



Decision and Reasons for Decision

Application Number:	310766
Applicant:	Gerhardt
Respondent:	Brisbane City Council
Decision Date:	27 November 2012
Catchwords:	<p>ADMINISTRATIVE LAW – RIGHT TO INFORMATION – GROUNDS ON WHICH ACCESS MAY BE REFUSED – EXEMPT INFORMATION – an agency may refuse access to a document to the extent the document comprises exempt information – information subject to legal professional privilege – whether the information would be privileged from production in a legal proceeding on the ground of legal professional privilege – sections 47(3)(a) and 48 of the <i>Right to Information Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW – RIGHT TO INFORMATION – GROUNDS ON WHICH ACCESS MAY BE REFUSED – NONEXISTENT DOCUMENTS – applicant contends additional documents exist – an agency may refuse access to a document because the document is nonexistent or unlocatable – whether the agency has taken all reasonable steps to locate the documents but the documents cannot be found – sections 47(3)(e) and 52(1)(a) of the <i>Right to Information Act 2009</i> (Qld)</p>

REASONS FOR DECISION

Summary

1. The applicant applied to Brisbane City Council (**Council**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for all documents relating to the applicant and his company, including documents relating to any investigation conducted by Council into the applicant.
2. Council identified 1345 pages responsive to the access application and decided to grant access to 746 full pages and 30 part pages, and refuse access to the balance of the information.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of Council's decision to refuse access to information (**refusal of access**) and also contended that Council had not located all relevant documents (**sufficiency of search**).

4. During the external review, additional responsive documents were located. Council also agreed to release some information to the applicant and several issues were informally resolved.¹ As a result, the information under consideration in this review has been narrowed to information which Council claims is exempt on the basis of legal professional privilege.
5. In the circumstances of this review, Council is entitled to refuse access to the remaining information in issue as it would be privileged from production in a legal proceeding on the ground of legal professional privilege, and Council is entitled to refuse access to the documents which the applicant alleges have not been located, on the basis that they do not exist.

Background

6. Significant procedural steps relating to the application are set out in the appendix to this decision.

Reviewable decision

7. The decision under review is Council's decision dated 23 August 2011.

Evidence considered

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

Information in issue

9. As noted at paragraph 4, the information remaining in issue was reduced on external review and is located on 543 full pages and 8 part pages (**Information in Issue**).

Issues in this review

10. The remaining issues for determination in this review are whether:
 - the Information in Issue is exempt under schedule 3, section 7 of the RTI Act; and
 - access can be refused to additional documents on the basis that the documents do not exist.

Is Council entitled to refuse access to the Information in Issue?

11. Yes, for the reasons that follow.

Relevant law

12. Under the RTI Act, a person has a right to be given access to documents of an agency.² However, this right is subject to other provisions of the RTI Act including the grounds on which an agency may refuse access to documents.³ Relevantly, the RTI Act provides that access may be refused to documents to the extent that they

¹ On 12 October 2012, OIC conveyed to the applicant the preliminary view that Council was entitled to refuse access to information on 33 part pages as it is either exempt because it would disclose the identity of a confidential source of information or because its disclosure would, on balance, be contrary to the public interest. The applicant accepted the view in relation to this information by not providing submissions on these aspects of the preliminary view. Accordingly, I have not considered this information in this decision.

² Section 23 of the RTI Act.

³ As set out in section 47 of the RTI Act.

comprise exempt information.⁴ Schedule 3 sets out categories of information the disclosure of which Parliament has deemed to be contrary to the public interest, and therefore exempt from disclosure.⁵

13. Schedule 3, section 7 of the RTI Act provides that information will be exempt from disclosure if it would be privileged from production in a legal proceeding on the ground of legal professional privilege. This exemption reflects the requirements for establishing legal professional privilege at common law.⁶
14. The general principles of legal professional privilege were summarised by the High Court of Australia in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*⁷ as follows:

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.

15. The dominant purpose is ‘*the ruling, prevailing, paramount or most influential purpose*’⁸ and is to be determined objectively, having regard to the evidence, the nature of the document and the parties’ submissions.⁹
16. Legal professional privilege is generally divided into two categories, advice and litigation privilege.¹⁰ Advice privilege attaches to confidential communications between a legal adviser and client or third party which are made for the dominant purpose of obtaining or providing legal advice.¹¹ Litigation privilege attaches to confidential communications between a legal adviser and client in relation to current or reasonably anticipated litigation.¹² In some cases, communications may not be subject to legal professional privilege because privilege has been waived, either expressly or impliedly, or the improper purpose exception applies.

Findings

17. Section 108(3) of the RTI Act prohibits the Information Commissioner from including information that is claimed to be exempt in reasons for a decision on external review. This prevents me from describing the actual content of the Information in Issue in these reasons. However, the Information in Issue is generally made up of:
 - correspondence between Council officers and Council’s legal advisors, including legal advisors in the Brisbane City Legal Practice and Council’s external legal advisors
 - file notes and memoranda of advice prepared by Council’s legal advisors
 - correspondence between potential witnesses and Council officers and/or Council’s legal advisors; and
 - internal Council documents and correspondence which convey the substance of Council’s legal advice to other Council officers.

⁴ Section 47(3)(a) of the RTI Act.

⁵ Section 48(2) of the RTI Act.

⁶ *Ozcare and Department of Justice and Attorney-General* (Unreported, Information Commissioner of Queensland, 13 May 2011) at [12].

⁷ (2002) 213 CLR 543 at [9].

⁸ *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 at [416].

⁹ *Grant v Downs* (1976) 135 CLR 674 at [692].

¹⁰ *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* (2002) 4 VR 322 (*Mitsubishi*) at [8]-[9].

¹¹ *AWB v Cole (No.5)* (2006) 155 FCR 30 at [41]; *Waterford v Commonwealth* (1987) 163 CLR 54 at [95]; *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357.

¹² *Mitsubishi*.

18. Having carefully reviewed the Information in Issue, I am satisfied that the dominant purpose of the communications in the Information in Issue was:
- to seek or provide legal advice about various matters being undertaken by Council; and/or
 - for use in existing or reasonably anticipated legal proceedings, including a prosecution in the Magistrates Court.
19. I am satisfied that the relevant officers within Brisbane City Legal Practice¹³ and Council's external legal advisor have the necessary degree of independence required to attract legal professional privilege.
20. The applicant submits that the Information in Issue:
- ... would contain pages that have been produced by other parties, third parties or have been circulated or read by other parties and or third parties whom were not bound by legal professional privilege and therefore those pages would not be considered legal professional privilege.*¹⁴
21. The applicant has not provided any evidence to support this submission. I am satisfied that Brisbane City Legal Practice was under a duty to keep communications on its legal files confidential. There is nothing before me indicating that the Information in Issue has not been treated in a confidential manner.
22. As noted above, the Information in Issue includes internal Council documents and correspondence which conveys the substance of Council's legal advice to other Council officers. Merely communicating privileged legal advice internally within a corporation or agency will not of itself deprive the agency or corporation of the benefit of that privilege.¹⁵ I am satisfied that legal professional privilege has not been waived by circulating the legal advice to a small number of officers within Council.
23. The Information in Issue includes some correspondence between Council's legal advisors and/or Council officers and third parties outside of Council. Having carefully examined these communications, I am satisfied that they were for the dominant purpose of obtaining evidence from potential witnesses to a prosecution that had either commenced, or was reasonably anticipated, at the time of the communication. Accordingly, I am satisfied litigation privilege applies to these communications.¹⁶
24. Based on the above, I find that the Information in Issue satisfies the requirements for legal professional privilege. There is no information before me that suggests that legal professional privilege has been waived or that the communications were made in furtherance of any illegal or improper purpose. Accordingly, I find that Council is entitled to refuse access to the Information in Issue as it is exempt under schedule 3, section 7 of the RTI Act.

Is there a reasonable basis to be satisfied that no additional documents responding to the access application exist?

25. Yes, for the reasons that follow.

¹³ The Information Commissioner considered the position of Council lawyers in *Potter and Brisbane City Council* (1994) 2 QAR 37 and found that they have the necessary degree of independence to give independent legal advice which attracts legal professional privilege.

¹⁴ Submission to OIC dated 2 November 2012.

¹⁵ *N55WLN and Department of Health* [2012] QICmr 19 at [29].

¹⁶ *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at [246].

Relevant law

26. The RTI Act provides that access to a document may be refused if the document is nonexistent or unlocatable.¹⁷ A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist.¹⁸
27. The RTI Act is silent on how an agency or Minister can be satisfied that a document does not exist. However in *PDE and the University of Queensland*¹⁹ (*PDE*), the Information Commissioner explained that, to be satisfied that a document does not exist, an agency must rely on its particular knowledge and experience, having regard to various key factors including:
- the administrative arrangements of government
 - the agency structure
 - the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it)
 - the agency's practices and procedures (including but not exclusive to its information management approach); and
 - other factors reasonably inferred from information supplied by the applicant including:
 - the nature and age of the requested document/s; and
 - the nature of the government activity the request relates to.
28. When these factors are properly considered and a conclusion reached that the document does not exist, it may be unnecessary for searches to be conducted.
29. Alternatively, an agency may rely on searches to justify a decision that the document sought does not exist. If an agency relies on searches, all reasonable steps must be taken to locate the requested document. In determining whether all reasonable steps have been taken, regard should be had to the factors listed in *PDE*.

Findings

30. In deciding that Council has taken all reasonable steps to locate any additional documents and that there is a reasonable basis to be satisfied that no additional documents exist, I have had regard to:
- the information identified by Council in response to the access application—including both the information released to the applicant and the information in Issue
 - Council's recordkeeping practices in relation to the types of documents the applicant sought
 - the nature and extent of the searches conducted by Council in processing the access application and on external review; and
 - the signed search certifications provided by Council officers.
31. The applicant believes that additional documents relevant to his access application exist and submits²⁰ in summary that:

¹⁷ Sections 47(3)(e) and 52 of the RTI Act.

¹⁸ Section 52(1)(a) of the RTI Act.

¹⁹ [2009] QICmr 7. Although *PDE* concerned the application of section 28A of the now repealed *Freedom of Information Act 1992* (Qld), the requirements of that section are replicated in section 52 of the RTI Act.

²⁰ In the applicant's external review application dated 20 September 2011 and various submissions made to OIC, including most recently in the submission dated 2 November 2012.

- specific categories of documents—such as reports, internal and external correspondence, evidence and investigation checklists—should exist in relation to various investigations carried out by Council and in relation to a prosecution commenced by Council
 - additional documents should exist in relation to the eleven properties listed in his access application
 - documents may have been created by ten named Council officers
 - documents may be held by Council's Office of Built Environment and Land Use, the Special Investigation Unit, Brisbane City Legal Practice and the Office of the Lord Mayor; and
 - Council is '*intentionally concealing and covering up/hiding documents*' relevant to his access application.
32. During the processing of the access application, Council:
- searched its electronic record system for each of the property addresses listed in the access application
 - searched its electronic record system for both the applicant's name and the name of his business; and
 - obtained and reviewed a considerable number of hard copy files, with 24 files ultimately found to be relevant to the application, along with miscellaneous emails provided by various Council officers.
33. Council conducted the following additional searches on external review.
- Council located and provided OIC with the attachments to some emails contained in the Information in Issue, where those attachments had not been identified during the processing of the access application.
 - At OIC's request, relevant Council officers conducted further searches of their email accounts, and the G drive where applicable, for any additional emails relevant to the access application. A number of additional relevant emails were produced to OIC. Some of these were released to the applicant, while others form part of the Information in Issue.
 - Council's Right to Information Officer retrieved and re-examined all relevant Council hard copy files to check that all responsive documents had been identified. A number of additional documents were identified and produced to OIC as a result of these searches. Most were released to the applicant, while some form part of the Information in Issue.
 - Relevant Council officers signed search certifications detailing the additional searches conducted. The search certifications indicate that Council officers spent over 26 hours searching for additional documents on external review.
34. Council also made submissions about its recordkeeping practices over the period relevant to the access application. Council submits²¹ that searches of its electronic email records were limited by the fact that Council transitioned its email management system in late 2010. As a result, unless emails were archived in a particular manner, Council submits that it is not possible to electronically search for earlier emails without restoring numerous email accounts at a significant cost. Council further submits that its usual practice for this type of process at the relevant time was '*... to have a hard copy file registered for the issue/property in question. Documents, as they were created or received, would be printed out/placed on these files*'.²²

²¹ In its submission to OIC dated 24 September 2012.

²² In its submission to OIC dated 8 November 2012.

35. As Council has conducted searches in response to the applicant's submissions that additional documents exist, the issue is whether Council has taken all reasonable steps to locate the additional documents. In deciding this issue I do not consider it necessary to deal separately with each of the contentions raised by the applicant, nor Council's individual responses as to why particular categories of documents do not exist.
36. Based on Council's knowledge of its recordkeeping practices at the relevant time covered by the access application, Council has extensively reviewed its hard copy files and conducted targeted searches of its electronic record management systems using appropriate search terms. Council identified relevant officers and units of Council which would be likely to hold documents which respond to the access application and conducted searches of their records. This included the areas of Council identified by the applicant in his access application and subsequently raised by the applicant on external review where they were within the scope of the access application.
37. Based on my review of the information available to me, I find that there is no evidence to support the applicant's claim that Council is '*intentionally concealing and covering up/hiding documents*' relevant to his access application.
38. I accept Council's submission that the transitioning of its email management system has affected its ability to access electronic copies of emails during the relevant time period. In view of the information identified by Council in response to the access application and Council's recordkeeping practices with respect to maintaining comprehensive hard copy files, I am satisfied there is no requirement for Council to search its back up systems for further documents.²³
39. Having reviewed all of the material before me—including the information released to the applicant in response to his access application, the Information in Issue and the submissions made by Council and the applicant—I am satisfied Council has taken all reasonable steps to locate relevant documents, and that there is a reasonable basis to be satisfied that no additional documents responding to the access application exist.²⁴

DECISION

40. I vary the decision under review and find, for the reasons set out above, that:
 - Council is entitled to refuse access to the Information in Issue under sections 47(3)(a) and 48 of the RTI Act; and
 - as Council has taken all reasonable steps to locate relevant documents, access to further documents the applicant contends exist can be refused under sections 47(3)(e) and 52(1)(a) of the RTI Act.
41. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Lisa Meagher
Acting Assistant Information Commissioner

Date: 27 November 2012

²³ Section 52(3) of the RTI Act.

²⁴ Sections 47(3)(e) and 52(1)(a) of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
10 May 2011	Council received the access application from the applicant's legal representative.
23 August 2011	Council issued its decision to the applicant (Council's decision).
20 September 2011	The applicant applied to OIC for external review of Council's decision.
23 September 2011	The applicant made oral submissions about the sufficiency of search issue.
30 September 2011	OIC notified the applicant in writing that the external review application had been accepted and clarified the scope of the review. The applicant made further oral submissions about the sufficiency of search issue.
30 September 2011	OIC notified Council the external review application had been accepted and requested a copy of the documents to which access was refused.
14 October 2011	Council provided OIC with a copy of the documents to which access was refused.
3 November 2011	Council provided OIC with a further copy of documents to which access was refused.
8 February 2012	The applicant made oral submissions to OIC about the sufficiency of search issue.
2 March 2012	The applicant made oral submissions to OIC about the sufficiency of search issue.
6 March 2012	The applicant made submissions to OIC about the sufficiency of search issue and OIC's processes.
8 March 2012	OIC responded to the applicant's correspondence about the sufficiency of search issue and OIC's processes.
9 March 2012	The applicant made submissions to OIC in relation to the sufficiency of search issue.
20 March 2012	Council provided OIC with a further copy of the documents to which access was refused.
21 March 2012	OIC asked Council for submissions about the refusal of access issue and the sufficiency of search issue.
5 April 2012	Council provided OIC with a submission on the refusal of access issue and advised it did not object to disclosing some information.
20 April 2012	Council provided OIC with a further submission on the refusal of access issue and the sufficiency of search issue.
26 April 2012	OIC asked Council to conduct further searches.
14 May 2012	OIC provided the applicant with an update on the review.
18 May 2012	OIC contacted the Building Services Authority (BSA) to request information about certain documents that Council claimed were exempt on the basis that disclosure would found a breach of confidence (BSA documents). BSA advised OIC that it did not object to disclosure of the BSA documents.
23 May 2012	Council provided OIC with additional documents responsive to the access application.
28 June 2012	OIC asked Council to release some information on the basis that Council did not object to its disclosure. OIC conveyed a preliminary view to Council that the BSA documents were not exempt.
28 June 2012	OIC wrote to the applicant conveying Council's submissions about its searches and invited the applicant to make further submissions about the sufficiency of search issue. The applicant contacted OIC by telephone to discuss OIC's letter.

Date	Event
2 July 2012	Council advised it had released some information to the applicant, and further advised that it accepted OIC's view about the BSA documents.
3 July 2012	The applicant asked OIC to clarify the status of the review.
3 July 2012	OIC asked Council to release the BSA documents on the basis that it no longer objects to disclosing these documents.
4 July 2012	OIC provided further information on the status of the review to the applicant.
5 July 2012	Council released the BSA documents to the applicant.
5 July 2012	OIC requested Council provide a copy of the documents which were released to the applicant as part of Council's decision.
10 July 2012	The applicant provided OIC with oral submissions about the sufficiency of search issue and the refusal of access issue.
10 July 2012	Council provided OIC with a copy of the documents which were released to the applicant as part of Council's decision.
11 July 2012	OIC asked Council to provide further submissions about the sufficiency of search issue.
12 July 2012	Council provided OIC with further submissions about the sufficiency of search issue.
19 July 2012	The applicant provided OIC with written submissions about the sufficiency of search issue.
26 July 2012	The applicant made oral submissions about the sufficiency of search issue and OIC's processes.
27 July 2012	OIC wrote to the applicant about OIC's processes.
13 August 2012	OIC conveyed a preliminary view to Council on the sufficiency of search issue and asked Council to conduct further searches for documents which responded to the access application and have relevant officers complete search certifications.
23 August 2012	OIC asked Council to release further information on the basis that Council no longer objected to disclosure.
27 August 2012	OIC wrote to the applicant to provide an update on the external review and to provide information about the sufficiency of search issue. The applicant made oral submissions to OIC about the sufficiency of search issue.
28 August 2012	Council released further information to the applicant.
30 August 2012	OIC conveyed a preliminary view to Council that Council was not entitled to refuse access to certain information and invited Council to make submissions if it did not agree with the view.
11 September 2012	The applicant made oral submissions to OIC about the sufficiency of search issue and the external review process.
18 September 2012	The applicant made written submissions to OIC about the sufficiency of search issue and the external review process.
19 September 2012	OIC responded to the applicant's written submissions about the sufficiency of search issue.
24 September 2012	Council provided OIC with a submission about the sufficiency of search issue, including signed search certifications from relevant Council officers, and copies of additional responsive documents which were located as a result of further searches. Council advised it did not object to disclosure of some of the additional documents located on external review.
25 September 2012	Council provided submissions about the refusal of access issue and advised it no longer objected to disclosing some information.
12 October 2012	OIC asked Council to release further information to the applicant on the basis that Council no longer objected to its disclosure.

Date	Event
12 October 2012	OIC conveyed a preliminary view to the applicant and invited the applicant to make submissions if he did not agree with the view.
15 October 2012	Council released further information to the applicant.
24 October 2012	The applicant made oral submissions to OIC on the sufficiency of search issue.
2 November 2012	The applicant advised OIC he did not accept the preliminary view and provided submissions on the sufficiency of search issue and the documents which Council claimed were exempt on the basis of legal professional privilege.
5 November 2012	OIC made further enquiries with Council in relation to the sufficiency of search issue.
8 November 2012	Council provided OIC with a submission on the sufficiency of search issue.