I am satisfied that the information already disclosed to the applicant, along with the Proposed Declaration and Declaration, ensured open and accountable government vis a vis the applicant and provided the applicant with sufficient background and contextual information about Council's actions or decision making in relation to the complaints. As a result, I consider that disclosure of the Recordings would only minimally advance the public interest factors of open and accountable government and provision of sufficient information about Council's actions and/or decision given they do not provide any additional detail about the outcome of the complaints or what action Council took in relation to the complaints. Therefore, I afford these factors favouring disclosure¹⁵ minimal weight.
20. As the Recordings relate to complaints made to Council about the applicant's dog, the Recordings contain the applicant's personal information, which raises a factor favouring disclosure.¹⁶ Personal information is defined¹⁷ as *'information or an opinion whether true or not, and whether recorded in material form or not, about an individual whose identity is apparent or can reasonably be ascertained, from the information or opinion.'*
21. Generally, this factor carries high weight as one of the purposes of the IP Act is to provide individuals with a mechanism to access their personal information held by government. However, the nature of the Recordings is such that multiple individuals' personal information is involved, which raises a factor favouring nondisclosure.¹⁸
22. In this case, the Recordings also contain the personal information of other individuals, being complainant/s and/or witness/es. The applicant's personal information is inextricably linked with the personal information of those other individuals and their information cannot sensibly be removed to enable a version of the Recordings that solely concerns the applicant's personal information to be disclosed. Further, in addition to raising the nondisclosure factor, I am satisfied that the intertwined nature of the personal information lessens the weight of the factor favouring disclosure of the applicant's personal information to a moderate degree.
23. The applicant submits¹⁹ that he requires the Recordings as Council has *'acted upon these uncorroborated and untested accusations in order to put in place a dangerous dog proposal which I am contesting'* and *'without [the Recordings] a proper response cannot be provided, as they can show false/misleading complaints and or bad faith by themselves...'* I have taken this to mean that the applicant is seeking access to the Recordings because he considers that disclosure could assist him in appealing Council's decision to issue the Declaration in relation to his dog. This raises factors favouring disclosure where disclosure could reasonably be expected to contribute to the administration of justice generally, including procedural fairness, and for the applicant.²⁰
24. Natural justice refers to the common law requirement to act fairly in the making of administrative decisions which affect a person's rights, interests or legitimate expectations. The fundamental requirements of procedural fairness—that is, an unbiased decision-maker and a fair hearing—should be afforded to a person who is the subject of a decision.²¹ Accordingly, the person who is the subject of a decision must be provided with adequate information about material that is credible, relevant and significant to the adverse finding

¹⁵ Schedule 4, part 2, items 1 and 11 of the RTI Act.

¹⁶ Schedule 4, part 2, item 7 of the IP Act.

¹⁷ In section 12 of the IP Act.

¹⁸ Schedule 4, part 4, section 6 of the RTI Act. This factor is discussed further below.

¹⁹ External review application dated 11 October 2018 and internal review application dated 16 August 2018.

²⁰ Schedule 4, part 2, items 16 and 17 of the RTI Act.

²¹ *Kioa v West* (1985) 159 CLR 550 (*Kioa*) per Mason J.

to be made, so that the person can be given the opportunity to make effective representations to the decision-maker.²²

25. As explained at paragraph 15 above, the Proposed Declaration contained the grounds on which it was made as well as reasons for the decision. The Proposed Declaration also invited the applicant to make written representations about why Council should not decide to make the Proposed Declaration. The Declaration was subsequently issued and indicated that the applicant *'made no representations in response to the proposed declaration notice...'*
26. Although the applicant hasn't specifically raised the issue that natural justice was not afforded in relation to the decision to issue the Declaration, on the basis of the information that is before me, I am satisfied that the applicant was given all relevant information required to respond to the Proposed Declaration and that the applicant was provided with an opportunity to refute the allegations prior to Council proceeding with issuing the Declaration, and therefore no procedural fairness issues arise in relation to Council's decision to issue the Declaration.
27. In terms of appealing Council's decision to issue the Declaration, the applicant contends Council acted on *'uncorroborated'* and *'untested'* allegations and he requires the Recordings to prepare a proper response. The Proposed Declaration and the information which has been released to the applicant in response to his access application shows that, following receipt of the complaints Council conducted an investigation. As a part of that investigation, Council's investigating officer spoke to the complainant/s and witness/es to obtain their accounts of the circumstances which gave rise to the complaints and found those accounts reliable. The substance of the complaints was then conveyed to the applicant during the telephone calls with Council's investigating officer²³ prior to the Proposed Declaration being issued which informed the applicant that the complaints had been substantiated (corroborated) by witness accounts, photographs and, in relation to one complaint, a veterinary report. Therefore, the complaints are not *'uncorroborated'* and *'untested'* vis a vis Council.
28. Perhaps what the applicant is saying is that he considers the complaints to be *'uncorroborated'* and *'untested'* because he has not heard the Recordings himself. The requirements of fair treatment and procedural fairness do not oblige an agency to provide the subject of a complaint with access to its entire investigation file nor reveal all of the information it gathered in dealing with the investigation.²⁴ It is sufficient in this case that the applicant was given notice of the proposed decision and adequate information upon which to base a response. I am satisfied that the applicant was afforded procedural fairness.
29. As to contributing to the administration of justice generally for the applicant, I am not satisfied that disclosure of the Recordings would enable the applicant to assess if there is a reasonable basis to pursue an appeal of Council's decision to issue the Declaration, nor would it allow the applicant to evaluate whether a legal remedy against the complainant/s and/or witness/es is available or worth pursuing, particularly in circumstances where the applicant has received the investigator's de-identified file notes of the recorded conversations.
30. In these circumstances, I do not consider that disclosing the Recordings would contribute to procedural fairness for the applicant, nor contribute to the administration of justice

²² Kioa per Brennan J.

²³ As evidenced by the two audio recordings released to the applicant.

²⁴ 8A3BPQ and Queensland Police Service [2014] QICmr 42 (30 October 2014) at paragraph 28.

generally or for the applicant, in relation to any current or future proceedings relating to the issuing of the Declaration. Accordingly, I afford these factors favouring disclosure minimal weight.

Factors favouring nondisclosure

31. Public interest factors favouring nondisclosure will arise under the RTI Act where disclosure of information could reasonably be expected to prejudice the protection of an individual's right to privacy²⁵ and cause a public interest harm because it would disclose personal information of a person, whether living or dead.²⁶
32. The applicant submits²⁷ that he is seeking access to the content of the complaint and that names, addresses etc can be edited out and that *'separately police had already provided me with the home address details of [a] complainant...'*²⁸ Further, the applicant contends²⁹ *'there is no such thing as the content of the complaint being the personal information of another individual...'*
33. While I acknowledge that the applicant says he has spoken to the person/s making the complaints and is aware of the address of two complainants, he is not aware of the actual identity of any complainant/s and/or witness/es. Disclosing the Recordings (even if clearly identifying information, such as names, were removed) may identify who those involved in the complaints process are, which I consider would amount to a significant intrusion into the personal sphere of those individuals. I am satisfied that the information is sensitive and the individuals involved in the complaints process would have had a reasonable expectation of privacy in providing this information to Council. Therefore, the public interest weighs in favour of protecting the privacy of other individuals in these circumstances³⁰ and I afford these factors significant weight.
34. As to the applicant's submission concerning complaint information not being personal information, this misapprehends the nature of personal information of an individual as defined under the IP Act. Personal information of an individual is not limited to names and addresses, but also extends to include recordings of an individual's voice, as their identity may be apparent or reasonably ascertainable from that recording, as well as other information which may lead to the identification of that individual. In this case the voice recordings may lead to the identification of individuals.
35. I note that Council, amongst other things, provides regulatory services within Brisbane, including declaring dogs dangerous. I consider it is important for the proper and effective functioning of Council that individuals are able to freely report incidents involving dogs that are of concern to them. A factor favouring nondisclosure will arise if the future supply of confidential information of this type to Council is prejudiced.³¹ I consider that routinely disclosing information such as the Recordings would likely make complainants reluctant to report their concerns in the future, which, in turn, could reasonably be expected to substantially impact Council's ability to obtain such information and discharge its regulatory responsibilities. Therefore, substantial weight should be afforded to this factor favouring nondisclosure.

²⁵ Schedule 4, part 3, item 3 of the RTI Act.

²⁶ Schedule 4, part 4, section 6(1) of the RTI Act.

²⁷ Submission dated 26 November 2018.

²⁸ Internal review application dated 16 August 2018.

²⁹ Submission dated 26 November 2018.

³⁰ Schedule 4, part 3, item 3 and schedule 4, part 4, item 6 of the RTI Act.

³¹ Schedule 4, part 4, item 8 of the RTI Act.

Balancing the public interest

36. For the reasons set out above, I am satisfied that the significant weight afforded to the nondisclosure factors relating to protection of personal information and privacy³² and prejudice to the flow of information³³ outweighs the relevant factors favouring disclosure³⁴ of the Recordings.

37. I therefore find that disclosing the Recordings would, on balance, be contrary to the public interest and access to the Recordings may be refused.³⁵

DECISION

38. I vary the decision under review. I find that access to the Recordings may be refused under section 67(1) of the IP Act and section 47(3)(b) of the RTI Act as disclosure would, on balance, be contrary to the public interest.

39. I have made this decision as a delegate of the Information Commissioner, under section 139 of the *Information Privacy Act 2009 (QLD)*.

Assistant Information Commissioner Corby

Date: 26 February 2019

³² Schedule 4, part 3, item 3 and schedule 4, part 4, item 6 of the RTI Act.

³³ Schedule 4, part 3, item 8 of the RTI Act.

³⁴ Schedule 4, part 2, items 1, 7, 11, 16 and 17 of the RTI Act.

³⁵ Under section 67(1) of the IP Act and section 47(3)(b) of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
11 October 2018	OIC received an application for external review of the internal review decision of Council dated 12 September 2018.
30 October 2018	OIC notified the applicant and Council that it had accepted the external review application. OIC requested Council provide a copy of the Recordings.
5 November 2018	OIC received the requested Recordings.
22 November 2018	OIC conveyed a preliminary view to the applicant.
26 November 2018	OIC received the applicant's submission.
4 December 2018	OIC requested and received from Council a copy of the documents and audio recordings which had been released to the applicant.
10 January 2019	OIC requested and received from Council a copy of the Proposed Declaration.
5 February 2019	OIC wrote to the applicant addressing issues raised by the applicant in a telephone message.
11 February 2019	OIC received the applicant's submission.