



Decision and Reasons for Decision

Citation:	<i>D44 and Western Downs Regional Council [2023] QICmr 11 (14 March 2023)</i>
Application Number:	316692
Applicant:	D44
Respondent:	Western Downs Regional Council
Decision Date:	14 March 2023
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL TO DEAL - EFFECT ON AGENCY'S FUNCTIONS - request for information about the applicant - whether the work involved in dealing with the application would substantially and unreasonably divert the resources of the agency from their use by the agency in the performance of its functions - section 41(1)(a) of the <i>Right to Information Act 2009 (Qld)</i>

REASONS FOR DECISION

Summary

1. The applicant applied to the Western Downs Regional Council (**Council**) under the *Right to Information Act 2009 (Qld)* (**RTI Act**) to access a range of documents about himself.¹
2. After consulting with the applicant to provide the applicant with the opportunity to revise the scope of his application, Council decided² to refuse to deal with the application on the basis that the work involved in dealing with it would, if carried out, substantially and unreasonably divert Council's resources from their use in the performance of its functions.³
3. The applicant sought internal review of Council's decision⁴ and, on internal review, Council affirmed its original decision.⁵ The applicant then applied⁶ to the Office of the Information Commissioner (**OIC**) for an external review of Council's decision.
4. Council, which is a small regional local authority with one delegated decision-maker, estimated it would take 161 hours to examine and redact documents, and conduct third party consultation in response to the application. Based on the information before me, I consider Council's processing estimate to be reasonable. For the reasons set out below, I affirm Council's decision refusing to deal with the application on the basis that

¹ Access application dated 28 January 2022, which became compliant on 15 February 2022.

² On 21 March 2022.

³ Under section 41 of the RTI Act.

⁴ On 30 March 2022.

⁵ On 26 April 2022.

⁶ On 1 May 2022.

to do so would constitute a substantial and unreasonable diversion of Council's resources.⁷

Background

5. The application seeks access to the following information:

All information, including but not limited to the following that relates to [the applicant]:

Subject 1

- 1. audio and telephone recordings*
- 2. emails*
- 3. letters*
- 4. internal or other memos*
- 5. outcomes/record of decision*
- 6. notebook and database entries*
- 7. reports*
- 8. job logs*
- 9. investigations/recommendations*
- 10. Metadata*

*This information all pertains to [the applicant] and [the applicant's] property located at [address]
Time period: 1 Jan 2018-Current (28/01/2022).*

6. Council notified the applicant⁸ (**Notice**) that it intended to refuse to deal with the application under section 41 of the RTI Act and invited the applicant to consult with Council, with a view to making the application in a form that would remove this ground as a basis for refusing to deal with the application.
7. In response to the Notice, the applicant confirmed that he did not wish to change the scope of the application.⁹
8. As noted in paragraph 3 above, Council then decided to refuse to deal with the application under section 41 of the RTI Act, and subsequently affirmed that decision on internal review.
9. The RTI Act requires the Information Commissioner to identify opportunities for early resolution and to promote settlement of external review applications.¹⁰ In accordance with this obligation, I provided the applicant with further details about the basis of Council's claim that it was entitled to refuse to deal with the application under section 41 of the RTI Act and invited the applicant to consider limiting the scope of the application.¹¹ In response, the applicant confirmed that he did not wish to narrow the terms of the application.¹²
10. Council maintains that dealing with the application would constitute a substantial and unreasonable diversion of its resources. On 27 September 2022, I wrote to the applicant conveying a preliminary view that Council was entitled to refuse to deal with the application under section 41 of the RTI Act.¹³ The applicant does not accept that Council is entitled to refuse to deal with the application on this basis.

⁷ Under section 41(1)(a) of the RTI Act.

⁸ By letter dated 10 March 2022.

⁹ Email dated 16 March 2022.

¹⁰ Section 90(1) of the RTI Act.

¹¹ By letter dated 12 July 2022.

¹² By email dated 21 July 2022.

¹³ It is the practice of OIC to convey a preliminary view, based on an assessment of the material before the Information Commissioner or her delegate at that time, to an adversely affected participant. This is to explain the issues under consideration to the participant and affords them the opportunity to put forward any further information they consider relevant to those issues. It also forms part of the Information Commissioner's processes for early resolution of external reviews.

11. Significant procedural steps relating to the external review are set out in the Appendix.

Reviewable decision and evidence considered

12. The decision under review is Council's internal review decision dated 26 April 2022.

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

14. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.¹⁴ I consider that a decision-maker will, when observing and applying the law prescribed in the RTI Act, be '*respecting*' and '*acting compatibly with*' this right and others prescribed in the HR Act.¹⁵ I further consider that, having done so when reaching my decision, I have acted compatibly with and given proper consideration to relevant human rights, as required under section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between the Victorian equivalents of Queensland's *Information Privacy Act 2009* (Qld) (**IP Act**) and RTI Act and HR Act: '*it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act*'.¹⁶

Issue for determination

15. The issue for determination is whether the application may be the subject of a refusal to deal decision under section 41 of the RTI Act.

Relevant law

16. The RTI Act requires an agency to deal with an access application unless this would not be in the public interest.¹⁷ One of the circumstances in which it would not be in the public interest to deal with an access application is where the work involved in dealing with the application would, if carried out, substantially and unreasonably divert the agency's resources from their use by the agency in the performance of its functions.¹⁸

17. In deciding to refuse to deal with an application on this basis, an agency must:

- (a) not have regard to any reasons the applicant gives for applying for access or the agency's belief about what are the applicant's reasons for applying for access;¹⁹ and
- (b) have regard to the resources that would be used for:²⁰
 - identifying, locating or collating the documents
 - making copies, or edited copies of any documents
 - deciding whether to give, refuse or defer access to any documents, including resources that would have to be used in examining any documents or conducting third party consultations; or

¹⁴ Section 21 of the HR Act.

¹⁵ See *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; and *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

¹⁶ *XYZ* at [573]. OIC's approach to the HR Act set out in this paragraph has recently been considered and endorsed by the Queensland Civil and Administrative Tribunal in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23] (noting that Judicial Member McGill saw '*no reason to differ*' from our position).

¹⁷ Section 39 of the RTI Act.

¹⁸ Section 41(1)(a) of the RTI Act. Before making a decision to refuse to deal with an application under section 41(1)(a), an agency must satisfy certain procedural prerequisites set out in section 42 of the RTI Act, for the purpose of allowing the applicant an opportunity to narrow the scope of the application, so that the agency can manage processing of the application.

¹⁹ Section 41(3) of the RTI Act.

²⁰ Section 41(2) of the RTI Act.

- notifying any final decision on the application.
18. Whether the work involved in dealing with an application would, if carried out, substantially and unreasonably divert the resources of an agency is a question of fact in each individual case.²¹ The volume of documents is not the only consideration. It is therefore necessary, in each case, to assess the work required to deal with the application in the context of the agency's other functions.

Findings

19. The applicant provided OIC with submissions in support of his case,²² which I have carefully considered. I have summarised and addressed those submissions below to the extent they are relevant to the issue for determination.
20. I have not had regard to any reasons the applicant gives for applying for access or the agency's belief about what are the applicant's reasons for applying for access.²³
21. I have reviewed the Notice²⁴ and I am satisfied that Council complied with the procedural prerequisites specified in section 42 of the RTI Act.

What work would be involved in dealing with the application?

22. In the Notice and the decision under review, Council's stated that its preliminary searches for documents responsive to the application had located 2114 pages²⁵ and it estimated that dealing with the application would take approximately 160 hours.
23. Generally, the applicant does not accept Council is entitled to rely on section 41 of the RTI Act²⁶ and contends that:²⁷

... Council in this case is certainly obligated by law to provide right to information. Further, how is it my problem that Council's systems make it difficult and labrious to obtain standard right to information items? That is a administrative matter/failing by Council, who, especially as a State entity should, have methods to retrieve this type of information efficiently. I note that our similar State departments are able to comply with requests I have made in the past - none have complained the way Council have - so they are either exaggerating how hard it is for them, they simple don't want to do the work, or they are proactively trying to avoid having to properly deal with my request ...

24. As noted above, whether dealing with an application would be a substantial and unreasonable diversion of an agency's resources is a question of fact to be determined in each individual case.

²¹ *Davies and Department of the Prime Minister and Cabinet* [2013] AICmr 10 (22 February 2013) at [28]. In this regard, I notified the applicant, in my letter dated 27 September 2022, that the fact '*similar State departments*' may have processed other access applications he had previously made does not, of itself, mean that processing the application would not be a substantial and unreasonable diversion of Council's resources.

²² As set out in the Appendix.

²³ Section 41(3) of the RTI Act.

²⁴ The Notice stated an intention to refuse to deal with the application and advised the applicant that he had 10 business days to consult with a view to making the application in a form that would remove this ground as a basis for refusing to deal with the application. It also invited the applicant to give written notice confirming or revising the scope of the application and stated that, if he did not respond, he would be taken to have withdrawn the application. Attachment C to the Notice listed examples of how the terms of an application could be revised and the Notice also attached a descriptive list of the documents which had, at that time, been located by Council's preliminary searches.

²⁵ Which Council described as comprising incoming and outgoing correspondence, diary entries, customer requests, spreadsheets and internal correspondence. The Notice also provided a listing, and general description, of the located documents.

²⁶ The applicant has not sought to directly challenge any particular aspect of Council's processing estimate.

²⁷ Email dated 21 July 2022.

25. The preliminary searches conducted by Council (both initially and on external review) have identified in excess of 2,200 pages of information as relevant to the application. This identified information comprises various types of documents—including emails, ‘CRM extracts’, case files notes, documents from Councils EDRM system (EDRMS), diary notes and 1783 pages of excel spreadsheets.
26. During the review, Council provided further and more detailed information to me regarding its record keeping systems and its processing estimate for the application.²⁸ Council’s estimate specified that processing the application would require:
- 15.5 hours for search and retrieval of documents and preliminary processing
 - additional time for manual extraction of metadata
 - 5 hours for schedule preparation
 - 4.37 hours for extraction of emails into PDF document format²⁹
 - 16.6 hours to examine pages (other than excel spreadsheet pages) for decision making³⁰
 - 110.54 hours to examine and redact Excel spreadsheet pages³¹
 - 6 hours to consult with approximately three third parties
 - 3 hours to prepare a decision.
27. I am satisfied that, while an agency is required to consider how much time an access application is likely to take to process, a precise assessment is not required. I also consider that, in conducting a merits review of Council’s internal review decision, it is necessary for me to determine whether Council’s processing estimate is reasonable.
28. On external review, Council submitted³² that:
- it does not have one record system for all customer information or interactions
 - information relevant to the application would be located on a number of different record keeping systems (namely, Council’s EDRMS, customer request management system, telephone system, email archive, financial system, officer diaries and network shared folders); and
 - most of Council’s record keeping systems do not readily catalogue document metadata.³³
29. Noting this, and that the application is widely framed (seeking access to *all* documents within a four year period relating to the applicant, ‘including but not limited to’ the 10 listed document categories), I consider a decision-maker dealing with the application would need to conduct further searches to identify any additional, responsive documents. As noted above, additional time would be also required to obtain metadata for responsive documents that were not located within Council’s EDRMS. On this basis, I consider it could take in excess of Council’s estimated 15.5 hours to search and retrieve information relevant to the application.
30. While the applicant submitted that Council should disclose the requested documents ‘entirely as is my constitutional right’,³⁴ a person’s right under the RTI Act to be given

²⁸ Council’s submissions dated 20 June 2022 and 31 August 2022.

²⁹ Based on a sample of 10 emails, Council estimated it would take 3.5minutes to convert each of the 76 emails located by its preliminary searches. Based on the estimated 76 responsive emails, Council estimated that this conversion step would take 4.37 hours.

³⁰ Calculated on the basis of it taking 2 minutes per page to examine, and redact, 498 pages.

³¹ Calculated on the basis of it taking 3.72 minutes per page to examine, and redact, 1783 pages

³² Submissions dated 20 June 2022.

³³ Council confirmed that only its EDRMS can readily catalogue metadata and, in all other recordkeeping systems, Council would be required to individually screenshot the document properties to obtain document metadata.

³⁴ Email dated 17 October 2022.

access to documents of an agency is not absolute—it is a right of access unless access would, on balance, be contrary to the public interest.³⁵ Accordingly, after locating all relevant documents, a decision-maker processing the application would then need to assess the located information to determine whether any grounds for refusal apply; conduct consultations; redact documents; and prepare a written decision.

31. In this regard, Council submitted³⁶ that:

- all of the responsive excel spreadsheet documents would require some level of redaction to protect the personal information (such as names/contact details) of other individuals; and
- as some of the responsive documents relate to the provision of access to the applicant's property,³⁷ consultation will be required with at least three parties.³⁸

32. Taking into account the details provided in the Notice about the nature of the documents which were located by Council's preliminary searches, I consider Council's estimates for examining and redacting documents and conducting third party consultation are reasonable.

33. Based on the information before me, I consider Council's 161 hour processing estimate to be reasonable, particularly given that this estimate does not include the time required to conduct additional searches and manually extract certain metadata, to ensure that all information relevant to the application is located.

Would the impact on Council's functions be substantial and unreasonable?

34. Council is a small, regional local authority and its Right to Information and Information Privacy Unit consists of one trained decision-maker³⁹ and, in the 2021-2022 financial year, Council dealt with 11 access and amendment applications.⁴⁰

35. Council's 161 hour partial processing estimate equates to approximately 22.5 business days for one full time decision-maker working on the application to the exclusion of all other functions of that officer.⁴¹ As noted above, this partial estimate does not include the additional time required to complete additional searches and obtain metadata for certain responsive documents. I am therefore satisfied that the time required to deal with the application would likely equal, or exceed, the 25 business day processing period usually allowed under the RTI Act for processing an application.⁴²

36. It is reasonable to expect that taking Council's only decision-maker offline for such a long period would substantially interfere with Council's ability to attend to its functions under the RTI Act and the IP Act for persons other than the applicant over this period. I consider the consequent delays in processing other applications and attending to other

³⁵ Section 44 of the RTI Act. The RTI Act sets out some limitations on the right of access, including the grounds for refusal of access set out in section 47 of the RTI Act.

³⁶ Submissions dated 20 June 2022.

³⁷ This is confirmed in the descriptive list of documents which was attached to the Notice.

³⁸ Under section 37 of the RTI Act, consultation is required to be undertaken with a third party regarding disclosure of information which may reasonably be expected to be of concern to that third party. Council's estimate is that it would take 2 hours to consult with each identified third party and consider any disclosure objections raised.

³⁹ In its submissions dated 31 August 2022, Council confirmed that this decision-maker does not ordinarily work fulltime, however, at the time Council received the application, this decision-maker was working fulltime, performing duties as Council's only RTI Act decision-maker as well as the duties of Council's Acting Customer Support & Governance Manager.

⁴⁰ Council submissions dated 31 August 2022. Council noted that the number of applications received in the 2021-2022 financial year were more than double the number received in any of the previous four years.

⁴¹ Based on a 5 day working week, at 7.15 hours per day.

⁴² Under section 18 of the RTI Act, the usual time allowed for processing an application is 25 business days. Whilst this period can be extended in certain circumstances, it is relevant to have regard to this timeframe when considering whether the time involved in processing a single access application will have a substantial impact on an agency's resources.

matters would have a considerable and telling detrimental impact on Council's functions. I am therefore satisfied that the work involved in dealing with the application would, if carried out, substantially divert the resources of Council from their use in the performance of its functions.

37. In determining whether the work involved in dealing with an application is unreasonable, it is not necessary to show that the extent of the unreasonableness is overwhelming. Rather, it is necessary to weigh up the considerations for and against, and form a balanced judgement of reasonableness, based on objective evidence.⁴³
38. Factors that have been taken into account in considering this question include:⁴⁴
- whether the terms of the request offer a sufficiently precise description to permit the agency, as a practical matter, to locate the documents sought
 - the public interest in disclosure of the documents
 - whether the request is a reasonably manageable one, giving due, but not conclusive, regard to the size of the agency and the extent of its resources usually available for dealing with access applications
 - the agency's estimate of the number of documents affected by the request, and by extension the number of pages and the amount of officer time
 - the reasonableness or otherwise of the agency's initial assessment and whether the applicant has taken a cooperative approach in re-scoping the application
 - the timelines binding on the agency
 - the degree of certainty that can be attached to the estimate that is made as to the documents affected and hours to be consumed; and in that regard, importantly whether there is a real possibility that processing time may exceed to some degree the estimate first made; and
 - whether the applicant is a repeat applicant to that agency, and the extent to which the present application may have been adequately met by previous applications.
39. I have had regard to the factors listed above to the extent that they are relevant to the circumstances of this case. As noted above, the application is widely framed and Council's 161 hour processing estimate does not include the additional time required to complete additional searches and obtain metadata for certain responsive documents. I do not regard the estimated processing time to be reasonably manageable in the current case, particularly in light of the need for Council to process other access applications and complete other Council functions. I am satisfied that taking Council's only decision-maker offline for in excess of 22 business days to process the application would also amount to an unreasonable diversion of Council's resources.

DECISION

40. For the reasons set out above, I affirm⁴⁵ the decision under review and find that Council may refuse to deal with the application under section 41(1)(a) of the RTI Act.

T Lake
Principal Review Officer
Date: 14 March 2023

⁴³ *ROM212 and Queensland Fire and Emergency Services* [2016] QICmr 35 (9 September 2016) at [42] and *F60XCX and Department of the Premier and Cabinet* [2016] QICmr 41 (13 October 2016) at [90], adopting *Smeaton v Victorian WorkCover Authority (General)* [2012] VCAT 1550 (**Smeaton**) at [30].

⁴⁴ See *Smeaton* at [39].

⁴⁵ As a delegate of the Information Commissioner, under section 145 of the RTI Act.

APPENDIX**Significant procedural steps**

Date	Event
1 May 2022	OIC received the external review application.
7 June 2022	OIC advised the applicant and Council that the external review application had been accepted. OIC requested additional information from Council.
20 June 2022	Council provided submissions in response to OIC's request.
12 July 2022	OIC conveyed a preliminary view to the applicant.
21 July 2022	The applicant responded to OIC contesting the preliminary view.
2 August 2022	OIC requested additional information from Council.
8 August 2022	Council requested an extension of time (until 1 September 2022) to respond to OIC's request. OIC granted the extension of time.
31 August 2022	Council provided submissions in response to OIC's request.
27 September 2022	OIC conveyed a further preliminary view to the applicant.
12 October 2022	The applicant requested clarification on matters relating to the external review.
14 October 2022	OIC provided a response to the applicant's questions.
17 October 2022	The applicant contested OIC's preliminary view.