



## Decision and Reasons for Decision

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**Citation:** *P52 and Fraser Coast Regional Council [2024] QICmr 7 (19 February 2024)*

**Application Number:** 317326

**Applicant:** P52

**Respondent:** Fraser Coast Regional Council

**Decision Date:** 19 February 2024

**Catchwords:** ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST INFORMATION - access to personal information of a committee of private individuals - personal information and right to privacy - whether disclosure of information would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the *Right to Information Act 2009 (Qld)*

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT OR UNLOCATABLE DOCUMENTS - request for report versions - whether agency has taken all reasonable steps to locate documents - whether access to further documents may be refused on the basis documents do not exist or cannot be located - sections 47(3)(e) and 52 of the *Right to Information Act 2009 (Qld)*

### REASONS FOR DECISION

#### Summary

1. The applicant applied<sup>1</sup> to Fraser Coast Regional Council (**Council**) for access to a 2016 report (**Report**) and related documents under the *Right to Information Act 2009 (Qld)* (**RTI Act**). The Report was requested by Council and created by the Bauple Economic and Community Development Committee (**Community Committee**) which comprised members of the community external to Council.
2. Council located eleven documents and decided<sup>2</sup> to release four of the documents in full and partially release the remaining seven documents subject to the redaction of third-party personal information.
3. The applicant applied for internal review.<sup>3</sup> Council decided to affirm its original decision.<sup>4</sup>

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<sup>1</sup> On 18 April 2023.

<sup>2</sup> On 20 April 2023.

4. The applicant applied<sup>5</sup> to the Office of the Information Commissioner (**OIC**) for external review of Council's decision on the basis that Council did not identify all relevant documents.
5. Additional information was located and disclosed by Council to the applicant during the external review process. The applicant did not accept OIC's view regarding the information refused by Council and its searches. For the reasons explained below, I vary Council's decision and find it may refuse access to the information remaining in issue on the ground that its disclosure would, on balance, be contrary to the public interest.<sup>6</sup> I also find Council has undertaken all reasonable steps to locate responsive documents and may refuse access to further documents on the basis they are non-existent or unlocatable.<sup>7</sup>

## Background

6. On external review the applicant identified documents he considered existed but had not been located by Council in response to his access application, including a second report by a Community Committee member (**Second Report**). After further searches, Council located the Second Report and related documents which it released to the applicant<sup>8</sup> subject to the redaction of third-party personal information.
7. Following Council's release of the Second Report and related documents to the applicant, he contended that a third report existed (**Third Report**) but had not been located by Council.<sup>9</sup> The applicant did not provide any supporting evidence for this contention regarding the Third Report, in contrast to his submissions to OIC regarding the existence of the Second Report, in which the applicant provided a copy of the Second Report. The applicant also contested OIC's view about disclosure of the information refused by Council.
8. During the external review the applicant sent correspondence to Council on a range of issues and copied OIC into that correspondence. I have taken into account all information provided by the applicant to OIC in relation to the reviewable issues in this review.

## Reviewable decision

9. The decision under review is Council's internal review decision dated 12 May 2023.

## Evidence considered

10. Evidence, submissions, legislation and other material I have considered in reaching this decision are set out in these reasons (including footnotes and the Appendix).
11. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to recognition and equality before the law and the right to seek and receive information.<sup>10</sup> I consider a decision-maker will be '*respecting and acting compatibly with*' these rights and others prescribed in the HR Act, when applying the law

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<sup>3</sup> On 3 May 2023.

<sup>4</sup> On 12 May 2023.

<sup>5</sup> On 23 May 2023.

<sup>6</sup> Sections 47(3)(b) and 49 of the RTI Act.

<sup>7</sup> Sections 47(3)(e) and 52 of the RTI Act.

<sup>8</sup> On 6 October 2023.

<sup>9</sup> By email on 12 November 2023.

<sup>10</sup> Sections 15 and 21 of the HR Act.

prescribed in the RTI Act.<sup>11</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>12</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.'*

### Information in issue

12. The information refused by Council (**Information in Issue**) appears on 13 pages<sup>13</sup> and includes names, email addresses, mobile telephone numbers of other individuals, as well as their opinions expressed in email correspondence.

### Issues for determination

13. The issues for determination are:
- whether Council has taken all reasonable steps to locate documents and may refuse access to further documents on the basis they are nonexistent or unlocatable;<sup>14</sup> and
  - whether access to the Information in Issue may be refused under the RTI Act because its disclosure would, on balance, be contrary to the public interest.<sup>15</sup>

### Nonexistent or unlocatable documents

#### Relevant law

14. Access to a document may be refused if the document does not exist or cannot be located.<sup>16</sup> To be satisfied that a document does not exist, various key factors will be relevant, including, but not limited to:<sup>17</sup>
- the administrative arrangements of government
  - the structure of the respondent agency
  - the respondent agency's functions and responsibilities
  - the respondent agency's practices and procedures (including but not exclusive to its information management approach); and
  - other factors reasonably inferred from information supplied by the applicant or the agency's submissions including the nature and age of the requested document/s and the nature of the government activity to which the request relates.
15. To determine whether a document exists, but is unlocatable, the RTI Act requires consideration of whether there are reasonable grounds to be satisfied that the

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<sup>11</sup> *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111]. OIC's approach to the HR Act set out in this paragraph has recently been considered and endorsed by QCAT Judicial Member McGill in *Lawrence v Queensland Police Service* [2022] QCATA 134, noting that he saw 'no reason to differ' from our position ([23]).

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

<sup>13</sup> 7 pages in the original documents (**Original Documents**) located by Council (pages 1, 17, 33, 49, 65, 81 and 113 of 163) and 6 pages in the additional documents (**Additional Documents**) located by Council on external review (pages 1, 26, 42, 43, 56 and 57 of 57).

<sup>14</sup> Section 47(3)(e) and 52 of the RTI Act.

<sup>15</sup> Section 47(3)(b) of the RTI Act.

<sup>16</sup> Sections 47(3)(e) and 52(1)(a) and 52(1)(b) of the RTI Act.

<sup>17</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).

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.<sup>18</sup>

16. When proper consideration is given to relevant factors, it may not be necessary for searches to be conducted. However, if searches are relied on by an agency to justify a decision that the documents do not exist, all reasonable steps must be taken to locate the documents. What constitutes reasonable steps will vary from case to case as the search and enquiry process an agency will be required to undertake will depend on which of the key factors are most relevant in the particular circumstances.<sup>19</sup>
17. The Information Commissioner's external review functions include investigating and reviewing whether agencies have taken reasonable steps to identify and locate documents applied for by applicants.<sup>20</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>21</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 identify and locate responsive documents.<sup>22</sup> Suspicion and mere assertion will not satisfy this onus.<sup>23</sup>

### **Findings**

18. In considering whether an agency has taken all reasonable steps to identify the requested document, I must firstly consider the terms of the applicant's request ie. the access application, as that dictates the appropriate range of searches an agency may reasonably be expected to conduct. The terms of this access application are:
  - *Who delivered the report and how, when, where was it registered in the FCRC registry/documentation system.*
  - *Who directed amendments to the Nov 16 report and how were those directions provided including (notes, records of telecom/emails, etc).*
  - *Authorities for any changes from the Nov 16 report before #3218064 was finalised.*
  - *What FCRC document number was given to the November 2016 BECDC Report by FCRC Registry on receipt.*
19. The above scope sets out several questions regarding the Report, however, it is reasonable to deduce, from these questions, that the applicant is seeking all Report versions, as well as any correspondence regarding changes to Report versions.
20. In this review, the applicant submits that a further version of the Report—a Third Report—exists and has not been located by Council. If such a document existed, I am satisfied that it falls within the scope of the applicant's request above. The applicant made the following submissions regarding the missing Third Report:<sup>24</sup>

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<sup>18</sup> *Pryor* at [20]-[21].

<sup>19</sup> See the findings of His Honour Justice McGill SC in *Webb v Information Commissioner* [2021] QCATA 116 at [5]-[6] (**Webb**).

<sup>20</sup> Section 130(2) of the RTI Act. The Information Commissioner also has power under section 102 of the RTI Act to require additional searches to be conducted during an external review.

<sup>21</sup> Section 87(1) of the RTI Act.

<sup>22</sup> See *Gapsa and Public Service Commission* [2016] QICmr 6 (11 February 2016) at [15].

<sup>23</sup> *Parnell and Queensland Police Service* [2017] QICmr 8 (7 March 2017) at [23]; *Dubois and Rockhampton Regional Council* [2017] QICmr 49 (6 October 2017) at [36]; *Y44 and T99 and Office of the Public Guardian* [2019] QICmr 62 (20 December 2019) at [38].

<sup>24</sup> Email received on 12 November 2023.

It has been established that there were **three Reports** and only one “Community Committee (tampered) Report” was presented to Council (i.e. the government body that resolved to obtain a report from a Community Committee...

The three reports evidently are:

1. The “one person” report with a Community Committee’s members name [redacted];
2. The “other (untampered) report” from the Community Committee which has not been disclosed by Council (names unknown); and
3. The “other (tampered) report” from the Community Committee which has been disclosed by Council but only after it had been tampered with, and then, approved by the CEO for presentation to Council.

...if one “Community Committee” Report can be identified by a publicly known committee name, there ought to be no reasonable basis on which to not disclose the **names** and, provide **an unedited version** of the other Community Committee Report (2. above)...

[sic]

21. Council located two versions of the Report in its initial searches and decision and disclosed both to the applicant.<sup>25</sup> The applicant raised concerns that Council had not located all versions of the Report and provided OIC with a copy of a report version that had not been identified by Council—the Second Report—as supporting evidence. OIC provided the Second Report to Council and required it to undertake further searches to locate the Second Report and any other associated documents, including, any further versions of the Report.
22. The applicant’s submissions regarding a missing report version were evidenced by the Second Report, and, at that point in the review, OIC had formed the view that Council had not undertaken all reasonable searches in response to the access application. As outlined above, Council undertook further searches and located the Second Report and some further emails, which it disclosed to the applicant subject to some minor redactions of third-party personal information of community members. It is important to acknowledge that Council’s initial searches did not identify this Second Report, and this document was only identified through further searches conducted on external review. Accordingly, it is understandable why the applicant contends in this external review that Council did not take all reasonable steps to locate documents in response to his access application.
23. However, since the commencement of this external review, Council has now conducted the following searches for responsive documents:<sup>26</sup>
  - eDocs – a Council employee searched its Electronic Document Management System using the search term ‘Bauple’ and located the ‘Final Report’ with document reference 3247601
  - Outlook – searches were conducted of all Councillor and Council employee email accounts using the search term ‘Bauple AND Committee’ in the period 1 September 2016 to 1 December 2016; and
  - Outlook – searches of all Councillor and Council employee email accounts using the email address of a Committee member in the period 1 November 2016 to 28 February 2017; and using the search terms ‘exploring AND economic AND

<sup>25</sup> The Report version at pages 50-64 of 163 of the Original Documents has some information removed on page 15 of the Report (duplicated at pages 66-80, 82-96, 98-112, 114-128, 130-144 and 146-160), compared to the version of the Report at pages 2-16 of 165 of the Original Documents (duplicated at pages 18-32 and 34-48).

<sup>26</sup> On 14 September 2023.

*community AND development AND bauple*’ in the period 1 June 2016 to 1 December 2017.

24. The applicant asked OIC and Council to confirm that *‘every RTI document has been provided including all emails from all sources and the chronology attached does represent what you provided.’*<sup>27</sup> It is not OIC’s role on external review to confirm that Council, or any agency, has provided every document *‘including all emails from all sources’*. This is not the test required by the RTI Act. As decision-maker, I must answer the question of whether Council has taken all reasonable steps to identify and locate documents, as opposed to all possible steps.<sup>28</sup> This means considering the terms of the access application, the applicant’s submissions, the located documents, and Council’s searches (both initially and additionally on external review). I have also had regard to Justice McGill’s comments<sup>29</sup> that a finding that all reasonable steps have been taken by an agency is open to reach *‘even if, at least in theory, further and better searches might possibly disclose additional documents.’*<sup>30</sup> In reaching this decision, I cannot guarantee to the applicant that *‘every RTI document’* and *‘all emails from all sources’* have been provided, as he requests.
25. The RTI Act requires that an agency has taken all reasonable steps to locate documents responding to the access application.<sup>31</sup> It is my finding that the searches conducted by Council have been comprehensive and reasonable with reference to the terms of the access application, and Council’s record keeping practices. If further documents existed, including further versions of the Report, I am satisfied they would have been located by the Outlook searches—noting the search terms and the fact that Council employee and Councillor accounts were searched—as well as Council’s searches of its Electronic Document Management System.
26. Neither Council nor the applicant have identified any further areas it would be reasonable to search, and on the information before me, I am unable to independently identify any further locations or reasonable enquiries. Accordingly, I find that Council has now taken all reasonable steps to locate documents responding to the terms of the access application and may refuse access to further documents on the basis they are nonexistent or unlocatable.<sup>32</sup>
27. While the applicant continues to contend that a version of the Report remains missing, having considered the documents located and disclosed by Council, I am not satisfied this is the case. I note that three versions of the Report have been located by Council and fully disclosed to the applicant.
28. Firstly, the Report submitted by the Community Committee to Councillor Anne Maddern on 21 November 2016<sup>33</sup> appears to be the Report tabled by Council at its ordinary meeting on 1 December 2016 for *‘further consideration by Council’*.<sup>34</sup> It was disclosed to the applicant following Council’s decision on his access application on 20 April 2023.<sup>35</sup> The applicant has described this as *‘[t]he “other (tampered) report” from the Community Committee which has been disclosed by Council but only after it had been tampered with, and then, approved by the CEO for presentation to Council.’*<sup>36</sup>

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<sup>27</sup> Email received on 10 October 2023.

<sup>28</sup> *S55 and Queensland Police Service* [2023] QICmr 3 (30 January 2023) at [23].

<sup>29</sup> *Webb*.

<sup>30</sup> *Webb* at [6].

<sup>31</sup> Section 52(1) of the RTI Act.

<sup>32</sup> Sections 47(3)(e) and 52(1) of the RTI Act.

<sup>33</sup> With covering email, at pages 49-64 of 163 of the Original Documents.

<sup>34</sup> < [Fraser Coast Regional Council Ordinary Meeting 8 February 2017](#) > (page 46, accessed on 19 February 2024) .

<sup>35</sup> Pages 50-64 of 163 of the Original Documents. See footnote 25.

<sup>36</sup> Email received on 12 November 2023.

29. The Second Report, or as described by the applicant the *'one person Report'*<sup>37</sup>—submitted by one Community Committee member to Councillor Anne Maddern on 17 November 2016<sup>38</sup>—was located by Council following additional searches on external review. Council disclosed the Second Report to the applicant on 6 October 2023.
30. The Third Report—which the applicant submitted had not been disclosed by Council and described it as the *"other (untampered) report" from the Community Committee which has not been disclosed by Council (names unknown)*<sup>39</sup>—was submitted by the Community Committee to Councillor Anne Maddern on 17 November 2016.<sup>40</sup> From my assessment, the report described by the applicant is likely to be the other report which was located by Council and disclosed along with the Original Documents following its decision on 20 April 2023.<sup>41</sup> It contains additional information on page 15 of 15 under the heading *'Interviews'*. The names of the Community Committee members are listed on page 4 of 15. While the applicant contends that a further version of the Report is missing, I consider that this document is likely to be the Third Report that the applicant is seeking.

### **Contrary to public interest information**

#### ***Relevant law***

31. The RTI Act's primary object is to give a right of access to information in the government's possession or under the government's control.<sup>42</sup> This right is subject to other provisions of the RTI Act,<sup>43</sup> including grounds on which access may be refused.<sup>44</sup> One of these grounds (which are to be interpreted narrowly and with a pro-disclosure bias)<sup>45</sup> permits an agency to refuse access to a document to the extent the document comprises information the disclosure of which would, on balance, be contrary to the public interest.<sup>46</sup>
32. The steps to be followed in determining whether disclosure of information would, on balance, be contrary to the public interest, are prescribed in section 49 of the RTI Act. In summary, a decision-maker must:
- identify any irrelevant factors and disregard them
  - identify relevant public interest factors favouring disclosure and nondisclosure
  - balance the relevant factors favouring disclosure and nondisclosure; and
  - decide whether disclosure of the information would, on balance, be contrary to the public interest.
33. Schedule 4 of the RTI Act contains non-exhaustive lists of factors that may be relevant in determining where the balance of the public interest lies in a particular case. I have not identified or considered any irrelevant factors in this matter.

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<sup>37</sup> Ibid.

<sup>38</sup> With covering email, at pages 42-55 of 57 of the Additional Documents.

<sup>39</sup> Email received on 12 November 2023.

<sup>40</sup> See pages 1-48 of the Original Documents.

<sup>41</sup> Ibid.

<sup>42</sup> Section 3(1) of the RTI Act.

<sup>43</sup> Section 23(1) of the RTI Act.

<sup>44</sup> Section 47 of the RTI Act.

<sup>45</sup> Section 47(2)(a) of the RTI Act.

<sup>46</sup> Sections 47(3)(b) and 49 of the RTI Act.

## Findings

### Applicant's submissions

34. The applicant provided submissions to OIC regarding Council's searches and refusal of access to the Information in Issue. I have extracted the key submissions below regarding the information refused by Council but have considered all of the submissions provided by the applicant:

*The above response is underpinned by the Preamble to the ROI Act Sect 1 (a), (b), (c), (d), (e), (f) and (g) and Parliament's specific intention Para 3. To not provide this information would be contrary to Parliament's intention. It would be absurd to argue provision of this information is contrary to the public interest when the Council resolution is for a Community Report for the betterment and sustainability of the community..... I trust you can comply with Parliament's intention and obtain the Report (#2) which the FCRC is refusing to provide.<sup>47</sup>*

...

*It is accepted private information ought not to be made public, but the dissenting economic option views of committee members ought to be transparent to members of the Bauple Community; that is in the public interest.*

*Given these circumstances it is astounding you can come to a preliminary view that it is "not in the public interest to disclose, due to the strong privacy protections afforded to protecting third party personal information".*

*Please reconsider why "personal opinions" ought not to be made public given the wording of Council's resolution. "Personal information" is quite distinct from "personal opinion", especially when LGA principles direct persons making such decisions must perform in accordance with LGA principles; this demands transparency.<sup>48</sup>*

[sic]

### Factors favouring disclosure

35. There is a broad public interest in Council accountability and disclosing information about Council's processes which could reasonably be expected to enhance this public interest consideration.<sup>49</sup> In considering the weight that should be afforded to this public interest factor, I have considered the extent to which Council has discharged its obligations of accountability and transparency by the information already disclosed, as well as the nature of the Information in Issue – which is limited to the personal information<sup>50</sup> of private individuals. The Information in Issue does not show Council's decision-making process about issues related to the Bauple community.
36. Relevantly, Council has fully disclosed the versions of the Report, and Councillor and Council email correspondence and details, and disclosed significant parts of the emails from Community Committee members to the recipient Councillors. I am satisfied Council has significantly discharged the public interest by its disclosure of this information and consider Council's accountability and transparency will only be

<sup>47</sup> Email received on 12 November 2023.

<sup>48</sup> Email received on 4 October 2023.

<sup>49</sup> Schedule 4, part 2, item 1 of the RTI Act.

<sup>50</sup> Schedule 5 of the RTI Act and section 12 of the *Information Privacy Act 2009* (Qld) (**IP Act**) defines 'personal information' as 'information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.'



marginally advanced by disclosure of the Information in Issue. Accordingly, I afford low weight to this factor favouring disclosure.

37. The applicant submitted that disclosure of the Information in Issue is required to establish whether breaches of the *Local Government Act 2009* (Qld) and *Public Records Act 2002* (Qld) have occurred. I have therefore considered whether disclosure of the Information in Issue could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official; or reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct.<sup>51</sup>
38. Throughout his submissions, the applicant has outlined allegations of misconduct by Councillors and Council employees, including unlawful ‘tampering’ with a public record.<sup>52</sup> I make no finding in this regard and note there is no evidence before me that Council, any Council employee, or any Councillor has unlawfully altered a public record. What I must consider in this case is whether disclosure of the specific Information in Issue itself could reasonably be expected to reveal or substantiate any misconduct or negligent, improper or unlawful conduct; or allow or assist inquiry into possible deficiencies of conduct or administration. There is no evidence before me to suggest that disclosing the Information in Issue—which entirely comprises the personal information of *private* individuals—would reveal any misconduct, or negligent, improper or unlawful conduct, or allow inquiry into any possible deficiencies of conduct, of Council, any Council employees, any Councillors or any other government agency or official. I am satisfied that neither of these factors are enlivened by the Information in Issue and no weight applies to these factors.
39. The applicant has submitted that disclosure of the Information in Issue is a matter of ‘*economic public interest*’ and ‘*the dissenting economic option views of committee members ought to be transparent to members of the Bauple Community*’.<sup>53</sup> I have therefore considered whether disclosure of the Information in Issue could reasonably be expected to contribute to positive or informed debate on important issues<sup>54</sup> or ensure effective oversight of expenditure of public funds.<sup>55</sup>
40. As noted above, the information located and disclosed by Council includes all versions of the Report. The Second Report was submitted as a sole person report to Councillor Anne Maddern and was noted as having a ‘*narrower but more intense focus*’.<sup>56</sup> It provides a different viewpoint to the other two versions of the Report. The ‘*dissenting economic option views of committee members*’ have therefore been disclosed to the applicant through the three versions of the Report. I am satisfied disclosure of the specific Information in Issue is not capable of contributing to positive or informed debate on important issues nor ensuring oversight of expenditure of public funds. Accordingly, I have not attributed any weight to either of these factors in favour of disclosure.
41. I have not identified any other factors favouring disclosure of the Information in Issue.<sup>57</sup>

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<sup>51</sup> Schedule 4, part 2, items 5 and 6 of the RTI Act.

<sup>52</sup> In his external review application on 23 May 2023 the applicant stated ‘*The Report never got to Council before it was tampered with by a Council Officer. This is in clear breach of the LGA: Section 4 and 13 refers.*’

<sup>53</sup> Email received on 4 October 2023.

<sup>54</sup> Schedule 4, part 2, item 2 of the RTI Act.

<sup>55</sup> Schedule 4, part 2, item 4 of the RTI Act.

<sup>56</sup> Email from Ms Maddern on 25 November 2016 to the sole Community Committee member, located at page 57 of 57 of the Additional Documents.

<sup>57</sup> For example, disclosure of the Information in Issue could not reasonably be expected to contribute to the protection of the environment or contribute to the enforcement of the criminal law (schedule 4, part 2, items 13 and 19 of the RTI Act).

## Factors favouring nondisclosure

42. As noted above, the Information in Issue is entirely the personal information<sup>58</sup> of private individuals (as distinct from government employees or elected representatives). The RTI Act recognises that disclosing an individual's personal information to someone else can reasonably be expected to cause a public interest harm and prejudice the protection of an individual's right to privacy.<sup>59</sup> As the Information in Issue is entirely the personal information of individuals other than the applicant, these two public interest factors favouring nondisclosure are enlivened for consideration.
43. In considering the weight that should be afforded to the personal information public interest harm factor, I consider it relevant that the Community Committee members are not government employees or elected representatives. While the identities of the Community Committee members and the Report and Second Report have been fully disclosed to the applicant, some of the opinions or feelings expressed in 2016 by some of the Committee members—and the identity of the members expressing those opinions—are not known to the applicant. I note the applicant has surmised the subject of the opinions or feelings expressed in the Information in Issue, and nothing in this decision should be taken as confirmation of his assumptions. Both the Report and Second Report refer to historical disputes;<sup>60</sup> and the Report acknowledges a strained relationship between Council and the small community<sup>61</sup> of Bauple.<sup>62</sup> Given the circumstances of this case, I afford high weight to this public interest harm factor.
44. The concept of 'privacy' is not defined in either the IP Act or the RTI Act. It can, however, essentially be viewed as the right of an individual to preserve their 'personal sphere' free from interference from others.<sup>63</sup> Disclosure of the personal information of private individuals in this matter would interfere with those individuals' right to preserve their personal sphere (including their private opinions and feelings expressed in an email) free from interference from others. For the reasons discussed in paragraph 43, I am satisfied that disclosing the Information in Issue to the applicant in these circumstances would prejudice the protection of those individuals' right to privacy. Relevantly, the identities of the Community Committee are known to the applicant and accordingly, the extent to which their personal opinions can be deidentified is limited.
45. Finally, with respect to the applicant's submission that *'not provid[ing] this information is contrary to Parliament's intention'*, I do not agree. Parliament expressly limited the right of access to information in the RTI Act with qualifications and exceptions. It is not an absolute right of access. The primary object of the RTI Act 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 give the access'* (emphasis added).<sup>64</sup> The right of access to documents of an agency or Minister is *'[s]ubject to this Act'*<sup>65</sup> and expressly includes exclusions of this right in part 4 of the RTI Act—which allow an agency or Minister to refuse to deal with an application—and section 47 of the RTI Act, which outline grounds on which access to documents may be

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<sup>58</sup> See footnote 50.

<sup>59</sup> Schedule 4, part 4, section 6(1) and schedule 4, part 3, item 3 of the RTI Act.

<sup>60</sup> Report, page 13-14 of 15; Second Report, page 12 of 12.

<sup>61</sup> Report, page 13 of 15.

<sup>62</sup> Bauple had a recorded population of 745 people in the 2021 Census - < [2021 Bauple, Census All persons QuickStats | Australian Bureau of Statistics \(abs.gov.au\)](https://abs.gov.au/quickstats/2021/2021/Bauple) > (accessed 19 February 2024).

<sup>63</sup> Paraphrasing the Australian Law Reform Commission's definition of the concept in 'For your information: Australian Privacy Law and Practice' Australian Law Reform Commission Report No. 108 released 11 August 2008, at paragraph 1.56.

<sup>64</sup> Section 3(1) of the RTI Act. The RTI Act must be applied and interpreted to further the primary object (section 3(2) of the RTI Act).

<sup>65</sup> Section 23(1) of the RTI Act.

refused. One of the grounds of refusal in section 47 of the RTI Act is if disclosure of the information would, on balance, be contrary to the public interest.<sup>66</sup>

46. I am satisfied that relying on section 47(3)(b) of the RTI Act as a basis for refusing access to information that would, on balance, be contrary to the public interest to disclose, is consistent with Parliament's intention and in accordance with the object of the RTI Act.

### **Balancing the public interest**

47. I have applied the pro-disclosure bias intended by Parliament. Favouring disclosure, I note the low weight of the public interest factor regarding Council transparency and accountability.<sup>67</sup> Against disclosure, I note the high weights of the public interest harm factor regarding personal information of individuals other than the applicant, and the public interest factor regarding prejudice to the right to privacy of individuals.<sup>68</sup> On balance, the nondisclosure factors are determinative in relation to the limited Information in Issue – being the personal information of individuals external to Council. Accordingly, I find that access to the Information in Issue may be refused as disclosure would, on balance, be contrary to the public interest.<sup>69</sup>

### **DECISION**

48. I vary the decision under review by finding that access to the Information in Issue may be refused by Council under the RTI Act because its disclosure would, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act.
49. I also find that access may be refused to further documents on the basis they are nonexistent or unlocatable under section 47(3)(e) of the RTI Act.
50. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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**S Martin**  
**Acting Right to Information Commissioner**

**Date: 19 February 2024**

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<sup>66</sup> Section 47(3)(b) of the RTI Act.

<sup>67</sup> Schedule 4, part 2, item 1 of the RTI Act.

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

<sup>69</sup> Sections 47(3)(b) and 49 of the RTI Act.

**APPENDIX****Significant procedural steps**

<b>Date</b>	<b>Event</b>
23 May 2023	OIC received the external review application.
24 May 2023	OIC requested procedural information from Council. Council provided procedural information to OIC.
15 June 2023	OIC advised the applicant and Council the external review had been accepted and requested Council provide a copy of the Information in Issue.
19 June 2023	Council provided OIC with a copy of the Information in Issue.
25 June 2023	OIC received submissions from the applicant.
26 June 2023	OIC received submissions from the applicant.
30 June 2023	OIC confirmed to the applicant the issues to be considered by OIC in the external review.
24 July 2023	OIC confirmed to the applicant the scope of the review to be considered by OIC. OIC received submissions from the applicant.
22 August 2023	OIC requested the applicant confirm their concerns regarding the Information in Issue.
24 August 2023	OIC received submissions from the applicant.
31 August 2023	OIC requested Council undertake further reasonable searches to locate any relevant documents.
14 September 2023	OIC received a submission from Council.
3 October 2023	OIC conveyed a preliminary view to the applicant. OIC requested Council disclose information to the applicant.
4 October 2023	OIC received submissions from the applicant.
1 November 2023	OIC received submissions from the applicant.
10 November 2023	OIC conveyed a preliminary view to the applicant.
12 November 2023	OIC received submissions from the applicant.
30 November 2023	OIC advised the applicant the external review would be finalised by a formal decision.