



## Decision and Reasons for Decision

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**Citation:** *F89 and Brisbane City Council* [2021] QICmr 69 (20 December 2021)

**Application Number:** 315737

**Applicant:** F89

**Respondent:** Brisbane City Council

**Decision Date:** 20 December 2021

**Catchwords:** ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - IRRELEVANT INFORMATION - information about other individuals not concerning the applicant - whether deleted information is irrelevant to the terms of the access application - section 88 of the *Information Privacy Act 2009* (Qld)

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

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

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST INFORMATION - invoices from legal advisers for legal services rendered - prejudice to business, commercial or financial affairs - whether disclosure of information would, on balance, be contrary to the public interest - section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

**ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - whether agency has conducted reasonable searches - whether access to further documents may be refused on the basis they are nonexistent or unlocatable - section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(e) and 52(1) of the *Right to Information Act 2009* (Qld)**

## REASONS FOR DECISION

### Summary

1. The applicant applied<sup>1</sup> to Brisbane City Council (**Council**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to documents containing their personal information<sup>2</sup> for the period 14 December 2019 to 11 February 2020. This was another in a series of access applications that the applicant made to Council seeking access under the IP Act to their personal information across various timeframes.
2. Council located 522 pages. It released 378 pages in full, 103 in part, and refused access in full to 41 pages. Council decided<sup>3</sup> to refuse access to some information on the basis it was subject to legal professional privilege and was therefore exempt information,<sup>4</sup> and to refuse access to other information on the grounds that its disclosure would, on balance, be contrary to the public interest.<sup>5</sup> Council also deleted some segments of information that it considered were irrelevant to the terms of the access application.<sup>6</sup>
3. The applicant applied for internal review of Council's decision.<sup>7</sup> On internal review, Council upheld the original decision in full.<sup>8</sup>
4. The applicant then applied<sup>9</sup> to the Office of the Information Commissioner (**OIC**) for external review of Council's decision.
5. For the reasons outlined below, I affirm Council's internal review decision. In respect of the sufficiency of search issue raised by the applicant on external review, I find that Council has taken all reasonable steps to locate responsive documents, and that access to further documents may be refused on the basis they are nonexistent or unlocatable.

### Background

6. The information that the applicant seeks to access concerns their employment by Council during the relevant period and can broadly be described as relating to workplace matters involving the applicant.
7. During the review, Council accepted OIC's view that certain information to which it had refused access was neither exempt information nor contrary to the public interest to

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<sup>1</sup> On 11 February 2020.

<sup>2</sup> The access application listed six categories of documents. Item 1 requested access to documents held by City WorkCover. Council advised the applicant that this part of their application had been sent to City WorkCover to deal with 'under their processes' and that its decision therefore would deal only with the remaining five items.

<sup>3</sup> On 23 April 2020.

<sup>4</sup> Section 67(1) of the IP Act and sections 47(3)(a), 48, and schedule 3, section 7 of the *Right to Information Act 2009* (Qld) (**RTI Act**).

<sup>5</sup> Section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.

<sup>6</sup> Section 88 of the IP Act.

<sup>7</sup> On 19 June 2020 (Council granted the applicant a significant extension of time).

<sup>8</sup> Decision notice issued on 15 July 2020.

<sup>9</sup> On 9 August 2020. However, due to an administrative system error, OIC did not identify the application until 19 November 2020.

disclose. Council disclosed that information to the applicant<sup>10</sup> and it is no longer in issue in the review.

### Reviewable decision

8. The decision under review is Council's internal review decision dated 15 July 2020.

### Evidence considered

9. Significant procedural steps relating to the external review are set out in the Appendix.
10. The evidence, submissions, legislation and other material I have considered in reaching my decision are set out in these reasons (including footnotes and the Appendix). The applicant's submissions have been taken into account where they deal with matters that are relevant to the issues to be determined in this review.<sup>11</sup>
11. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.<sup>12</sup> 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.<sup>13</sup> 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:<sup>14</sup> '*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.*'<sup>15</sup>

### Information in issue

12. The information in issue in this review may be categorised as follows:
- information about unrelated human resource/staffing matters of Council (**Irrelevant Information**)
  - information subject to legal professional privilege (**LPP Information**)
  - information about workplace matters including workplace management of the applicant by Council (**Workplace Information**)
  - personal information of Council employees and other third parties (**Third Party Information**); and
  - information about charge-out rates and payments made to a law firm for legal assistance provided to Council (**Billing Information**).

### Issues for determination

13. The issues for determination are:
- whether the Irrelevant Information may be deleted on the basis it is irrelevant to the terms of the access application
  - whether access to LPP Information may be refused as exempt information

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<sup>10</sup> Part 2, page 51 and part 6, pages 43-44.

<sup>11</sup> Including the external review application and submissions received on 10 January 2021, 12 February 2021, 14 June 2021, 20 June 2021, 2 July 2021 and 13 December 2021.

<sup>12</sup> Section 21 of the HR Act.

<sup>13</sup> *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].

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

<sup>15</sup> *XYZ* at [573].

- whether access to the Workplace Information, Third Party Information and Billing Information may be refused because its disclosure would, on balance, be contrary to the public interest; and
  - whether Council has taken all reasonable steps to locate responsive documents.
14. I note that these issues are the same as, or similar to, issues arising in various of the other applications that the applicant has made to OIC for external review of Council's decisions.<sup>16</sup> However, despite the findings in those decisions (which I note the applicant did not appeal) they have continued to agitate the same or similar issues in this and other subsequent reviews, including raising issues and complaints about Council which OIC has no jurisdiction to investigate or otherwise deal with under the IP Act.

### **Matters outside OIC's jurisdiction**

15. Throughout the review, the applicant (through their representative) raised numerous complaints and procedural issues about Council generally, and about its processing of the access application. These ranged from complaints about alleged inconsistencies in Council's handling of information and illegible redactions, to the absence of watermarks and footers on released documents.<sup>17</sup> The applicant also complained that Council had created records that concerned them, but that did not contain their name, which they considered gave rise to a risk that documents about them may not be located through Council searches.<sup>18</sup>
16. As noted above, the applicant has been advised in this review,<sup>19</sup> and during their numerous other external review applications, of the limits of OIC's jurisdiction regarding complaints made about Council, as well as the fact that any procedural errors that an agency may have made when processing an access application are irrelevant on external review because OIC conducts a merits review of the agency decision. Despite this, the applicant has continued to make submissions and complaints about irrelevant matters, or about matters falling outside OIC's jurisdiction.<sup>20</sup>
17. OIC's role under the IP Act in this review is to consider the information to which Council has refused access and decide whether that refusal of access was correct, as well as to consider the sufficiency of search issue raised by the applicant. To the extent that the applicant has made submissions relevant to these issues, I have taken them into account in making my decision.
18. This decision does not address the applicant's complaints about Council's record-keeping practices or, for example, the circumstances surrounding Council's workplace management of the applicant.<sup>21</sup>

### **Irrelevant information**

19. Section 88 of the IP Act provides that an agency may give access to a document subject to the deletion of information it considers is not relevant to an access application. This is a mechanism to allow irrelevant information to be deleted from documents which are identified for release to an applicant.

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<sup>16</sup> See, for example, *P90 and Brisbane City Council* [2021] QICmr 23 (27 May 2021) (**P90**), and *F66 and Brisbane City Council* [2021] QICmr 53 (20 October 2021).

<sup>17</sup> See, for example, the applicant's emails of 10 January 2021, 20 June 2021, 2 July 2021 and 13 December 2021.

<sup>18</sup> Email of 2 July 2021.

<sup>19</sup> For example, in this review, the applicant received an information sheet on 4 December 2020 that outlined OIC's jurisdiction and explained what OIC can and cannot consider on external review. The information specifically confirms that OIC cannot investigate complaints about an agency's record-keeping practices.

<sup>20</sup> For example, the bulk of the submissions made by the applicant in their email of 2 July 2021 are irrelevant to the issues for determination in this review and discuss matters over which OIC has no jurisdiction.

<sup>21</sup> See, particularly, the issues raised in the applicant's email of 2 July 2021.

20. In deciding whether information is irrelevant, it is necessary to consider whether the information has any bearing upon, or is pertinent to, the terms of the application.<sup>22</sup> I have reviewed the Irrelevant Information.<sup>23</sup> I am satisfied that it relates to workplace matters concerning other Council staff and does not relate to or concern the applicant. The information is outside the terms of the access application (by scope and/or by date) and can, therefore, be considered as information which is not relevant to the application, with access refused on that basis under section 88 of the IP Act.

### Exempt information - legal professional privilege

#### Relevant law

21. Schedule 3 of the RTI Act specifies the types of information Parliament has determined are exempt because release would be contrary to the public interest.<sup>24</sup> Relevantly, information is exempt information if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.<sup>25</sup> This exemption reflects the requirements for establishing legal professional privilege at common law.<sup>26</sup>

22. Establishing whether legal professional privilege applies to information at common law requires that the information must comprise a communication:

- made in the course of a lawyer-client relationship
- that was and remains confidential; and
- which was made for the dominant purpose of seeking or providing legal advice or for use in existing or reasonably anticipated legal proceedings.<sup>27</sup>

23. When each of these requirements is met, legal professional privilege is established.<sup>28</sup>

#### Finding

24. I have considered the LPP Information<sup>29</sup> and am satisfied that it comprises confidential communications between City Legal and its client (Council), made for the dominant purpose of seeking or providing legal advice or assistance. I am satisfied that the lawyers who provided the advice are suitably qualified and of a sufficiently independent character.<sup>30</sup> There is nothing before me to suggest that the qualification or exceptions to privilege apply. Accordingly, I affirm Council's decision to refuse access to the LPP Information on the grounds that it attracts legal professional privilege and is therefore exempt information.<sup>31</sup>

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<sup>22</sup> *O80PCE and Department of Education and Training* (Unreported, Queensland Information Commissioner, 15 February 2010) at [52] which was a decision made under the equivalent provision in the repealed *Freedom of Information Act 1992* (Qld).

<sup>23</sup> Part 5, pages 1, 17-18; part 7, page 17; part 8, pages 1, 4-5.

<sup>24</sup> Section 67(1) of the IP Act provides that an agency or Minister may refuse access in the same way and to the same extent as under section 47 of the RTI Act. Section 47(3)(a) allows refusal of access to exempt information.

<sup>25</sup> Schedule 3, section 7 of the RTI Act.

<sup>26</sup> The doctrine of legal professional privilege is both a rule of evidence and a common law right. The High Court in *Daniels Corporation International Pty Ltd v Australian and Consumer Commissioner* (2002) 213 CLR 543 (*Daniels*) at [552] relevantly noted: 'It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings' (footnotes omitted). See also *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 (*Esso*).

<sup>27</sup> *Esso and Daniels*.

<sup>28</sup> However, qualifications and exceptions to privilege (such as waiver and improper purpose) may, in particular circumstances, affect the question of whether information attracts or remains subject to it, and therefore is exempt under the RTI Act.

<sup>29</sup> Part 10, page 3.

<sup>30</sup> *Waterford v Commonwealth* (1987) 163 CLR 54.

<sup>31</sup> Section 67(1) of the IP Act and section 47(3)(a) and schedule 3, section 7 of the RTI Act.

## Contrary to the public interest information

### Relevant law

25. Under the IP Act, a person has a right to be given access to documents of an agency to the extent they contain the individual's personal information.<sup>32</sup> However, this right is subject to provisions of the IP Act and RTI Act including the grounds on which an agency may refuse access to documents.<sup>33</sup> An agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.<sup>34</sup>
26. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision maker must:<sup>35</sup>
- identify factors irrelevant to the public interest and disregard them
  - identify factors in favour of disclosure of information
  - identify factors in favour of nondisclosure of information; and
  - decide whether, on balance, disclosure of the information would be contrary to the public interest.
27. Schedule 4 of the RTI Act contains non-exhaustive lists of factors that may be relevant in determining where the balance of public interest lies in a particular case. I have considered these lists,<sup>36</sup> together with all other relevant information, in reaching my decision. I have kept in mind the IP Act's pro-disclosure bias<sup>37</sup> and Parliament's requirement that grounds for refusing access to information be interpreted narrowly.<sup>38</sup> I have not taken any irrelevant factors into account.

### Workplace Information

28. Council refused access to certain Workplace Information<sup>39</sup> relating to the investigation by Council of matters concerning the applicant's employment and the subsequent suspension and termination of the applicant's employment. This information includes complainant/witness information, and information involving Council's Human Resources (HR) division.
29. The public interest factors favouring disclosure of the Workplace Information (and the weight that I afford to each factor) are as follows:
- access by the applicant to their personal information<sup>40</sup> (significant weight)
  - advancing Council accountability and transparency regarding its handling of workplace matters involving the applicant<sup>41</sup> (moderate weight)

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<sup>32</sup> Section 40 of the IP Act.

<sup>33</sup> Section 67(1) of the IP Act provides that an agency may refuse access to a document in the same way and to the same extent it could refuse access to the document under section 47 of the RTI Act were the document to be the subject of an access application under the RTI Act.

<sup>34</sup> Section 67(1) of the IP Act and section 47(3)(b) and 49 of the RTI Act. The term public interest refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that, in general, a public interest consideration is one which is common to all members of, or a substantial segment of the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.

<sup>35</sup> Section 49(3) of the RTI Act.

<sup>36</sup> I have considered each of the public interest factors outlined in schedule 4 of the RTI Act, and any relevant factors are discussed below (in relation to each category of documents). Some factors have no relevance, for example, the factor concerning innovation and the facilitation of research.

<sup>37</sup> Section 64 of the IP Act.

<sup>38</sup> Section 67(2) of the IP Act and section 47(2) of the RTI Act. In deciding whether disclosure of the information in issue would, on balance, be contrary to the public interest, I have taken no irrelevant factors into account in making my decision.

<sup>39</sup> Part 2, page 44; part 3, pages 14-18, 56-58, 77-88, 92-94; part 6, pages 11, 19-20, 23-24, 73, 77, 81, 83, 85, 143-151; part 7, pages 17, 46-48, 51-53, 57-59, 87.

<sup>40</sup> Schedule 4, part 2, item 7 of the RTI Act.

<sup>41</sup> Schedule 4, part 2, items 1 and 3 of the RTI Act.

- contributing to the administration of justice<sup>42</sup> (low weight); and
  - advancing the fair treatment of the applicant in accordance with the law in their dealings with Council (low weight).<sup>43</sup>
30. The public interest factors favouring nondisclosure of the Workplace Information (and the weight that I afford to each factor) are as follows:
- prejudice to the protection of an individual's right to privacy<sup>44</sup> (significant weight)
  - the public interest harm arising from disclosure of personal information of another individual<sup>45</sup> (significant weight)
  - prejudice to Council's ability to obtain confidential information (significant weight);<sup>46</sup> and
  - prejudice to the management function of Council<sup>47</sup> (significant weight).
31. I acknowledge that information concerning the applicant's suspension and dismissal from Council are of concern and importance to the applicant. In support of disclosure of this type of information, the applicant (through their agent) submitted that they had been treated unfairly and denied procedural fairness.<sup>48</sup>

*Why Council doesn't adequately release information to a Council employee under investigation – this is highly concerning. [The applicant] was TERMINATED whilst on workers' compensation. [They] went through the disciplinary process whilst suffering mental illnesses from a workplace assault. The outcome of the suspension and termination was significant and I believe meets the term 'negatively affects' when we take into account the OIC's information regarding **Natural Justice**. A verbal meeting disclosing/seeking limited/varied information is not enough compared to a written, comprehensive letter which was not provided to [the applicant] until the Show Cause letter in November 2019. Especially given [the applicant's] illnesses.*

...

*It appears that the OIC has not considered the exceptional circumstances [the applicant] was in due to [their] medical (psychiatric) conditions, and the limited explanatory documentation outlining the allegations and information in writing.*

32. The applicant made similar submissions about unfairness in other of their reviews. I discussed these issues in detail in the decision in *P90*.

## Finding

33. The Workplace Information is about the applicant and I accept that their employment management process by Council had significant consequences for them. Accordingly, I afford significant weight to the factor favouring disclosure concerning the applicant accessing their own personal information.
34. I also accept that disclosing the Workplace Information could reasonably be expected to enhance Council's accountability and transparency in terms of how it conducts workplace investigations.<sup>49</sup>
35. In terms of the weight to be afforded to these factors, although the applicant disputes it in their submissions, I maintain the view that I expressed in *P90*. That is, I consider that

<sup>42</sup> Schedule 4, part 2, items 16 and 17 of the RTI Act.

<sup>43</sup> Schedule 4, part 2, item 10 of the RTI Act.

<sup>44</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>45</sup> Schedule 4, part 4, section 6 of the RTI Act.

<sup>46</sup> Schedule 4, part 3, item 16 of the RTI Act.

<sup>47</sup> Schedule 4, part 3, item 19 of the RTI Act.

<sup>48</sup> Email of 2 July 2021.

<sup>49</sup> *8A3BPQ and Queensland Police Service* [2014] QICmr 42 (30 October 2014) at [22] to [24] (**8A3BPQ**); *F60XCX and Department of Natural Resources and Mines* [2017] QICmr 19 (9 June 2017) at [61] to [66] (**F60XCX**).

the information already released to the applicant by Council, both as part of the management process, as well as through the various access applications they have made to Council, significantly reduces the weight to be afforded to these factors. I note the submissions made by the applicant regarding their mental state when participating in the management process and the contention that this prejudiced their ability to fully participate in the process. I note that the applicant was assisted by a union representative in the management process. However, in any event, I am not satisfied that disclosure of the Workplace Information would significantly enhance the applicant's understanding of the process and the outcome, or address their concerns regarding the fairness of the process. As has been explained to the applicant previously, the Information Commissioner has decided that the requirement on an agency to be accountable and transparent in the conduct of disciplinary investigations does not oblige the agency to provide the applicant with access to its entire investigation file, nor to reveal all of the information it gathered in dealing with the investigation.<sup>50</sup> In this case, I consider that sufficient information has been disclosed by Council to explain to the applicant its investigation and disciplinary action processes. I therefore afford moderate weight to the accountability and transparency factors.

36. The applicant also raised the application of the administration of justice disclosure factors listed at schedule 4, part 2, items 16 and 17 of the RTI Act. I am not aware of any current or anticipated legal proceedings, or legal remedies, that the applicant is currently pursuing or intending to pursue, or how disclosure of the documents would assist them in pursuing or evaluating any legal remedies. In the absence of such information, it is difficult to identify how disclosure could reasonably be expected to contribute to the administration of justice either generally, or specifically for the applicant. As I understand it, the conciliation process in the Queensland Industrial Relations Commission has concluded. In these circumstances, and without further details about the basis of any anticipated legal action or remedy, I would afford these factors only low weight in the public interest balancing test.
37. With respect to the public interest in advancing the fair treatment of the applicant in accordance with the law, as I have noted, the applicant clearly considers that they were treated unfairly by Council. In the context of a workplace investigation, procedural fairness generally requires that a person is:
- adequately informed of the allegations made against them
  - given an opportunity to respond to the allegations; and
  - informed of the outcome of the investigation.<sup>51</sup>
38. The applicant was advised of the nature of the allegations in an interview with Council,<sup>52</sup> and a detailed Show Cause Notice issued by Council.<sup>53</sup> The applicant was provided with an opportunity to respond, including being granted two extensions of time to respond, and was also offered a face to face meeting with the decision-maker to provide any further information. The applicant was then informed of the decision and the reasons for Council's decision, with specific reference to their response.<sup>54</sup> As I have noted, they received assistance from a union representative in this process.

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<sup>50</sup> 8A3BPQ at [24].

<sup>51</sup> *Gapsa and Department of Transport and Main Roads* (Unreported, Queensland Information Commissioner, 6 September 2013) at [20]; and *ODWOPH and Queensland Bulk Water Supply Authority trading as Seqwater* [2017] QICmr 3 (13 February 2017) at [28].

<sup>52</sup> On 28 October 2019 with the applicant and Union representative.

<sup>53</sup> Dated 11 November 2019. Council provided significant detail of the allegations across five pages of the 11 page Show Cause Notice to the applicant, including dates, names of other parties involved in the events or conversations, and details of what was alleged to have been said or done by the applicant.

<sup>54</sup> The applicant submitted a 12 page response to the Show Cause Notice.



39. Relevantly, the Information Commissioner has previously held that fair treatment and procedural fairness in a workplace investigation does not *'entitle the applicant to all information about the investigation including the information provided by other individuals who participated in the investigation process.'*<sup>55</sup> Having considered both the refused and released information, I do not consider that disclosure of the Workplace Information would substantially contribute to the obligation to afford procedural fairness to the applicant and I therefore afford low weight to this factor favouring disclosure.<sup>56</sup>
40. Turning to the factors favouring nondisclosure, I am satisfied that disclosing communications within an agency involving managers and/or HR officers discussing the management of an employee's conduct could reasonably be expected to have a negative impact on the future exchange of such information, with an associated negative effect on the agency's staff management processes. In terms of the witness information, I am satisfied that disclosure may deter witnesses from providing full and open accounts to investigators in future workplace investigations, thereby prejudicing both Council's ability to obtain confidential information in the future, and its investigation processes and outcomes. In order to conduct effective workplace investigations, agencies rely on managers and staff freely cooperating in the investigative process.<sup>57</sup> Accordingly, I afford these nondisclosure factors significant weight.
41. The Workplace Information also contains the personal information of individuals other than the applicant. I am satisfied that disclosure would prejudice the protection of the right to privacy of these individuals.<sup>58</sup> While the information from witnesses is provided in a workplace context, it is not routine personal work information.<sup>59</sup> Rather, it comprises sensitive information given in relation to a workplace investigation. For this reason, I consider that disclosure of this information under the IP Act would be a significant intrusion into the relevant persons' privacy and the extent of the public interest harm that could be anticipated from disclosure is significant.
42. I therefore afford the four nondisclosure factors identified at paragraph 30 above significant weight in the public interest balancing test.
43. After balancing the factors weighing both for and against disclosure of the Workplace Information, I find that the balance of the public interest weighs in favour of nondisclosure of this information. Accordingly, access may be refused on the basis disclosure would, on balance, be contrary to the public interest.

### Third Party Information

44. Council refused access to personal information of third parties including mobile telephone numbers of Council staff, signatures and sharefile reference numbers.<sup>60</sup>
45. I consider there is little to no public interest favouring disclosure of this information, beyond the general public interest in accessing information held by government. In

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<sup>55</sup> 8A3BPQ at [28].

<sup>56</sup> Schedule 4, part 2, item 16 of the RTI Act.

<sup>57</sup> F60XCX at [129] to [136]; I6XD0H at [33] to [35]; *Gapsa and Department of Transport and Main Roads* (Unreported, Queensland Information Commissioner, 6 September 2013) at [30] to [35]; *Malliet and Department of Justice and Attorney-General* [2015] QICmr 5 (19 March 2015) at [25].

<sup>58</sup> Schedule 4, part 3, item 3 and schedule 4, part 4, section 6(1) of the RTI Act.

<sup>59</sup> Often, information relating to the day-to-day work duties of a public servant may be disclosed under the IP and RTI Acts, despite it falling within the definition of personal information. Generally, this information would not, on balance be contrary to the public interest to disclose. However, agency documents can also contain personal information of public servants which is not routine work information: see *Gapsa and Department of Transport and Main Roads* (Unreported, Queensland Information Commissioner, 12 April 2013) at [71].

<sup>60</sup> Part 2, pages 33, 45; part 3, pages 39, 42, 89, 99, 101, 107; part 4, page 2; part 6, pages 5, 7, 9, 12, 14, 15, 17, 21, 25, 27-28, 33, 35, 37, 39, 40, 42, 45-47, 49-50, 52, 54, 56, 62-64, 66, 68, 70, 72-74, 77, 80-81, 83, 85, 89, 100, 102, 111, 115, 129, 132, 134, 138, 141, 142, 144, 148, 158, 162, 167, 169, 177-178, 180-181; part 7, pages 18, 22, 24, 61, 69, 72, 78, 79, 81, 84, 88, 90, 92, 94, 98, 100, 106, 108, 111; part 9, pages 13, 16.

contrast, I would afford moderate to significant weight to the public interest nondisclosure and harm factors that seek to protect the personal information and privacy of other individuals.<sup>61</sup>

46. I acknowledge the applicant's submissions (made in this and other reviews)<sup>62</sup> that mobile numbers have previously been released to them, and that the redactions have been applied inconsistently by Council across a number of their access applications. I also acknowledge the applicant's submissions that, as they consider mobile numbers to be Council information, it would not be contrary to the public interest to disclose them. However, these submissions do not raise relevant factors in favour of disclosure under the RTI Act aside from (as acknowledged above) the general public interest in facilitating access to government-held information.<sup>63</sup>
47. In contrast, release of this information would disclose personal information of Council officers and other third parties. In terms of mobile numbers, the Information Commissioner has previously held that:<sup>64</sup>

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

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

### Finding

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

### Billing Information

50. A small portion of refused information (**Billing Information**)<sup>65</sup> relates to discussions of hourly rates charged by legal advisers and payments for the legal assistance provided to Council. While I am satisfied that the Billing Information does not meet the requirements of LPP, I am satisfied that its disclosure would, on balance, be contrary to the public interest. The Information Commissioner has previously decided that disclosing information about the billing structure and hourly rates of a lawyer would prejudice the commercial and financial affairs of that entity<sup>66</sup> and would, on balance, be contrary to the

<sup>61</sup> Schedule 4, part 3, item 3 and schedule 4, part 4, section 6 of the RTI Act.

<sup>62</sup> Email of 2 July 2021 in this review. See also OIC's decision in P90.

<sup>63</sup> Schedule 4, part 2, items 1, 3 and 11 of the RTI Act.

<sup>64</sup> *Smith and Sunshine Coast Regional Council; Diamond Energy Pty Ltd (Third Party)* [2017] QICmr 42 5 September 2017) at [16]. See also *Underwood and Minister for Housing and Public Works* [2015] QICmr 27 (29 September 2015) at [66] to [68].

<sup>65</sup> Part 10, pages 1, 2.

<sup>66</sup> Schedule 4, part 3, item 2 of the RTI Act.

public interest to disclose.<sup>67</sup> I am satisfied that disclosing the Billing Information could reasonably be expected to prejudice the commercial and financial affairs of the entity. I am unable to identify factors favouring disclosure of this information beyond the general public interest in the accountability of Council to which I afford only low weight.

## Finding

51. After weighing the public interest factors favouring disclosure and nondisclosure, I find that disclosure of the Billing Information would, on balance, be contrary to the public interest and access may be refused on this basis.

## Sufficiency of search

### Relevant law

52. Access to a document may be refused if the document is nonexistent or unlocatable.<sup>68</sup>
53. To be satisfied that documents are nonexistent, a decision-maker must rely on their particular knowledge and experience and have regard to a number of key factors, including:<sup>69</sup>
- the administrative arrangements of government
  - the agency structure
  - the agency's functions and responsibilities
  - the agency's practices and procedures (including but not exclusive to its information management approach); and
  - other factors reasonably inferred from information supplied by the applicant including the nature and age of the requested document/s and the nature of the government activity to which the request relates.
54. If searches are relied on to justify a decision that the documents do not exist, all reasonable steps must be taken to locate the documents. What constitutes reasonable steps will vary from case to case as the search and inquiry process an agency will be required to undertake will depend on the particular circumstances.
55. To determine whether a document exists, but is unlocatable, the RTI Act requires consideration of whether there are reasonable grounds for the agency to be satisfied that the requested document has been or should be in the agency's possession; and whether the agency has taken all reasonable steps to find the document. In answering these questions, regard should again be had to the circumstances of the case and the key factors.<sup>70</sup>
56. The Information Commissioner's external review functions include investigating and reviewing whether agencies have taken reasonable steps to identify and locate

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<sup>67</sup> In *Price and Department of Justice and Attorney-General* (unreported, Queensland Information Commissioner, 12 March 2002) at [44], the Information Commissioner found that disclosure of information about lawyers' billing structure and hourly charge-out rates might reasonably be expected to assist the lawyers' competitors to compete with them more effectively in the legal services market generally and would therefore be contrary to the public interest to disclose.

<sup>68</sup> Section 67(1) of the IP Act and sections 47(3)(e) and 52 of the RTI Act. A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist - section 52(1)(a) of the RTI Act. A document is unlocatable if it has been or should be in the agency's possession and all reasonable steps have been taken to find the document but it cannot be found - section 52(1)(b) of the RTI Act.

<sup>69</sup> *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) at [28].

<sup>70</sup> *Pryor* at [21].

documents applied for by applicants.<sup>71</sup> 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.<sup>72</sup> 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 locate all relevant documents. Suspicion and mere assertion will not satisfy this onus.

### Submissions of the parties

57. At a late stage of the review, after becoming aware through another review that a search of Council's email system could be conducted using a *SourceOne* search, the applicant raised a general sufficiency of search issue, arguing that Council should be required, as a matter of course, to conduct a *SourceOne* search when responding to an access application.<sup>73</sup>
58. OIC wrote to Council<sup>74</sup> to seek further information about this issue and sought a submission from Council in support of its position that it had taken all reasonable steps to locate responsive documents.
59. In response, Council submitted<sup>75</sup> that the timeframe of this access application is approximately three months and that searches of the following areas of Council had located 522 responsive pages:
  - Chief Executive Officer's Office
  - Brisbane Infrastructure Divisional Manager's Office
  - Field Services Group Executive Manager's Office
  - Urban Amenity Branch, Field Services Group
  - Human Resources
  - Ethical Standards Unit
  - City Legal; and
  - RTI Unit.
60. Council argued that it is reasonable to expect that these targeted searches would locate all documents responding to the terms of the access application, including responsive emails, and that it should not be required to conduct a *SourceOne* search of its entire email system, particularly when the applicant had not identified any missing documents that it is reasonable to expect that only a *SourceOne* search would locate.
61. Council also contended that undertaking and including the results of *SourceOne* searches would have increased the number of responsive documents significantly by including multiple duplicate email chains and attachments to such an extent that Council may have refused to deal with the application on the basis of a substantial and unreasonable diversion of resources.
62. The applicant was invited to respond to Council's submission. After requesting several extensions of time, the applicant's agent eventually provided a submission dated 13 December 2021. The submission refers to a number of matters irrelevant to the sufficiency of search issue, and in respect of which OIC has no jurisdiction in any event,

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<sup>71</sup> Section 137(2) of the IP Act. The Information Commissioner also has power under section 115 to require additional searches to be conducted during an external review.

<sup>72</sup> Section 87(1) of the RTI Act.

<sup>73</sup> See the decision in *T74 and Brisbane City Council* [2021] QICmr 54 (21 October 2021) for a discussion of *SourceOne* searches and the issues involved.

<sup>74</sup> Email of 20 August 2021.

<sup>75</sup> Email of 11 October 2021.

including, for example, complaints by the applicant about duplication by Council of documents between different access applications, and the inclusion by Council in its decision of documents that fall outside the date range specified in the access application.<sup>76</sup>

63. In their submission, the applicant contended that Council should be required to conduct a further 18 categories of searches, which they listed, including searches of the email accounts of nine named Council officers, as well as searches of other records that they described as including 'UAB-Communications', 'SAP Notifications/training or related', 'HRHELP', 'Executive Summary records', 'Content Manager Records', 'OS-SSC-PAYROLL-BenefitsLeaveandTerminations', and 'Junk email files/folders of those already considered...'.<sup>77</sup>
64. The applicant also argued that, through documents released to them in other reviews, they believed that other categories of relevant documents existed and that searches of these categories were required:<sup>77</sup>

#### CATEGORY REFERENCES

*Some emails within Council (especially by December 2019) included a Category of 'z File pls'.*

*As evidence of this Category existing in documentation regarding [the applicant], you can look at the previous IP matter of [reference deleted]. In part 11 of that release of information, page 5, there is an email from [the applicant] to [name deleted] dated 11 December 2019. [The applicant] did not categorise this email to Council, so it has been categorized [sic] by Council after they received it. (This is actually, I believe, changing [the applicant's] email from the original one sent). There are multiple references to this Category in other correspondence and information.*

*[The applicant] requests that this Category 'z File pls' is included in extended/further searches by Council. Emails that included [sic] this Category would, I assume, be associated with [names deleted] (but there may be others). [The applicant] requires these documents to be provided to [them]. I assume there may reasonably be more than what has already been released previously.*

*Another Email Category includes '4 Mica to Read'. [The applicant] requires this searched as well, and the documents provided to [them]. I assume there may reasonably be more than what has already been released.*

*There may be other Categories which Council associated with [the applicant], so Council need [sic] to undertake a search to locate these also, and provide the responsive information to [the applicant].*

*Both the above email Categories were used in regard to emails associated with [the applicant].*

65. In terms of identifying specific responsive documents that they contended were missing from the documents located by Council, the applicant identified the following:
- documents relating to fortnightly reviews required to be conducted under Council's Suspension Protocol
  - paysheets/timesheets for the relevant period; and
  - notes of a telephone conversation between the applicant and Payroll on 16 December 2019.

<sup>76</sup> Where an agency, through administrative error or otherwise, gives an access decision about documents that fall outside the scope of an access application, the agency is regarded as having given administrative access to this information, rather than access under the IP or RTI Acts. As such, OIC has no jurisdiction to deal with this information on external review.

<sup>77</sup> Email of 13 December 2021.

## **Finding**

66. As noted above, where a sufficiency of search issue is raised on external review, the issues for OIC to determine are:
- whether there are reasonable grounds for believing that additional responsive documents exist in the agency's power or possession; and, if so
  - whether the searches and inquiries conducted by the agency in an effort to locate the additional responsive documents have been reasonable in all the circumstances.
67. The applicant bears the practical onus of establishing reasonable grounds to be satisfied that the agency has not discharged its obligation to locate all relevant documents and that further searches and inquiries ought reasonably be required. I do not consider they have discharged this onus in this review.
68. In respect of the list of the additional 18 categories of searches that the applicant contends ought to be carried out, they have not identified specific missing documents that it would be reasonable to expect that these searches would locate. Rather, the applicant simply speculates that these searches may result in locating additional responsive documents. That is not sufficient to discharge the onus upon them. As noted above, suspicion and mere assertion will not satisfy this onus.
69. Similarly, I am not satisfied that the applicant has established that searches of 'z File pls', '4 Mica to Read,' or any other unspecified email category ought reasonably be required. The applicant simply submits that it is reasonable to assume that there may be more responsive documents than those that have already been released. Again, such a submission is not sufficient to discharge the onus upon the applicant to establish reasonable grounds for expecting that additional responsive documents exist in Council's possession or under its control.
70. As regards the specific documents identified by the applicant as missing (at paragraph 64 above), I consider it is reasonable to expect that the targeted searches that Council conducted (as set out in paragraph 59 above) in an effort to locate all responsive documents were sufficient to identify and locate these documents if they existed in Council's possession, particularly the searches conducted of the HR branch and the Urban Amenity branch.
71. In summary, the applicant's submissions have not satisfied me that there are reasonable grounds for believing that additional responsive documents exist in Council's possession or under its control that could reasonably be expected to be located through a *SourceOne* search, or any other additional search or inquiry by Council. I am satisfied that the searches and inquiries that Council has conducted have been reasonable in the circumstances of this case.
72. I find that access to any additional documents may be refused on the basis that they are nonexistent or unlocatable under section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.

## **DECISION**

73. For the reasons set out above, I affirm Council's internal review decision by finding that:
- the Irrelevant Information may be deleted under section 88 of the IP Act
  - access to the LPP Information may be refused under section 67(1) of the IP Act and sections 47(3)(a) and 48 and schedule 3, section 7 of the RTI Act because it is exempt information; and

- access to the Workplace Information, Third Party Information and Billing Information may be refused under section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act because its disclosure would, on balance, be contrary to the public interest.
74. In addition, I find that the searches and inquiries conducted by Council in an effort to locate all responsive documents have been reasonable in all the circumstances of this review and that access to any additional responsive documents may be refused on the basis they are nonexistent or unlocatable under section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.
75. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

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S Martin  
**Assistant Information Commissioner**

**Date: 20 December 2021**

## APPENDIX

### Significant procedural steps

Date	Event
9 August 2020	OIC received the application for external review. <sup>78</sup>
27 August 2020	OIC received a submission from the applicant.
20 November 2020	OIC requested and received preliminary documents from Council.
4 December 2020	OIC accepted the application for review and received copies of the information in issue from Council.
15 December 2020	OIC conveyed a preliminary view to Council.
18 December 2020	OIC conducted a teleconference with the applicant.
10 January 2021	OIC received a submission from the applicant.
15 January 2021	OIC responded to the applicant.
12 February 2021	OIC received an email from the applicant.
16 February 2021	OIC received a response from Council.
27 May 2021	OIC conveyed a preliminary view to the applicant and asked Council to release additional information to the applicant.
14 June 2021	OIC received further submissions from the applicant, and a request for a formal decision.
20 June 2021	OIC received a request from the applicant that their various external reviews be dealt with separately.
21 June 2021	OIC re-issued its preliminary view letter.
2 July 2021	OIC received a submission from the applicant.
20 August 2021	OIC requested that Council respond to the sufficiency of search issue raised by the applicant.
7 and 27 September 2021	OIC requested that Council provide its response.
28 September 2021	OIC provided the applicant with an update.
11 October 2021	OIC received a submission from Council about sufficiency of search.
28 October 2021	OIC conveyed a preliminary view to the applicant about sufficiency of search.
13 December 2021	OIC received a submission from the applicant.

<sup>78</sup> Not identified by OIC until 19 November 2020 due to administrative system error.