



Decision and Reasons for Decision

Citation:	<i>Sedlar and Logan City Council</i> [2017] QICmr 52 (7 November 2017)
Application Number:	313161
Applicant:	Sedlar
Respondent:	Logan City Council
Decision Date:	7 November 2017
Catchwords:	<p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - SCOPE OF APPLICATION - whether documents contain the applicant's personal information - whether information about applicant's land is information about applicant - documents outside the scope of access application - information irrelevant to the scope of access application - sections 12, 40 and 88 of the <i>Information Privacy Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - information regarding complaints about applicant's land - whether disclosure would, on balance, be contrary to public interest - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT DOCUMENTS - information regarding complaints about applicant's land - applicant contends additional documents exist - whether agency required to locate post-application documents - form of access - whether agency has taken all reasonable steps to locate documents but the documents cannot be found or do not exist - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(e) and 52 of the <i>Right to Information Act 2009</i> (Qld)</p>

REASONS FOR DECISION

Summary

1. The applicant applied to the Logan City Council (**Council**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to documents relating to complaints made to Council about the applicant's land between 1 January 2016 and 6 October 2016.¹

¹ Access application dated 5 October 2016, received by Council on 6 October 2016. The applicant and Council agreed to extend the period covered by the application until 12 October 2016. This is addressed at paragraphs 91-94 below.

2. Council located 54 pages of information in response to the access application. It decided² to release this information, except for parts of 17 pages,³ which were refused on the basis that they were not information about the applicant or his land, and were therefore irrelevant to the applicant's application under the IP Act.
3. On internal review,⁴ Council decided⁵ to vary its original decision. It made the same finding regarding the 17 part pages, but also located and considered some further responsive documents. Of these, Council decided that two emails and one recording could be released; however, 8 pages were outside the scope of the applicant's application under the IP Act or, alternatively, disclosure of them would, on balance, be contrary to the public interest. Council also found that further documents raised by the applicant could be refused on the ground that they were nonexistent or unlocatable.
4. The applicant then applied⁶ to the Office of the Information Commission (**OIC**) for an external review.
5. For the reasons set out below, I vary Council's internal review decision and find that the 17 part pages may be refused on the ground that their disclosure would, on balance, be contrary to the public interest. I otherwise agree with Council that the 8 pages located on internal review are outside the scope of the applicant's application under the IP Act; and any further documents the applicant contends should have been located may be refused on the ground that they are nonexistent or unlocatable.

Background

6. Council received complaints about alleged land clearing and earthworks on the applicant's land. Council's Land Use Investigation Team investigated these concerns by attending the land to take photographs and speak to the applicant. Council issued a show cause notice dated 11 August 2016 to the applicant, and the applicant responded to the notice in a letter to Council dated 10 October 2016.
7. Before responding to the notice, the applicant made his access application that is the subject of this external review, seeking further information in relation to the complaints about his land, including information identifying who made the complaints.
8. Significant procedural steps relating to the external review are set out in the Appendix.

Reviewable decision

9. The decision under review is Council's internal review decision dated 21 December 2016.

Evidence considered

10. The evidence, submissions, legislation and other material considered in reaching this decision are disclosed in these reasons (including footnotes and the Appendix).

² Decision dated 3 November 2016.

³ The decision refers to 16 part pages; however, on OIC's count, Council redacted parts of 17 of the 54 pages (that is, pages 1, 2, 3, 7, 8, 9, 22, 25, 27, 32, 38, 39, 41, 42, 47, 48 and 53 of 54).

⁴ Internal review application dated 24 November 2016.

⁵ Internal review decision dated 21 December 2016.

⁶ External review application dated 18 January 2017.

Information in issue

11. The information in issue comprises:

- **Category A Information**—parts of 17 pages that Council decided were irrelevant to the access application; and
- **Category B Information**—8 pages that Council decided were outside the scope of the access application or, alternatively, constituted information the disclosure of which would, on balance, be contrary to the public interest.

Issues for determination

12. The issues for determination are whether:

- the Category A Information and Category B Information are irrelevant to, or outside the scope of, the applicant's IP Act application
- the Category A Information may be refused on the ground its disclosure would, on balance, be contrary to the public interest; and
- any further documents the applicant contends should have been located can be refused on the ground they are nonexistent or unlocatable.

Preliminary issue

13. The applicant's applications for internal and external review and his submissions during the external review focus on his status as a Justice of the Peace, and his belief that this status entitles him to full access to the information he seeks. It is therefore necessary to address this issue before considering the issues for determination set out above.

14. In his internal review application, the applicant stated:

... I wish to inform you that the privacy principles do not apply, as per section 19 and 21 of the IP Act.

I hold a Judicial Officer's position, being a Justice of the Peace, an entity created by a Minister and given public functions under an Act. Therefore I qualify as a Public Authority as per section 21 of the IP Act.

I hereby request that all documents relating to my application, 54 pages plus any other omitted documents found to be forwarded to me in their entirety with full access. [sic]

15. In his external review application, the applicant stated that he relied on his above submissions. During the external review, he made similar submissions on letterhead titled 'Office of the Justice of the Peace Queensland', as follows:⁷

You're reasoning for non-disclosure being contrary to the public interest, as a Judicial Officer a statutory authority I maintain strict confidentiality, an independent judiciary and form part of the judicial arm of the government. It is necessary in the interest of justice to order the production of these documents to my office in their entirety to be used as evidence in legal process.

*...
Failing to produce a copy of these documents as requested, you are held in contempt of one of Her Majesty's Justice of the Peace and judicial processes, obstructing the course of justice.*

⁷ Submission dated 12 July 2017.

YOU ARE HEREBY COMMANDED, in Her Majesty's name, TO DELIVER the said documents to my office, by the 30 July 2017. [sic]

16. Initially, the applicant appears to contend that Council cannot rely on the privacy principles in the IP Act to refuse him access to information because he is a Justice of the Peace. This submission misconstrues Council's original decision, which did not rely on the information privacy principles⁸ to refuse him access to information.⁹ The information privacy principles cannot be relied on to refuse access to information sought under an access application. Rather, the relevant grounds for refusing access to documents are set out in the *Right to Information Act 2009* (Qld) (**RTI Act**).¹⁰ These grounds include the public interest test¹¹ which may, depending on the circumstances, involve consideration of factors regarding privacy and personal information.
17. In his submissions made during the external review,¹² the applicant refers to the public interest test, but maintains that it cannot be relied on to refuse him access to information, because he is a Justice of the Peace. The applicant has offered no evidence to OIC of his registration as a Justice of the Peace. However, a search of the Department of Justice and Attorney-General's online register of Justices of the Peace¹³ indicates that he is registered¹⁴ as a Justice of the Peace (Qualified) (**JP (Qual)**) in Queensland.¹⁵ In these circumstances, I accept that the applicant is a JP (Qual).
18. The applicant argues that, because he is a JP (Qual), he is a judicial officer, and is therefore entitled to the entirety of all documents sought by him. In other words, he considers that the grounds for refusing access to documents cannot be relied on because he is a judicial officer.
19. Having made an access application and seeking both internal and external review, the applicant appears to accept that *some* provisions of the IP Act apply to him. However, the RTI Act equivalent¹⁶ of the IP Act provisions raised by the applicant¹⁷ exclude the application of the *entirety* of the RTI Act, not just the grounds of refusal of concern to the applicant.
20. Further, these provisions relate to the holder of judicial office who has *received* an access application, rather than *made* an access application, as is the case here.
21. Also, the provisions in question operate only '*in relation to the court's judicial functions*'.¹⁸ The applicant may consider that he seeks the information '*in relation to [a] court's judicial functions*', given his advice that the information is necessary for evidence in legal proceedings.¹⁹ However, the material before me indicates that the applicant seeks the

⁸ In schedule 3 of the IP Act.

⁹ When an agency uses, and possibly discloses, personal information in order to respond to an access application, such use and disclosure fall within exceptions (in IPP 10(1)(c) and IPP 11(1)(d) in schedule 3 of the IP Act) to the requirement (in section 27 of the IP Act) that the agency comply with the Information Privacy Principles—see *Nine Network Australia Pty Ltd and Queensland Police Service* (Unreported, Queensland Information Commissioner, 31 July 2013) at [13].

¹⁰ Specifically, section 47(3) of the RTI Act. These grounds apply by virtue of section 67(1) of the IP Act.

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

¹² As well as relying on his internal review application.

¹³ At <<http://www.justice.qld.gov.au/justice-services/justice-of-the-peace/registered#>>.

¹⁴ Section 21 of the *Justice of the Peace and Commissioners for Declarations Act 1991* (Qld) (**JP Act**).

¹⁵ The office of Justice of the Peace is a public office, with the broadly stated public purpose of keeping the peace in Queensland, and the Governor in Council may appoint as Justices of the Peace as many persons as the Governor thinks necessary—section 15(1) of the JP Act.

¹⁶ Section 17 of the RTI Act, which provides that an '*entity to which [the RTI] Act does not apply*' means an entity mentioned in schedule 2 of the RTI Act, and includes '*a court, or the holder of a judicial office or other office connected with a court, in relation to the court's judicial functions*' in schedule 2, part 2, item 1 of the RTI Act.

¹⁷ Section 19 of the IP Act, which provides that an '*entity to which the privacy principles do not apply*' means an entity mentioned in schedule 2 of the IP Act, and includes '*a court, or the holder of a judicial office or other office connected with a court, in relation to the court's judicial functions*' in schedule 2, part 2, item 1 of the IP Act.

¹⁸ Schedule 2, part 2, item 1 of the RTI Act.

¹⁹ Submissions dated 12 July 2017.

information for legal proceedings regarding offences²⁰ that he alleges occurred when Council officers investigated complaints about alleged land clearing and earthworks on his land.²¹ In such proceedings, the applicant would be acting in his personal capacity. Similarly, I am satisfied that the applicant is acting in his personal capacity in the present matter.²²

22. In these circumstances, it is unnecessary for me to determine whether the applicant is a judicial officer by virtue of his status as a JP (Qual). Whether or not the applicant is a judicial officer, I am satisfied that he has no additional entitlement to access information relative to other applicants. As is the case for all other applicants' access applications, I consider it appropriate to consider whether the grounds for refusing access to documents apply in this matter.

Is the information in issue irrelevant to or outside the scope of the application?

Relevant law

23. Section 88 of the IP Act provides that an agency may give access to a document subject to the deletion of information it considers is not relevant to an application. This is not a ground for refusal of access, but a mechanism to allow irrelevant information to be deleted from documents which are identified for release to an applicant.
24. If a document does not contain any information that is relevant to the terms of the access application, it is outside the scope of the access application. Further, if a document does not contain any personal information of the applicant, it is outside the scope of an access application under the IP Act. Once it is determined that a document is outside the scope of the application, the document will not be considered as part of that application.
25. In deciding whether information is irrelevant to or outside the scope of an access application, it is necessary to consider whether the information has any bearing upon, or is pertinent to, the terms of the application.²³
26. Further, in deciding whether a document is outside the scope of an access application under the IP Act, it is necessary to determine whether the document contains the applicant's personal information. This consideration arises because section 40 of the IP Act creates a right for an individual to access documents *'to the extent they contain the individual's personal information'*.²⁴ Given this position, a document must include some amount of an applicant's personal information in order for the individual to have a right to access that document under the IP Act.
27. 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.

²⁰ Under the under the *Local Government Act 2009* (Qld), *Vegetation Management Act 1999* (Qld), *Privacy Act 1988* (Cth) and *Summary Offences Act 2005* (Qld).

²¹ As stated in the applicant's letter to Council dated 10 October 2016 responding to the show cause notice.

²² Justice and Attorney-General, Queensland Government, *Justices of the Peace Handbook* (2017) at <https://publications.qld.gov.au/dataset/justice-of-the-peace-handbook> at 2.2/3 addresses conflicts of interest for justices of the peace and commissioners of declarations.

²³ *O80PCE and Department of Education and Training* (Unreported, Queensland Information Commissioner, 15 February 2010) at [52].

²⁴ Section 40(1)(a) of the IP Act.

28. The following questions are relevant in determining whether information is a particular individual's personal information:²⁵
- Can an individual be identified from the information? and
 - Is the information sought about that individual?
29. If the answer to both of these questions is yes, the information will comprise the applicant's personal information.
30. In some instances, an individual's identity is clear on the face of the documents, for example, an individual's name or photograph or a detailed description of them. Where a document does not contain information that clearly identifies an individual, an individual may be reasonably identifiable through additional information. The following factors will influence whether an individual's identity can be reasonably ascertained:²⁶
- how available the additional information is
 - how difficult it is to obtain
 - how many steps are required to identify the individual
 - how certain the identification will be
 - whether it will identify one specific individual or a group of people; and
 - whether the individual receiving the information can use it to identify the individual.
31. Whether information is 'about' an individual is a contextual question, independent from considering whether the information identifies an individual. The word 'about' is not defined in the IP Act or the RTI Act and it is therefore necessary to consider the word's ordinary meaning, which includes 'of; concerning; in regard to ... connected with'.²⁷ Accordingly, in considering whether information is 'about' an individual, it is necessary to consider whether the information reveals anything about the individual.²⁸

Findings

32. The scope of the applicant's access application under the IP Act was for:

*Copies of complaints to Council in relation to [the applicant's land] from 1 January 2016 until 6 October 2016.*²⁹

Category A Information

33. The portions of information on 17 pages constituting the Category A Information consist of information about who made the complaints about the applicant's land,³⁰ and information about individuals present at site inspections conducted by Council.³¹
34. In the decision under review, Council found that the Category A Information was irrelevant to the access application. On external review Council has accepted that each of the six documents comprising the 17 pages that contain the Category A Information

²⁵ See *Mahoney and Ipswich City Council* (Unreported, Queensland Information Commissioner, 17 June 2011) (**Mahoney**) at [19] - [27], followed in *Mathews and University of Queensland* (Unreported, Queensland Information Commissioner, 21 September 2012) at [13]-[18], *Tomkins and Rockhampton Regional Council* [2016] QICmr 2 (22 January 2016) and *Alsop and Redland City Council* [2017] QICmr 27 (2 August 2017).

²⁶ *Mahoney* at [21].

²⁷ Macquarie Dictionary Online <https://www.macquariedictionary.com.au/>.

²⁸ *Mahoney* at [23] - [27].

²⁹ The applicant and Council agreed to extend the period covered by the application until 12 October 2016. This is addressed at paragraphs 91-94 below.

³⁰ At pages 1, 2, 3, 7, 8, 9, 22, 25, 27, 32, 41, 42 and 53 of 54.

³¹ At pages 32, 38, 39, 47, and 48 of 54.

also contain information which identifies³² the applicant and is about him—that is, the applicant's personal information. Accordingly, Council has accepted that the six documents may be sought under the applicant's IP Act application, and that it is therefore not possible to delete the Category A Information within the six documents on the basis that it is irrelevant to that application.

35. For sake of completeness, I confirm this position.

Category B Information

36. The 8 pages constituting the Category B Information consist of four file notes by Council officers,³³ two letters to an individual who made the complaints to Council about the applicant's land, and a template for a land use compliance memorandum.
37. The template for the land use compliance memorandum has no bearing upon, and is in no way pertinent to, the terms of the access application.
38. The remaining seven pages do not contain information that identifies the applicant, nor information which enables his identity to be reasonably identifiable. They do not refer to the applicant by name, nor do they refer to the owner of the land.³⁴ They refer only to the land itself, and earthworks, vegetation and the use of trucks on that land.
39. Relevantly, in the decision of *Mahoney*,³⁵ the Right to Information Commissioner did not accept that information about land owned by an individual constituted that individual's personal information and observed:

The information sought does not reveal a fact or opinion about the applicant and without more, there is an insufficient connection between the information sought and the applicant to make the information sought the applicant's personal information. In short, the information sought is about the applicant's land rather than the applicant.

40. I consider this reasoning to be apposite regarding the remaining 7 pages. Accordingly, I am satisfied that these 7 pages do not contain the applicant's personal information and do not fall within the scope of his access application under the IP Act.
41. In summary, I find that both the template and the 7 other pages that constitute the Category B Information are outside the scope of the applicant's application under the IP Act. Given this finding, it is unnecessary for me to consider Council's alternative argument that disclosure of the Category B Information would be contrary to the public interest.

Is disclosure of the Category A Information contrary to the public interest?

42. As noted above,³⁶ the Category A Information cannot be deleted on the basis that it is irrelevant. Given the Information Commissioner³⁷ can decide any matter in relation to an access application that could, under the IP Act, have been decided by the agency dealing

³² Either explicitly (for example, his name) or by enabling his identity to be reasonably ascertainable (for example, references to the owner of the land that was the subject of the complaint).

³³ Three of which are recorded in internal Council emails and one of which appears to use a file note template.

³⁴ Note—page 1 of 8 does mention land owner, but the context is general and hypothetical, and does not appear to relate to the applicant specifically.

³⁵ See footnote 25 above.

³⁶ At paragraphs 34 and 35.

³⁷ Or delegate.

with the application,³⁸ I will now consider whether disclosure of the Category A Information would, on balance, be contrary to the public interest.

43. The Category A Information consists of information about who made the complaints regarding the applicant's land and information about individuals present at Council's site inspections³⁹—specifically, names, contact details (address, telephone and email), Council customer reference numbers, employers, details of conversations with Council by telephone or in person, and images of individuals and vehicle number plates in photographs.

Relevant law

44. 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 other provisions, including the grounds for refusing access to documents set out in the RTI Act.⁴⁰ Relevantly, an agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.
45. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest and explains the steps that a decision-maker must take in deciding the public interest,⁴¹ namely:
- identify any irrelevant factors and disregard them
 - identify 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.
46. 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.

Findings

Irrelevant factors

47. As set out at paragraphs 14 and 15 above, the applicant has submitted that he should be granted access to the information he seeks because he is a Justice of the Peace. As the IP Act applies equally to all individuals,⁴² I consider this to be an irrelevant factor.
48. I have not taken into account this irrelevant factor, nor any other irrelevant factors, when applying the public interest test to the Category A Information.

³⁸ Section 118(1)(b) of the IP Act.

³⁹ As noted above at paragraph 33.

⁴⁰ Section 67(1) of the IP Act.

⁴¹ Section 49(3) of the RTI Act. Schedule 4 of the RTI Act sets out a non-exhaustive list of factors for deciding whether disclosing information would, on balance, be contrary to the public interest.

⁴² *Williams and Queensland Police Service* [2017] QICmr 28 (4 August 2017) at [38].

Factors favouring disclosure

Accountability and transparency

49. The applicant did not make any submissions regarding government accountability or transparency. However, given the nature of the information sought by the applicant, it is necessary to consider whether disclosure of the Category A Information could reasonably be expected to:
- promote open discussion of public affairs and enhance government accountability⁴³
 - inform the applicant about policies, guidelines and codes of conduct followed by Council in its dealings with members of the community;⁴⁴ and
 - reveal background or contextual information that informed a government decision.⁴⁵
50. Generally, there is a public interest in investigations of complaints, including complaints regarding alleged breaches of planning laws,⁴⁶ being conducted with a level of transparency and accountability that affords the parties (and the public generally) with an understanding of the conclusions and outcome of the investigation. However, this requirement that Council be accountable and transparent in its conduct of complaint handling does not, in my view, oblige Council to provide the applicant with access to the entirety of its documentation regarding the complaints, nor reveal all of the information it gathered in dealing with the complaints.
51. I acknowledge that, given that the applicant is the owner of the land that was the subject of the complaints, disclosing the Category A Information would provide the applicant with a more comprehensive understanding of the information before Council which informed its actions. However, in this case, the information that Council has already released to the applicant reveals that:
- land use planning investigations commenced after Council received a complaint about trees being cleared and earthworks on the land⁴⁷
 - Council issued a show cause notice dated 11 August 2016 requesting that the applicant respond to the alleged breaches of relevant planning laws; and
 - Council issued a compliance notice dated 7 October 2016 which explained Council's concerns with the applicant's land.
52. Based on the material before me, I consider that the information already in the applicant's possession significantly advances the accountability and transparency factors favouring disclosure. This information has informed the applicant about the general nature of the complaints being investigated and Council's investigation processes. Given that the Category A Information reveals only, or primarily, information provided by third parties to Council, rather than steps taken by Council regarding such information, I am satisfied that disclosure of the Category A Information is not likely to advance the accountability and transparency factors a great deal further.

⁴³ Schedule 4, part 2, item 1 of the RTI Act.

⁴⁴ Schedule 4, part 2, item 3 of the RTI Act.

⁴⁵ Schedule 4, part 2, item 11 of the RTI Act.

⁴⁶ At the relevant time, the applicable law was that set out in the *Sustainable Planning Act 2009* (Qld) and associated regulatory instruments.

⁴⁷ Audio recording of on-site conversation between applicant and Council's Land Use Investigation Team Leader on 30 September 2016.

53. In these circumstances, I consider these factors warrant relatively little weight. I therefore afford them minimal weight.

Deficiencies in conduct

54. On the material before me, it is evident that the applicant objects to the manner in which Council investigated the complaints about alleged land clearing and earthworks on his land. He alleges that Council officers committed various offences when investigating the complaints.⁴⁸
55. In these circumstances, although the applicant has not made submissions about disclosure revealing deficiencies in the conduct of Council or its officers, I have nonetheless considered whether disclosure of the Category A Information could reasonably be expected to:
- allow or assist inquiry into the possible deficiencies in the conduct or administration of any agency or official;⁴⁹ or
 - reveal or substantiate that misconduct or negligence, improper or unlawful conduct has been engaged in by an agency or official.⁵⁰

56. On consideration of the nature of the Category A Information and its context within the information that has been released to the applicant, there is nothing to suggest inappropriate conduct on the part of Council officers who conducted the investigation. The investigations appear, on their face, to be appropriate and in accordance with the usual manner that such investigations are conducted. I am unable to identify how disclosure of the Category A Information could reveal any deficiency in the conduct of any Council officer investigating the complaints, or any deficiency in Council's investigation process more generally. Accordingly, I am satisfied that these factors do not apply in this review. However, for sake of completeness, I note that even if I were incorrect in this regard, and these factors could be said to apply, they would nonetheless warrant low to no weight.

Administration of justice for the applicant

57. The applicant submits that the information he seeks will *'be used as evidence in legal process'*.⁵¹ I have therefore considered whether disclosure of the Category A Information could reasonably be expected to contribute to the administration of justice for a person.⁵²
58. As noted above,⁵³ the applicant alleges that Council officers have committed a number of offences. The Category A Information would provide the applicant with somewhat more detail regarding the complaints—however, the information already disclosed to the applicant has informed him of the general nature of the complaints and Council's processes during the investigation of them. The Category A Information would also inform the applicant about who made the complaints to Council—however, the applicant's allegations appear to relate to Council and its officers, rather than any complainant. In these circumstances, I am unable to identify how the applicant's ability to assess or commence any action he considers appropriate regarding the Council officers and/or Council would be enhanced by disclosure of the Category A Information.

⁴⁸ See footnotes 20 and 21.

⁴⁹ Schedule 4, part 2, item 5 of the RTI Act.

⁵⁰ Schedule 4, part 2, item 6 of the RTI Act.

⁵¹ Submissions dated 12 July 2017.

⁵² Schedule 4, part 2, item 17 of the RTI Act.

⁵³ At paragraphs 21 and 54.

59. I further note that, should the applicant decide to commence any proceedings, it is reasonable to expect that he may use court disclosure processes available to him. In these circumstances, I consider the comments of the Information Commissioner in *Phyland and Department of Police*⁵⁴ are relevant:

The RTI Act was not, however, designed to serve as an adjunct to court processes, but to comprise a stand-alone mechanism for enabling public access to government-held information. Obviously, the applicant is entitled to elect to pursue access under the right of access conferred by the RTI Act. In doing so, however, she must accept the qualifications upon and limitations to that right imposed by the Act itself, including refusal of access where ... disclosure would disclose personal information or infringe upon an individual's right to privacy.

60. Given these considerations, I am unable to identify how disclosure of the Category A Information would advance the administration of justice for the applicant. Accordingly, I am satisfied that this public interest factor does not apply. However, I note that even if this conclusion were incorrect, and this factor applied, it would nonetheless warrant low to no weight.

Advance fair treatment and procedural fairness

61. Given the applicant's concerns regarding Council's investigations, I have also considered whether disclosure of the Category A Information could reasonably be expected to:

- advance the fair treatment of individuals in accordance with the law in their dealings with agencies;⁵⁵ and
- contribute to the administration of justice generally, including procedural fairness.⁵⁶

62. Notions of fair treatment and procedural fairness require that a person be provided with adequate information about material that is credible, relevant and significant to an adverse finding to be made, so that the person has the opportunity to make responsive, effective submissions to the decision-maker.⁵⁷ They do not entitle the person to *all* information about investigation, and do not necessarily entitle the person to information provided by and identifying the complainant.

63. In this matter, it is relevant that the applicant has been advised of the general substance of the complaints and afforded the opportunity to respond. In these circumstances, I consider that the public interest in fair treatment and procedural fairness has been served by the information already in the applicant's possession. Noting the relatively limited nature of the Category A Information, I am satisfied that its release could not reasonably be expected to further advance fair treatment or procedural fairness to any significant degree. Accordingly, I am satisfied that these factors warrant little, if any, weight.

Incorrect, misleading information

64. Given the circumstances of this review, I have also considered whether disclosure of the Category A Information could reasonably be expected to reveal that it was incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant.⁵⁸

⁵⁴ (Unreported, Queensland Information Commissioner, 31 August 2011) at [24].

⁵⁵ Schedule 4, part 2, item 10 of the RTI Act.

⁵⁶ Schedule 4, part 2, item 16 of the RTI Act.

⁵⁷ *Kioa v West* (1985) 159 CLR 550 at 629 per Brennan J.

⁵⁸ Schedule 4, part 2, item 12 of the RTI Act.

65. The Category A Information largely consists of information that identifies individuals who made the complaints about the applicant's land or were present at Council's site inspections. A small amount of the Category A Information comprises somewhat more information about the complaints than has been disclosed to the applicant. This type of information is, by its very nature, the opinions and versions of events expressed by relevant individuals, which are shaped by factors such as their memory of events and subjective impressions. This subjectivity does not render the information necessarily incorrect or unfairly subjective.⁵⁹
66. There is no material before me to suggest that disclosure of the information identifying certain individuals, or the somewhat greater detail about the complaints, could reasonably be expected to reveal that any of the Category A Information was incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant. Accordingly, I am satisfied that this factor does not apply. Even if I were incorrect in this regard, and this factor applied, it would warrant low to no weight.

Personal information of the applicant

67. The applicant has submitted that a factor favouring the disclosure of the Category A Information is that it is his personal information. The RTI Act recognises that it is in the public interest for individuals to access their personal information which is held by government agencies.⁶⁰
68. I acknowledge that the documents in which the Category A Information appear contain the applicant's personal information. However, the Category A Information itself does not contain the personal information of the applicant, but rather the personal information of other individuals. Given this position, I am satisfied that this factor does not apply.

Other factors favouring disclosure

69. I have carefully considered all other public interest factors favouring disclosure listed in schedule 4, part 2 of the RTI Act and can identify no other factors that weigh in favour of disclosure of the Category A Information.

Factors favouring nondisclosure

Personal information of other individuals and their privacy

70. I have considered whether disclosing the Category A Information could reasonably be expected to prejudice the protection of the privacy of individuals other than the applicant,⁶¹ or cause a public interest harm through disclosing their personal information.⁶²
71. As noted at paragraph 43, the Category A Information consists of information about individuals who made the complaints about the applicant's land or were present at Council's site inspections—specifically, names, contact details (address, telephone and email), Council customer reference numbers, employers, details of conversations with Council by telephone or in person, and images of individuals and vehicle number plates in photographs.

⁵⁹ *Marshall and Department of Police* (Unreported, Queensland Information Commissioner, 25 February 2011) at [15]-[20].

⁶⁰ Schedule 4, part 2, item 7 of the RTI Act.

⁶¹ Schedule 4, part 3, item 3 of the RTI Act.

⁶² Schedule 4, part 4, section 6 of the RTI Act.

72. I am satisfied that the Category A Information is the personal information of these individuals. Further, I am satisfied that disclosure of the Category A Information could reasonably be expected to prejudice their right to privacy. This would be particularly so regarding information provided by a complainant. In my view, Council would not ordinarily reveal the identity of a complainant to the owner of the land in question, unless it was necessary for, or relevant to, Council's handling of the investigation. Further, given the sensitive nature of complaint information, I am satisfied that disclosure of it would be a significant privacy intrusion, and the extent of public interest harm arising from disclosure would be highly significant. Consequently, in terms of those parts of the Category A Information that were provided with the complaints, I afford very significant weight to the factors regarding protection of privacy and personal information.
73. While the rest of the Category A Information—about those present during Council's site inspections—is somewhat less sensitive, the intrusion and harm resulting from disclosure would nevertheless remain relatively significant. Accordingly, in terms of such information, I afford the factors significant weight.

Confidential supply of information

74. I have considered whether disclosing the Category A Information could reasonably be expected to prejudice the flow of information to Council in its capacity as regulatory agency.⁶³
75. Council is responsible for administering and enforcing local laws and policies, such as the *Logan Planning Scheme 2015*, as well as state-wide planning laws.⁶⁴ Community engagement in relation to reporting possible offences, as provided for in these instruments, is important in ensuring that planning is administered fairly and consistently. I consider that receiving and investigating complaints, in order to establish if any offences have occurred, is an integral part of enforcement and administration of the law, and the release of the Category A Information has the potential to prejudice this process.⁶⁵
76. There is an expectation that personal information such as a complainant's name, address, contact phone number, and details of the complaint will be used for the purpose of assessing a complaint. It is implicit that personal information will not be given to any other party, unless the complainant provides his or her permission, or the law requires a regulatory agency to do so,⁶⁶ for example, in order to afford procedural fairness.⁶⁷
77. I consider that the release of the much of the Category A Information—that is, information provided in relation to the complaints—could reasonably be expected to prejudice the willingness of individuals to report concerns to local government authorities, and therefore prejudice the enforcement of planning legislation and associated regulatory instruments.
78. On the evidence available to me, I consider that these factors should be given significant weight in terms of such information.

⁶³ Schedule 4, part 3, item 13 and 16 the RTI Act; and schedule 4, part 4, section 8(1)(b).

⁶⁴ See footnote 46.

⁶⁵ Schedule 4, part 3, item 16 the RTI Act; and schedule 4, part 4, section 8(1)(b).

⁶⁶ The implied right to privacy is expressly stated in Logan City Council's complaint form, which may be used for complaints to Council: http://www.logan.qld.gov.au/__data/assets/pdf_file/0004/411439/LCC_Complaints-Form.pdf

⁶⁷ As noted at paragraph 63 above, I am satisfied that is not the case here.

Balancing the public interest

79. In this matter, I have afforded the accountability and transparency factors favouring disclosure minimal weight, as I consider that the applicant has been provided with sufficient information to understand the nature of the complaint about his land and the investigation processes employed by Council to investigate the complaints. I have also afforded low to no weight to factors favouring disclosure regarding revealing or substantiating deficiencies in conduct; revealing that the Category A Information was incorrect, misleading or similar; and advancing administration of justice for the applicant, procedural fairness or fair treatment.
80. The relevant factors favouring nondisclosure relate to the right to privacy regarding the personal information of individuals other than the applicant, and prejudice and harm to the flow of confidential information regarding potential breaches of planning laws. Insofar as the Category A Information comprises information provided in relation to the complaints, I have afforded very significant weight to the privacy and personal information factors, and significant weight to the confidential supply of information factors. In terms of the remaining Category A Information, I have afforded significant weight to the privacy and personal information factors.
81. Balancing these factors against one another, I am satisfied that the factors favouring nondisclosure outweigh those favouring disclosure.

Conclusion

82. Based on the information before me, Council is entitled to refuse access to the Category A Information on the basis that its disclosure would, on balance, be contrary to the public interest.⁶⁸

Further documents

83. In the applicant's external review application, he stated that he relied on submissions in his internal review application. As the applicant's internal review application specified a number of documents that the applicant considered Council should have located, it is necessary to address those documents in this decision.
84. During the external review, the applicant also submitted:⁶⁹

On page 1 [of OIC's preliminary view] reference to my access application is being made from 1st January 2016 until 6 October 2016 and makes no mention of the extension made to 12 October 2016. My question to you is, has your external review included this extension to 12 October 2016?

Relevant law

85. To the extent that the documents of an agency contain an individual's personal information, the individual has a right to access them under the IP Act. The individual's access application must give sufficient information concerning the documents for the agency to identify them.⁷⁰ The application can only apply to documents in existence on the day the application is received.⁷¹ In terms of the form of access, section 83(3) of the

⁶⁸ Under section 67(1) of the IP Act and section 47(3)(b) of the RTI Act.

⁶⁹ Submissions dated 12 July 2017.

⁷⁰ Section 43(2)(c) of the IP Act.

⁷¹ Section 47(1) of the IP Act.

IP Act provides that 'if an applicant has requested access in a particular form, access must be given in that form'.

86. As noted above,⁷² there are some limitations on the right of access under the IP Act, including grounds for refusal of access.⁷³ Relevantly, an agency may refuse access to a document if the document is nonexistent or unlocatable.⁷⁴ A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist.⁷⁵ A document is unlocatable if it has been or should be in the agency's possession and all reasonable steps have been taken to find the document but it cannot be found.⁷⁶
87. To be satisfied that documents are *nonexistent*, the Information Commissioner has previously recognised that a decision-maker must rely on their particular knowledge and experience and have regard to a number of key factors. These key factors include:
 - the administrative arrangements of government
 - the agency structure
 - the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it)
 - the agency's practices and procedures (including but not exclusive to its information management approach); and
 - other factors reasonably inferred from information supplied by the applicant including the nature and age of the requested document/s and the nature of the government activity to which the request relates.⁷⁷
88. When proper consideration is given to relevant factors, it may not be necessary for searches to be conducted. This is the case in circumstances where it is ascertained that a particular document was not created because, for example, the agency's processes do not involve creating that specific document. In such instances, it is not necessary for the agency to search for the document. Rather, it is sufficient that the relevant circumstances which account for the nonexistent document are adequately explained by the agency.
89. Searches may also be relied on to satisfy the decision-maker that a document does not exist. If searches are relied on to justify a decision that the documents do not exist, all reasonable steps must be taken to locate the documents.⁷⁸ What constitutes reasonable steps will vary from case to case as the search and enquiry process an agency will be required to undertake will depend on which of the key factors are most relevant in the particular circumstances.
90. To determine whether a document exists, but is *unlocatable*, the RTI Act requires consideration of whether there are reasonable grounds to be satisfied that the requested document has been or should be in the agency's possession; and whether the agency

⁷² At paragraph 44.

⁷³ Set out in section 47(3) of the RTI Act. These grounds apply by virtue of section 67(1) of the IP Act.

⁷⁴ Sections 47(3)(e) and 52 of the RTI Act.

⁷⁵ Section 52(1)(a) of the RTI Act.

⁷⁶ Section 52(1)(b) of the RTI Act.

⁷⁷ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) (**Pryor**) at [19], which adopted the Information Commissioner's comments in *PDE and the University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (**PDE**). The decision in *PDE* concerned the application of section 28A of the now repealed *Freedom of Information Act 1992* (Qld). Section 52 of the RTI Act is drafted in substantially the same terms as the provision considered in *PDE* and, therefore, the Information Commissioner's findings in *PDE* are relevant here.

⁷⁸ As set out in *PDE* at [49]. See also section 130(2) of the RTI Act.

has taken all reasonable steps to find the document.⁷⁹ In answering these questions, regard should again be had to the circumstances of the case and the key factors.⁸⁰

Findings

Documents to 12 October 2016

91. The applicant's access application requested documents from '*1 January 2016 to present 6 October 2016*'. It was received by Council on 6 October 2016. Council and the applicant agreed to a revised scope for the application, extending its timeframe to 12 October 2016. Further, Council released a number of documents dated after 6 October 2016 to the applicant.⁸¹
92. However, section 47(1) of the IP Act provides that '*[a]n access application is taken only to apply to documents that are, or may be, in existence on the day the application is received*'. Given this provision, the timeframe for responsive documents cannot extend beyond the date on which Council received the application—that is, 6 October 2016.
93. Documents created after this date, but before notice of Council's original decision was given on 3 November 2016, are 'post-application' documents. Section 47(1) of the IP Act does not prevent Council from giving access to post-application documents,⁸² as has occurred here. However, the applicant is not entitled to a review of Council's decision about 'post-application documents'.⁸³
94. Given this position, OIC's jurisdiction does not extend to consideration of post-application documents. Accordingly, I am unable to consider the applicant's concerns regarding the sufficiency of Council's searches for documents created or received by Council during the period 7 to 12 October 2017 inclusive.

Documents raised in the applicant's internal review application

95. I note that two emails⁸⁴ and one audio recording⁸⁵ specified in the applicant's internal review application were released to him pursuant to Council's internal review decision. I also note that several other documents specified in that application were located by Council, but form part of the Category A Information or Category B Information, and have therefore been addressed above.⁸⁶
96. The applicant raised photographs that Council had released to him in printed form pursuant to its original decision, requesting that these be provided in '*original digital format*' as well. Section 83(3) of the IP Act provides that '*if an applicant has requested access in a particular form, access must be given in that form*'. Further, a '*reviewable decision*' is defined as including '*a decision giving access to documents in a form different to the form applied for by the applicant*'.⁸⁷ In his access application, the applicant had crossed boxes indicating that his preferred forms of access were '*Inspect document/s*' and '*Document/s sent to me by email*'. The applicant had not mentioned

⁷⁹ Section 52(1)(b)(ii) of the RTI Act.

⁸⁰ Pryor at [21].

⁸¹ See pages 10 to 21 of 54.

⁸² Section 47(2) of the IP Act.

⁸³ Section 47(3)(b) of the IP Act.

⁸⁴ Dated 9 and 23 September 2016.

⁸⁵ Dated 30 September 2016.

⁸⁶ Complaints to Council (as recorded in Council file notes), internal email dated 23 September 2016 regarding file no. 986643-1, letter to complainant dated 2 March 2016 regarding file no. 986642-1, and letter to complainant dated 2 March 2016 regarding file no. 986643-1.

⁸⁷ '*... unless access in the form applied for would involve an infringement of the copyright of a person other than the State*'—see definition of '*reviewable decision*' in schedule 5 of the IP Act.

photographs specifically in his application, and therefore had not requested that they be provided in any particular form. In any event, section 83(1) of the IP Act provides for access to a document to be given in five specific ways: inspection, copies, listening or viewing, written transcripts, or written documents. Both printed form and digital format constitute the same form of access—that is, copies. Given the applicant has already received printed copies, his concerns regarding digital copies do not relate to form of access under the IP Act; rather, they relate to Council's mode of delivering the copies. In these circumstances, Council's decision to release the photographs to the applicant in printed form, rather than their '*original digital form*', is not a reviewable decision. In absence of a reviewable decision, the Information Commissioner has no jurisdiction to address the applicant's request in this regard.

97. The applicant also specified complaints from the complainant (in writing or audio recordings), a show cause letter dated 2 March 2016 with a compliance dated of 27 May 2016 and an audio recording of his conversation with a Council officer on 12 February 2016. In Council's internal review decision, Council set out details of its initial searches, which were completed in response to the applicant's access application, and its further searches, which were conducted as part of its internal review. These details indicate that Council has conducted comprehensive searches of its computer drives, file management system and archive systems. During the external review, the applicant was given the opportunity to provide submissions regarding these searches and to identify any further searches he considers Council should conduct; however, he has not provided any submissions in relation to this point.
98. I have noted the contents of the information located by Council, including the Category A Information and the Category B Information, particularly in terms of how this information indicates that complaints were received and managed by Council. Taking into consideration this material and the searches conducted by Council, as set out in its internal review decision, and in absence of any submissions from the applicant, I consider that Council has ensured that appropriate officers undertook comprehensive, suitably targeted searches of locations where it was reasonable to expect that responsive documents, including those raised by the applicant in his internal review application, would be found.

Conclusion

99. The date range for documents responsive to the applicant's access application is 1 January 2016 to 6 October 2016. Based on all of the material before me, I am satisfied that:
 - Council has conducted all reasonable searches for documents responsive to the access application under the IP Act within this date range
 - there are reasonable grounds to be satisfied that any further documents are nonexistent or unlocatable;⁸⁸ and
 - accordingly, any further documents the applicant considers Council should have located may be refused on this ground.⁸⁹

DECISION

100. For the reasons set out above, I vary Council's decision and find that:

⁸⁸ Section 52(1) of the RTI Act.

⁸⁹ Under section 67(1) of the IP Act and section 47(3)(e) of the RTI Act.

- access to the Category A Information may be refused⁹⁰ on the ground that its disclosure would, on balance, be contrary to the public interest;⁹¹ and
- the Category B Information does not contain the applicant's personal information and is therefore outside the scope of the applicant's application under the IP Act;⁹²
- the further documents raised by the applicant may be refused⁹³ on the ground that they are nonexistent or unlocatable.⁹⁴

101. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

A Rickard
Assistant Information Commissioner

Date: 7 November 2017

⁹⁰ Under section 67(1) of the IP Act and section 47(3)(b) of the RTI Act.

⁹¹ Under section 49 of the RTI Act.

⁹² Section 40(1)(a) of the IP Act.

⁹³ Under section 67(1) of the IP Act and section 47(3)(e) of the RTI Act.

⁹⁴ Under section 52 of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
18 January 2017	OIC received the application for external review.
19 January 2017	OIC notified Council that the application for external review was received. OIC requested information from Council.
20 January 2017	OIC received information from Council as requested.
3 February 2017	OIC notified the applicant that the application for external review had been accepted. OIC outlined the process to be undertaken in an external review.
3 February 2017	OIC notified Council that the application for external review had been accepted. OIC requested further information from Council.
6 February 2017	Council provided the information as requested by OIC.
15 February 2017	OIC requested further information from Council.
17 February 2017	Council provided the information as requested by OIC.
22 February 2017	OIC requested further information from Council.
22 February 2017	Council provided the information as requested by OIC.
23 February 2017	Council provided further information as requested by OIC.
4 May 2017	By telephone, OIC contacted Council for clarification regarding some of the information provided by Council.
30 June 2017	OIC conveyed a preliminary view to the applicant.
30 June 2017	OIC conveyed a preliminary view to Council.
13 July 2017	The applicant provided written submissions in response to OIC's preliminary view.
18 July 2017	OIC wrote to the applicant to refute allegations made in his submissions that OIC was biased against him.
29 September 2017	OIC contacted Council to clarify its preliminary view. Council confirmed its acceptance of the preliminary view.