



Decision and Reasons for Decision

Citation: *Q30 and Brisbane City Council [2022] QICmr 4 (25 January 2022)*

Application Number: 315667

Applicant: Q30

Respondent: Brisbane City Council

Decision Date: 25 January 2022

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - EXEMPT INFORMATION - LEGAL PROFESSIONAL PRIVILEGE - whether information would be privileged from production in a legal proceeding - whether access may be refused under section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(a) and 48 and schedule 3, section 7 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST INFORMATION - workplace information - personal information of other individuals - personal information and privacy - prejudice to management function of Council and ability to obtain confidential information - whether disclosure of information would, on balance, be contrary to the public interest - section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - whether agency has conducted reasonable searches - whether access to further documents may be refused on the basis they are nonexistent or unlocatable - section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(e) and 52(1) of the *Right to Information Act 2009* (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 documents containing his personal information,² as a Council employee, for the period 12 February 2020 to 20 April 2020.³ This was another in a series of access applications that the applicant made to Council seeking access to his personal information across various timeframes.
2. Council located 698 pages and released 517 pages in full, and 79 pages in part. It refused access to 102 pages in full. Council decided⁴ to refuse access to some information on the basis it was subject to legal professional privilege and was therefore exempt information,⁵ and to refuse access to other information on the grounds that its disclosure would, on balance, be contrary to the public interest.⁶
3. The applicant applied for internal review of Council's decision.⁷ On internal review, Council upheld the original decision in full.⁸
4. The applicant then applied⁹ to the Office of the Information Commissioner (**OIC**) for external review.
5. For the reasons set out below, I affirm Council's internal review decision. In addition, in respect of the sufficiency of search issue raised by the applicant on external review, I find that Council has taken all reasonable steps to locate responsive documents, and that access to further documents may be refused on the basis they are nonexistent or unlocatable.

Background

6. The information that the applicant seeks to access concerns his employment by Council during the relevant period and can broadly be described as relating to workplace matters involving the applicant. It includes information about management actions taken by Council in respect of the applicant.
7. During the review, Council accepted OIC's view that certain information to which it had refused access was neither exempt information nor contrary to the public interest information. Council agreed to disclose this information to the applicant¹⁰ and it is no longer in issue in this review.

¹ On 20 April 2020.

² The access application listed eight categories of documents. Item 1 requested access to documents held by City WorkCover in relation to the applicant's WorkCover claim number. Council advised the applicant on 16 June 2020 that this part of his application had been sent to City WorkCover to deal with 'under their processes', and that Council's decision would therefore deal only with the remaining seven categories of documents.

³ The applicant was employed by Council between 2013 and 2020.

⁴ Decision dated 16 June 2020.

⁵ Section 67(1) of the IP Act and sections 47(3)(a), 48, and schedule 3, section 7 of the *Right to Information Act 2009* (Qld) (**RTI Act**).

⁶ Section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.

⁷ On 14 August 2020.

⁸ Decision notice issued on 11 September 2020. Council affirmed its original decision in full, 'subject to the provision of the Re-issued Material corrected after the removal of inadvertent corporate logo redactions applied on 56 pages through technical error.'

⁹ On 5 October 2020 (received on 6 October 2020).

¹⁰ Part 6 – pages 7-22 and 28.

Reviewable decision

8. The decision under review is Council's internal review decision dated 11 September 2020.

Evidence considered

9. Significant procedural steps relating to the external review are set out in the Appendix.
10. The evidence, submissions, legislation and other material I have considered in reaching my decision are set out in these reasons (including footnotes and the Appendix). I have taken account of the applicant's submissions to the extent that they are relevant to the issues for determination in this review.¹¹
11. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.¹² I consider a decision-maker will be '*respecting, and acting compatibly with*' that right and others prescribed in the HR Act, when applying the law prescribed in the IP Act and the RTI Act.¹³ I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between equivalent pieces of Victorian legislation:¹⁴ '*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.*'¹⁵

Information in issue

12. The information in issue may be categorised as follows:
- information subject to legal professional privilege (**LPP Information**)
 - information about workplace interactions and workplace management of the applicant by Council (**Workplace Information**); and
 - personal information of Council employees and other third parties, including mobile telephone numbers (**Third Party Information**).

Issues for determination

13. The issues for determination are:
- whether access to LPP Information may be refused as exempt information
 - whether access to the Workplace Information and Third Party Information may be refused because disclosure would, on balance, be contrary to the public interest; and
 - whether Council has taken reasonable steps to locate responsive documents.
14. I note that these issues are the same as, or similar to, issues arising in various of the other applications that the applicant has made to OIC for external review of Council's decisions. In particular, these issues were discussed in detail in *P90 and Brisbane City Council* [2021] QICmr 23 (27 May 2021) (**P90**) and in *F89 and Brisbane City Council*

¹¹ Including the external review application and emails received on 11 January 2021, 14 June 2021, 20 June 2021, 21 July 2021, 23 July 2021 and 4 January 2022.

¹² Section 21(2) of the HR Act.

¹³ *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

¹⁴ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹⁵ *XYZ* at [573].

[2021] QICmr 69 (20 December 2021) (**F89**). However, despite the findings in those decisions, he has continued to agitate the same or similar issues in this and other subsequent reviews.

Matters outside OIC's jurisdiction

15. Throughout the review, the applicant (through his agent) raised complaints and procedural issues about Council generally, and about Council's processing of the access application. These ranged from complaints about alleged inconsistencies in Council's handling of information, to complaints about the inconsistent use of footers on Council's documents, and incorrect use of watermarks on released documents.¹⁶ The applicant also complained that Council sometimes gave no reasons for redacting information, or, when giving a reason, used incorrect references to the relevant schedule contained in the RTI Act. He also complained about redactions made to Council's logo.¹⁷
16. As noted above, the applicant has been advised in this review,¹⁸ and in numerous other of his external review applications, of the limits of OIC's jurisdiction regarding complaints made about Council, as well as the fact that any procedural errors that an agency may have made when processing an access application are irrelevant on external review because OIC conducts a merits review of the agency decision. Despite this, the applicant has continued to make submissions and complaints about irrelevant matters, or about matters falling outside OIC's jurisdiction.¹⁹
17. OIC's role under the IP Act in this review is to consider the information to which Council has refused access and decide whether that refusal of access was correct, as well as to consider the sufficiency of search issue raised by the applicant. To the extent that the applicant has made submissions relevant to these issues, I have taken them into account in making my decision. OIC does not have jurisdiction under the IP Act to deal with the applicant's complaints about Council, including, for example, complaints about Council's record-keeping, or complaints about the circumstances surrounding Council's workplace management of the applicant.

Exempt information - legal professional privilege

Relevant law

18. Schedule 3 of the RTI Act specifies the types of information Parliament has determined are exempt because release would be contrary to the public interest.²⁰ Relevantly, information is exempt information if it would be privileged from production in a legal

¹⁶ Emails from the applicant's agent on 21 July 2021 and 23 July 2021.

¹⁷ See footnote 8 above. Council had acknowledged in an earlier application that a software error had resulted in Council's logo being inadvertently redacted from documents released to the applicant. Council subsequently re-released the documents with the logo visible. The applicant complained that this error was continuing to occur.

¹⁸ For example, in this review, the applicant received an information sheet on 4 December 2020 which outlined OIC's jurisdiction and explained what OIC can and cannot consider on external review. The information specifically confirms that OIC cannot investigate complaints about an agency's record-keeping practices.

¹⁹ The bulk of the submissions made by the applicant's agent in emails of 21 July 2021 and 23 July 2021 are irrelevant to the issues for determination in this review and include complaints about matters over which OIC has no jurisdiction.

²⁰ Section 67(1) of the IP Act provides that an agency or Minister may refuse access in the same way and to the same extent as under section 47 of the RTI Act. Section 47(3)(a) of the RTI Act allows refusal of access to exempt information.

proceeding on the ground of legal professional privilege.²¹ This exemption reflects the requirements for establishing legal professional privilege at common law.²²

19. Establishing whether legal professional privilege applies to information at common law requires that the information must comprise a communication:
- made in the course of a lawyer-client relationship
 - that was and remains confidential; and
 - that was made for the dominant purpose of seeking or providing legal advice or for use in existing or reasonably anticipated legal proceedings.²³
20. When each of these requirements is met, legal professional privilege is established.²⁴

Finding

21. I have considered the LPP Information²⁵ and am satisfied that it comprises confidential communications between City Legal and its client (Council), made for the dominant purpose of seeking or providing legal advice or assistance. I am satisfied that the lawyers who provided the advice are suitably qualified and of a sufficiently independent character.²⁶ There is nothing before me to suggest that the qualification or exceptions to privilege apply. Accordingly, I affirm Council's decision to refuse access to the LPP Information on the grounds that it attracts legal professional privilege and is therefore exempt information.²⁷

Contrary to the public interest information

Relevant law

22. Under the IP Act, a person has a right to be given access to documents of an agency.²⁸ However, this right is subject to provisions of the IP Act and RTI Act including the grounds on which an agency may refuse access to documents.²⁹ An agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.³⁰
23. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision maker must:³¹

²¹ Schedule 3, section 7 of the RTI Act.

²² The doctrine of legal professional privilege is both a rule of evidence and a common law right. The High Court in *Daniels Corporation International Pty Ltd v Australian and Consumer Commissioner* (2002) 213 CLR 543 (**Daniels**) at 552 relevantly noted 'It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings' (footnotes omitted). See also *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 (**Esso**).

²³ *Esso and Daniels*.

²⁴ However, qualifications and exceptions to privilege (such as waiver and improper purpose) may, in particular circumstances, affect the question of whether information attracts or remains subject to it, and therefore is exempt under the RTI Act.

²⁵ Part 1 - pages 139, 143, 155, 161, 169, 173; part 2 - pages 13-15, 17; part 3 - pages 16-20, 40, 42; part 4 - pages 2-3; part 5 - pages 15-16, 33, 56-63, 65, 68; part 9 - pages 1-2, 14-24.

²⁶ *Waterford v Commonwealth* (1987) 163 CLR 54 at 62.

²⁷ Section 67(1) of the IP Act and section 47(3)(a) and schedule 3, section 7 of the RTI Act. Council has not waived privilege in the LPP Information.

²⁸ Section 40 of the IP Act.

²⁹ 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 it could refuse access to the document under section 47 of the RTI Act were the document to be the subject of an access application under the RTI Act.

³⁰ Section 67(1) of the IP Act and section 47(3)(b) and 49 of the RTI Act. 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.

³¹ Section 49(3) of the RTI Act.

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

24. Schedule 4 of the RTI Act contains non-exhaustive lists of factors that may be relevant in determining where the balance of public interest lies in a particular case. I have considered these lists,³² together with all other relevant information, in reaching my decision. I have kept in mind the IP Act's pro-disclosure bias³³ and Parliament's requirement that grounds for refusing access to information be interpreted narrowly.³⁴

Workplace Information

25. Council refused access to certain Workplace Information³⁵ relating to the investigation by Council of matters concerning the applicant's employment and the subsequent suspension and termination of his employment. This information includes complainant/witness information, and information involving Council's Human Resources (HR) division.

26. The public interest factors favouring disclosure of the Workplace Information (and the weight that I afford to each factor) are as follows:

- access by the applicant to his personal information³⁶ (significant weight);
- advancing Council accountability and transparency regarding its handling of workplace matters involving the applicant³⁷ (moderate weight)
- contributing to the administration of justice³⁸ (low weight); and
- advancing the fair treatment of the applicant in accordance with the law in his dealings with Council (low weight).³⁹

27. The public interest factors favouring nondisclosure of the Workplace Information (and the weight that I afford to each factor) are as follows:

- prejudice to the protection of an individual's right to privacy⁴⁰ (significant weight)
- the public interest harm arising from disclosure of personal information of another individual⁴¹ (significant weight)
- prejudice to the management function of Council⁴² (significant weight); and
- prejudice to Council's ability to obtain confidential information (significant weight).⁴³

28. I acknowledge that information concerning the applicant's suspension and dismissal from Council are of concern and importance to the applicant. In support of disclosure of

³² I have considered each of the public interest factors outlined in schedule 4 of the RTI Act, and any relevant factors are discussed below (in relation to each category of documents).

³³ Section 64 of the IP Act.

³⁴ Section 67(2) of the IP Act and section 47(2) of the RTI Act. In deciding whether disclosure of the information in issue would, on balance, be contrary to the public interest, I have taken no irrelevant factors into account in making my decision.

³⁵ Part 2 – page 14; part 3 – pages 1, 5, 12, 14, 15, 30, 32, 34, 44-46, 82-84, 100-111; part 4 – pages 1-2; part 5 – pages 1, 5, 8-10, 15, 25, 27, 47, 49, 51, 89, 103-113; part 6 – page 3; and part 9 – page 15.

³⁶ Schedule 4, part 2, item 7 of the RTI Act.

³⁷ Schedule 4, part 2, items 1 and 3 of the RTI Act.

³⁸ Schedule 4, part 2, items 16 and 17 of the RTI Act.

³⁹ Schedule 2, part 2, item 10 of the RTI Act.

⁴⁰ Schedule 4, part 3, item 3 of the RTI Act.

⁴¹ Schedule 4, part 4, section 6 of the RTI Act.

⁴² Schedule 4, part 3, item 19 of the RTI Act.

⁴³ Schedule 4, part 3, item 16 of the RTI Act.

this type of information, the applicant (through his agent) submitted that he had been treated unfairly and denied procedural fairness:⁴⁴

*I do not understand why the OIC has low and minimal weight favouring disclosure for 'contributing to the administration of justice generally and for you specifically' when it comes to **investigation information**.*

*In this case, Council investigation was undertaken after a work injury, during the time [the applicant] continued to suffer symptoms of work related mental illness/es. The investigation included providing information to City WorkCover (Council's self-insurer, for workers' compensation claim 200030). City WorkCover contacted Council Management for information as part of the claim. Council wanted to limit/remove [the applicant's] rights via an agreement (such as personal injury common law claim) and that is obvious from emails and the deed. The investigation lead [sic] to [the applicant's] termination (31 January 2020) which we know occurred whilst [the applicant] **was on workers' compensation**.*

Council knew [the applicant] suffered a work injury, and that he had an accepted workers' compensation claim. It's my understanding that Council management provided information to the claims officer. To reduce access to relevant information in an IP release means that administration of justice generally is unfair. [The applicant] was sacked, whilst on workers' compensation, and access to this unredacted investigative material may have meant the CFMEU may have been able to have [the applicant] reinstated (which was the goal of the QIRC proceedings – reinstatement). There may have been other proceedings. A reasonable person may have coped with limited information, but [the applicant] is not a reasonable person because he suffered/suffers significant mental illness/es [sic] from a work injury. 5 business days to respond to a Show Cause is not reasonable given [the applicant's] circumstances/illnesses/workers' compensation. Even though [the applicant] was represented by the CFMEU, it was still up to [the applicant] (and myself) to provide information to the CFMEU and lack of information in a form that [the applicant] could somewhat reasonably understand (given his illnesses) did not happen until the Show Cause – this was when allegations and other detail was provided to [the applicant] in written, details format. A verbal meeting is not the same as a lengthy letter, and it was evident that the CFMEU sought a number of extensions because 5 business days was not enough time to respond to the Show Cause. It has to come down to the Reasonable Person test or circumstances for fairness.

With all due respect, I believe there was no administration of justice generally (and for [the applicant]). In the reissued Preliminary view it is mentioned "In addition, I also consider that the public interest harm factor regarding Council's management function applies to disclosure of the Investigation Information in this review, as disclosure could reasonably be expected to have a substantial adverse effect on the management by Council of its staff. I am satisfied that the weight of this nondisclosure factor is very high."

*What about the **substantial adverse effect** on [the applicant] in being terminated by Council whilst on workers' compensation? In suffering significant, certified symptoms during the second half of 2019 (and ongoing) since he was assaulted whilst working for Council. Where are [the applicant's] rights about this?*

Finding

29. The Workplace Information is about the applicant and I accept that the employment management process by Council had significant consequences for him. Accordingly, I afford significant weight to the factor favouring disclosure concerning the applicant accessing his own personal information.
30. I also accept that disclosing the Workplace Information could reasonably be expected to enhance Council's accountability and transparency in terms of how it conducts workplace

⁴⁴ See the email of 23 July 2021.

investigations.⁴⁵ However, in terms of the weight to be afforded to these factors, I maintain the view that was explained to the applicant both in this review and in detail in OIC's decisions in *P90* and *F89*. The applicant's submissions, in effect, focus on his views about the unfairness of the management process in which Council engaged. I am not satisfied that disclosure of the Workplace Information would significantly enhance the applicant's understanding of the process and the outcome, or address what he considers to be the unfairness of the process.

31. Furthermore, I consider that the information already released to the applicant by Council, both as part of the management process, as well as through the various access applications he has made to Council, significantly reduces the weight to be afforded to these factors. As has been explained to the applicant previously, the Information Commissioner has decided that the requirement on an agency to be accountable and transparent in the conduct of disciplinary investigations does not oblige the agency to provide the applicant with access to its entire investigation file, nor reveal all of the information it gathered in dealing with the investigation.⁴⁶ In this case, I consider that sufficient information has been disclosed by Council to explain to the applicant its investigation and disciplinary action processes. I note the submissions made by the applicant's agent regarding the applicant's mental state when participating in the processes and the contention that this prejudiced his ability to fully participate. However, I also note that the applicant was assisted by a union delegate in the management process. In any event, as I have noted above, I am not satisfied disclosure of the Workplace Information would significantly enhance the applicant's understanding of the process or address his unfairness concerns. I therefore afford moderate weight to the accountability and transparency factors.
32. The applicant also raised the application of the administration of justice disclosure factors listed at schedule 4, part 2, items 16 and 17 of the RTI Act. I am not aware of any current or anticipated legal proceedings, or legal remedies, that the applicant is currently pursuing or intending to pursue, or how disclosure of the documents would assist him in pursuing or evaluating any legal remedies. In the absence of such information, it is difficult to identify how disclosure could reasonably be expected to contribute to the administration of justice either generally, or specifically for the applicant. As I understand it, the proceedings that the applicant instituted in the Queensland Industrial Relations Commission alleging unfair dismissal have concluded. In these circumstances, and without further details about the basis of any anticipated legal action or remedy, I would afford these factors only low weight in the public interest balancing test.
33. With respect to the public interest in advancing the fair treatment of the applicant in accordance with the law, the applicant clearly considers he was treated unfairly by Council. In the context of a workplace investigation, procedural fairness generally requires that a person is:
 - adequately informed of the allegations made against them
 - given an opportunity to respond to the allegations; and
 - informed of the outcome of the investigation.⁴⁷

⁴⁵ *8A3BPQ and Queensland Police Service* [2014] QICmr 42 (30 October 2014) at [22] to [24] (**8A3BPQ**); *F60XCX and Department of Natural Resources and Mines* [2017] QICmr 19 (9 June 2017) at [61] to [66] (**F60XCX**).

⁴⁶ *8A3BPQ* at [24].

⁴⁷ *Gapsa and Department of Transport and Main Roads* (Unreported, Queensland Information Commissioner, 6 September 2013) at [20] (**Gapsa**); and *ODWOPH and Queensland Bulk Water Supply Authority trading as Seqwater* [2017] QICmr 3 (13 February 2017) at [28].

34. The applicant was advised of the nature of the allegations in an interview with Council,⁴⁸ and received a detailed Show Cause Notice issued by Council.⁴⁹ The applicant was provided with an opportunity to respond, including being granted two extensions of time to respond, and was also offered a face to face meeting with the decision-maker to provide any further information.⁵⁰ The applicant was then informed of the decision and the reasons for Council's decision, with specific reference to his response.⁵¹ As I have noted, he received assistance from a union representative in this process.
35. Relevantly, the Information Commissioner has previously held that fair treatment and procedural fairness in a workplace investigation does not '*entitle the applicant to all information about the investigation including the information provided by other individuals who participated in the investigation process.*'⁵² Having considered both the refused and released information, I do not consider that disclosure of the Workplace Information would substantially contribute to any further procedural fairness for the applicant and I therefore afford low weight to this factor favouring disclosure.⁵³
36. Turning to the factors favouring nondisclosure, I am satisfied that disclosing communications within an agency involving managers and/or HR officers discussing the management of an employee's conduct could reasonably be expected to have a negative impact on the future exchange of such information, with an associated negative effect on the agency's staff management processes. In terms of the witness information, I am satisfied that disclosure may deter witnesses from providing full and open accounts to investigators in future workplace investigations, thereby prejudicing both Council's ability to obtain confidential information in the future, and its investigation processes and outcomes. In order to conduct effective workplace investigations, agencies rely on managers and staff freely cooperating in the investigative process.⁵⁴ Accordingly, I afford these nondisclosure factors significant weight.
37. The Workplace Information also contains the personal information of individuals other than the applicant. I am satisfied that disclosure would prejudice the protection of the right to privacy of these individuals.⁵⁵ While the information from witnesses is provided in a workplace context, it is not routine personal work information.⁵⁶ Rather, it comprises sensitive information given in relation to a workplace investigation. For this reason, I consider that disclosure of this information under the IP Act would be a significant intrusion into the relevant persons' privacy and the extent of the public interest harm that could be anticipated from disclosure is significant.
38. I therefore afford the four nondisclosure factors identified at paragraph 27 above significant weight in the public interest balancing test.

⁴⁸ On 28 October 2019 with the applicant and union representative.

⁴⁹ Dated 11 November 2019. Council provided significant detail of the allegations across five pages of the 11 page Show Cause Notice to the applicant, including dates, names of other parties involved in the events or conversations, and details of what was alleged to have been said or done by the applicant.

⁵⁰ See part 2, pages 5-16 of the released documents.

⁵¹ The applicant provided a 12 page response to the Show Cause Notice.

⁵² 8A3BPQ at [28].

⁵³ Schedule 4, part 3, item 16 of the RTI Act.

⁵⁴ F60XCX at [129] to [136]; I6XD0H and Department of Community Safety (Unreported, Queensland Information Commissioner, 26 June 2012) at [33] to [35]; Gapsa at [30] to [35]; Malfliet and Department of Justice and Attorney-General [2015] QICmr 5 (19 March 2015) at [25].

⁵⁵ Schedule 4, part 3, item 3 and schedule 4, part 4, section 6(1) of the RTI Act.

⁵⁶ Often, information relating to the day-to-day work duties of a public servant may be disclosed under the IP and RTI Acts, despite it falling within the definition of personal information. Generally, this information would not, on balance be contrary to the public interest to disclose. However, agency documents can also contain personal information of public servants which is not routine work information: see Gapsa and Department of Transport and Main Roads (Unreported, Queensland Information Commissioner, 12 April 2013) at [71].

39. After balancing the factors weighing both for and against disclosure of the Workplace Information, I am satisfied that the factors favouring nondisclosure outweigh the factors favouring disclosure. Accordingly, I find that the balance of the public interest weighs in favour of nondisclosure, and access may therefore be refused on that basis.

Third Party Information

40. Council refused access to personal information of third parties such as mobile telephone numbers of Council staff, signatures, payroll numbers, and sharefile reference numbers.⁵⁷
41. I consider there is little to no public interest favouring disclosure of this information, beyond the general public interest in accessing information held by government. In contrast, I would afford moderate to significant weight to the public interest nondisclosure and harm factors that seek to protect the personal information and privacy of other individuals.⁵⁸
42. I acknowledge the applicant's submissions (made in this and other reviews)⁵⁹ that mobile numbers have previously been released to him, and that the redactions of this type of information have been applied inconsistently by Council across a number of his access applications. I also acknowledge the applicant's submissions that, as he considers mobile numbers to be Council information, it would not be contrary to the public interest to disclose them. However, these submissions do not raise relevant factors in favour of disclosure under the RTI Act aside from (as acknowledged above) the general public interest in facilitating access to government-held information.⁶⁰
43. In contrast, release of this information would disclose personal information of Council officers and other third parties. In terms of mobile numbers, the Information Commissioner has previously held that:

a mobile phone number is different to other contact details (such as email addresses or office phone numbers) in that it allows an individual to be contacted directly and potentially outside of working hours.[and] permits potential contact with an employee when off duty and/or engaged in private activity, which gives rise to a reasonable expectation of intrusion into the officer's private life or 'personal sphere'.⁶¹

44. As regards the weight to be attributed to the nondisclosure factors concerning personal information and privacy, I note that applicant's submissions that he had access to the mobile numbers of other Council officers when he was employed by Council, as well as his submissions about inconsistent redactions by Council. I accept that, where this is the case, his previous access to the same information may reduce the weight of the nondisclosure factors to a certain extent. However, given that I am not able to identify any factors favouring disclosure of this information, I find that the moderate to significant weight that I attribute to the privacy and personal information nondisclosure and harm factors is sufficient to support my finding that disclosure of this information would, on balance, be contrary to the public interest.

⁵⁷ Part 1 – pages 38, 39, 96, 97, 101, 106, 107, 111, 112, 147, 151, 159, 174; part 2 – pages 3, 4, 10, 11, 13, 14, 16, 19-22, 55, 58; part 3 – pages 3, 7, 11, 12, 39, 65, 68, 146-149; part 4 – page 1; part 5 – pages 5, 29, 37, 42, 64, 67; part 6 – pages 1, 4, 5, 23; part 7 – pages 1, 5, 6; part 8 – page 6; part 9 – pages 3, 11, 12.

⁵⁸ Schedule 4, part 3, item 3 and schedule 4, part 4, section 6 of the RTI Act.

⁵⁹ Email of 23 July 2021 in this review. See also the discussion about telephone numbers in *P90* and *F89*.

⁶⁰ Schedule 4, part 2, items 1 and 3 of the RTI Act.

⁶¹ *Smith and Sunshine Coast Regional Council; Diamond Energy Pty Ltd (Third Party)* [2017] QICmr 42 5 September 2017) at [16]. See also *Underwood and Minister for Housing and Public Works* [2015] QICmr 27 (29 September 2015) at [66] to [68].

Finding

45. After balancing the public interest factors favouring disclosure and nondisclosure of the Third Party information, I find that the factors favouring nondisclosure outweigh those favouring disclosure, such that disclosure would, on balance, be contrary to the public interest and access may be refused on that basis.

Sufficiency of search

Relevant law

46. Access to a document may be refused if the document is nonexistent or unlocatable.⁶²
47. To be satisfied that documents are nonexistent, a decision-maker must rely on their particular knowledge and experience and have regard to a number of key factors, including:⁶³
- the administrative arrangements of government
 - the agency's structure
 - the agency's functions and responsibilities
 - 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.
48. 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. 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 the particular circumstances.
49. To determine whether a document exists, but is unlocatable, the RTI Act requires consideration of whether there are reasonable grounds for the agency to be satisfied that the requested document has been or should be in the agency's possession; and whether the agency has taken all reasonable steps to find the document. In answering these questions, regard should again be had to the circumstances of the case and the key factors listed in paragraph 47.⁶⁴
50. The Information Commissioner's external review functions include investigating and reviewing whether agencies have taken reasonable steps to identify and locate documents applied for by applicants.⁶⁵ Generally, the agency that made the decision under review has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant.⁶⁶ However, where an external review involves the issue of missing documents, the applicant has a practical onus to establish reasonable grounds to be satisfied that the agency has not

⁶² Section 67(1) of the IP Act and sections 47(3)(e) and 52 of the RTI Act. A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist—section 52(1)(a) of the RTI Act. 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—section 52(1)(b) of the RTI Act.

⁶³ *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).

⁶⁴ *Pryor* at [21].

⁶⁵ Section 137(2) of the IP Act. The Information Commissioner also has power under section 115 to require additional searches to be conducted during an external review.

⁶⁶ Section 87(1) of the RTI Act.

discharged its obligation to locate all relevant documents. Suspicion and mere assertion will not satisfy this onus.

Submissions of the parties

51. At a late stage of the review, after becoming aware through another review that a search of Council's email system could be conducted using a *SourceOne* search, the applicant raised a general sufficiency of search issue, arguing that Council should be required, as a matter of course, to conduct a *SourceOne* search when responding to an access application.⁶⁷
52. OIC wrote to Council⁶⁸ to seek further information about this issue and sought a submission from Council in support of its position that it had taken all reasonable steps to locate responsive documents.
53. In response, Council submitted⁶⁹ that the timeframe of this access application is approximately just over two months, and that searches of the following areas of Council had located 698 responsive pages:
 - Field Services Group Executive Manager's Office
 - Urban Amenity Branch, Field Services Group
 - Human Resources
 - Payroll
 - City Legal; and
 - RTI Unit.
54. Council argued that it is reasonable to expect that these targeted searches would locate all documents responding to the terms of the access application, including responsive emails, and that it should not be required to conduct a *SourceOne* search of its entire email system, particularly when the applicant had not identified any missing documents that it is reasonable to expect that only a *SourceOne* search would locate.
55. Council also contended that undertaking and including the results of *SourceOne* searches would have increased the number of responsive documents significantly by including multiple duplicate email chains and attachments to such an extent that Council may have refused to deal with the application on the basis of a substantial and unreasonable diversion of resources.
56. The applicant was invited to respond to Council's submission. After requesting several extensions of time, the applicant's agent provided a submission dated 4 January 2022. The bulk of that submission deals with matters irrelevant to the sufficiency of search issue, and in respect of which OIC has no jurisdiction in any event, including, for example, complaints by the applicant about the inclusion by Council in its decision of documents that fall outside the date range specified in the access application.⁷⁰ The applicant also continued to complain about such matters as Council's record-keeping practices, inconsistent redactions in released documents, and use of footers.

⁶⁷ See the decision in *T74 and Brisbane City Council* [2021] QICmr 54 (21 October 2021) for a discussion of *SourceOne* searches and the issues involved.

⁶⁸ Email of 20 August 2021.

⁶⁹ Email of 11 October 2021.

⁷⁰ Where an agency, through administrative error or otherwise, gives an access decision about documents that fall outside the scope of an access application, the agency is regarded as having given administrative access to this information, rather than access under the IP Act or RTI Act. As such, OIC has no jurisdiction to deal with this information on external review.

57. In the relevant part of his submission that dealt with sufficiency of search, the applicant contended that Council should be required to conduct a *SourceOne* search, as well as searches of a further 15 areas of Council, which he listed, including searches of the email accounts of nine named Council officers, as well as searches of other records that the applicant identified as including '*UAB-Communications, OS-SSC-PAYROLL-BenefitsLeaveandTerminations, HR Delivery, Executive Summary records, Content manager records, and Junk email files/folders of those already considered*'.
58. In terms of identifying specific responsive documents that they contended were missing from the documents located by Council, the applicant identified the following:
- documents recording a conversation that may have taken place between two Council officers about providing the applicant with a response
 - documents about any searches for documents concerning the applicant that may have been conducted by Council using an alternate name for the applicant as the search term
 - correspondence/communications between Council and the Disputes Commissioner; and
 - communications between named Council officers concerning any discussion about a possible referral to the Disputes Commissioner.

Finding

59. As noted above, where a sufficiency of search issue is raised on external review, the issues for OIC to determine are:
- whether there are reasonable grounds for believing that additional responsive documents exist in the agency's power or possession; and, if so
 - whether the searches and inquiries conducted by the agency in an effort to locate the additional responsive documents have been reasonable in all the circumstances.
60. The applicant bears the practical onus of establishing reasonable grounds to be satisfied that the agency has not discharged its obligation to locate all relevant documents and that further searches and inquiries ought reasonably be required. I do not consider they have discharged this onus in this review.
61. In respect of the list of the additional 15 categories of searches that the applicant contends ought to be carried out, he has not identified specific missing documents that it would be reasonable to expect that these searches would locate. Rather, the applicant simply speculates that these searches may result in locating additional responsive documents. That is not sufficient to discharge the onus upon him. As noted above, suspicion and mere assertion will not satisfy this onus.
62. As regards the specific documents identified by the applicant as missing (at paragraph 58 above), I consider it is reasonable to expect that the targeted searches that Council conducted (as set out in paragraph 53 above) in an effort to locate all responsive documents were sufficient to identify and locate these documents if they existed in Council's possession.
63. In respect of the first and fourth items identified by the applicant at paragraph 58 above, if a note of a conversation between the officers named by the applicant had been made, or emails exchanged, it is reasonable to expect that a search of Council's RTI unit would have located such documents given that officers of that unit were named by the applicant

as being involved. I consider the same applies to the third item. There is nothing before me to suggest the involvement of the Disputes Commissioner but, in any event, I consider it is reasonable to expect that if the matter had been referred to the Disputes Commissioner, the searches of the RTI unit conducted by Council would have located any responsive documents, given the officers identified by the applicant as potentially involved in any referral.

64. As regards the second item, the applicant appears to contend that additional documents should exist arising out of an internal email dated 10 March 2020 in which the Manager of Council's Urban Amenity division queried whether a Deed of Release should be prepared in the applicant's name, or in '*one of the alternate names identified*'. Having reviewed the relevant exchange of emails, I am satisfied that the query can reasonably be interpreted as concerning whether the Deed should be prepared in the applicant's name, or in the name of the relevant union (or union delegate) that brought the proceedings against Council on the applicant's behalf. There is nothing before me to suggest that Council used an alternative name for the applicant or conducted searches for responsive documents using an alternative name. I am not satisfied that there are reasonable grounds for believing that such documents exist in Council's possession or under its control.
65. In summary, the applicant's submissions have not satisfied me that there are reasonable grounds for believing that additional responsive documents exist in Council's possession or under its control that could reasonably be expected to be located through a *SourceOne* search, or any other additional search or inquiry by Council. I am satisfied that the searches and inquiries that Council has conducted have been reasonable in the circumstances of this case.
66. I find that access to any additional documents may be refused on the basis that they are nonexistent or unlocatable under section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.

DECISION

67. For the reasons set out above, I affirm the decision under review by finding that:
- access to the LPP Information may be refused under section 67(1) of the IP Act and sections 47(3)(a) and 48 and schedule 3, section 7 of the RTI Act because it is exempt information; and
 - access to the Workplace Information and Third Party Information may be refused under section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act because its disclosure would, on balance, be contrary to the public interest.
68. In addition, I find that the searches and inquiries conducted by Council in an effort to locate all responsive documents have been reasonable in all the circumstances and that access to further documents may be refused on the basis they are nonexistent or unlocatable under section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.

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

S Martin
Assistant Information Commissioner

Date: 25 January 2022

APPENDIX

Significant procedural steps

Date	Event
5 October 2020	OIC received the application for external review.
12 October 2020	OIC requested preliminary documents from Council.
13 October 2020	OIC received the preliminary documents.
3 November 2020	OIC accepted the application and requested copies of the information in issue from Council.
5 November 2020	OIC received copies of the information in issue.
15 December 2020	OIC conveyed a preliminary view to Council.
18 December 2020	OIC conducted a teleconference with the applicant about his multiple applications.
11 January 2021	OIC received the applicant's submissions.
15 January 2021	OIC provided an update to the applicant.
16 February 2021	OIC received a response from Council.
7 March 2021	OIC received a further response from Council.
27 May 2021	OIC conveyed a preliminary view to the applicant. OIC requested that Council release additional information to the applicant.
14 June 2021	OIC received the applicant's request for an extension of time and a request for adjusted communication.
20 June 2021	OIC received a submission from the applicant.
21 June 2021	OIC re-issued its preliminary view to the applicant.
21 and 23 July 2021	OIC received submissions from the applicant.
20 August 2021	OIC requested information from Council regarding a sufficiency of search issued raised by the applicant
23 September 2021	OIC received an additional responsive document from Council.
27 September 2021	OIC requested that Council release additional information to the applicant and provide its submission on remaining sufficiency of search issues.
11 October 2021	OIC received Council's submission.
28 October 2021	OIC conveyed a preliminary view to the applicant about sufficiency of search issues.
4 January 2022	OIC received submissions from the applicant.