Office of the Information Commissioner
Queensland

Decision and Reasons for Decision

Citation:	***B36 and Brisbane City Council* [2022] QICmr 42 (7 September 2022)**
Application Number:	**316524**
Applicant:	**B36**
Respondent:	**Brisbane City Council**
Decision Date:	**7 September 2022**
Catchwords:	**ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL TO DEAL WITH ACCESS APPLICATION - EFFECT ON AGENCY'S FUNCTIONS - request for all documents about applicant for specified time period - whether the work involved in dealing with application would, if carried out, substantially and unreasonably divert resources of agency from their use by agency in performing its functions - sections 60 and 61 of the *Information Privacy Act 2009* (Qld)**

REASONS FOR DECISION

Summary

1. The applicant applied[1] to Brisbane City Council (**Council**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) in the following terms:

> *Under the relevant* Information Privacy Act *(IP Act) and/or* Right to Information Act *(RTI Act), I hereby formally request access to* **any and all information, in any format***,* including, **but not limited to** - *written correspondence/ notes / documentation/ emails / letters, verbal/ recorded/taped communications, phone calls/notes, photos, manager's notes, files, investigations and/or reports, and meeting notes* **on or about me***, … , regarding* **Administrative Access Complaint** *and associated information, held within/by Brisbane City Council (including the Office of the Disputes Commissioner). Date range is 4 September 2020 to 17 September 2021 (inclusive).*
>
> [Applicant's emphasis]

2. The applicant identified five areas of Council that she considered would likely hold responsive documents. However, she also stated that she requested *'a general broad search of Council outside of just the above. Third parties may be involved so please advise me if this is the case'*.

3. Council purported to decide to refuse to deal with the application under section 60 of the IP Act on the grounds that to process it would substantially and unreasonably divert

[1] Dated 20 September 2021.

Council's resources in the performance of its functions. However, Council was outside the statutory timeframe in issuing the required preliminary notice under section 61 of the IP Act.[2] It was therefore deemed to have given a decision refusing access to the requested information.[3]

4. By email dated 5 January 2022, the applicant applied to the Office of the Information Commissioner (**OIC**) for external review of Council's deemed refusal of access.

5. For the reasons set out below, I set aside Council's deemed refusal of access to the requested information. In substitution, I find that Council was entitled to refuse to deal with the access application under section 60 of the IP Act.

Background

6. The applicant has made numerous access applications to Council arising out of her interactions with Council occurring either on her own behalf, or while acting as an agent for another person in relation to multiple access applications made to Council by that person.

Reviewable decision

7. The decision under review is Council's deemed refusal of access under section 66 of the IP Act.

Evidence considered

8. Significant procedural steps relating to the external review are set out in the Appendix.

9. 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). I have taken account of the applicant's submissions to the extent that they are relevant to the issues for determination in this review.[4]

10. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.[5] 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.[6] 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:[7] '*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*.*'[8]

Issue for determination

[2] The access application was compliant on 20 September 2021. The section 61 notice was issued on 27 October 2021, being business day 26.
[3] Council's purported initial decision dated 10 November 2021 and its purported internal review decision dated 7 December 2021 were invalid.
[4] Including the external review application and the submission dated 22 July 2022.
[5] Section 21(2) of the HR Act.
[6] *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].
[7] *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[8] *XYZ* at [573].

11. While Council's decision is deemed to have been a refusal of access decision, it is clear from its purported initial and internal review decisions that its intention, had the relevant timeframes been met, was to refuse to deal with the access application under section 60 of the IP Act. Those purported decisions have the force of submissions for the purposes of this external review.

12. When conducting a merits review of an agency's decision, the Information Commissioner stands in the shoes of the agency and makes the correct and preferable decision. At the conclusion of the review, the Information Commissioner must make a written decision affirming or varying the decision, or setting it aside and making a decision in substitution.[9]

13. Accordingly, the issue for determination is whether Council was entitled to refuse to deal with the access application under section 60 of the IP Act.

Relevant law

14. An individual has a right under the IP Act to be given access to documents of an agency to the extent that the documents contain the individual's personal information.[10] An agency is required to deal with an access application unless doing so would, on balance, be contrary to the public interest.[11] The only circumstances in which dealing with an access application will not be in the public interest are set out in sections 59, 60 and 62 of the IP Act.

15. Relevantly, section 60(1)(a) of the IP Act permits an agency to refuse to deal with an access application if the agency considers that the work involved in dealing with the application would, if carried out, substantially and unreasonably divert the resources of the agency from their use by the agency in the performance of its functions.

16. The phrase *'substantially and unreasonably'* is not defined in the IP Act, the *Right to Information Act 2009* (Qld), or the *Acts Interpretation Act 1954* (Qld) (**AIA**). It is therefore appropriate to consider the ordinary meaning of these words.[12] The dictionary definitions[13] of those terms relevantly provide:

    - *'substantial'* means *'of ample or considerable amount, quantity, size, etc'*
    - *'unreasonable'* means *'exceeding the bounds of reason; immoderate; exorbitant'.*

17. In deciding whether dealing with an application would substantially and unreasonably divert an agency's resources from the performance of its functions, the IP Act requires that a decision-maker:

    - must not have regard to any reasons the applicant gives for applying for access, or the agency's belief about what are the applicant's reasons for applying for access;[14] and
    - must have regard to the resources involved in:
        - identifying, locating and collating documents

[9] Section 123 of the IP Act.
[10] Section 40 of the IP Act.
[11] Section 58 of the IP Act.
[12] Section 14B of the AIA.
[13] Macquarie Dictionary Online www.macquariedictionary.com.au (accessed 5 September 2022).
[14] Section 60(3) of the IP Act.

- deciding whether to give, refuse or defer access to documents, including the resources that would have to be used in examining documents and editing documents
- conducting any third party consultations
- making copies, or edited copies of documents; and
- notifying any final decision on the application.[15]

18. While each agency's and each application's circumstances will vary, general factors that are relevant when deciding whether the diversion of resources or interference with normal operational functions is unreasonable include:

- the size of the agency[16]
- the ordinary allocation of RTI resources
- the other functions of the agency;[17] and
- whether and to what extent processing the application will take longer than the legislated processing period of 25 business days.

19. In determining whether the work involved in dealing with an application is unreasonable, it is not necessary to show that the extent of the unreasonableness is overwhelming. Rather, it is necessary to weigh up the considerations for and against, and form a balanced judgement of reasonableness, based on objective evidence.[18] Factors that have been taken into account in considering this question include:[19]

- whether the terms of the request offer a sufficiently precise description to permit the agency, as a practical matter, to locate the documents sought
- the public interest in disclosure of the documents
- whether the request is a reasonably manageable one, giving due, but not conclusive, regard to the size of the agency and the extent of its resources usually available for dealing with access applications
- the agency's estimate of the number of documents affected by the request, and by extension, the number of pages and the amount of officer time
- the reasonableness or otherwise of the agency's initial assessment and whether the applicant has taken a cooperative approach in re-scoping the application
- the timelines binding on the agency
- the degree of certainty that can be attached to the estimate that is made as to the documents affected and hours to be consumed; and in that regard, importantly whether there is a real possibility that processing time may exceed to some degree the estimate first made; and
- whether the applicant is a repeat applicant to that agency, and the extent to which the present application may have been adequately met by previous applications.

Submissions of Council

20. As per its purported initial and internal review decisions, Council submits as follows:

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[15] Section 60(2) of the IP Act.
[16] *Middleton and Building Services Authority* (Unreported, Queensland Information Commissioner, 24 December 2010) at [34]-[37].
[17] *60CDYY and Department of Education and Training* [2017] QICmr 52A (7 November 2017) at [18].
[18] *ROM212 and Queensland Fire and Emergency Services* [2016] QICmr 35 (9 September 2016) at [42] and *F60XCX and Department of the Premier and Cabinet* [2016] QICmr 41 (13 October 2016) at [90], adopting *Smeaton v Victorian WorkCover Authority (General)* [2012] VCAT 1550 (***Smeaton***) at [30].
[19] *Smeaton* at [39].

- *search results from the eight Council business areas located over 2680 pages across 533 files responsive to this application;*
- *the time commitment by Council officers on initial searches, identification, collation and partial scanning of materials (exclusive of document review by a decision maker) was in excess of 26 hours;*
- *reviewing the more than 2680 pages would involve significant work that includes:*
  - *opening the files and documents and reviewing their contents;*
  - *opening attachments and reviewing their contents;*
  - *compiling all documents into a pdf format and structuring them in a manner suitable for review;*
  - *editing pages to redact irrelevant information and information concerning Council employees or other third parties; and*
  - *assessing and applying any Schedule 3 exemptions or Schedule 4 public interest factors including potential prejudice.*
- *the time involved for me, as decisionmaker, to review each page of the located documents and marking up each page in preparation for release would, as a conservative estimate take me one minute per page amounting to approximately 45 hours*
- *the estimated time to review the material set out above is in addition to that required to compile the documents, scan, and convert all the document holdings to pdf and structure them to enable review. As our team does not include a dedicated administrative officer, that task falls to the decision maker. A realistic estimate of document preparation time would be one minute per two pages amounting to an additional 22 hours of work.*

Balanced against the time required to conduct the internal review process, additional matters I considered included:

- *the impact of the narrowed scope of the IP Act application;*
- *available delegated resources to handle IP Act and RTI Act internal reviews;*
- *the scope and volume of other work within the City Legal Corporate Governance and Commercial team;*
- *the volume of internal review applications completed this year; and*
- *the other workload within the team and the existing internal review matters requiring decision in December 2021.*

Your narrowing of the scope of your application to exclude emails from your own email address that were cc'ed to your account is of little effect in reducing the work involved as each document is still required to be reviewed to assess if it can be excluded.

Internal review workload

Council has delegated the authority for internal review decisions pursuant to s.94(2) of the IP Act to nominated personnel within the City Legal Corporate Governance and Commercial team that has a current staffing compliment of seven . The availability of a decision maker for internal review matters is further limited by the legislative requirement for that person to possess a certain level of seniority to the original decision maker and of course, by having the requisite experience within the team to conduct the reviews.

Internal review applications are but one part of the specialist work performed by the City Legal Corporate Governance and Commercial team that includes significant Council projects including review, amendment and drafting of Council local laws, review of Council delegations and development of a new delegation register.

These key projects are in addition to the 761 new file matters allocated to our team for the 2021 year to 30 November 2021. Of the 761 new matters allocated, 29 have been internal review matters. Of those 29 matters, three of those internal review applications remain current with the team and all three decisions are due on 8 December 2021. Two of the internal review

applications are from you. Your other internal review claims inadequacy of search requiring recommencement of the search, collation and review process.

In light of the significant workload within our team and the competing internal review decision deadlines, the commitment of one legal officer singularly to one file for more than 9 working days to the exclusion of all other work is unsustainable and poses an unreasonable and substantial impact on Council resources.

Submissions of the applicant

21. To the extent that it is necessary for the prerequisites in section 61 of the IP Act to be satisfied before a decision to refuse to deal with an access application is made under section 60 of the IP Act, the purported section 61 notice issued by Council to the applicant[20] satisfies these prerequisites. I have noted the applicant's response to Council, including her suggested narrowing of her application as follows:[21]

> *… **I am prepared to narrow the scope** of this IP application by omitting emails that have been CCd to my email address of […] – PROVIDED THAT these emails are duplicated such as when I send emails to Council and then CC my own email address of […]*
>
> *This would not include emails where I am CCd in, for example, emails that are not from my email address of […].*
>
> [Applicant's emphasis]

22. In her submission to OIC dated 22 July 2022, the applicant focused on arguments as to why disclosure of the responsive information would be in the public interest:

> *I would like to remind the OIC that the* Administrative Action Complaint *(or AAC) with Council is an **investigation** complaint. I lodged my complaint with Council and it was referred as an Administrative Action Complaint. This AAC* investigation *was going for 3 months when the investigation officer suddenly went on leave, and it was left to the Disputes Commissioner (Ms Stefanie Nesbitt) to correspond with me via email.*
>
> *It was Council, including Ms Nesbitt and the CEO, who advised me I could go to the Queensland Ombudsman's Office in relation to any suspected Administration Action failure.*
>
> *As you would be aware, taking a complaint to an external complaint body (even to the CCC), requires substantive evidence. The type of particular evidence which may (most likely, being an investigation) come from information released under privacy legislation. The object of privacy legislation, to my understanding, is to give a right of access to information in the government's possession or under the government's control unless, on balance, it is contrary to the public interest to release it.*
>
> *I believe, reasonably, that with-holding investigative information prejudices my right to administration of justice.*
>
> *Clearly, Council often writes (to me) about taking a complaint to the Queensland Ombudsman, or lodging review with the OIC, or going to the CCC (if you're unhappy with the outcome of their investigation or review). Yet I am witnessing more and more the refusal (or outright unnecessary delay or reduction in information being released) to release my personal information (including investigative information).*

[20] Dated 27 October 2021.
[21] Dated 7 November 2021.

I genuinely believe I have suffered a wrong, and without access to the investigative file of the AAC (and associated information), then I am unable to be sure of any remedy/external complaint or investigation which may be available under the law (as I genuinely am unable to decide on what information to go over if I don't have access to it!). I believe I have demonstrated my willingness, determination and potential/ability (despite disability/impairment) to lodge complaints, so it's not hard to see that I would go down the course of action of further external complaints (therefore it is reasonable that I would pursue a remedy). It is therefore obvious that disclosure of the information I am seeking from Council in this matter would greatly assist myself to pursue a remedy (ie Queensland Ombudsman, or even the CCC) or to evaluate whether a remedy was available, or worth pursuing.

The AAC was not finalised, but prematurely closed. There is a concern from the Disputes Commissioner herself about a conflict of interest *connection. I raised matters with a Divisional Manager who appears to have suddenly disappeared from Council after I raised concerns of some of her (questionable) information in her emails to me.*

The reason I seek access to emails I have sent to, as well as emails I have received from, Council, in relation to the AAC is to ensure Council received (and perused/considered) all the relevant information provided, as well as the emails and information they sent to me are actually all contained *in the investigation file of my AAC.*

I also have a current, ongoing ***Queensland Human Rights Commission*** *investigation, which is at a* ***conciliation*** *stage. Some information on the AAC investigative file may be information that I could potentially submit to the QHRC as part of this conciliation process. …*

I have had issues accessing investigative/complaint files including the CMP and Ethical standards investigations. Council refused to release them to me via administrative *releases, and I then had issues applying for information via Council's RTI Unit. Clearly this continues to be an issue with accessing the AAC investigation information and associated material.*

With respect, I am concerned that Council may be deliberately trying to with-hold certain investigative information from me in an attempt to suppress and subvert information being provided to me via the privacy request. I am also concerned that delaying sufficiently long enough to receive information from my privacy request, puts me out of time to lodge concerns with external complaint bodies. …

[Applicant's emphasis]

Findings

What work would be involved in dealing with the access application?

23. Council advised that preliminary search inquiries from eight Council business areas had located over 2680 potentially responsive pages.

24. Based on this number of pages, Council estimated that 22 hours of administrative work would be involved in:

- searching for, extracting and reviewing the documents for relevance
- collating, scanning and compiling the documents into a pdf format for review by a decision-maker; and
- editing/redacting the documents in preparation for release.

25. Council's estimate was based upon one minute per two pages. I consider this to be a reasonable basis for the estimate. I am satisfied that, while an agency is required to consider how much time an access application is likely to take to process, a precise assessment is not required. As such, in cases where an assessment may, in itself,

substantially and unreasonably divert the agency's resources, an estimate is acceptable.

26. Council also estimated that 45 hours would be required to be spent by a decision-maker in:

- reviewing the documents and assessing them against the provisions of the IP Act; and
- marking up the documents to reflect the decision.

27. Council's estimate was based upon one minute per page, which I consider to be a conservative estimate. It is reasonable to expect that, given the nature of the access application as a request for complaint documents, responsive documents would likely contain the personal information of third parties. As such, I consider the time needed to review, consider and redact the personal information of other persons is likely to be significantly more than one minute. In my view, a more reasonable estimate is two minutes per page. This equates to a further 90 hours of work involved in processing the access application.

28. In addition, I note that Council did not include an estimate of time needed to conduct any third party consultations, nor to prepare a written decision. I consider it is reasonable to estimate a further five hours would be required to complete these tasks, given the volume of documents.

29. In summary, I am satisfied that approximately 117 hours of work[22] would be required to process and decide the applicant's access application.

Would the impact on Council's functions be substantial and unreasonable?

30. Yes. I am satisfied that processing the access application would substantially and unreasonably impact Council's functions, for the reasons set out below.

31. Based on the estimate set out above for compiling, reviewing and editing the responsive emails, as well as making and issuing a decision, the processing of the application would involve approximately 117 hours of work. This equates to one Council officer working on the access application for almost 17 business days,[23] or over three weeks, to the exclusion of all other functions.

32. In its submissions, Council focused on the available resources in its City Legal division (which is responsible for conducting internal reviews of IP Act/RTI Act access decisions), and the competing work priorities of that division (see paragraph 20 above). Based on that information, and the wide range of other legal work for which the division is responsible, I am satisfied that spending nearly 17 business days to deal with one application would have a substantial and unreasonable impact on those resources.

33. However, on the basis that Council's decision was, in fact, a deemed refusal of access (see paragraph 3 above), I have also considered the impact on the resources of Council's RTI unit were the application required to be processed by that unit.

34. I discussed the resourcing of Council's RTI unit in detail at paragraphs 40 to 46 of my decision in *T74 and Brisbane City Council* [2021] QICmr 54 (21 October 2021)[24] and I

[22] 22 + 90 + 5.
[23] Based on a seven hour working day.
[24] Issued to the applicant who was acting as agent for the access applicant in that matter.

rely upon the observations and findings made there. While I do not have to hand the current number of access applications that Council is processing, previous years have shown that Council is an extremely busy RTI unit that receives a high volume of access applications relative to other agencies.[25] OIC's own interactions with Council indicate the high volume of work required to be processed by the unit.

35. Accordingly, having regard to information previously provided by Council about the staffing of its RTI Unit and the high volume of applications it receives each year, I am satisfied that spending 17 days to process one application would have a substantial and unreasonable impact on Council's resources.

36. I have had regard to the factors listed at paragraph 19 above to the extent that they are relevant to the circumstances of this case.

37. I acknowledge, as noted at paragraph 21 above, that the applicant attempted to narrow the scope of her application by excluding emails sent from her email address, provided that these emails were duplicates (for example, emails that the applicant sent to Council and where she copied in her email address). The applicant did not exclude emails where she was copied in, but which were not sent from her email address.

38. I agree with Council's position that this concession is of little practical effect in reducing the work involved in processing the application because a review of each email would still be required to decide whether or not it can be excluded on the terms identified by the applicant.

39. As noted, the applicant's submissions focus solely on the public interest in disclosure of the requested information, rather than any arguments concerning the work involved in processing the application and its impact on Council's resources. I accept that the public interest in disclosure is one relevant factor to be taken into when considering the application of section 60 of the IP Act (see paragraph 19 above). However, in terms of the applicant's submission that she requires access to the requested information in order to make a complaint to the Queensland Ombudsman (**QO**), or because it may possibly be relevant to a complaint that she states she is pursuing with the Queensland Human Rights Commission (**QHRC**), I am not satisfied that she requires access to the information in order to make those complaints. If the applicant considers that Council has engaged in maladministration, she is free to make her complaint to the QO which will assess her complaint and request relevant information from Council if necessary. Similarly, if the applicant considers that Council has breached her human rights in dealing with her complaint, she can raise this matter with the QHRC which will, again, seek relevant information from Council if necessary.

40. In summary, having regard to all relevant factors listed in paragraph 19 above, I am satisfied that requiring an officer of Council in either the RTI unit or the City Legal division to work on processing the applicant's access application, to the exclusion of all other work, for a period of over three weeks, would significantly impact Council's ability to process other access applications/applications for internal review, and attend to its other local government functions, resulting in a substantial and unreasonable diversion of Council's resources.

[25] Pages 94-96 of Department of Justice and Attorney-General, *'*Right to Information Act 2009 *and* Information Privacy Act 2009 *Annual Report 2020-21'* at <rti.qld.gov.au> show that, in the 2020-21 financial year, Council received 544 RTI and IP applications; the next highest number of applications were received by City of Gold Coast (173) and Moreton Bay Regional Council (107), with all other local governments receiving fewer than 100 access applications.

41. For the reasons set out above, I am satisfied that the work involved in dealing with the access application would, if carried out, substantially and unreasonably divert Council's resources from their use in the performance of Council's functions.

DECISION

42. I set aside Council's deemed refusal of access. In substitution, I find that Council was entitled to refuse to deal with the applicant's access application under section 60 of the IP Act.

43. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

A Rickard
A/Right to Information Commissioner

Date: 7 September 2022

APPENDIX

Significant procedural steps

Date	Event
5 January 2022	OIC received the application for external review.
6 January 2022	OIC requested that Council provide the initial documents.
10 January 2022	Council provided the initial documents.
10 February 2022	OIC advised the applicant and Council that the application for review had been accepted.
1 April 2022	OIC updated the applicant.
19 May 2022	OIC communicated a preliminary view to the applicant.
8 June 2022	The applicant requested and was granted an extension of time to 7 July 2022 in view of her disabilities.
15 June 2022	The applicant was granted a further extension of time to 22 July 2022.
22 July 2022	OIC received submissions from the applicant.
26 August 2022	The applicant requested an update.