



## Decision and Reasons for Decision

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Citation:	<i>F72 and Brisbane City Council</i> [2025] QICmr 47 (22 July 2025)
Application Number:	318589
Applicant:	F72
Respondent:	Brisbane City Council
Decision Date:	22 July 2025
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - whether agency has conducted reasonable searches - whether access to documents may be refused on the basis they are nonexistent - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(e) and 52(1)(a) of the <i>Right to Information Act 2009</i> (Qld)

### REASONS FOR DECISION

#### Summary

1. The applicant applied<sup>1</sup> to the Brisbane City Council (**Council**) under the former<sup>2</sup> *Information Privacy Act 2009* (Qld) (**IP Act**) for complaints about his bicycle use in specific locations, and use of several nominated libraries.<sup>3</sup>
2. Council conducted searches and was unable to locate any documents responding to the terms of the access application. Council therefore decided<sup>4</sup> that access may be refused to the requested documents on the basis that these documents are nonexistent, under section 67(1) of the former IP Act and sections 47(3)(e) and 52(1)(a) of the *Right to Information Act 2009* (Qld) (**RTI Act**).<sup>5</sup>
3. The applicant applied to the Office of the Information Commissioner for external review of Council's decision.
4. For the reasons set out below, I affirm Council's decision under section 123(1)(a) of the former IP Act.
5. In reaching this decision I have had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.<sup>6</sup> I consider a decision-maker will be 'respecting and acting compatibly with' that right and others prescribed in the HR Act, when

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<sup>1</sup> By application dated 15 December 2024 (**access application**).

<sup>2</sup> See discussion at paragraphs 6-7.

<sup>3</sup> Including metadata and within the date range of 1 January 2023 to 15 December 2024.

<sup>4</sup> Internal review decision dated 7 April 2025 – the **decision under review**.

<sup>5</sup> Section 67(1) of the former IP Act allows an agency or Minister to refuse access to a document in the same way and to the same extent the agency or Minister 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>6</sup> Section 21 of the HR Act.

applying the law prescribed in the former IP Act and the RTI Act.<sup>7</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>8</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>9</sup>

## Relevant Law

6. The law as discussed in these reasons is that as applied before 1 July 2025. On 1 July 2025 significant parts of the *Information Privacy and Other Legislation Amendment Act 2025* (Qld) (**IPOLA Act**) commenced which, among other things, repealed chapter 3 of the IP Act and therefore removed from that Act the right to seek access to documents.
7. Applications on foot before 1 July 2025, however, are to be dealt with as if the IPOLA Act had not been enacted.<sup>10</sup> The access application the subject of this review is an application of that kind. References in these reasons, therefore, to the IP and RTI Acts are to provisions of each of those Acts as in force prior to 1 July 2025.
8. The issue for determination is whether the Council was justified in refusing access to requested documents under section 67(1) of the former IP Act and sections 47(3)(e) and 52(1)(a) of the RTI Act, on the grounds those documents are nonexistent.
9. Under the RTI Act, a document is nonexistent if there are reasonable grounds to be satisfied the document does not exist.<sup>11</sup>
10. To be satisfied that documents are nonexistent, a decision-maker must rely on their particular knowledge and experience, having regard, as circumstances may require, to various factors, including the agency's structure, its practices and procedures (including its information management approaches), and considerations reasonably inferable from information supplied by an applicant.<sup>12</sup>
11. If, as here, searches for documents are conducted and relied upon by the agency, it must be shown that all reasonable steps have been taken to locate requested documents.<sup>13</sup>
12. Accordingly, the key issue to be resolved in this matter is whether all reasonable steps have been taken by the Council to locate the documents requested in the applicant's access application.

## Discussion

13. During initial processing of the access application, searches were undertaken by several Council business units at the request of Council's RTI and Privacy Unit: Customer Services, Library Services; Compliance and Regulatory Services (**CARS**); City Standards and Transport Planning and Operations (**TPO**) Branches.<sup>14</sup>

<sup>7</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>8</sup> *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>9</sup> *XYZ* at [573].

<sup>10</sup> Chapter 8, part 3 of the IP Act – see particularly sections 215 and 217, subsection (2) of the latter providing that the '*former IP Act continues to apply in relation to the application or purported application as if the amendment Act had not been enacted.*'

<sup>11</sup> Section 52(1)(a) of the RTI Act.

<sup>12</sup> See, for example, *Lester and Department of Justice and Attorney-General* [2017] QICmr 17 (16 May 2017) at [11]-[12] and *Gapsa and Public Service Commission* [2016] QICmr 6 (11 February 2016) (**Gapsa**) at [13]-[14], adopting the Information Commissioner's comments and enumeration of relevant factors in *PDE and the University of Queensland* [2009] QICmr 7 (9 February 2009) (**PDE**) at [37].

<sup>13</sup> Having regard to the factors stated in *PDE*, as they may arise: *Gapsa* at [14], citing *PDE* at [49]-[53]. See also section 137(2) of the former IP Act.

<sup>14</sup> See page 1 of Council's initial decision dated 25 February 2025.

14. Searches were also conducted by the initial decision maker themselves, of multiple Council record systems: its 'Records Management System', 'Development and Regulatory Tracking System', and 'Correspondence Management Systems'.<sup>15</sup> As the initial decision-maker concluded:<sup>16</sup>

*Council relies upon the use of the above systems for the tracking of complaints, investigations and documents. Should the requested document have existed, it should have been in one or all of the above systems.*

15. Dissatisfied with Council's initial decision, the applicant applied for internal review.<sup>17</sup> That application included, among other things, a request that Council conduct additional searches, including of business units other than those of whom inquiries were made during initial processing.
16. Further searches were undertaken on internal review, including by additional business units: City Communications and City Legal, Community Facilities and Transport for Brisbane.<sup>18</sup>
17. The internal review decision maker also explained in the decision under review why certain searches requested by the applicant were not undertaken,<sup>19</sup> before going on to explain that searches had been made of:

*...Council's electronic records management systems, using search terms, criteria and the date range taken directly from your IP Act application... search terms included:*

- *alternatives of your name ...*
- *your contact details (phone number, email address)*
- *complaints (parks, bikeways and libraries)*
- *activity (bicycle, bikeway, libraries, complaints), and*
- *location [the decision here setting out suburb and geographic locales, as specified in the access application].*

*Results from all searches undertaken, produced the same outcome - nil records.*

18. As can be seen from the above discussion, none of the multitude of searches undertaken by Council during initial processing and on internal review located any relevant documents.
19. The applicant does not accept that Council has conducted all reasonable searches. In his application for external review, the applicant contends, among other things, that:
- a. *BCC did not provide any information about its complaints management systems;*
  - b. *BCC did not demonstrate an undertaking of all reasonable steps;*
  - c. *the search parameters used by BCC limited the outputs; ...*
20. I addressed the above submissions in my letter to the applicant dated 20 May 2025, conveying my preliminary view that Council had discharged its search obligations (footnotes omitted):

*... whilst you consider Council should provide further information about its complaint management systems (which I understand you consider is required to assess the reasonableness of the searches undertaken by Council), the relevant issue in this review is whether the Information Commissioner (or delegate) considers that such information is relevant and required in order to determine whether Council has taken all reasonable steps to*

<sup>15</sup> See page 1 of Attachment A to Council's 25 February 2025 initial decision. The initial decision maker '*...implemented a variety of search terms relating to the details of ...[the access] application.*' initial decision dated 25 February 2025, Attachment A, page 2.

<sup>16</sup> Initial decision dated 25 February 2025, Attachment A, page 2.

<sup>17</sup> Internal review application dated 25 March 2025.

<sup>18</sup> Internal review decision dated 7 April 2025, pages 2-3.

<sup>19</sup> Internal review decision dated 7 April 2025, page 3.

*identify and locate the requested documents. On the information currently before me, I am not satisfied that this further information is required as the information already provided by Council about its searches is sufficient for me to, on a preliminary basis, form the view that Council's search efforts have been reasonable.*

*In assessing Council's searches, the relevant question is whether Council has taken all reasonable steps to identify and locate documents as opposed to all possible steps. Based on the information before me, it appears that searches have been conducted by Council in appropriate locations (that is, where relevant documents, if they did exist, would be expected to be stored). Council appears to have used appropriate search terms and explained why searches of certain divisions may not have been conducted, based on its knowledge of operational, administrative and record-keeping practices of those divisions and Council as a whole. Those explanations appear cogent, and I am unable to identify any objective evidence suggesting requested documents should exist, nor any further lines of enquiry or searches that I could reasonably request Council undertake.*

21. The applicant contested my preliminary view, lodging submissions in reply on 3 June 2025. In summary terms, the applicant considers Council has not taken all reasonable steps to locate documents responding to his access application and takes issue with the level of detail provided by Council regarding its searches.<sup>20</sup> The applicant further questions Council's election to undertake searches of certain business units as against others. The applicant argues Council should be required to produce further information about its searches, additional details of Council's records management and customer relationship management systems and its complaint management policies, procedures and processes.
22. The applicant's 3 June 2025 submissions contain nothing to cause me to revisit the preliminary view I conveyed to him on 20 May 2025, as set out above.
23. As noted above, Council's initial and internal review decisions explain the search efforts undertaken by it in an attempt to locate documents relevant to the access application, including advice as to why certain lines of enquiry were pursued, and others not. These explanations, premised on Council's knowledge and experience of its own structure and record-keeping practices, are to my mind objectively rational, and permit the conclusion that Council has taken all reasonable steps to locate requested documents.
24. Council's decisions are supported by internal case notes and advice provided to OIC on 3 June 2025, all of which simply confirm the reasoning and explanations conveyed in each of its initial and internal review decisions, as discussed above.
25. Also relevant is the absence of any probative material tending to suggest requested documents should exist in Council's possession or control. While Council bears the formal onus of justifying its decision,<sup>21</sup> there is a practical onus on an applicant pressing a 'sufficiency of search' case to put forward evidence pointing to the existence of requested documents<sup>22</sup> – particularly where, as here, agency search efforts have otherwise been comprehensive and logical in their scope and approach.
26. Apart from broad assertions in his application for external review of '*allegations*' about his '*use of public space*', the applicant has supplied no such evidence. He has not, for example, pointed to his being involved in any incidents on Council bikeways or in relevant libraries at specific dates or times, which might then have resulted in the creation of documents of the type requested in his access application.

<sup>20</sup> See particularly page 3 of the applicant's submissions.

<sup>21</sup> Section 100 of the former IP Act.

<sup>22</sup> *Gapsa and Public Service Commission* [2016] QICmr 6 (11 February 2016) at [15]; *Dubois and Rockhampton Regional Council* [2017] QICmr 49 (6 October 2017) at [36]; *A51 and Office of the Health Ombudsman* [2020] QICmr 17 (24 March 2020) at [15].

27. While the applicant may require additional information about Council's searches, and/or further searches themselves, as a delegate of the independent external review decision maker,<sup>23</sup> I do not. For the reasons explained above, I am satisfied that Council has taken all reasonable steps to locate documents requested by the applicant in his access application. Having regards to its structure and usual practices, procedures and information management processes,<sup>24</sup> Council has undertaken searches of various business units and interrogated a number of information management systems, using appropriate search terms reasonably likely to have identified requested documents in the event any existed.
28. I have no reason to doubt Council's explanations, and the applicant has not, as noted, put forward any evidence pointing to the existence of responsive documents or to otherwise call those explanations into question.
29. Council may refuse access to requested documents on the basis they are nonexistent.
30. Finally, in his application for external review the applicant stated '*I consider it a possibility that the documents requested are being claimed as exempt.*'<sup>25</sup> I understand this to be an argument that Council may have made its decision refusing access to documents on the basis of nonexistence as a de facto way of 'exempting' from disclosure or refusing access to documents it does actually have in its possession or under its control. There is nothing at all before me to support this assertion.

## DECISION

31. I affirm<sup>26</sup> the decision under review by finding that access to the requested documents may be refused under section 67(1) of the former IP Act and sections 47(3)(e) and 52(1)(a) of the RTI Act on the ground that they are nonexistent.
32. I have made this decision as a delegate of the Information Commissioner, under section 139 of the former IP Act.



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**Jim Forbes**  
**Assistant Information Commissioner**

**Date: 22 July 2025**

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<sup>23</sup> Ie, the Information Commissioner.

<sup>24</sup> And thus consistently with the principles summarised in paragraph 10.

<sup>25</sup> Appendix 1 to applicant's application for external review, page 11.

<sup>26</sup> Under section 123(1)(a) of the former IP Act.