



## Decision and Reasons for Decision

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**Citation:** *Brodsky and Gympie Regional Council* [2014] QICmr 17 (2 May 2014)

**Application Number:** 311830

**Applicant:** Brodsky

**Respondent:** Gympie Regional Council

**Decision Date:** 2 May 2014

**ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – CONTRARY TO PUBLIC INTEREST INFORMATION – personal information – whether disclosure 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 applied to Gympie Regional Council (**Council**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to all documents for a certain time period relating to communications between Council and other individuals about the removal of a driveway on an easement and all documents relating to the construction of a bitumen road on the easement.
2. Council located 10 pages and decided to grant full access to five pages and part access to five pages on the basis that disclosure would, on balance, be contrary to the public interest.<sup>1</sup>
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of Council's decision on the basis that:
  - Council had not located all documents responsive to the access application; and
  - Council erred in its decision to grant part access to one document on the basis it contained the private affairs and personal information of a third party.

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<sup>1</sup> Council advised OIC by letter dated 26 February 2014 that its decision incorrectly referenced schedule 4 part 4 item 3(c) of the RTI Act - that disclosure could have a substantial adverse effect on the management or assessment by an agency of the agency's staff. Council advised that the correct reference should have been to schedule 4, part 4, item 6 of the RTI Act – that disclosure could reasonably be expected to cause public interest harm if disclosure would disclose personal information of a person. OIC conveyed this to the applicant in its second preliminary view letter dated 4 March 2014 and further confirmed to the applicant by letter dated 17 March 2014 that an error by Council in its decision did not affect the consideration of issues in the external review.

4. On external review, Council located six additional documents. These were released to the applicant subject to the deletion of irrelevant information and information considered to be the personal information of third parties.<sup>2</sup> The sufficiency of Council's searches is no longer in issue in this review.<sup>3</sup>
5. For the reasons given below, I affirm Council's decision and find that access may be refused to the information in issue on the basis that its disclosure would, on balance, be contrary to the public interest under section 47(3)(b) and section 49 of the RTI Act.

## **Background**

6. Other significant procedural steps relating to the access application and external review are set out in the appendix.

## **Reviewable decision**

7. The decision under review is Council's decision dated 22 November 2013.

## **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. The information in issue comprises wording within four lines of one paragraph of the document identified as document five by Council in response to the access application (**Information in Issue**).

## **Relevant law**

10. Under the RTI Act, a person has a right to be given access to documents of an agency.<sup>4</sup> However, this right is subject to other provisions of the RTI Act including grounds on which an agency may refuse access to documents.<sup>5</sup> Access may be refused to information where its disclosure would, on balance, be contrary to the public interest.<sup>6</sup> The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest<sup>7</sup> and explains the steps that a decision-maker must take<sup>8</sup> in deciding the public interest as follows:

- identify any irrelevant factors and disregard them
- identify relevant public interest factors favouring disclosure and nondisclosure
- balance the relevant factors favouring disclosure and nondisclosure; and

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<sup>2</sup> The personal information comprised the names and addresses of third parties and the applicant did not contest any deletions made to the additional six documents.

<sup>3</sup> The applicant did not provide submissions disputing OIC's view that the location of additional documents resolved the sufficiency of search issue and the applicant is therefore considered to have elected not to seek access to further additional documents in this external review.

<sup>4</sup> Section 23 of the RTI Act.

<sup>5</sup> As set out in section 47 of the RTI Act.

<sup>6</sup> Sections 47(3)(b) and 49 of the RTI Act. The term *public interest* refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.

<sup>7</sup> Schedule 4 of the RTI Act sets out the factors for deciding whether disclosing information would, on balance, be contrary to the public interest. However, this list of factors is not exhaustive. In other words, factors that are not listed may also be relevant.

<sup>8</sup> Section 49(3) of the RTI Act.

- decide whether disclosure of the information in issue would, on balance, be contrary to the public interest.

## Findings

### ***Applicant submissions on OIC processes***

11. The applicant raised concerns<sup>9</sup> about OIC's external review process. I understand those concerns to be in essence that:
  - OIC favoured Council by raising personal information as a relevant public interest factor when Council had not relied on this factor in its decision<sup>10</sup> and perhaps OIC has a '*deliberate policy of favouring agencies*'
  - the external review process was '*ineffective*' and '*why bother having an Information Commissioner*' and perhaps a '*troublemaker*' applicant is enough to derail a review
  - he could not be assured of the legitimacy of OIC's preliminary views on the merits of the external review application and therefore the applicant wished to have the Information in Issue '*scrutinised by an independent party*' or be '*allowed to view the Information in Issue*' himself; and that
  - OIC has not addressed the applicant's concerns about the conduct of the external review process and he requested that all correspondence relating to the external review '*become part of the written decision*'.
12. In response to the applicant's concerns and in my role as Right to Information Commissioner, I have reviewed the processing of this external review. There is no evidence to indicate that OIC's management of the matter or the conduct of officers under my supervision was inappropriate or favoured Council in any way. I am satisfied that fairness was accorded to both the applicant and Council at all times and in accordance with the requirement in section 97(2) RTI Act.
13. The procedures adopted throughout this external review, mirror the procedure on external review prescribed by the RTI Act.<sup>11</sup> That procedure may be described as being:
  - subject to the RTI Act and within the discretion of the Information Commissioner or her delegates
  - conducted with as little formality and technicality, and with as much expedition, as the requirements of the relevant law and a proper consideration of the matters before the Commissioner allow
  - not bound by the rules of evidence; and
  - subject to the directions of the Commissioner or her delegates.
14. Applying this procedure in practice resulted in a number of stages being undertaken in this external review. After preliminary inquiries confirmed OIC's jurisdiction to conduct the review, steps were taken to identify opportunities for early resolution and obtain relevant documents and background information. Participants to the review were

<sup>9</sup> In submissions dated 13 February, 16 February 2014, 10 March and 24 March 2014.

<sup>10</sup> In submissions dated 16 February 2014, the applicant resiled from this view after having '*reread Council's decision more carefully.*'

<sup>11</sup> Section 95 of the RTI Act.

informed of the preliminary view formed on the issues in dispute and an opportunity was provided for submissions to be provided in response. Only after receipt of final submissions was a final position determined.<sup>12</sup>

15. Additionally, I reiterate my statement to the applicant in correspondence<sup>13</sup> about the integrity of this office, that the preliminary views of the delegated decision maker in this matter were formed as a result of careful examination of the information under review in the context of the relevant law and submissions made by the applicant and Council.
16. I note the applicant's demand for scrutiny of the Information in Issue by some other entity or the access applicant himself. OIC alone is the body appointed to provide independent, timely and fair review of decisions made under the RTI Act and the *Information Privacy Act 2009* (Qld) (**IP Act**). This review is merits based and results in the making of a fresh decision.
17. OIC through its Commissioner is accountable to the Queensland Parliament via its Legal Affairs and Community Safety Committee. Being independent of ministerial control in the exercise of its functions, including its external review function, acts to ensure that the community can have confidence that decisions and processes of OIC are independent, fair and impartial.
18. As explained above, the obligation to undertake external review of decisions made under the RTI and IP Acts is the province of OIC alone and section 107 of the RTI Act expressly prohibits disclosure on external review of documents to any person except in very limited circumstances which do not apply in this case.<sup>14</sup> Thus scrutiny of the Information in Issue by the access applicant or some other entity is not permissible by law.
19. Finally, there is no requirement on me under the RTI Act to make all correspondence part of this decision as requested by the access applicant. As noted in paragraph 8, all evidence, submissions, legislation and other material considered in reaching this decision are disclosed in these reasons (including footnotes and Appendix).

***Where does the balance of the public interest lie in this matter?***

20. In balancing the public interest, I have carefully considered the applicant's relevant submissions. I am satisfied that disclosing the Information in Issue to the applicant would, on balance, be contrary to the public interest for the reasons that follow.
21. I have examined the irrelevant factors in schedule 4 of the RTI Act and am satisfied I have not taken into account these or any other irrelevant factors in reaching my decision. Factors favouring disclosure and nondisclosure of the Information in Issue and their respective weight are discussed below.

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<sup>12</sup> Section 90(1) RTI Act requires OIC to identify opportunities and processes for early resolution of an external review and promote 'settlement' of the application. But when informal resolution is not achieved, a written decision which includes reasons for the decision must be made.

<sup>13</sup> Dated 17 March 2014

<sup>14</sup> The exception to section 107 of the RTI Act permits disclosure to a member of OIC staff in the course of performing their duties or the person (or their representative) who created the document or gave the documents or information to the agency or Minister.

## **Factors favouring disclosure**

### **Personal information**

22. The applicant submits the Information in Issue *'when read in the context of the letter would be expected to contain a description of actions taken by myself or of actions done to myself...it is not believable that this deletion relates to personal information'*.<sup>15</sup> The applicant contends that the opinions of a person cannot comprise their personal information. Rather the applicant contends that 'personal information' can only comprise information which identifies an individual, such as their name, address and signature.<sup>16</sup> The applicant speculates that the Information in Issue is about him or someone's opinion about him and because it is not identifying information when read in the context of the relevant paragraph, it cannot be 'personal information' and he should therefore be entitled to access this information under the RTI Act. The applicant also submits that OIC has failed to explain how the Information in Issue can be personal information.<sup>17</sup>
23. 'Personal information' is defined in 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'*.<sup>18</sup> The statutory definition clearly states that a person's opinion constitutes their personal information.
24. While I am restricted from describing the precise content of the Information in Issue,<sup>19</sup> it broadly encompasses a third party's opinion about the applicant in the context of incidents that occurred between private individuals in relation to the relevant easement. To the extent that the Information in Issue is *about* the applicant, it is his personal information and this gives rise to a factor favouring disclosure.<sup>20</sup> Though the Information in Issue is very limited, importance attaches to providing individuals with access to their personal information as held by government. However, the weight that attaches to this public interest factor is discounted because the Information in Issue may be described as speculative opinion, not related to the agency's performance of works upon the easement or to any matter for which the agency holds jurisdiction to investigate or deal with. Accordingly, I attribute moderate weight to this public interest factor.

### **Contribute to informed debate, inform the community of government operations and assist inquiries into deficiencies in agency conduct and reveal unlawful conduct on the part of an agency**

25. The applicant submits that release of the Information in Issue would advance the following factors favouring disclosure on the basis that its disclosure could reasonably be expected to:
- contribute to positive and informed debate on important issues or matters of serious interest<sup>21</sup>

<sup>15</sup> Applicant's submissions dated 16 February 2014.

<sup>16</sup> Applicant's oral submissions made to the OIC on 17 January 2014.

<sup>17</sup> In preliminary view letters to the applicant dated 5 February 2014 and 4 March 2014 and further explained in correspondence dated 17 March 2014.

<sup>18</sup> Also defined in Schedule 6 of the RTI Act.

<sup>19</sup> Section 108(3) of the RTI Act provides that the Information Commissioner must not, in a decision or in reasons for a decision on external review, include information that is claimed to be exempt information or contrary to the public interest information.

<sup>20</sup> Schedule 4, part 2, item 7 of the RTI Act.

<sup>21</sup> Schedule 4, part 2, item 2 of the RTI Act.

- inform the community of the government's operations, including, in particular, the policies, guidelines and codes of conduct followed by the government in its dealings with members of the community<sup>22</sup>
- allow or assist inquiries into possible deficiencies in the conduct or administration of an agency or official<sup>23</sup>; and
- reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct.<sup>24</sup>

26. However, I am satisfied from my review of the Information in Issue that it does not concern the administration of Council nor is it about the conduct of Council employees. Being an opinion expressed by a third party about the applicant in the context of incidents that occurred between private individuals, its release would not advance these public interest factors favouring disclosure. I therefore find that these four factors do not arise in the circumstances of this review.

### **Government accountability and transparency**

27. In contrast, I consider that factors raised by the applicant relating to enhancing government accountability<sup>25</sup> and revealing background information that informed a decision<sup>26</sup> do arise for consideration to some degree.
28. There is a general public interest in promoting access to agency-held information. Also, release of the Information in Issue could provide the applicant with the 'complete picture' of material put to Council in the context of the easement. However, I find the bulk of the data already released to the applicant reveals the contextual information about the removal of the driveway and construction of the bitumen road on the easement. Therefore, the disclosure of that information has already largely satisfied these public interest factors. In contrast, the Information in Issue would not further advance these public interest factors to any significant degree as it essentially comprises personal opinion about the applicant and third party and not data about work done by the agency on the easement and therefore I afford them low weight.

### **Contribute to the administration of justice for a person**

29. The applicant submits that the Information in Issue may assist him to commence legal proceedings against another person, particularly if the Information in Issue is about him and concerns his reputation.<sup>27</sup> This raises the pro-disclosure factor about possible contribution to the administration of justice for a person.<sup>28</sup>
30. However, the mere assertion that the Information in Issue is required to enable pursuit of a legal remedy is not sufficient to establish the relevance of this factor.<sup>29</sup> An applicant must at least demonstrate that they have suffered some kind of actionable wrong in respect of which a remedy is, or may be, available under the law. The applicant's mere assertion that he may be the subject of a '*vexatious litigant claim*' is insufficient to enliven this factor and accordingly, I find the factor does not arise.

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<sup>22</sup> Schedule 4, part 2, item 3 of the RTI Act.

<sup>23</sup> Schedule 4, part 2, item 5 of the RTI Act.

<sup>24</sup> Schedule 4, part 2, item 6 of the RTI Act.

<sup>25</sup> Schedule 4, part 2, item 1 of the RTI Act.

<sup>26</sup> Schedule 4, part 2, item 11 of the RTI Act.

<sup>27</sup> Applicant's oral submissions to OIC made on 17 January 2014.

<sup>28</sup> Schedule 4, part 2, item 17 of the RTI Act.

<sup>29</sup> *Willsford and Brisbane City Council* (1996) 3 QAR 368.

**Fair treatment of an individual and reveal information to be incorrect, misleading or unfairly subjective**

31. The applicant submits that disclosure of the Information in Issue could reasonably be expected to:
- advance the fair treatment of individuals in accordance with the law in their dealings with agencies<sup>30</sup>; and
  - reveal that the Information in Issue is incorrect, misleading or unfairly subjective.<sup>31</sup>
32. I find that these public interest factors would not be advanced by release of the Information in Issue. A person's opinion by its very nature concerns an individual's particular version of events and impression of persons which will obviously be shaped by factors such as the individual's memory and subjective impressions. This inherent subjectivity does not however mean that the resulting account or opinion is necessarily incorrect or false and misleading.<sup>32</sup>
33. Also, there is no evidence before me to indicate that Council had regard to the Information in Issue in its dealings with the applicant or the opinion maker, particularly as the Information in Issue is only connected in a broad sense to the relevant easement. There is no issue then of the Information in Issue assisting the applicant in his dealings with the agency in accordance with law. As I can determine no application of these factors in the circumstances of this matter, I find they do not arise and therefore afford them no weight.

**Factors favouring nondisclosure**

**Others' personal information and privacy**

34. The Information in Issue contains the personal information<sup>33</sup> of individuals *other* than the applicant. As noted in paragraph 24, it contains a third party's opinion *about* the applicant in the broad context of incidents that occurred between private individuals in relation to the relevant easement and as opinion, it constitutes personal information as it is defined in section 12 of the IP Act. As such the personal information of the third party is intertwined with personal information of the applicant in such a way that they cannot be separated. The RTI Act recognises that disclosure of personal information of a person (not the applicant) would give rise to public interest harm, a factor favouring nondisclosure.<sup>34</sup>
35. Whether disclosure of a person's personal information would cause a public interest harm will depend on the context in which their personal information appears. There is only a small pool of people with an interest in the relevant easement and on this basis and together with the information already released to the applicant, I consider that disclosure could reasonably reveal the third party's identity to the applicant and significant public interest harm would result.

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<sup>30</sup> Schedule 4, part 2, item 10 of the RTI Act.

<sup>31</sup> Schedule 4, part 2, item 12 of the RTI Act.

<sup>32</sup> *Marshall and Department of Police* (Unreported, Queensland Information Commissioner, 25 February 2011).

<sup>33</sup> As defined in section 12 of the IP Act and outlined in paragraph 23 of this decision.

<sup>34</sup> Schedule 4, part 4, item 6 of the RTI Act.

36. A second factor favouring nondisclosure also arises for consideration. I must consider whether, under the RTI Act, disclosing the third party's personal information could reasonably be expected to prejudice the protection of that individual's right to privacy.<sup>35</sup>
37. The concept of 'privacy' is not defined in either the IP Act or the RTI Act. It can, however, essentially be viewed as the right of an individual to preserve their 'personal sphere' free from interference from others.<sup>36</sup> The Information in Issue comprises the subjective impressions of the third party. I therefore find that disclosure of the Information in Issue would be an intrusion into the privacy of that person because it would reveal an aspect of the third party which was privately provided to Council.<sup>37</sup> The Information Commissioner has previously found that a person raising concerns with an agency is a central aspect of their 'personal sphere'. I note too that the Information in Issue is not known to the applicant nor will it further the applicant's knowledge about removal of the driveway or the bituminising of the easement by Council.
38. For these reasons, I consider disclosing the personal information of the third party would be a substantial intrusion into the privacy of that individual. I also consider, as explained above, that disclosure of the individual's personal information would cause significant public interest harm. In these circumstances, I afford significant weight to these two public interest factors.

### ***Balancing the relevant public interest factors***

39. I recognise the importance of individuals having access to their personal information as held by the government. I also note that disclosure of the Information in Issue may to a small extent promote government accountability and transparency. However, the weight to be afforded to these factors is reduced by the data that has already been released to the applicant and the fact that the Information in Issue is opinion of a third party in the broad context of the easement. The opinion is not related to the agency's performance of works upon the easement, the heart of the applicant's request for information, nor does it relate to any matter that could be described as a function of the agency.
40. Balanced against these factors are the significant weight to be afforded to the protection of another person's personal information and that person's right to privacy, in circumstances where it is not possible to separate the applicant's personal information from the personal information of others within the Information in Issue.
41. Having identified the public interest factors for and against disclosure, I find that in this instance, the balance tips in favour of nondisclosure for the reasons explained above.

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<sup>35</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>36</sup> Paragraphing 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 11 August 2008, at paragraph 1.56.

<sup>37</sup> *OP5BNI and Department of National Parks, Recreation, Sport and Racing* (Unreported, Queensland Information Commissioner, 12 September 2013) at [45].



## **DECISION**

42. I am satisfied that disclosing the Information in Issue would, on balance, be contrary to the public interest under section 49 of the RTI Act, and access to the Information in Issue may therefore be refused under section 47(3)(b) of the RTI Act. Accordingly, I affirm Council's decision.
43. I have made this decision as a delegate of the Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

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**J S Mead**  
**Right to Information Commissioner**

**Date: 2 May 2014**

## APPENDIX

### Significant procedural steps

Date	Event
25 October 2013	Council received the applicant's access application.
22 November 2013	Council issued its decision on the access application.
28 November 2013	The applicant applied to OIC for external review of Council's decision.
6 January 2014	Council provided OIC with the requested documents.
17 January 2014	OIC provided an oral preliminary view to the applicant by telephone and the applicant provided OIC with submissions by telephone.
5 February 2014	OIC conveyed its written preliminary view to the applicant and invited him to provide submissions supporting his case if he did not accept the written preliminary view.
13 February 2014	The applicant notified OIC that he did not accept the preliminary view and provided OIC with submissions.
16 February 2014	The applicant notified OIC that he wished to amend his earlier submissions and provided OIC with further submissions.
19 February 2014	OIC requested further submissions from Council about its search processes and clarified with Council the basis of its decision refusing access to the Information in Issue.
28 February 2014	OIC received further submissions from Council and copies of documents located by Council as a result of its further searches in response to OIC's request.
4 March 2014	OIC advised the applicant of the results of Council's searches. OIC also conveyed a second preliminary view to the applicant which affirmed its earlier view.
10 March 2014	The applicant did not accept OIC's second preliminary view and provided further submissions about his concerns regarding the external review process.
17 March 2014	OIC wrote to the applicant responding to his concerns.
24 March 2014	The applicant provided OIC with further submissions and requested a formal decision.