



Decision and Reasons for Decision

Citation:	<i>X50 and Brisbane City Council [2021] QICmr 12 (11 March 2021)</i>
Application Number:	315625
Applicant:	X50
Respondent:	Brisbane City Council
Decision Date:	11 March 2021
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - INFORMATION AS TO EXISTENCE OF PARTICULAR DOCUMENTS - request for information about a named individual - whether requested information is prescribed information - whether existence of requested information may be neither confirmed nor denied under section 69 of the <i>Information Privacy Act 2009 (Qld)</i>

REASONS FOR DECISION

Summary

1. The applicant applied¹ to Brisbane City Council (**Council**) under the *Information Privacy Act 2009 (Qld)* (**IP Act**) for access to information in the following terms:

I am looking to find out which documents of mine were accessed under the RTI attached with this document, received by council on 01/05/2019. Specifically I'm looking to confirm which of the drawings associated with the building approval on my property [address deleted] were accessed. In particular, [name of applicant's firm deleted] Architecture drawings; Lower Slab Plan S001, Structural Details S020, and Structural Details S021.

These drawings, which I want confirmation of being accessed, have been included in a submission found on PD online [reference deleted] to oppose my Development Application. This submission also has the details of myself, my builder, and the neighbors [sic] emails, which might need to be redacted.

I would also like confirmation that the person/persons who accessed my BA drawings are [names of applicant's neighbours deleted]. I noticed on the RTI release (attached) that they did not provide identification, so I would like confirmation by way of emails to set up the viewing of the documents, and if possible of the signing of the visitor register at council's office.

I am looking to confirm that these two people, my neighbors [sic], have viewed and photographed my copyright protected documents during an RTI application through council,

¹ Application dated 25 June 2020.

and have used this stolen information to submit an objection to my DA. This has resulted in the need for me to appeal the DA decision in court, and has led to serious financial losses.

2. In conjunction with his external review application, the applicant provided a copy of documents apparently released to him by Council in response to an earlier access application he had made. These included a copy of an access application made to Council under the *Right to Information Act 2009 (Qld) (RTI Act)* by a person or persons requesting access to documents relating to a Development Application for the applicant's property. All identifying information for the RTI access applicant/s had been redacted from the documents released to the applicant by Council.
3. Council commenced processing the application under the IP Act.² However, it did not issue a decision within the statutory timeframe set out in the IP Act and was therefore deemed to have refused access to the requested information.³ I will explain below the issues that arose during the processing of the application by Council.
4. The applicant seeks review of Council's deemed refusal of access to documents that would confirm the identity of the applicant's neighbours as the persons who made the RTI access application to Council, and who subsequently attended at Council to inspect responsive documents.
5. For the reasons explained below, I vary Council's deemed refusal of access by deciding to neither confirm nor deny the existence of such documents under section 69 of the IP Act. I am satisfied that, if the requested documents were to exist in Council's possession or under its control, they would contain 'prescribed information', that is, personal information the disclosure of which would, on balance, be contrary to the public interest, under section 67(1) of the IP Act,⁴ and section 47(3)(b) and section 49 of the RTI Act.

Processing of the access application

6. As noted above, Council did not process the access application within the timeframe stipulated in the IP Act, and was therefore deemed to have refused access to the requested information. However, it does not appear that Council alerted itself to the fact that the period for processing the application had expired, because it sought an extension of time from the applicant to complete processing the application and to issue a decision.⁵ The applicant granted the request for an extension, and Council purported to issue a decision on 18 August 2020, whereby it decided to grant the applicant access to the bulk of the same information that had been released to the RTI access applicant, with some additional redactions.⁶ However, in respect of that part of the applicant's access application wherein the applicant sought access to documents confirming that the RTI access applicant who had attended at Council to inspect documents was his neighbour, Council advised the applicant that it neither confirmed nor denied the existence of such documents.⁷
7. It appears that both Council and the applicant proceeded on the mistaken belief that Council had made a valid initial decision. The applicant applied to Council for internal

² The application sought access to both personal and non-personal information: see section 54 of the IP Act.

³ Section 66 of the IP Act.

⁴ Section 67(1) of the IP Act sets out that an agency may refuse access to information in the same way and to the same extent that the agency could refuse access to the document under section 47 of the RTI Act.

⁵ Council's request for an extension of time was invalid under section 55 of the IP Act as it was made after Council was deemed to have made a decision.

⁶ Council refused access to three audio recordings on the basis that their disclosure would, on balance, be contrary to the public interest because they contained the personal information of persons other than the applicant.

⁷ Section 69 of the IP Act.

review of that decision.⁸ To complicate matters further, before the expiry of what would have been the statutory period for issuing an internal review decision (had Council's initial decision, and the application for internal review, been valid), the applicant applied⁹ to the Office of the Information Commissioner (**OIC**) for external review of Council's purported 'neither confirm nor deny' response, submitting that his neighbours had:

'... shown blatant disregard for Council's RTI procedures and for copyright laws by photographing my drawings and then using them illegally which has cause [sic] me to suffer loss. ... I have requested this external review as I am not confident [sic] that Council will be able to make an impartial decision on this matter, as they themselves have facilitated the breach of my copyright in this instance.'

8. After the applicant made his application to OIC for external review, Council purported to issue an internal review decision,¹⁰ affirming its (invalid) initial decision. Council rejected the applicant's contention that it had allowed a breach of the applicant's copyright to occur, stating:

To the extent that a third party has reproduced documents relating to the building approval for your property at [address deleted] which are copyright protected, without the written permission of the copyright holders, such reproduction was not based on copies of documents supplied by Council in response to an RTI Act application.

Accordingly, my view is that disclosure by Council of the identity of the applicant for the RTI Act application will not assist you to pursue any remedy that you may have in relation to breach of copyright.

9. As noted above, given that it did not process, nor request an extension of time to process, the applicant's application within the relevant statutory timeframes, Council is deemed to have refused access to the requested information. A deemed decision is taken to have been made by an agency's principal officer,¹¹ meaning that there can be no internal review of such a decision by a more senior officer.¹² Council's purported internal review decision is therefore of no effect. Accordingly, for the purposes of this external review, the information contained in Council's purported initial and internal review decisions can only be regarded as having the force of submissions that explain Council's position in response to the access application.

Background to the access application

10. The applicant lodged a Development Application with Council seeking approval to build a residential house on land situated in Brisbane. The applicant is an architect and his firm prepared a number of the supporting documents, including plans of the proposed residence.
11. The applicant fell into dispute with his neighbours about a number of aspects of the building work. His neighbours lodged an online objection to his Development Application with Council.¹³ The applicant contends that, attached to that objection were copies of documents that were subject to a claim of copyright, including his own firm's plans and drawings, and that the documents had been unlawfully copied by his neighbours. He submits that, as a result of his neighbours' objection (and their (or Council's) alleged associated breach of his copyright), Council decided to impose conditions on the building

⁸ Application dated 28 August 2020.

⁹ Application dated 10 September 2020.

¹⁰ Decision dated 25 September 2020.

¹¹ Section 66(1) of the IP Act.

¹² Section 94(3) of the IP Act.

¹³ Dated 24 November 2019, via Council's *Development.i* online submission facility (accessed 4 March 2021).

work, and the applicant was forced to appeal Council's decision in the Planning and Environment Court, causing him 'damage and loss'.¹⁴

12. The applicant seeks to establish how his neighbours obtained copies of the relevant documents that were attached to the online objection so that he can consider the prospects of bringing an action against them for copyright infringement. He suspects that his neighbours obtained access to the documents from Council under the RTI Act, and that when they attended at Council to inspect the documents,¹⁵ they unlawfully photographed the copyrighted documents without the applicant's consent.
13. The applicant seeks access to the requested information in order to enhance the accountability of Council, which he contends either committed or facilitated a breach of his copyright, and, as regards his neighbours, to '*allow [him] to further pursue this matter for justice under the criminal law*'.¹⁶

Reviewable decision

14. The decision under review is Council's deemed refusal of access.

Evidence considered

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

Application of the Human Rights Act

16. I have had regard to the *Human Right Act 2019* (Qld) (**HR Act**), particularly to the right to seek and receive information as embodied in section 21 of that Act. I consider that in observing and applying the law prescribed in the IP Act, a decision maker will be '*respecting and acting compatibly with*'¹⁷ this right and others prescribed in the HR Act, and that I have done so in making this decision, as required under section 58(1) of the HR Act. In this regard, I note Bell J's observations on the interaction between the Victorian analogues of Queensland's RTI/IP Acts 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*'.¹⁸

Issue for determination

17. The issue for determination is whether, if they exist, the documents sought by the applicant would contain prescribed information under section 69 of the IP Act, thereby permitting a decision to be made to neither confirm nor deny the existence of such documents.
18. For the purposes of this decision, I will hereinafter refer to the person/s who made the RTI access application to Council as the 'third party'.

¹⁴ Application for external review dated 10 September 2020.

¹⁵ See section 83(4)(c) of the IP Act.

¹⁶ Application for external review dated 10 September 2020.

¹⁷ *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 [11].

¹⁸ *XYZ* at [573].

Relevant law

19. Section 69 of the IP Act is appropriately used where there is something about the way in which, whether by accident or design, an access application is framed which will mean that the agency acknowledging the existence or non-existence of the particular kind of information requested is liable to cause the detriment that key grounds for refusal prescribed in the IP Act and the RTI Act are intended to avoid.
20. Before applying the exception contained in section 69, a decision-maker must be satisfied that if the requested documents existed, they would contain 'prescribed information'.¹⁹ Prescribed information includes personal information,²⁰ the disclosure of which would, on balance, be contrary to the public interest.²¹
21. Determining this issue essentially requires a decision-maker to conduct a hypothetical public interest balancing exercise, as prescribed in section 49 of the RTI Act,²² by identifying public interest factors that would operate to favour disclosure and nondisclosure, and making a judgment as to where the balance of the public interest would lie, were the requested documents to exist.
22. In this case, Council submits that the appropriate response to the relevant part of the applicant's access application is a 'neither confirm nor deny' response because, given the way in which the applicant worded his access application (by naming his neighbours and seeking access to documents confirming that they had attended at Council to inspect documents), confirmation of the existence of responsive documents would confirm the applicant's contentions about the identity of the third party, and would disclose prescribed information to the applicant: that is, personal information the disclosure of which would, on balance, be contrary to the public interest.
23. On external review, a 'neither confirm nor deny' response presents procedural challenges as the decision-maker is unable to confirm the existence of information. As the Information Commissioner explained in *EST and Department of Family Services and Aboriginal Affairs*:²³

In a review of an ordinary refusal of access decision, the applicant for access is necessarily disadvantaged, in the extent to which meaningful submissions can be made about the exempt status of matter in issue, by a lack of precise knowledge as to the nature of the matter in issue. That disadvantage is exacerbated in a review of a decision to invoke a ... "neither confirm or deny" response. The review must largely proceed in private between the Information Commissioner and the respondent ...

¹⁹ Defined in schedule 5 to the IP Act.

²⁰ Personal information comprises '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': section 12 of the IP Act.

²¹ 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, although there are some recognised public interest considerations that may apply for the benefit of an individual: Chris Wheeler, 'The Public Interest: We Know It's Important, But Do We Know What It Means' (2006) 48 AIAL Forum 12, 14.

²² In summary terms, section 49 of the RTI Act requires a decision maker to identify any irrelevant factors and disregard them; identify relevant public interest factors favouring disclosure and nondisclosure of subject information; balance relevant factors favouring disclosure and nondisclosure; and decide whether disclosure of subject information would, on balance, be contrary to the public interest. I have taken no irrelevant factors into account.

²³ (1995) 2 QAR 645 (*Est*) at [20].

External review procedure

24. During the review, I wrote to the applicant on three occasions²⁴ to express the view that a 'neither confirm nor deny' response was appropriate, given the way in which he had framed his access application, and to explain why I considered that some of the applicant's arguments in favour of disclosure of the requested information were misconceived.
25. The applicant did not accept my views and lodged three sets of submissions²⁵ in support of his position.
26. I will discuss the applicant's submissions below. Those submissions are predicated on the applicant's belief that the third party is his neighbour. Nothing in the discussion below should be taken to either confirm or deny the existence of the documents requested by the applicant, or to confirm or deny the applicant's contentions about the identity of the third party.

Allegation of apprehended bias

27. Following the provision to the applicant of my first 'preliminary view' letter, the applicant submitted:²⁶

The OIC is Queensland's independent statutory body to promote access to government-held information, and to protect people's personal information held by the public sector, as outlined on the OIC website. As stated in your letter, the OIC is also in place to review access and amendment issues in a fair and unbiased way. The OIC website briefly outlines your significant experience in this area, and it also lists your 15 years of public sector experience working as a senior lawyer in a number of government agencies. I do feel it prudent at this point to ask you to confirm that your previous experience working for government agencies does not cause any conflict of interest in this case looking into Brisbane City Council RTI processes. As I said, this is only a confirmation, as I'm sure that your professionalism and experience would outweigh any possible perceived bias that may be interpreted in your decision making.

28. I responded as follows:²⁷

... as regards the issue you have raised regarding a possible conflict of interest and/or possible perceived bias on my part, I am satisfied that I have no conflict of interest and nor are there any reasonable grounds to support any perception of bias against you. The mere fact that I have formed a view that does not support your position is not indicative of bias. This appears to be the only basis on which you have raised the issue.

29. For the sake of completeness, I record that I have considered the applicant's submission, alongside the High Court's test for assessing apprehended bias for a decision maker. The High Court's test requires consideration of 'if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide'.²⁸ The High Court has also noted that:

[t]he question of whether a fair-minded lay observer might reasonably apprehend a lack of impartiality with respect to the decision to be made is largely a factual one, albeit one which it

²⁴ Letters dated 28 October 2020, 17 November 2020 and 1 December 2020.

²⁵ Letters dated 9 November 2020, 25 November 2020 and 5 December 2020.

²⁶ Applicant's letter dated 9 November 2020.

²⁷ Letter dated 17 November 2020.

²⁸ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6] per Gleeson CJ, McHugh, Gummow and Hayne JJ. See also *Michael Wilson & Partners Limited v Nicholls* (2011) 244 CLR 427 at [31] per Gummow ACJ, Hayne, Crennan and Bell JJ.

*is necessary to consider in the legal, statutory and factual contexts in which the decision is made.*²⁹

30. OIC is an independent statutory body that conducts merits review of government decisions about access to, and amendment of, documents. The procedure to be followed on external review is, subject to the IP Act, within the discretion of the Information Commissioner.³⁰ In order to ensure procedural fairness (as required by both the IP Act³¹ and common law), 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 party. This apprises that party of the issues under consideration and affords them the opportunity to put forward any further information they consider relevant to those issues.
31. For this review, I am the delegate of the Information Commissioner.³² I am satisfied that, in the conduct of this review, the applicant has been treated in the same way as any other applicant for review. He has been afforded procedural fairness. I explained to him why I had formed the preliminary view that a 'neither confirm nor deny' response was justified. In the event that he disagreed, he was provided with an opportunity to provide relevant submissions in support of his position which I would take into account before making a final decision. He has availed himself of that opportunity on a number of occasions.
32. I have applied the provisions of the IP Act to the issues for determination and explained my reasoning to the applicant. I am satisfied that I have no conflict of interest in dealing with his matter. In those circumstances, paraphrasing the High Court's test, I am unable to identify any basis for finding that a fair-minded lay observer might reasonably apprehend that I might not bring an impartial and unprejudiced mind to the resolution of this matter.

Application of the public interest balancing test

33. In order for section 69 of the IP Act to apply, I must be satisfied, on the face of the applicant's access application, that the requested information would, if it exists, contain personal information the disclosure of which would, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act.
34. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision maker must:³³
- 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.

Findings

Irrelevant public interest factors

35. I have not taken any irrelevant factors into account in reaching my decision.

²⁹ *Isbester v Knox City Council* (2015) 255 CLR 135 at [20] per Kiefel, Bell, Keane and Nettle JJ.

³⁰ Section 108 of the IP Act.

³¹ Section 110(2) of the IP Act.

³² Section 139 of the IP Act.

³³ Section 49(3) of the RTI Act.

Public interest factors favouring nondisclosure

36. I am satisfied that the requested documents, if they exist, would contain the personal information of persons other than the applicant.
37. Where disclosure of information would disclose the personal information of another person, a public interest harm automatically arises. Schedule 4, part 4, section 6 of the RTI Act provides that disclosure of information could reasonably be expected to cause a public interest harm (**harm factor**) if disclosure would disclose personal information of a person, whether living or dead.
38. In addition, schedule 4, part 3, item 3 recognises an associated factor that favours nondisclosure of personal information of others – where disclosure could reasonably be expected to prejudice the protection of an individual’s right to privacy (**nondisclosure factor**).
39. The exercise by an individual of their legislated right to make an RTI or IP application seeking access to information held by government is clearly an aspect of their private affairs. Individuals may make access applications for all range of information held by government, including information of a highly sensitive and personal nature. Their reasonable expectation is that government agencies will protect their privacy interests, as private citizens using a governmental information access regime, and not disclose their identity to the world at large except in prescribed circumstances.³⁴ In my experience, this is what occurs in practice. Agencies do not routinely disclose the identities of access applicants when processing an access application, absent the express consent of those persons, even when formally consulting with third parties who may be directly affected by the agency’s decision.³⁵
40. For these reasons, if the requested information were to exist, I would afford significant weight to both the harm factor and the nondisclosure factor in recognition of the strong public interest in protecting the personal information and right to privacy of private citizens exercising their statutory right to seek access to information held by government.

Public interest factors favouring disclosure

41. The applicant’s arguments in favour of disclosure, as distilled from his submissions, can be summarised as follows:
 - disclosure could reasonably be expected to enhance Council’s accountability by identifying possible deficiencies in Council’s document inspection process;³⁶ and
 - disclosure could reasonably be expected to contribute to the administration of justice generally, and/or for a person.³⁷
42. In his external review application, the applicant stated:

In Council’s decision notice they have not indicated the specific reasons for not identifying the third party RTI applicant. I understand that there are limitations regarding the release of personal information, specifically Schedule 4, Part 4 Section 6 of the RTI act [sic]. With the current circumstance of events, being the other applicant breaching [sic] copyright laws and

³⁴ Departments and Ministers (but not local governments) are required to include the name of an applicant in their disclosure log if the department or Minister gives access to a document that does not contain the personal information of the applicant and the document has been accessed within the access period: see section 78(3) of the RTI Act.

³⁵ Pursuant to section 56 of the IP Act.

³⁶ Schedule 4, part 2, items 1 and 5 of the RTI Act.

³⁷ Schedule 4, part 2, items 16 and 17 of the RTI Act.

by council facilitating them to photograph my information, I would have thought that under Schedule 4 Part 2, that [sic] the information I have requested would be released for the purpose of enhancing the Government's accountability, identifying possible deficiencies in the RTI document inspection process, and to help reveal the unlawful use of my documents which has caused me damage and loss. Releasing this information will also allow me to further pursue this matter for justice under criminal law.

43. In response,³⁸ I stated that I was not satisfied that disclosure of the third party's name alone would:

- enable the applicant to establish how copies of copyrighted documents were obtained, or that Council had facilitated a breach of copyright
- enhance Council's accountability by revealing deficiencies in the administration of its RTI processes given that Council had rejected the suggestion that any unauthorised reproduction of documents occurred through Council's inspection processes; or
- applying the principles in *Willsford and Brisbane City Council*,³⁹ assist the applicant to pursue a legal remedy, or assess whether a legal remedy is or may be available.

44. In respect of the last point, I explained that the decision in *Willsford* established that a public interest factor favouring disclosure of third party personal information would arise if it could be established that:

- loss or damage or some kind of wrong had been suffered in respect of which a remedy was, or might be, available under the law
- the applicant had a reasonable basis for seeking to pursue the remedy; and
- disclosure of the information held by the agency would assist the applicant to pursue the remedy, or to evaluate whether a remedy was available, or worth pursuing.

45. The applicant had submitted that the online objection lodged by his neighbours, using 'stolen information', resulted in Council giving him a decision on his Development Application that he was forced to appeal in court, thereby sustaining a loss. However, I rejected that argument, stating:

Your argument is misconceived on several grounds. I do not accept that whatever decision Council may have given to you in response to your BA [Building Application] was based solely on one online objection. Council is obliged to take a variety of factors and considerations into account when deciding a BA. Your argument that the online objection, and furthermore, that the inclusion in the online objection of copyrighted documents, was the sole and direct cause of loss or damage sustained by you, is without merit. Council already had access to the copyrighted documents and was required to assess them as part of its consideration of your BA. Whether the objector included the actual documents in their objection, or simply discussed their contents in support of the objection, is irrelevant as far as Council's assessment of your BA is concerned, and Council's obligation to take account of all relevant information.

For these reasons, even if copyrighted documents were included in the online objection without permission of the copyright owners, I reject the argument that you suffered loss or damage as a direct result. The objector could still have made the same objection based only on an inspection of the documents (to which Council had access in any event).

³⁸ Letter dated 28 October 2020.

³⁹ (1996) 3 QAR 368 (*Willsford*).

46. In response,⁴⁰ the applicant argued that the three criteria set out in *Willsford* were satisfied:

Under the three criteria favouring disclosure you have referenced, there has been a definite wrong that has been suffered in the infringement of my copyright by both the third party in taking photographs of my documents, and by council for publishing those documents along with my personal information in a public forum without my permission. Reading the three criteria, it is my view that there is no need to establish both a successful argument in relation to loss or damage and proof of wrong occurring.

This information which has been made public without my consent has the potential to harm my reputation as an architect as it can reflect poorly on my perceived ability to follow the guidelines of council requirements. I feel that this is a reasonable basis for me to consider to pursue a remedy, and the disclosure of the third party's identity is the only way to confirm the identity of the copyright infringement offender.

In terms of factors favouring disclosure in the public interest, while the disclosure of the third party's identity does not directly promote discussion of council's accountability, it will however show the undue influence that has been afforded to the submitter by council, if they are in fact the same person. The reason I say this is that the submitter has made numerous complaints against me and my development which I feel have been made in an attempt to influence and pressure council into taking action against me. The submitter has made it clear to council through the number of their complaints that they will not stop raising multiple issues until action has been taken, which council has eventually obliged.

...

In summary, the third party who accessed my documents and who infringed my copyright should have their right to privacy waived as they have broken the law. The identity of the third party should be revealed to me so I can evaluate my options to pursue this matter further. Council needs to be more accountable for their RTI processes, and should be more stringent in their publishing of personal information online. I have shown how I believe I have satisfied the criteria for a public interest factor favouring the disclosure of the third party's identity, and that while I value your experience and opinion, it is not necessary for me to prove to you a likelihood of a success in pursuing a legal remedy.

Again, I request council to confirm the identity of the third party who accessed my Building Approval documents. As per my initial RTI application, I wish to view the un-redacted RTI application form with their full name, and also confirmation of their identity by way of emails sent to set up the viewing of the documents, and the signed visitor's register at council's offices for the corresponding date of inspection. The reason for this is the third party did not provide proof of identification at the time of the application, so these steps are to prove beyond doubt the identity of the third party.

47. Most of the arguments raised by the applicant had already been addressed in my previous letter to him. I responded to him by reiterating that:⁴¹

- he had not explained why he required access to the requested information in order to consider bringing a claim for breach of copyright when he acknowledged that he was already aware of the identity of his neighbours as persons who had lodged the online submission and whom he contended had breached his copyright
- if he wished to explore his legal rights around this alleged breach of copyright, he or his lawyers could raise the issue directly with his neighbours; and
- release of the requested information would not provide him with evidence that either Council or the third party permitted/committed a breach of copyright.

⁴⁰ Letter dated 9 November 2020.

⁴¹ Letter dated 17 November 2020.

48. I also advised the applicant that the allegations he had included in his submissions of undue influence and vexatious complaint-making by his neighbours, and the history of his Development Application and his dealings with Council, were irrelevant to my determination of the issues in this review.
49. In respect of submissions made by the applicant regarding what he contended were inadequacies in Council's document inspection processes and suggestions he had for improvement, I advised him that he could take these issues up with Council directly, as I had no jurisdiction under the IP Act to inquire into, or investigate, such matters. Similarly, I had no jurisdiction to require Council to provide evidence proving that no breach of copyright occurred through its inspection process, as requested by the applicant.
50. The applicant responded⁴² with a further submission in which he argued that I had not adequately explained why I considered that the public interest factors favouring nondisclosure of the requested information outweighed those favouring disclosure. He argued that the fact that his copyright had been breached should tip the balance of the public interest in favour of disclosure:

*If I decide to take the matter of my privacy being breached further, then, as you most likely know, I need to proceed with a number of steps to prove the infringement. I am the copyright owner, a valid copyright exists, and I have evidence that [my neighbour] has or had a digital copy of my copyright protected drawings, in the form of his online submission made to Council. If I am to proceed, I also need to prove that [my neighbour/s] had access to those original drawings. They did not get my permission to view or copy or use the drawings, and they did not obtain access through the building certifier or the structural engineer. Brisbane City Council is the only other person/entity who has access to/control of these drawings. What I have been trying to do through this whole process, is to get the identity of the person whom [sic] viewed my drawings during an RTI through council, as proof of access to the original drawings. This will, in my mind, provide the needed evidence to my claim that [my neighbours] viewed and unlawfully copied my documents during an RTI inspection. I agree that at this point, without having confirmed the RTI party's identity, my claim is speculative. Council maintains that the "reproduction was not based on copies of documents **supplied** by Council", (my emphasis) and I agree that Council did not supply the documents to these people. This is why I refer to them as "stolen documents", as I believe they were viewed legitimately under an RTI, and then copyright was breached when the viewer took photographs of the drawings.*

...

I maintain that the viewer of the RTI has waived their rights to privacy when they infringed my copyright and took unlawful copies of my documents. I find it difficult to agree that a public interest harm would occur with the release of the identity of persons who I believe I already know. If you do not agree, then can you please explain how the public interest should be weighted so the privacy of someone who has broken the law should be protected.

51. I wrote to the applicant again⁴³ to clarify both my preliminary view regarding the public interest, as well as the issues that arise when assessing a 'neither confirm nor deny' response raised by an agency. I explained that, by accepting that the public interest factors raised by the applicant applied, and by giving them weight in the public interest balancing test, I would, in effect, be confirming that Council had the requested information in its possession, because these accountability factors would otherwise have no application or relevance given that the applicant had not alleged that anyone other than his neighbours had breached his copyright. That would serve to defeat Council's 'neither confirm nor deny' position. Hence, my analysis of the public interest balancing test was required to proceed on a hypothetical basis:

⁴² Letter dated 25 November 2020.

⁴³ Letter dated 1 December 2020.

I would simply observe that if I were to be satisfied in a particular case that the release of information could reasonably be expected to assist in inquiring into a possible deficiency in an agency's administrative processes regarding document inspection, the weight I would afford to this factor would depend on the extent that the information would assist with the inquiry. In this case, I have noted that the release of the requested information, if it exists, would reveal that a person attended at Council's premises to inspect documents. Council rejects the suggestion that any unauthorised reproduction of your plans was based on copies of documents supplied by Council in response to an RTI Act application. To take the inquiry any further would require the matter to be raised with the person who you believe inspected the documents. For this reason, I would afford this accountability factor only moderate weight in the public interest balancing test in such circumstances.

52. In respect of the application of the *Willsford* principles, I reiterated my view that they did not apply. The applicant now contended he required access to the requested information to prove that his neighbours had access to the original drawings via Council, and that this was necessary to assist him to assess the prospects of bringing an action for breach of copyright. I advised the applicant that I did not understand proving access to the original copyrighted work to be a necessary requirement for establishing a breach of copyright. It is necessary to establish that a work has been used, without permission, in one of the ways exclusively reserved to the copyright owner, which includes reproduction of the work. The applicant had already asserted that he could establish that his neighbours had reproduced, without his permission, what he claimed was material subject to a valid claim of copyright. In addition, I re-stated my view that it was difficult to identify any loss or damage flowing from any asserted breach of copyright, given that the same submission could have been made by the applicant's neighbours regardless of whether or not copyrighted drawings were attached to it, and taking account of the fact that Council already had access to the drawings. I noted that the remedy for a breach of copyright is usually damages, or an account of profits.
53. For these reasons, and those explained in my previous correspondence with the applicant, I advised the applicant that it remained my view that the requested information, if it existed, would clearly comprise the personal information of persons other than him, and that its disclosure would, on balance, be contrary to the public interest. I stated that, even if the requested information were to exist, and even if I were to accept that the accountability factors the applicant had raised applied to it and should be afforded moderate weight when balancing the public interest, I remained of the view that the public interest in protecting both the personal information and privacy interests of the third party, outweighed the public interest in disclosure. While the arguments raised by the applicant in favour of disclosure were merely speculative, those favouring nondisclosure were not: disclosure of the requested documents, if they existed, would disclose the personal information of the third party and thereby automatically prejudice the protection of their privacy interests.
54. The applicant continued to dispute my views, and argued that I had not explained '*...how someone has their privacy protected when they have done something wrong.*'⁴⁴ He continued to rely on copyright infringement as a significant factor favouring disclosure of the requested information:

In terms of potentially perusing [sic] the copyright infringement, I am under the belief that if I make an allegation then I will have to prove that it occurred, and I would need to be able to identify the infringer. The release of the unredacted document in Appendix A would allow me to identify the infringer and prove my neighbours had access to the documents. The neighbour, by submitting a document to council has not infringe[d] copyright, as it was council who published the drawings in a public forum without my permission. The neighbour infringed copyright when they took photographs of my drawings, thereby converting a hardcopy original

⁴⁴ Letter dated 5 December 2020.

into digital form without my permission. The RTI applicant's identity will prove the neighbour had the opportunity for this to occur. I acknowledge your view that it is difficult for you to identify any loss or damage to me, however I would maintain that is not a valid reason under the IP or RTI Acts for you to withhold the information.

55. The applicant also contended that this was not a situation where a 'neither confirm nor deny' response was valid as Council had already released to him a redacted copy of the RTI access application made by the third party and he therefore knew the documents existed: *'You seem to be intent on protecting the privacy of someone who has broken the law, under the guise of protecting the public interest, even though I have a good idea of who the perpetrator is'*.⁴⁵
56. The applicant's submission immediately above is misconceived. Through information previously released to him by Council, he is aware only that an unidentified person made an RTI access application to Council seeking access to certain documents. However, his access application in this review is framed so as to seek access to other documents (emails exchanged with Council regarding inspection arrangements, and an extract from Council's visitors' register) that would identify his neighbours as the person/s who made that application. I have already explained why a request expressed in those terms may properly result in a 'neither confirm nor deny' response.
57. As regards the applicant's continued contentions about the infringement of his copyright, I can only state again that, for the reasons explained above, and as set out in detail in my three letters to the applicant during the course of the review, I am not satisfied that disclosure of the requested information, if it were to exist, would assist the applicant to pursue a remedy or to evaluate whether a remedy is available, or worth pursuing. If the applicant wishes to pursue an action for copyright infringement against his neighbours and/or Council arising out of the information attached to his neighbours' online submission to Council, he is able to do so. He may allege how he believes the infringement occurred, and his neighbours and/or Council may either admit or deny that allegation in response. I do not accept that he requires access to the requested information in order to consider pursuing that course of action.

Balancing the public interest

58. I am satisfied that, if the requested information were to exist, it would comprise the personal information of persons other than the applicant. As explained, applying a hypothetical public interest balancing test, I would afford significant weight to both the nondisclosure factor, and the public interest harm factor, that serve to protect the personal information, and privacy interests, of other persons. I would afford moderate weight to the two public interest factors favouring disclosure contained in schedule 4, part 2, items 1 and 5 of the RTI Act, concerning the accountability of Council. I am not satisfied that disclosure of the requested information, if it were to exist, could reasonably be expected to contribute to the administration of justice either generally, or for a person, and I therefore find that those factors would not apply.
59. For the sake of completeness, I note that I have considered the other public interest factors favouring disclosure contained in schedule 4 of the RTI Act. I am not satisfied that they would apply, were the requested information to exist.
60. After balancing the competing public interest factors, I find that those weighing in favour of nondisclosure would outweigh those favouring disclosure, such that disclosure of the

⁴⁵ Letter dated 5 December 2020.

requested information, if it were to exist, would, on balance, be contrary to the public interest.

DECISION

61. I vary Council's deemed refusal of access by finding that, if the requested documents exist, they would contain prescribed information for the purposes of section 69 of the IP Act: that is, personal information the disclosure of which would, on balance, be contrary to the public interest under section 67(1) of the IP Act, and section 47(3)(b) and section 49 of the RTI Act. I therefore decide to neither confirm nor deny the existence of such documents under section 69 of the IP Act.
62. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

Louisa Lynch
Right to Information Commissioner

Date: 11 March 2021

APPENDIX**Significant procedural steps**

Date	Event
10 September 2020	OIC received the application for external review.
14 September 2020	OIC made preliminary inquiries of Council. Council provided requested information.
15 September 2020	Council provided requested information.
7 October 2020	Council provided a copy of its purported internal review decision.
22 October 2020	OIC accepted the application for external review.
28 October 2020	OIC conveyed a written preliminary view to the applicant.
9 November 2020	OIC received a submission from the applicant.
17 November 2020	OIC conveyed a written preliminary view to the applicant.
25 November 2020	OIC received a submission from the applicant.
1 December 2020	OIC conveyed a written preliminary view to the applicant.
5 December 2020	OIC received a submission from the applicant.