



Decision and Reasons for Decision

Citation: *K Ahern and Brisbane City Council [2023] QICmr 33 (30 June 2023)*

Application Number: 316574

Applicant: K Ahern

Respondent: Brisbane City Council

Decision Date: 30 June 2023

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT OR UNLOCATABLE - whether agency has taken all reasonable steps to locate requested documents - whether access to further documents can be refused on the ground they are nonexistent or unlocatable under sections 47(3)(e) and 52(1) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST - applicant contends information in issue is the name of a former Councillor - personal information and privacy of individuals other than the applicant - whether disclosure of information would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ under the *Right to Information Act 2009* (Qld) (**RTI Act**) to Brisbane City Council (**Council**) for access to the following documents created between 1 July 2021 and 22 November 2021:²

[1] *digital copy of telephone call recording between [applicant] and [Council officer from Council's Rapid Response Group (RRG Officer)] from BCC at about 7 pm on 17.11.21 on mobile no. [redacted];*

[2] *copy BCC complaint file recording complaint by an unidentified person (Complainant) regarding public safety risk associated with access by residents of [applicant's address] or any other third parties to [Council Park] made / investigated during November 2021;*

¹ On 22 November 2021.

² For ease of reference in this decision I have added numbered itemisation to the document categories sought by the applicant.

- [3] copy of file notes of discussion between [RRG Officer] and [redacted] observed at [an address neighbouring the applicant's address] on 16.11.21;
- [4] copy of documents recording details of 'removal of bollards' [sic] and/ 'installation of a locked gate' in [Council Park] carpark (referred to by [RRG Officer] in call on 17.11.21);
- [5] and document/s and report recording any complaint investigation by [RRG Officer] and recording investigation report of complaint by [RRG Officer] to Parks Department of BCC and any documents recording any further investigation of any related complaint by BCC from 1 July 2021 to date.

2. Council located 14 pages and two audio recordings and decided³ to fully disclose 8 pages and one audio recording, and refuse access to parts of six pages and part of one audio recording.⁴
3. The applicant applied⁵ to the Office of the Information Commissioner (**OIC**) for external review of Council's decision on the grounds that Council had not located responsive documents.
4. For the reasons outlined below, I vary Council's decision.⁶ I am satisfied that access to any further documents may be refused on the ground they either do not exist or cannot be located.⁷ Additionally, I am satisfied that access may be refused to the small amount of information in the complaint email (see paragraph 8) on the grounds that it would, on balance, be contrary to the public interest to disclose.⁸

Background

5. Significant procedural steps relating to the external review are set out in the Appendix.
6. The applicant contended on external review that further documents exist that are responsive to the terms of their access application that were not located by Council.
7. On external review Council were required to undertake further searches and to provide information about the searches undertaken.
8. An additional 5 pages (**Complaint Email**) were located by Council, being:
 - a 4 page complaint email addressed to the Regional Coordinator of Parks (**Parks Officer**) in the Program Planning and Integration area of City Standards (**Parks Division**) (which sits in the Brisbane Infrastructure Section of Council) concerning persons accessing the applicant's property via the Council Park dated 17 November 2021; and,
 - a 1 page email in reply dated 18 November 2021 from the Parks Officer.
9. Access was given to the Complaint Email with information removed that would, on balance, be contrary to the public interest to disclose. The applicant submitted that the redactions contain the name of a former Brisbane City Council Councillor and should be disclosed. Additionally, the applicant maintained their position that further documents existed that had not been located.

³ By amended decision on 27 January 2022.

⁴ The disclosed documents comprised a 9 page DART complaint received on 16 November 2021; 5 page DART complaint received on 22 November 2021; part of one audio recording between the RRG Officer and complainant on 16 November 2021; and one audio recording between the RRG Officer and applicant on 17 November 2021.

⁵ On 15 February 2022.

⁶ Section 110(1)(b) of the RTI Act.

⁷ Sections 47(3)(e) and 52(1) of the RTI Act.

⁸ Sections 47(3)(b) and 49 of the RTI Act.

10. During the review Council agreed to provide the applicant with a redacted transcript of the parts of the audio recording between Council and a third party (**Transcript**) to which access had been refused.⁹ The applicant accepted the Transcript in settlement of the issue of access to the parts of the audio recording to which access had been refused. Therefore, the partly refused audio recording and the Transcript are not in issue in this decision.

Reviewable decision and evidence considered

11. The reviewable decision is Council's decision issued on 27 January 2022.
12. 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).
13. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.¹⁰ 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.¹¹ 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:¹² '*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.*'

Issues for determination

14. The issues for determination are:
 - whether access to any further documents responsive to the terms of the access application may be refused on the basis they do not exist or cannot be located; and
 - whether access may be refused to a small amount of information in the Complaint Email on the grounds it is, on balance, contrary to the public interest to disclose.

Document nonexistent or unlocatable

Relevant law

15. Under the RTI Act a person has a right to be given access to documents of an agency.¹³ However, this right is subject to provisions of the RTI Act including the grounds on which an agency may refuse access to documents.¹⁴ Relevantly, access to a document may be refused if the document is nonexistent or unlocatable.¹⁵

⁹ Disclosed by OIC on 16 August 2022.

¹⁰ Section 21 of the HR Act.

¹¹ *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]. OIC's approach to the HR Act set out in this paragraph has recently been considered and endorsed by QCAT Judicial Member McGill in *Lawrence v Queensland Police Service* [2022] QCATA 134, noting that he saw '*no reason to differ*' from our position ([23]).

¹² *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹³ Section 23 of the RTI Act.

¹⁴ Including section 47(3) of the RTI Act.

¹⁵ Sections 47(3)(e) and 52(1) of the RTI Act. A document is nonexistent if the agency of Minister dealing with the application for access is 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.

16. To be satisfied that a document does not exist, various key factors will be relevant, including, but not limited to:¹⁶
- the administrative arrangements of government
 - the structure of the respondent agency
 - the respondent agency's functions and responsibilities
 - the respondent 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 or the agency's submissions including the nature and age of the requested document/s and the nature of the government activity to which the request relates.
17. To determine whether a document exists, but is unlocatable, the RTI Act requires consideration of whether there are reasonable grounds to be satisfied that the requested document has been or should be in the agency's possession; and whether the agency has taken all reasonable steps to find the document.¹⁷
18. When proper consideration is given to relevant factors, it may not be necessary for searches to be conducted. However, if searches are relied on by an agency 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 which of the key factors are most relevant in the particular circumstances.¹⁸
19. 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.¹⁹ 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.²⁰ 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 discharged its obligation to identify and locate responsive documents. Suspicion and mere assertion will not satisfy this onus.²¹
20. An additional consideration when assessing whether an agency has taken reasonable steps to identify and locate documents applied for by an applicant is the terms of the access application or its scope. The terms of an access application set the parameters for the documents that an agency is to identify and locate when processing the access application. The general rule is that the terms of an RTI Act access application should not be interpreted narrowly or with the same degree of precision as a piece of legislation.²² However an access application must give sufficient information

¹⁶ *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).

¹⁷ *Pryor* at [20]-[21].

¹⁸ See findings of Justice McGill SC in *Webb v Information Commissioner* [2021] QCATA 116 at [5]-[6].

¹⁹ Section 130(2) of the RTI Act. The Information Commissioner also has power under section 102 of the RTI Act to require additional searches to be conducted during an external review.

²⁰ Section 87(1) of the RTI Act.

²¹ *Gapsa and Public Service Commission* [2016] QICmr 6 (11 February 2016) at [15]; *Parnell and Queensland Police Service* [2017] QICmr 8 (7 March 2017) at [23]; *Dubois and Rockhampton Regional Council* [2017] QICmr 49 (6 October 2017) at [36]; *Y44 and T99 and Office of the Public Guardian* [2019] QICmr 62 (20 December 2019) at [38].

²² *Fennelly and Redland City Council* (Unreported, Queensland Information Commissioner, 21 August 2012) at [21] (**Fennelly**) and *O80PCE and Department of Education and Training* (Unreported, Queensland Information Commissioner, 15 February 2010) (**O80PCE**) at [35].

concerning the requested document to enable a responsible officer of the agency to identify the document.²³ There are sound practical reasons for requiring the documents sought in an access application to be clearly and unambiguously identified, including that the terms of the access application set the parameters for an agency's response and the direction of an agency's search efforts.²⁴ The scope of an access application cannot be unilaterally broadened on external review.²⁵

Findings

Submissions and Searches

21. In her external review application²⁶ the applicant stated that she had been made aware in a telephone conversation on 17 November 2021 with the RRG Officer that a complaint had been made about occupants of her residence driving through a council park to access their private property which created concerns about public safety (**Complaint**). She stated that the RRG Officer told her that he would refer the Complaint to Council's Parks division for follow up action and he would investigate putting a locked gate in place to prevent further access. She stated that the RRG Officer told her that the complainants had also lodged a complaint with Council's Parks division.
22. The applicant also contended that in light of these statements made by the RRG Officer, documents recording a complaint to the Parks division and any follow up or investigation of the complaint/complaints should exist and had not been located.²⁷
23. In addition to the above concern the applicant also stated in her external review application that she had observed a person who was believed to be a Council inspector surveilling her property in August or September 2021 hence she had applied for 'records of any other complaint/s to BCC regarding the residents or activities at [her] home and any investigation/s undertaken by BCC in response to any such complaints or requests.' In this context the applicant contended that no documents had been located relating to any other complaints about her property.²⁸
24. Council was notified of the external review and asked to provide OIC with a copy of the documents it had located in response to the access application, together with information about the searches conducted.²⁹
25. In response Council provided a search certification³⁰ which outlined the searches that had been conducted by Council when processing the access application. That certification shows that Council searched the following terms within the timeframe of the access application:
 - The applicant's street address

²³ Section 24(2)(b) of the RTI Act.

²⁴ *Cannon and Australian Quality Egg Farms Ltd* (1994) 1 QAR 491 at [8] (**Cannon**) considering equivalent provisions in the now repealed *Freedom of Information Act 1992* (Qld) (**FOI Act**); *O80PCE and Department of Education and Training* (Unreported, Queensland Information Commissioner, 15 February 2010) at [33].

²⁵ See *Robbins and Brisbane North Regional Health Authority* (1994) 2 QAR 30 at [17]; *Arnold and Redland City Council* (Unreported, Queensland Information Commissioner, 17 October 2013) at [17] to [21]; *Simpson MP and Department of Transport and Main Roads* (Unreported, Queensland Information Commissioner, 29 July 2011) at [11] to [22]; *Fennelly* at [15].

²⁶ Received on 15 February 2022.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Letter dated 18 March 2022.

³⁰ Dated 9 May 2022.

- The complainant name
- The applicant's street name alone
- The name of the Council Park.

26. Council's certification also shows that Council searched the following areas/databases:

- DART (Development and Regulatory Tracking system). Council advised *'DART is the primary system where records of complaints are held, includes subsequent investigation and outcomes, and is the first place we conduct searches where a complaint/as is involved.'* (sic)
- CMX (Correspondence Management System); and
- Content Manager (Council's electronic records management system).

27. Council further submitted that the following additional search had been undertaken by Council's Right to Information and Information Privacy Officer, in response to OIC's notification of the external review:³¹

[The Officer] did a complaint search on [the name of the applicant's street], for the time span of 1 May 2021 to 30 November 2021, which is broader than the timeframe of the RTI application scope. This listed all of the complaints/calls listed against the length of [the applicant's street] that appears within the suburb boundaries of [the applicant's suburb]. [The Officer] went down the list looking for [the applicant's address] and any nearby properties. There were two entries for [the applicant's address] – these are the same two that were previously identified as being relevant.

[The Officer] then did a location search on [the applicant's address], which would bring up not only complaints, but also any investigations and any development applications...

A Council officer did inspect the [Council Park] and the [applicant's] access to their property via the park, and took photographs, but this was done as part of the investigation of the complaint that was logged on 16 November 2021. The details of this complaint and the photos taken were released to [the applicant] as part of the original processing of the application.

[The Officer] couldn't find any documents relating to any surveillance being undertaken of the [applicant's] premises in August-September 2021 by Council officers.

The only complaints that could be located were the two already considered as part of the initial processing of the RTI application, both received by Council in November 2021 (one on 16th, the other on 22nd).

28. I put it to the applicant that Council's searches appeared to be reasonable and that it was open to conclude that no further documents existed.³² The applicant replied³³ with a copy of an email dated 3 December 2021 from a Senior Technical Officer, from Council's Parks Division addressed to another Council officer (**Gate Email**). The email contained a request for the installation of a park gate at the location the subject of the complaint and requested that *'the footings be made extra large with reo to ensure it is extremely difficult to remove'*. The applicant submitted that the Gate Email demonstrated that further documents responsive to her access application should exist.

³¹ On 9 May 2022.

³² Letter dated 16 August 2022.

³³ By email dated 30 August 2022.

29. In consideration of the Gate Email presented by the applicant (in case other documents within the date parameters of the scope existed), enquiries were made with Council³⁴ about whether the Parks Division of Council used the databases which up to that date had been searched in this matter. Council submitted that the DART database is the compliance and complaints database, anything related to complaints or compliance is recorded on DART, including such things as development applications, building applications, licences and the like. The CMX database is the communication/correspondence database, and Content Manager is the electronic management system. Council stated that the Parks Division generally did not have much cause to utilise these databases.
30. In light of this response, I required Council³⁵ to conduct searches of the Parks Division for documents responsive to the terms of the access application created between 1 July 2021 and 22 November 2021. This search yielded the 5 page Complaint Email.³⁶ Council provided these documents to the applicant,³⁷ subject to the removal of information that would, on balance, be contrary to the public interest to disclose.³⁸
31. The email from the Parks Officer to the complainant contained the following sentence:³⁹

Council is aware of the issue and is currently working through the logistics to get this rectified.

32. I put it to Council that the above sentence suggested that a further complaint or communication making the Parks Division aware of the issue may exist that predated the Complaint Email and that this communication may have been an internal communication from the RRG Officer to the Parks Division.⁴⁰ Council stated that the above statement was a reference to Council being aware of the issue in a historical sense; that the issue the subject of the Complaint had been known to the Parks division for a number of years prior to receipt of the Complaint Email. Council also stated that no internal transfer had occurred from the RRG Officer to the Parks division.⁴¹ Additionally, Council stated that most communications between the Parks division and the Council area responsible for delivering the gate installation had been verbal communications over the telephone.⁴²
33. I wrote to the applicant and conveyed the above information.⁴³ In response the applicant submitted⁴⁴:

I am very surprised and disappointed that over 12 months after receiving my RTI application, BCC has located the very documents that were clearly the subject of my application. Clearly [Parks Officer] in the BCC Parks Division (and [redacted] in [the Ward Office]), who were personally contacted and emailed by the unidentified complainant have been involved in the 'logistics' around installation of a new gate in order to 'mitigate future access' for a long time. There does not appear to be any information about why these documents were 'overlooked' and not produced as required under the Right to Information legislation, given the BCC action was current and ongoing.

³⁴ Telephone call on 31 August 2022.

³⁵ Email dated 31 August 2022.

³⁶ See paragraph 8.

³⁷ On 14 December 2022.

³⁸ The applicant did not contest any grounds of refusal except the steps taken by Council to locate responsive documents.

³⁹ Email dated 18 November 2021.

⁴⁰ Email dated 7 December 2022 and telephone conversation on 14 December 2022.

⁴¹ Telephone conversation on 14 December 2022.

⁴² Telephone conversation on 14 December 2022.

⁴³ On 15 December 2022.

⁴⁴ On 19 April 2023.

...

I have now had the opportunity to review what has been produced by BCC and consider there are many documents related to my RTI request that appear to have been overlooked and not been produced by BCC.

34. The applicant went on to list specific documents she considered would exist that had not been located (**Applicant's List**):⁴⁵

- a) *BCC Call Centre Reference notes recording the unidentified complainant's contact with BCC in November 2021 (redacted as required)*
- b) *Telephone file notes and emails to and from [Parks Officer] (and file) in response to the unidentified third parties' complaint received by [Parks Officer] and [redacted] of [redacted] Ward Office and any discussion/ decision to install the [Council Park] gate including any related email/s and notes of meetings between BCC staff in the various BCC work divisions including [Parks Officer] / [Local Councillor] / [various persons identified in the Gate Email] and third-party contractors.*
- c) *Documents related to the allegation referred to by unidentified complainant that there are usually bollards or yellow posts and a lockable rail gate or signage to deter people from driving into the park mentioned during the complainant's telephone discussion with [RRG Officer] on 16 November 2021 and again at page 2 of the complainant's email dated 17.11.21 and at page 3 where the person's name has been redacted ...' there use(d) to be a yellow posts and locked rail."*
- d) *...I understand this information about the bollards and lockable gates relates to actions taken by BCC to install bollards and gates at the relevant [Council Park] location in about 2006 / 2008 / 2010 to block my access through [Council Park] and that this information was passed on to [redacted] by [the former Councillor]. I do not know the date this information may have been passed on by [the former Councillor]. If that is the case, and the source of the information is [the former Councillor], then I query why it is appropriate to redact [the former Councillor's] name from the complainant's email as the names of other BCC representatives have not been redacted from the disclosed documents.*
- e) *As far as I can recall, [the former Councillor] was responsible for and oversaw the installation of and removal of the bollards and locked gates in the [Council Park] carpark on multiple occasions whilst she acted as the BCC representative for [redacted] Ward Office. It seems reasonable that the relevant documents with associated expenses would be recorded with and stored by BCC available through [redacted] Ward Office.*
- f) *...My original RTI application 21/22 – 220 at point 4 requested documents recording details of the removal of bollards and installation of a locked gate in [Council Park]. There is nothing to indicate what (if any) steps have been taken by BCC RTI to locate and identify the relevant [Council Park] gate & bollard documents requested...*
- g) *Documents related to [Parks Officer's] email advice to the unidentified complainant on 18 November 2021 that BCC was aware of the issue of access in [Council Park] and was 'currently working through the logistics of having this rectified.' [Parks Officer] then goes on to record 'we will endeavour to mitigate future access'.*

[sic]

Analysis

⁴⁵ For ease of reference in this decision I have added alphabetised itemisation to the Applicant's List of documents.

35. I have synthesised and addressed each of the applicant's sufficiency of search concerns below.
36. First, the applicant contended that the RRG Officer had indicated to her that he would refer the matter to the Parks Division and that there should be documents evidencing such referral and any follow up or investigation of the complaint/complaints.⁴⁶ The following evidence is pertinent to this point:
- Council's submission that the Complaint was not referred internally by the RRG Officer to the Parks Division set out at paragraph 32
 - Council's submissions regarding its searches set out at paragraphs 25, 26, 27 and 29 above
 - Council's submission that DART is the '*primary system where records of complaints are held, includes subsequent investigation and outcomes, and is the first place we conduct searches where a complaint/as is involved*'
 - the DART Complaint Details Report created on 16 November 2021⁴⁷ recording notes from the initial complainant contact with Council and the investigation conducted by Council, in which the RRG Officer, on 21 November 2021, made the following 'closure notification' to the report '*C490 job complete for RRG. This access has been going on for years as observed on Nearmaps going back to 2009*'
 - the Transcript⁴⁸ of the audio recording of the interaction between the complainant and the RRG Officer on 16 November 2021, in which the complainant indicates they are in the process of writing an email complaint to the Parks Division and the RRG Officer responds to the effect that that is the appropriate next step for the complainant to take as they would ultimately have to provide complaint information to the Parks Division anyway as the RRG Officer's next step would be to pass on the complainant's details to the Parks Division and have them follow up with the complainant. The complainant then indicated they would send the email to the Parks Division; and
 - the Complaint Email from the complainant to the Parks division dated 17 November 2021.⁴⁹
37. I consider that the above information provides sufficient evidence to conclude that the complainant, after the discussion with the RRG Officer on 16 November 2021, and following the advice of the RRG Officer, made a complaint directly to the Parks Division by email (the Complaint Email); that the RRG Officer considered the job complete on 21 November 2021; and, that no internal transfer or referral of the Complaint occurred between the RRG Officer (who closed the matter days after the discussion with the Complainant) to the Parks Division.
38. Additionally, I consider that the databases searched by Council in the first instance were appropriate in light of Council's submissions about the systems used for complaint handling and record keeping. I accept Council's explanation that the Parks Division does not generally use the DART system. I consider this is why no records about the Complaint Email were located by Council's searches of that system. I am satisfied that Council's subsequent searches during the external review were reasonable and appropriate given the information available on the face of the documents located and Council's submissions concerning Council's administrative practices in relation to complaint handling and record keeping. I also consider that the

⁴⁶ In her external review application received 15 February 2022.

⁴⁷ Disclosed to the applicant at pages 1-3 of 9, on 27 January 2022.

⁴⁸ Disclosed to the applicant on 16 August 2022.

⁴⁹ Disclosed to the applicant on 14 December 2022.

search terms used were appropriate in light of the documents sought by the applicant. I am satisfied that the searches undertaken by Council would have uncovered documents referring or transferring the Complaint from the RRG Officer to the Parks Division if they existed.

39. Second, in relation to the applicant's concern that there should be additional documents regarding any follow up or investigation of the Complaint referred to by the RRG Officer, I consider it is evident from the Transcript that the RRG Officer intended to take no further action and leave the Complainant to take the matter up directly with the Parks Division by email. In light of the interaction between the Complainant and the RRG Officer documented in the Transcript, I am satisfied that the entries in the DART Complaint Details Report are the extent of the action taken by the RRG Officer and that there was no follow up or investigation undertaken by him.
40. Further to this, I am satisfied that the searches undertaken by Council (in the first instance and during the external review) were sufficiently targeted and would have uncovered documents regarding any additional follow up or investigation of the Complaint referred to by the RRG Officer if they existed.
41. Accordingly, I find that no documents exist regarding the transfer or referral of the Complaint by the RRG Officer to the Parks Division of Council and any follow up or investigation of the Complaint, and access to such documents may be refused pursuant to section 52(1)(a) of the RTI Act on the basis that they do not exist.
42. Third, with respect to the applicant's concern, based on her observation of a person believed to be a Council officer surveilling her property, that further documents should exist that were created between 1 July 2021 and 22 November 2021 in relation to any other related complaint or complaints to Council regarding the residents or activities at her home and any investigation or investigations undertaken by Council in response to any such complaints or requests, the following evidence is relevant:
 - the DART Complaint Details Report created on 16 November 2021 recording notes from the initial complainant contact with Council and the investigation conducted by Council, in particular the 'closure notification' in the Report entered by the RRG Officer, on 21 November 2021, stating '*C490 job complete for RRG. This access has been going on for years as observed on Nearmaps going back to 2009*'
 - Council's submissions regarding its searches set out at paragraphs 25, 26, 27 and 29 above, in particular paragraph 28; and
 - Council's submission set out at paragraph 32 that the statement in the Complaint Email chain that Council was aware of the 'issue' (access to properties through the Council Park) meant that Council had been aware of the issue for a number of years.
43. As above, I consider that the searches conducted by Council in the first instance were reasonable. I am satisfied that the databases searched were appropriate in light of Council's submissions about the systems used for complaint handling and record keeping and that the search terms used when searching those databases were appropriate in the circumstances of this matter and would have located any documents concerning complaints or investigations about the residents of, or activities at the applicant's residence created between 1 July 2021 and 22 November 2021, if they existed. I further consider that Council's subsequent searches during the external review were appropriate and thorough and would have located such documents if they existed.

44. Furthermore, I consider the statement in the closure notification in the DART Complaint Details Report that 'access' had been going on for years as observed on Nearmaps, and Council's submission at paragraph 32 that it had been aware of the 'issue' for years, suggest that documents may exist that predate 1 July 2021 and which may explain the presence of a Council Officer near the applicant's property in August or September 2021. However, as noted above, I consider that the searches undertaken by Council to locate documents created between 1 July 2021 and 22 November 2021 concerning complaints or investigations about the residents of, or activities at the applicant's residence have been reasonable, and would have located such documents if they existed.
45. In light of the searches conducted by Council, I accept its submissions set out at paragraph 27 that no documents were located that relate to any surveillance being undertaken of the applicant's premises in August or September 2021 by Council officers and that the only complaints that could be located were the two complaints from November 2021.⁵⁰ Consequently, I consider that no further documents exist that are responsive to the applicant's request for documents created between 1 July 2021 and 22 November 2021 about any other related complaints regarding the residents or activities at her home and any investigation or investigations undertaken by Council in response to any such complaints or requests and access to such documents may be refused pursuant to section 52(1)(a) of the RTI Act on the basis that they do not exist.
46. Finally, with respect to the documents in the Applicant's List at paragraph 34 that the applicant contends should exist, the following evidence is relevant:
- the DART Complaint Details Report created on 16 November 2021 recording notes from the initial complainant contact with Council and the investigation conducted by Council, disclosed to the applicant at pages 1-3 of 9, on 27 January 2022⁵¹
 - the documents disclosed to the applicant by Council in the first instance and on external review (see paragraphs 2 and 8)
 - Council's submissions regarding its searches set out at paragraphs 25, 26, 27 and 29 above; and
 - Council's submission set out at paragraph 32.
47. As noted at paragraph 19, in circumstances where the sufficiency of an agency's searches is in issue, there is an onus on an applicant to provide information that can form the basis for requiring an agency to conduct further searches. Mere assertion that more documents should exist will not suffice. I have carefully reviewed the items in the Applicant's List and am of the view that they are just assertions as to the existence of information. There is nothing in the Applicant's List that points to the existence of further information responsive to the terms of the access application.
48. I consider that Council's searches, both in the first instance and on external review were conducted in the appropriate databases, given Council's submissions about the systems used for complaint handling and record keeping and that the search terms used when searching those databases were appropriate in the circumstances of this matter and would have located the documents appearing in the Applicant's List if they existed. I am of this opinion particularly given the applicant sought access to documents created between 1 July 2021 and 22 November 2021, a period of less than five months. It is possible that further documents exist in relation to these issues that were created prior to or subsequent to that period but they are not captured by the

⁵⁰ Complaints made 16 November 2021 and 22 November 2021.

⁵¹ Subject to the removal of information that would, on balance be contrary to the public interest to disclose.

terms of the applicant's access application and are therefore outside the scope of the application and this review.

49. In conclusion, I am satisfied that Council has conducted searches of all relevant locations where it was reasonable to expect documents responding to the scope of the access application would, if they existed, be found. For the reasons outlined above and on the material before me, I am satisfied Council has located all documents responding to the terms of the access application; there are reasonable grounds to be satisfied that no further documents exist; and access may be refused to any further documents pursuant to section 52(1)(a) of the RTI Act on that basis.

Contrary to Public Interest Information

Information in Issue

50. The information in issue for this part of the decision comprises the name and email address of a private individual⁵² on two pages of the Complaint Email.

Relevant law

51. As noted at paragraph 15, the right of access to documents that is afforded a person by the RTI Act is subject to provisions of the RTI Act including the grounds on which an agency may refuse access to documents. Relevantly, access to a document may be refused to the extent that it comprises information, the disclosure of which would, on balance, be contrary to the public interest.⁵³

52. In regard to assessing whether disclosure of information would, on balance, be contrary to the public interest, the following considerations are relevant.

53. 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.

54. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision-maker must:⁵⁴

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

55. Schedule 4 of the RTI Act non-exhaustively lists factors that may be relevant in determining where the balance of the public interest lies in a particular case. I have considered these factors,⁵⁵ together with all other relevant information, in reaching my decision. I have also applied the RTI Act's pro-disclosure bias⁵⁶ and considered Parliament's intention that grounds for refusing access to information are to be interpreted narrowly.⁵⁷

Applicant's submissions

56. In her submissions noted at paragraph 34 at item d) the applicant stated:

⁵² See paragraph 57 below.

⁵³ Sections 47(3(b)) and 49 of the RTI Act.

⁵⁴ Section 49(3) of the RTI Act.

⁵⁵ I have considered each of the public interest factors outlined in schedule 4 of the RTI Act, and any relevant factors are discussed below. Some factors have no relevance, for example, the factors concerning protection of the environment and the maintenance of peace and order (schedule 4, part 2, items 13 and 15 of the RTI Act).

⁵⁶ Section 44 of the RTI Act.

⁵⁷ Section 47(2) of the RTI Act.

...I query why it is appropriate to redact [former Councillor of the applicant's Council Ward] name from the complainant's email as the names of other BCC representatives have not been redacted from the disclosed documents

57. While the applicant had not previously taken issue with the redaction of information at any point in the review, I have taken the applicant's query as a submission that the redaction in the Complaint Email is contested.
58. While I am precluded from disclosing information that I consider is contrary to the public interest to disclose,⁵⁸ I can confirm that the information in issue is not the name of the former Councillor for the applicant's Council Ward but rather, is the personal information⁵⁹ of a third party (**Third Party Information**).

Irrelevant Factors

59. I have taken no irrelevant factors into account in arriving at this decision.

Factors favouring disclosure

60. The RTI Act recognises that the public interest will favour disclosure of information which could reasonably be expected to:
- promote open discussion of public affairs and enhance the Government's accountability⁶⁰; and
 - reveal the reason for a government decision and any background or contextual information that informed the decision.⁶¹
61. The Third Party Information is the name and email address of a private individual. I acknowledge that the RTI Act is to be administered with a pro-disclosure bias, and accept that disclosing the Third Party Information would provide the applicant with a full and unredacted record of the Complaint in Council's records. However, given the Third Party Information is ephemeral to the substantive issue of the Complaint, disclosure would only marginally enhance Council's accountability.
62. I am satisfied that disclosing the Third Party Information would not provide any insight into the steps taken by Council in investigating the Complaint, nor reveal considerations of Council in its decision making. I note that, to the extent such information is held by Council, it has already been disclosed to the applicant in the information released to date.⁶² I find disclosure of the Third Party Information would not enhance Council's accountability to any great degree. Accordingly, I afford these factors low weight.⁶³
63. I have carefully considered all factors listed in schedule 4, part 2 of the RTI Act, and can identify no other public interest considerations in favour of disclosure of the Third Party Information, beyond that identified above.⁶⁴

⁵⁸ Section 108(3) of the RTI Act.

⁵⁹ Defined in schedule 5 of the RTI Act and section 12 of the IP Act as 'information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion'.

⁶⁰ Schedule 4, part 2, item 1 of the RTI Act.

⁶¹ Schedule 4, part 2, item 11 of the RTI Act.

⁶² See paragraphs 2 and 8.

⁶³ Schedule 4, part 2, items 1 and 11 of the RTI Act.

⁶⁴ For example, I cannot see how disclosure of the Third Party Information could reasonably be expected to contribute to innovation and the facilitation of research, or contribute to the maintenance of peace and order.

Factors favouring nondisclosure

64. The RTI Act recognises that disclosing an individual's personal information to a person other than the individual can reasonably be expected to cause a public interest harm.⁶⁵
65. The RTI Act also recognises that the public interest will favour nondisclosure of information that could reasonably be expected to prejudice the protection of an individual's right to privacy.⁶⁶ While the concept of privacy is not defined in the RTI Act, it may be viewed as the right of an individual to preserve their '*personal sphere*' free from interference from others.⁶⁷
66. I am satisfied that the Third Party Information is personal information and that disclosure of that information would cause a public interest harm by revealing inherently personal and identifying details. I also find that they comprise part of the third party's private sphere, which that individual is entitled to keep free from intrusion.
67. Accordingly, I find that both these public interest factors favouring nondisclosure of the Third Party Information⁶⁸ should be afforded high weight.

Balancing the public interest

68. In the circumstances of this case, I am satisfied that disclosure of the Third Party Information would only marginally enhance Council's accountability and transparency and that those public interest factors can, therefore, only be afforded low weight.
69. Balanced against the weight of the pro-disclosure factors is the much higher weight which I have afforded to protecting the personal information and safeguarding the privacy of the third party whose details appear in the Complaint Email. The nondisclosure factors outweigh the disclosure factors and are determinative. I therefore find that disclosure of the Third Party Information would, on balance, be contrary to the public interest and access to the information may be refused on this basis.⁶⁹

DECISION

70. I vary Council's decision and find that Council may refuse access to:
 - further documents on the ground they are nonexistent, under sections 47(3)(e) and 52(1)(a) of the RTI Act; and
 - the Third Party Information contained in the Complaint Email on the ground that it is contrary to the public interest to disclose under sections 47(3)(b) and 49 of the RTI Act.
71. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

⁶⁵ Schedule 4, part 4, section 6 of the RTI Act.

⁶⁶ Schedule 4, part 3, item 3 of the RTI Act.

⁶⁷ Paraphrasing the Australian Law Reform Commission's definition of the concept in 'For your information: Australian Privacy Law and Practice' Australian Law Reform Commission Report No. 108 released 12 August 2008, at paragraph 1.56.

⁶⁸ Schedule 4, part 3, item 3 and schedule 4, part 4, section 6 of the RTI Act.

⁶⁹ Sections 47(3)(b) and 49 of the RTI Act.

Assistant Information Commissioner Corby

Date: 30 June 2023

APPENDIX**Significant procedural steps**

Date	Event
15 February 2022	OIC received the external review application.
16 February 2022	OIC requested and received preliminary documents from Council.
18 March 2022	OIC notified Council that it had accepted the external review application and requested information about its searches and other information. OIC notified the applicant that it had accepted the external review application solely on the issue of Council's searches, and identifying the scope of the external review.
13 April 2022	OIC requested the overdue information from Council. OIC received some of the requested information from Council.
29 April 2022	OIC updated the applicant.
5 May 2022	OIC received a telephone call from the applicant.
9 May 2022	OIC received the outstanding information from Council.
25 May 2022	OIC returned a telephone call from the applicant.
13 and 14 June 2022	OIC received a telephone call from the applicant.
20 and 21 June 2022	OIC received and returned a telephone call from the applicant.
12 July 2022	OIC contacted the applicant by telephone regarding the redacted transcript. OIC contacted Council to discuss the redacted transcript and our expectation it would resolve the review, based on the applicant's comments.
25 July 2022	OIC received and returned a telephone call from the applicant.
28 July 2022	OIC provided a copy of the redacted transcript to Council and confirmed the next steps in the review.
4 August 2022	OIC received and returned a telephone call from the applicant.
12 August 2022	OIC received a telephone call from the applicant.
15 August 2022	OIC contacted Council by telephone.
16 August 2022	OIC issued a preliminary view and redacted partial transcript to the applicant.
30 August 2022	OIC received a submission from the applicant contesting the preliminary view.
31 August 2022	OIC issued a preliminary view to Council regarding searches. OIC updated the applicant.
21 September 2022	OIC contacted Council regarding the overdue searches. OIC granted an extension of time in response to Council's request.

Date	Event
26 September 2022	OIC updated the applicant.
13 October 2022	OIC updated the applicant. OIC contacted Council about the overdue searches.
7 November 2022	OIC contacted Council about the overdue searches.
8 November 2022	OIC updated the applicant.
17 November 2022	OIC contacted Council about the overdue searches
21 November 2022	OIC received the requested search information and additional documents from Council.
23 November 2022	OIC contacted Council to clarify information.
6 and 7 December 2022	OIC received further information from Council.
14 December 2022	OIC contacted Council for further information. OIC issued a further preliminary view to the applicant.
20 and 22 December 2022	OIC received two voice messages from the applicant.
23 December 2022	OIC emailed the applicant to grant her requested extension of time to 9 January 2023.
30 January 2023	OIC received emailed submissions in this review from an unauthorised individual.
16 February 2023	OIC posted a letter to the applicant by express post to the postal address she provided OIC in her external review application.
1 March 2023	OIC emailed the applicant in response to another matter, and advised we had posted a letter to progress this review which was awaiting collection at her local post office, and we awaited her response.
21 March 2023	OIC emailed the applicant at two email addresses from which she had communicated with OIC, outlining the unauthorised correspondence received on 30 January 2023, the attempts we had made to contact her while ensuring her privacy, and requested specific information for the review to progress.
27 March 2023	OIC's letter of 16 February 2023 was returned to OIC as uncollected by the applicant.
28 March 2023	The applicant provided a partial response to OIC's correspondence.
29 March 2023	OIC issued a letter by express post to the updated address provided by the applicant on 28 March 2023 and required certain actions by the applicant if they wished to proceed with their review.
19 April 2023	OIC received an email submission from the applicant confirming the submissions attached and contesting my preliminary view issued in December 2022.

Date	Event
10 May 2023	OIC issued a letter by express post advising the applicant the next step in the external review was to issue a formal decision.