



Decision and Reasons for Decision

Application Number: 210896

Applicant: Mr S Thomson

Respondent: Lockyer Valley Regional Council

Decision Date: 23 September 2010

Catchwords: ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – ACCESS TO DOCUMENTS – REFUSAL OF ACCESS – MATTER AFFECTING PERSONAL AFFAIRS – applicant sought access to identifying information of complainant/s – whether the information is exempt from disclosure under section 44(1) of the *Freedom of Information Act 1992*

ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – REFUSAL TO DEAL WITH APPLICATION – whether dealing with part of the application would substantially and unreasonably divert the resources of the agency from their use by the agency in the performance of its functions under section 29(1) of the *Freedom of Information Act 1992*

ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – ACCESS TO DOCUMENTS – REFUSAL OF ACCESS – DOCUMENTS AVAILABLE UNDER ARRANGEMENTS MADE BY AGENCY – whether access can be refused to publicly available audio recordings of Council meetings under section 22(a) of the *Freedom of Information Act 1992*

ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – ACCESS TO DOCUMENTS – REFUSAL OF ACCESS – SUFFICIENCY OF SEARCH – whether document nonexistent or unlocatable under section 28A of the *Freedom of Information Act 1992*

Contents

REASONS FOR DECISION	3
Summary	3
Applicable legislation	3
Background.....	3
Decision under review	5
Steps taken in the external review process	6
Issues raised by the Applicant.....	8
Jurisdiction: Issues 3 and 13	9
Scope	9
Issues to be determined in the review	10
Findings	10
Personal Affairs: Issue 14	10
Section 44(1) of the FOI Act	11
Personal Affairs Question	12
What are personal affairs of a person?.....	12
Consideration of the Identifying Information	12
Public Interest Question.....	13
Public interest arguments favouring disclosure	13
Public interest arguments favouring non-disclosure	14
Privacy Interest	15
Flow of information.....	15
Balancing the public interest.....	15
Diversion of Resources: Issues 2 &11	16
Sufficiency of search: Issues 1, 4, 5, 6, 7, 8, 9, 10, 12, 15, 16, 17, 18, 19 and 20.....	17
Section 28A of the FOI Act.....	18
Searches conducted by Council	19
Issue 1: Inspection by Ms Nina Bertram	21
Issue 4: Multiple complaints.....	21
Issue 5: Visit from Acting Engineering Department Head.....	22
Issue 6: Signed Local Rural Fire Brigade letter	23
Issue 7: Documents which the Applicant says he has that Council has not provided	23
Issue 8: Council allegedly taking pictures of Applicant's property	24
Issue 9: Dated photographs	25
Issue 10: Best resolution photographs in electronic form	25
Issue 12: Meeting of 12 August 2009	25
Issue 15: Relationship between Applicant and Council	26
Issue 16: Why weren't the Additional Documents located originally?	26
Issue 17: Audio Recordings	28
Issue 18: Documents relating to Cr Neuendorf's Request Form 2153	29
Issue 19: Complaint to CEO dated 14 November 2008.....	29
Issue 20: Documents concerning the Show Cause Notice.....	30
Summary – sufficiency of search	30
DECISION	32

REASONS FOR DECISION

Summary

1. Mr Thomson (**Applicant**) sought access to documents held by Lockyer Valley Regional Council (**Council**) about his property, himself, all Council correspondence regarding messy and/or untidy and/or visually polluted properties and related documents within a six year date range (**FOI Application**).
2. As Council did not notify the Applicant of its decision within the statutory time-frame and the further time the Office of the Information Commissioner (**OIC**) allowed, Council's principal officer was deemed to have refused access to the requested documents.
3. Having considered the relevant factors set out in this decision, I am satisfied that:
 - the information deleted by Council from a number of complaint documents identifies the complainant/s and qualifies for exemption under section 44(1) of the *Freedom of Information Act 1992 (Qld)* (**FOI Act**)
 - Council may refuse to deal with Items 8-11 of the FOI Application under section 29(1) of the FOI Act on the basis that dealing with this aspect of the application would substantially and unreasonably divert Council's resources from their use in performing Council functions
 - Council is entitled to refuse access to the audio recordings sought by the Applicant in accordance with section 22(a) of the FOI Act; and
 - in respect of the additional documents which the Applicant contends Council has not located, access may be refused under section 28A of the FOI Act.

Applicable legislation

4. The FOI Act was repealed by the *Right to Information Act 2009 (Qld)* (**RTI Act**)¹ which commenced on 1 July 2009.² However, because the FOI Application was made under the FOI Act and has not yet been finalised, for the purposes of this external review, I am required to consider the application of the FOI Act (and not the RTI Act) to the matter in issue.³

Background

5. On 9 December 2008, Council received the FOI Application, dated 5 December 2008 from the Applicant.
6. The Applicant requested copies of every single item of information Council had with reference to [*his property*], and or [*himself*], from 1 January 2003 to 9 December 2008, including:
 - All mail, paper and electronic, sent and received (Item 1)
 - *All notes, memos and or records made by any council employee or councillor* (Item 2)

¹ Section 194 of the RTI Act.

² With the exception of sections 118 and 122 of the RTI Act. Though these provisions have since commenced.

³ Section 199 of the RTI Act.

- *All photos taken of and associated with said property, including their respective dates, in the maximum quality possible – electronic copies would be preferred please (Item 3)*
 - *All records of all visits to and past said property, including dates and persons involved (Item 4)*
 - *All complaints and comments received, quoting exact dates and exact verbatim wording, including oral, written, or by any other means, including from the public, council staff and councillors (Item 5)*
 - ...
 - *ALL information possible regarding Miss Nina Bertram regarding an alleged incident of her inspecting said property prior to an arranged meeting, and more specifically ANY information available regarding herself and a possibly maroon coloured sedan, ie. if her own vehicle was similar. (Item 7)*
7. The Applicant accepted that the names and addresses of complainants could not be provided but requested that consistent identification be used where numerous complaints were made by the same person (Item 6).
8. The Applicant also requested ‘a copy of all correspondence sent by council (LVRC and Gatton and Laidley) regarding’:
- *messy and/or untidy and/or visually polluted properties (Item 8)*
 - *all show cause notices issued for any reason, and the exact outcome of each (Item 9)*
 - *all enforcement notices issued for any reason, and the exact outcome of each (Item 10)*
 - *all correspondence with the Local Government Ombudsman regarding complaints against the Council within this time period (Item 11)*
9. By letter dated 12 December 2008, Council acknowledged receipt of the Applicant’s FOI Application and informed the Applicant that it could take up to 60 days to make a decision if consultation was required.
10. The OIC became aware of the FOI Application upon receiving a letter dated 5 June 2009 from the Honourable Ian Rickuss MP, Member for Lockyer, on behalf of the Applicant, requesting an investigation of the lack of response from Council.
11. On 22 June 2009, Council applied under section 79 of the FOI Act for further time in which to make a decision.
12. On 23 June 2009, OIC granted Council an extension until 6 July 2009 to deal with the FOI Application and advised the Hon. Rickuss MP of this extension.
13. In a letter to the Applicant dated 3 July 2009, Council:
- advised that a decision had been made to treat the FOI Application in two parts - Items 1-7 then Items 8-11
 - provided copies of the documents located in relation to Items 1-7, one of which Council claimed to be partially exempt under section 42(1) of the FOI Act
 - confirmed that Council did not have a maroon coloured sedan and that Ms Bertram’s personal vehicle is not maroon; and further, that Ms Bertram did not have knowledge of the incident alleged in Item 7 prior to the Applicant raising the matter; and

- refused to deal with the request for Items 8-11 on the basis that it would involve *'an excessive amount of work for the limited resources of [the] agency'* under section 29(1) of the FOI Act.
14. Council also offered to discuss amending the FOI Application with the Applicant, to remove reasons for the refusal to deal with Items 8-11.
 15. On 14 July 2009, OIC received an email from the Applicant requesting external review (**External Review Application**).

Decision under review

16. Overview of the relevant dates:

Date	Action
9 December 2008	FOI Application received by Council
7 February 2009	Council deemed to have refused access to the documents requested by the Applicant
9 June 2009	OIC received an external review application from the Honourable Ian Rickuss MP on behalf of Applicant
3 July 2009	Date of letter of decision from Council to Applicant
6 July 2009	Due date for decision after extension granted by OIC
7 July 2009	Applicant received letter dated 3 July 2009 from Council
14 July 2009	OIC received External Review Application

17. The 'appropriate period' for processing the FOI Application is 60 days.⁴ Therefore, under section 27(5) of the FOI Act, Council's principal officer was taken to have refused access to the documents requested in the FOI Application on 7 February 2009.
18. On 23 June 2009, OIC granted Council until 6 July 2009 to deal with the FOI Application under section 79 of the FOI Act.
19. Council's decision is dated 3 July 2009, 3 days prior to the expiry of the extension period. However, the Applicant indicates that he did not receive this letter until 7 July 2009. As Council did not deal with the FOI Application and notify the Applicant of its decision by 6 July 2009, under section 79(3) of the FOI Act, Council's principal officer is taken to have made a decision affirming the original decision (ie. the deemed decision to refuse access on 7 February 2009) on the last day of the further time allowed.
20. Therefore, the decision under review is the decision Council's principal officer is deemed by the FOI Act to have made on 6 July 2009 affirming the deemed decision refusing access on 7 February 2009.
21. I accept that the letter dated 3 July 2009 is an explanation of Council's position and have taken this into account in making this decision.

⁴ Sections 27(7)(b) and 27(5) of the FOI Act.

Steps taken in the external review process

22. Finalising this review took significantly longer than anticipated because of the difficulty encountered by OIC in obtaining information from both Council and the Applicant. As the Applicant would not communicate with OIC staff other than in writing, attempts to narrow the issues and clarify the Applicant's concerns were protracted and difficult. In many respects, the difficulties OIC experienced in this regard appear to mirror Council's efforts to engage with the Applicant. At the same time, OIC had to follow up matters repeatedly with Council and notwithstanding submissions and certifications as to searches undertaken, Council continued to locate additional documents during the review, thus undermining confidence in Council's record keeping systems and practices.
23. Due to the difficulties discussed paragraph 22 above, this review involved considerable 'to and fro' with Council and the Applicant. The most significant steps taken in the process were as follows:
- By letter dated 20 July 2009, OIC advised Council of receipt of the External Review Application, requested a copy of Council's letter of 3 July 2009 and flagged sufficiency of search issues raised by the Applicant.
 - By letter to the Applicant dated 20 July 2009, OIC acknowledged receipt of the External Review Application and asked the Applicant provide a telephone number to facilitate communication during the review. On 23 July 2009, OIC again requested that the Applicant provide a telephone contact number. However, the Applicant responded by email, refusing to communicate by telephone.
 - By letter to the Applicant dated 17 August 2009, Acting Assistant Commissioner Jefferies (**A/AC Jefferies**) offered to meet in person with the Applicant.
 - By letter dated 18 August 2009, OIC sought a submission about its searches and further information from Council about issues raised by the Applicant.
 - On 14 September 2009, Council provided a written submission to OIC and advised that three more documents had been discovered.
 - By letter dated 1 October 2009, A/AC Jefferies communicated to the Applicant:
 - Council's submission and responses in relation to issues he had raised, requesting that the Applicant provide a submission if the information provided did not resolve the sufficiency of search issues; and
 - a preliminary view that Council was entitled to refuse to deal with Items 8-11 on the basis of section 29 of the FOI Act, requesting a submission in response if the Applicant did not accept the preliminary view by 19 October 2009.
 - On 2 October 2009, the Applicant sought to provide a confidential email to OIC.
 - By letter dated 14 October 2009, A/AC Jefferies indicated to the Applicant that OIC would not accept correspondence in confidence, asked the Applicant to provide details regarding broad assertions he had made in his correspondence in order to conduct sufficiency of search investigations and extended the due date for the Applicant's submissions.
 - By email to OIC dated 14 October 2009, the Applicant provided a new email to replace his earlier confidential email.
 - On 16 October 2009, OIC received oral submissions from Council regarding sufficiency of search and Council's refusal to provide access to Items 8-11 on the basis of section 29(1) of the FOI Act.
 - On 30 October 2009, OIC sent a letter to Council (a copy of which was also sent to the Applicant) which:

- summarised the sufficiency of search information provided by Council on 16 October 2009; and
 - requested that further searches be undertaken and certified by the Mayor and Councillors and the results provided to OIC by 17 November 2009.
- By email to OIC dated 11 November 2009, the Applicant raised a number of issues in relation to the review and said in an email the following day '*I will submit more*'.
- On 17 November 2009, OIC received an email from the Applicant refusing to make submissions until OIC provided additional information.
- By email dated 18 November 2009, OIC confirmed that the Applicant's submissions were to be provided by 27 November 2009.
- On 20 November 2009, OIC received a facsimile from Council containing signed certifications from various Councillors that searches had been conducted for all documents relating to the Applicant. Councillor Milligan's response also included an additional document – a letter dated 29 October 2008 from the Applicant – which was not originally provided.
- On 26 November 2009, OIC gave the Applicant copies of search certifications completed by each Councillor and the Mayor.
- By letter dated 23 December 2009, A/AC Jefferies conveyed her preliminary view regarding the issues in the review and provided the Applicant with a final opportunity to provide submissions by 15 January 2010.
- On 14 January 2010, OIC received an email from the Applicant declining to make submissions.
- By letter dated 9 February 2010, A/AC Jefferies requested that Council provide further information about its searches.
- During February and March 2010, OIC made further inquiries with Council regarding its processes and searches. Council provided:
 - further submissions by letter dated 23 February 2010, including a further three letters and four emails which had not been previously located
 - further submissions by telephone on 17, 19 & 23 March 2010 in which Ms Judy Collie (RTI Coordinator) located an additional 31 emails within the scope of the FOI Application; and
 - additional certifications of searches.
- On 7 April 2010, Council agreed to provide electronic copies of all photographs within the scope of the FOI Application to the Applicant. Council later informed OIC that eight further photographs had been located.
- On 16 April 2010, I issued formal notices under section 85 of the FOI Act, requiring Council to produce all relevant documents by 30 April 2010 and appear before me to answer questions in relation to the external review.
- In response to the notice to produce, on 28 May 2010, Council provided a further four complaint documents and nine emails which had not previously been provided.
- In response to a telephone call with OIC on 9 June 2010, Ms Collie located another document, being the notes accompanying one of the above complaints.
- On 22 June 2010, Mr Derek Sellers (Acting CEO of Council), Ms Nina Bertram (Senior Environmental Health Officer) and Ms Collie attended the office of OIC as required under section 85 of the FOI Act (**Hearing**). The Applicant was invited but did not attend. At the Hearing, both Ms Bertram and Ms Collie answered questions under oath, as permitted by section 86 of the FOI Act.
- On 23 June 2010, OIC required Council to conduct further searches as a result of the evidence presented at the Hearing.
- On 1 July 2010, Council provided a further 13 documents within the scope of the FOI Application.

Issues raised by the Applicant

24. Below is a summary of the issues the Applicant raised in his External Review Application and throughout his correspondence with OIC. I have adopted this numbering throughout the decision.

Classification	Issue
Issue 1	<i>The Applicant alleged that Ms Bertram, a Council officer, drove past his house prior to an arranged meeting in a maroon sedan. He contended that Council had not located any documents relevant to this issue.</i>
Issue 2	<i>The Applicant contested Council's refusal to provide access to Items 8-11 on the basis of section 29(1) of the FOI Act</i>
Issue 3	<i>The Applicant was generally concerned about the time taken by Council in processing the FOI Application and his treatment by Council during this process</i>
Issue 4	<i>The Applicant alleged that Council informed him of a number of different complaints against him and that there should be evidence of these</i>
Issue 5	<i>The Applicant alleged that he received a visit from a high level Council officer about a complaint, but no documents were provided in this regard</i>
Issue 6	<i>The Applicant sought access to a signed copy of a letter from the local rural fire brigade</i>
Issue 7	<i>The Applicant claimed to have copies of correspondence with Council which were not provided during the FOI process</i>
Issue 8	<i>The Applicant alleged that Council officers were at the Applicant's property taking pictures while the Applicant was not there, but these pictures were not provided</i>
Issue 9	<i>The Applicant sought access to dated photographs</i>
Issue 10	<i>The Applicant sought access to photographs in electronic form in the best resolution possible</i>
Issue 11	<i>The Applicant claimed that both Council and OIC should have offered to help the Applicant to reduce the scope of Items 8-11</i>
Issue 12	<i>The Applicant claimed that Council had informed him that certain documents were withheld for the purpose of bringing legal action against the Applicant.</i>
Issue 13	<i>The Applicant sought access to the documents of a Member of Parliament</i>
Issue 14	<i>The Applicant sought access to the identifying information of complainants</i>

Classification	Issue
Issue 15	<i>The Applicant was convinced that in general, other documents should exist, based on the relationship between the Applicant and Council</i>
Issue 16	<i>The Applicant wanted to know why the additional complaint documents located on external review were not located originally</i>
Issue 17	<i>The Applicant wanted to know why audio copies of Council meetings in which the Applicant's property had been mentioned were not provided</i>
Issue 18	<i>The Applicant wanted to know whether any other paperwork was found in relation to one of the additional documents provided: 'Dave Neuendorf's Councillor Request Form No 2153 dated 19/8/08'</i>
Issue 19	<i>The Applicant claimed he was not provided with a copy of a written complaint he sent to the CEO on 14 November 2008</i>
Issue 20	<i>The Applicant wanted to know why there was no internal documentation relating to the Show Cause Notice provided by Council to the Applicant</i>

Jurisdiction: Issues 3 and 13

25. Not all of the issues raised by the Applicant fall within the Information Commissioner's jurisdiction.
26. In relation to Issue 3, OIC informed the Applicant during the review that under the FOI Act the Information Commissioner's jurisdiction was confined to review of FOI decisions made by agencies and that, therefore, OIC did not have jurisdiction to review Council's processing of the FOI Application.
27. In relation to Issue 13, OIC informed the Applicant during the review that neither the FOI Act⁵ nor the RTI Act⁶ provides for access to documents of a Member of Parliament.⁷

Scope

28. The scope of the FOI Application extends to:
 - all documents (including those specified in Items 1-7) containing information in relation to the Applicant's property and/or the Applicant, from 1 January 2003 to 9 December 2008 (see paragraph 6 above); and
 - all documents described in Items 8-11 (see paragraph 6 above).
29. The Applicant chose not to view certain "rates" information in relation to the previous owners and transfer papers for the property.

⁵ Section 11(1)(b) of the FOI Act.

⁶ Section 17 & Schedule 2, Part 1, RTI Act.

⁷ Except where the Member of Parliament is also a Minister and the documents were created in his/her capacity as Minister.

30. The Applicant also excluded names and addresses of complainants from the scope of the FOI Application (see paragraph 7 above). Therefore, names and addresses are excluded from scope, but identifying information remains in issue.
31. Council indicates that it assumed that the Applicant did not seek access to documents he authored and/or documents he already had. However the Applicant did not agree to limit the scope in this regard and therefore such documents are included in the scope.
32. Throughout the external review, Council located additional documents that responded to the FOI Application. With the exception of information that identified complainants, Council has provided, or has agreed to provide, the Applicant with copies of these documents.

Issues to be determined in the review

33. The issues to be determined in the external review are whether:
 - the third party information deleted from the complaint documents qualifies for exemption under section 44(1) of the FOI Act
 - Council may refuse to deal with Items 8-11 of the FOI Application under section 29(1) of the FOI Act on the basis that dealing with this aspect of the application would substantially and unreasonably divert Council's resources from their use by Council in performing its functions
 - access can be refused to audio recordings of Council Meetings in which the Applicant's property is mentioned (**Audio Recordings**); and
 - section 28A of the FOI Act applies in respect of any further documents the Applicant contends exist but which have not been located by Council.

Findings

34. In making my decision in this review, I have considered the following:
 - FOI Application and External Review Application
 - letter from Council dated 3 July 2009
 - the Applicant's further email correspondence
 - Council's oral and written submissions
 - records of telephone conversations between staff of OIC and Council staff
 - certifications provided by Councillors and Council staff
 - Statutory Declaration provided by Ms Bertram
 - part of the audio recording of Council Meeting dated 12 August 2009
 - the matter in issue
 - the documents released to the Applicant
 - relevant provisions of the FOI Act; and
 - previous decisions of the Information Commissioner of Queensland and decisions in other Australian jurisdictions as identified in the reasons for this decision.

Personal Affairs: Issue 14

35. In its letter dated 3 July 2009, Council claimed a partial exemption under section 42(1) of the FOI Act in relation to a Gatton Shire Council Customer Request Form dated 16 May 2005. Information was also deleted from two of the additional documents - the Councillor Request Form 2153 and a letter dated 12 April 2006.

36. Council also provided OIC with a copy of a telephone message taken for Councillor Neuendorf which records the complaint relating to Councillor Request Form 2153. Council submits that the telephone message is not within the scope of the review because the message was received outside of Council. However, the telephone message formed the basis for the Councillor Request Form 2153 and was in Council's possession at the time of the FOI Application. I am satisfied that the telephone message is a Council document and that it forms part of the Councillor Request Form 2153.
37. On 19 March 2010, Council sent further documents to the Applicant. All of these documents had been previously provided, except for a Gatton Shire Council Customer Request Form dated 29 October 2004 from which identifying information of the complainant had been deleted.
38. On 28 May 2010, Council provided OIC with the following documents, none of which were provided to the Applicant:
- handwritten letter from third party to Council dated 26 September 2003
 - handwritten letter from third party to Council dated 23 September 2003; and
 - handwritten letter from third party to Council dated 7 April 2003.
39. By letter dated 30 June 2010, Council provided further documents to OIC, including:
- letter from Mr Brad Domrow, Director Community Services, to third party dated 16 April 2003
 - two separate Gatton Shire Council Customer Request Forms dated 1 February 2005
 - Gatton Shire Council Customer Request Form dated 7 February 2005
 - Ms Bertram's undated action list
 - Ms Bertram's action list dated 12 February 2007; and
 - email from Mr Domrow to Ms Bertram dated 7 July 2006.
40. As indicated at paragraph 30 above, the name and address of complainants is not within the scope of the FOI Application.
41. The matter in contention in Issue 14 is the information in the documents at paragraphs 35 to 39 above which was not provided to the Applicant, either because parts were deleted, or because access was refused to the document on the whole (**Identifying Information**).

Section 44(1) of the FOI Act

42. Sub-sections 44(1) & (2) of the FOI Act provide:

44 Matter affecting personal affairs

- (1) *Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.*
- (2) *Matter is not exempt under subsection (1) merely because it relates to information concerning the personal affairs of the person by whom, or on whose behalf, an application for access to a document containing the matter is being made.*

43. I am required under section 44(1) to consider the following questions:
- does the matter in issue concern the personal affairs of person/s (other than the Applicant) (**Personal Affairs Question**)? If so, a public interest consideration favouring non-disclosure of the matter in issue is established; and
 - secondly, are there public interest considerations favouring disclosure of the matter in issue which outweigh all public interest considerations favouring non-disclosure of the matter in issue (**Public Interest Question**)?

Personal Affairs Question

What are personal affairs of a person?

44. In *Stewart and Department of Transport (Stewart)*,⁸ the Information Commissioner discussed in detail the meaning of the phrase 'personal affairs of a person' as it appears in the FOI Act. In particular, the Information Commissioner found that information concerns the 'personal affairs of a person' if it concerns the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase 'personal affairs', that phrase has a well accepted core meaning which includes:
- family and marital relationships
 - health or ill health
 - relationships and emotional ties with other people; and
 - domestic responsibilities or financial obligations.

45. Whether or not information concerns an individual's personal affairs is a question of fact.

Consideration of the Identifying Information

46. Broadly speaking, the Identifying Information relates to complaints made in respect of activities undertaken at the Applicant's property and the Applicant's animals. The Identifying Information identifies the person/s making the complaint.
47. The Identifying Information is not confined to a person's name and/or address, but includes other information from which the person could be identified. Similarly, where information is provided in a handwritten format, such information may identify the person providing the information.
48. In the decision of *Byrne and Gold Coast City Council*⁹ (**Byrne**) (where the matter in issue concerned a complaint made by a local resident to the local Alderman about the length of grass on public land), the Information Commissioner found that the fact that a person made a complaint to an elected representative about a matter of concern to them, was information concerning that person's personal affairs.¹⁰ In reaching this conclusion, the Information Commissioner stated:

⁸ (1993) 1 QAR 227.

⁹ (1994) 1 QAR 477

¹⁰ Similarly, in *Stewart*, the Information Commissioner decided that the fact that Mr and Mrs Stewart had lodged complaints with a government department, was a matter concerning their personal affairs.

*In my opinion the making of that complaint was a personal affair of the third party ... [who] was acting in the capacity of a private citizen exercising a citizen's privilege to make a private approach to an elected representative about a matter of concern.*¹¹

49. More specifically in *Byrne*, the Information Commissioner decided that the fact of making a complaint is to be distinguished from the substance of the complaint, which may or may not itself comprise information concerning the personal affairs of the complainant so as to qualify for exemption under section 44(1) of the FOI Act.¹²
50. Importantly, in *Stewart*, the Information Commissioner stated:

*For information to be exempt under s.44(1) of the FOI Act, it must be information which identifies an individual or is such that it can readily be associated with a particular individual. Thus deletion of names and other identifying particulars or references can frequently render a document no longer invasive of personal privacy, and remove the basis for claiming exemption under s.44(1).*¹³

51. I have examined the Identifying Information. This information identifies a person/s other than the Applicant in the context of complaints made to Council. Applying the principles in *Byrne*, I am satisfied that the Identifying Information concerns the personal affairs of a person/s other than the Applicant.
52. Some of the Identifying Information concerns both the Applicant and the complainant/s. Such information is described as 'shared personal affairs'. In instances where an applicant's personal affairs cannot practicably be separated from another person's personal affairs¹⁴, the shared personal affairs information is considered 'inextricably interwoven'¹⁵, the exception in section 44(2) of the FOI Act does not apply and the information is prima-facie exempt, subject to the application of the public interest test.¹⁶
53. In view of the above, I am satisfied that the Identifying Information is prima-facie exempt from disclosure.

Public Interest Question

54. Given my finding above, I now need to consider whether there are public interest considerations that favour disclosure of the Identifying Information which outweigh the public interest in protecting personal privacy and any other public interest considerations that favour non-disclosure of the matter in issue.

Public interest arguments favouring disclosure

55. The following public interest considerations favour disclosure of the matter in issue:
- disclosure of information about how government functions are conducted can enhance the accountability of agencies in the performance of their functions

¹¹ At paragraph 33.

¹² (1994) 1 QAR 477 at paragraph 36.

¹³ *Stewart* at paragraph 81.

¹⁴ under section 32 of the FOI Act.

¹⁵ The Commonwealth Administrative Appeals Tribunal has considered circumstances where 'shared personal affairs' are 'inextricably interwoven' for the purposes of the *Freedom of Information Act 1982* (Cth) in *Anderson and Australian Federal Police* (1986) 11 ALD 355 at 367 at paragraphs 48 and 49; and *WAJ and Commonwealth Ombudsman* [1998] AATA 442 at paragraphs 53, 57 and 66.

¹⁶ *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at pp.343-345 (paragraphs 172-178).

- obtaining information about the nature of complaints made, and the steps taken by Council to address those complaints is of particular relevance to the Applicant;¹⁷ and
 - the public interest in an applicant obtaining information that concerns their personal affairs.
56. Having reviewed the information which Council has already released, or has agreed to release, to the Applicant, I am generally satisfied that while there is a general public interest in enhancing the accountability of Council, the information which Council has and will release (essentially, that information which does not concern the personal affairs of others) is sufficient to address the public interest consideration of accountability. In short, Council has provided the Applicant with the substance of the complaints and the information which has not been released to the Applicant would not provide any additional information which would further the public interest in Council's accountability.
57. In these circumstances (i.e. the substantive content of the complaints has already been released to the Applicant by Council during the FOI process) I do not consider that disclosure of the Identifying Information would materially enhance the Applicant's ability to scrutinise Council's actions. Accordingly, I am satisfied that little weight can be given to these public interest considerations which favour disclosure of the matter in issue.
58. However, there is one exception – the three handwritten letters outlined at paragraph 38 above. The Applicant has not been provided with any information from these letters and I acknowledge that there is a public interest in the Applicant obtaining this information. However, this must be weighed against the public interest arguments favouring non-disclosure which are discussed at paragraph 68 below.
59. Section 6 of the FOI Act, provides assistance to an applicant to the extent that the information in issue concerns the applicant's personal affairs:

6 Matter relating to personal affairs of applicant

If an application for access to a document is made under this Act, the fact that the document contains matter relating to the personal affairs of the applicant is an element to be taken into account in deciding—

- (a) *whether it is in the public interest to grant access to the applicant; and*
- (b) *the effect that the disclosure of the matter might have.*

60. However, less weight is attributable to this public interest factor where the information in issue concerns the 'shared personal affairs' of an applicant and another individual.¹⁸

Public interest arguments favouring non-disclosure

61. The following public interest considerations favour non-disclosure of the matter in issue:
- the public interest in protecting personal privacy if the matter in issue concerns the personal affairs of a person other than the Applicant (**Privacy Interest**); and

¹⁷ See *Villanueva and Queensland Nursing Council* (2000) 5 QAR 363 and *Pemberton and University of Queensland* (1994) 2 QAR 293, paragraphs 164-193.

¹⁸ See *KBN and Department of Families, Youth and Community Care* (1998) 4 QAR 422 at p.437, paragraph 58.

- the public interest in safeguarding the flow of information to agencies which will allow agencies to fulfil their regulatory functions and deal properly with complaints made to them (**Flow of Information**).¹⁹

Privacy Interest

62. There is an inherent public interest in protecting personal privacy if the matter in issue concerns the personal affairs of a person other than the Applicant. An appropriate weight must be allocated to that interest, having regard to the character and significance of the particular information in issue.²⁰
63. Ordinarily, the privacy interest in the identity of persons providing information to a local government in relation to its administration of local laws is relatively high, unless that information has been treated in such a way as to reduce the weight of the privacy interest, for instance, if the information is in the public domain or the individual consents to disclosure of information.²¹
64. That is not the case in this review and as such, I consider that the weight attributable to this public interest factor remains high.

Flow of information

65. A further public interest consideration favouring non-disclosure of the Identifying Information, is the public interest in safeguarding the flow of information from members of the public concerning possible breaches of the law, which allows agencies, such as Council, to deal properly with complaints made to them.²² Public agencies with regulatory responsibilities such as local governments carry important public functions. The public interest is served by ensuring that such agencies are not unnecessarily hindered in their ability to discharge those functions for the benefit of the broader community. In discharging their responsibilities, agencies such as Council often rely on information provided by members of the public. The public would be less likely to provide information that is relevant to Council's regulatory functions if information as to the information providers' identity would be disclosed to a person about whom a complaint was made.
66. Inhibiting the flow of that information is detrimental to the public interest and I am therefore satisfied that the weight to be given to this public interest consideration is relatively high.

Balancing the public interest

67. I have considered whether the public interest considerations that favour disclosing the identifying information outweigh the public interest in protecting personal privacy and the flow of information to Council. Of significance is the fact that disclosing the Identifying Information would not (with the exception of the letters discussed at paragraph 58 above) provide the Applicant with any additional information which would further the public interest in increasing Council's accountability with respect to its complaint handling process and would have the detrimental effect discussed above on the flow of information.

¹⁹ See *Re Byrnes and The Public Trustee of Queensland* (1996) 3 QAR 161 at paragraph 23.

²⁰ See *Lower Burdekin Newspaper Company Pty Ltd and Burdekin Shire Council; Hansen, Covolo and Cross (Third Parties)* (2004) 6 QAR 328 at paragraph 23 (**Burdekin**)

²¹ See *Burdekin* at paragraph 24.

²² *Gifford and Redland Shire Council* (Unreported, 29 January 2007).

68. Regarding the letters discussed at paragraph 58 above, whilst there is a public interest in the Applicant being made aware of the content of these complaints, the handwriting is capable of identifying the third party/ies. There is no obligation in the FOI Act on Council to produce a typed version of these letters from which identifying information can be deleted. Therefore, on balance, the privacy and flow of information interests which would be prejudiced by the disclosure of the handwritten letters outweigh the public interest in the Applicant being made aware of the content of the complaints.
69. Having balanced the competing factors, I am satisfied that disclosure of the matter in issue would not, on balance, be in the public interest and therefore is exempt from disclosure under section 44(1) of the FOI Act.

Diversion of Resources: Issues 2 & 11

70. Section 29(1)(a) of the FOI Act provides:

29 Refusal to deal with application—agency’s or Minister’s functions

(1) An agency or Minister may refuse to deal with an application for access to documents or, if the agency or Minister is considering 2 or more applications by the applicant, all the applications, if the agency or Minister considers the work involved in dealing with the application or all the applications would, if carried out—

(a) substantially and unreasonably divert the resources of the agency from their use by the agency in the performance of its functions;

...

71. By email dated 10 March 2009, Council conveyed to the Applicant its view that the Applicant’s request for documents outlined in Items 8 to 11 would be a substantial and unreasonable diversion of its resources. The email invited the Applicant to contact Council to discuss the FOI Application. The Applicant’s response neither altered nor confirmed the scope of the application.
72. On 14 September 2009, Council informed OIC that it estimated the diversion of time resources involved to be a minimum of 80 hours and the cost to be \$2,218, on the following grounds:
- a search of the former Laidley Shire Council’s electronic document management system “Reclind” identified 1060 documents
 - a search of Gatton Shire Council’s EDRMS identified 558 documents
 - between the date of amalgamation and the date the FOI Application was lodged, a further 192 documents were identified; and
 - whilst some of the documents were in electronic form, some of the documents were in hard copy and would have to be physically searched.
73. By letter dated 14 October 2009, A/AC Jefferies explained to the Applicant that whilst Council’s email dated 10 March 2009 did not constitute notice under section 29A of the FOI Act, it appeared that Council had attempted to engage with the Applicant with a view to reducing the scope of the FOI Application. A/AC Jefferies also gave the Applicant another opportunity to provide submissions to reduce the scope of the FOI Application, however the Applicant did not provide such submissions. Therefore, in relation to Issue 11, I am satisfied that the Applicant had an opportunity, both during the processing of the FOI Application and on external review to reduce the scope of Items 8 to 11.

74. I have had regard to the number of documents involved and Council's estimate of the time required to search and assess these documents. It would be anticipated that the documents responding to Items 8-11 would, by their nature, contain information concerning the personal affairs of persons other than the Applicant. Even though the Applicant does not wish to access identifying information of third parties, in order to process this application, Council would need to expend resources carefully reading the material and redacting identifying information from an estimated 1810 documents.
75. Even if each document required only five minutes to locate, read, identify and redact, this would take 150 hours. In addition to this, Council informed OIC that:
- some of the relevant documents are held at a different location and it would be necessary to travel to process these documents
 - whilst the Lockyer Valley documents are held electronically, as are most of those from Gatton, the former Laidley Shire Council documents are not and it will require significant time to locate and photocopy these documents; and
 - Laidley documents, though recorded on an electronic system, are also likely to be stored off site, which will involve additional travel time.
76. I am satisfied that it would take at least 80 hours, and likely much more, for the relevant documents to be located and assessed. I understand that the RTI Coordinator is the only Council employee who deals with Freedom of Information and access applications. I am particularly cognisant of the fact that local government resources derive significantly from the rate payments of local residents and that there are many competing demands for local government services to be provided from these public monies.
77. I find that dealing with Items 8 to 11 of the FOI Application would substantially and unreasonably divert Council's resources from their use by Council in the performance of its functions and therefore Council is not required to deal with this part of the FOI Application.

Sufficiency of search: Issues 1, 4, 5, 6, 7, 8, 9, 10, 12, 15, 16, 17, 18, 19 and 20

78. In his External Review Application and throughout his correspondence, the Applicant raised the following concerns regarding the sufficiency of Council's searches in relation to his FOI Application:
- why weren't the following documents provided?:
 - documents in relation to Ms Bertram driving past the Applicant's house prior to a meeting in a maroon sedan (Issue 1)
 - documents in relation to other complaints against the Applicant (Issue 4)
 - documents in relation to a visit from the Acting Engineering Department Head (Issue 5)
 - signed letter from the local Rural Fire Brigade (Issue 6)
 - photographs taken by Council on 8 September 2008 when the Applicant was not at home (Issue 8)
 - dated copies of all photographs (Issue 9)
 - best resolution photographs (Issue 10)
 - documents allegedly being withheld for the purpose of Council bringing legal action against the Applicant (Issue 12)
 - documents that were not initially located (Issue 16)

- audio copies of Council meetings in which the Applicant's property had been mentioned (Issue 17)
- other paperwork in relation to Councillor Neuendorf's Request Form No 2153 dated 19 August 2008 (Issue 18)
- Applicant's complaint to the CEO dated 14 November 2008 (Issue 19); and
- other documentation in relation to the Show Cause Notice (Issue 20).
- on the basis of the Applicant's relationship with Council, the Applicant expected that further documents would exist (Issue 15); and
- the Applicant possessed a number of other documents which Council had not yet provided (Issue 7).

Section 28A of the FOI Act

79. Section 28A of the FOI Act provides:

28A Refusal of access – document nonexistent or unlocatable

- (1) *An agency or Minister may refuse access to a document if the agency or Minister is satisfied the document does not exist.*
- (2) *An agency or Minister may refuse access to a document if –*
 - (a) *the agency or Minister is satisfied the document has been or should be in the agency's or Minister's possession; and*
 - (b) *all reasonable steps have been taken to find the document but the document can not be found.*

80. In *PDE and University of Queensland (PDE)*²³ the Information Commissioner discussed sections 28A(1) and 28A(2) of the FOI Act.²⁴

81. To be satisfied that a document does not exist under section 28A(1) of the FOI Act, it is necessary for the agency to make an evaluative judgment based on its knowledge and experience with respect to:²⁵

- the administrative arrangements of government
- the agency's structure, functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it)
- the agency's practices and procedures, including but not exclusively its information management approaches; and
- key factors within the FOI application or factors reasonably inferred from any other information supplied by the Applicant.

82. If the agency relies on searches to make a decision under section 28A(1), or makes a decision under section 28A(2) of the FOI Act, the agency must take all reasonable steps to find the document before refusing access. To ensure that all reasonable steps have been taken to locate documents, a decision-maker should make enquiries and undertake searches of all relevant locations, having regard to the key factors listed above.

²³ Information Commissioner Queensland, unreported, 9 February 2009.

²⁴ See generally paragraphs 33 – 55 of *PDE*.

²⁵ *PDE* at [37-38]; *Stiller and the Department of Transport* (Information Commissioner Queensland, unreported, 11 February 2009) at [51].

Searches conducted by Council

83. Council indicates that it conducted searches in the following manner:
- searches of Council's electronic data and records management system using the search terms of the Applicant's name, the name of the former owner and property assessment number
 - requests to Council staff and Councillors for any and/or all relevant material including diary notes, e-mails, telephone file notes, photographs and correspondence; and
 - searches of the electronic files of previous Council employees who might have interacted with the Applicant.
84. Council indicates that it has a policy that all incoming documentation is to be scanned and registered on EDRMS DataWorks (now known as ECM). However, Council acknowledges that there can be 'the odd glitch' with this because staff have to register the documents on the system. In the review, OIC reminded Council that searches would need to be conducted for hard copy documents, not just those on the ECM and such searches were completed.
85. Council also provided oral submissions with respect to the searches conducted for documents. In summary:
- the photographs that were located were held on the health officer's work computer and on compact discs and as the relevant health officer is the only person who would attend premises to take such photographs, Council does not expect any more photographs to be held anywhere else
 - no written record is necessarily made of environmental health complaints received by telephone; and
 - no documentation is necessarily generated when a health officer attends a property in response to a complaint.
86. On 16 October 2009, OIC requested that further searches be undertaken, recorded and certified by the Mayor and Councillors in case they had in their possession any hand written diary notes, emails, telephone messages or correspondence.
87. On 20 November 2009, OIC received the following signed certifications that searches had been conducted for all documents relating to the Applicant in the specified date range and that all documents that had been located had been provided or an explanation given for why they couldn't be located:
- Councillor Tanya Milligan: *'I have nothing in my possession other than what I have already given – due to crashed hard drive and new computer'*
 - Councillor David Neuendorf: *'I don't have anything in my possession'*
 - Councillor Jim McDonald: *'No documents are held by me relating to the Applicant. A couple of emails were received and replied but all have been deleted from my server. I understand these emails were also received by Council. Any letters or documents sent by Council to me have been returned to council for destruction every meeting'*
 - Councillor Graham Moon: *'No documents held relating to Applicant'*

- Councillor Peter Friend: *'I hold no paper work'*
- Councillor Janice Holstein: *'I do not have any such records in my possession'*
- Councillor Steve Jones: *'No documents were received or sent prior to this date.'*

88. On 11 March 2010, OIC requested further certifications from Council in relation to its searches and on 25 March 2010 and 29 March 2010 OIC received the following signed certifications together with a record of further searches undertaken by Council's RTI Coordinator:

- Nicole Reisenleiter, Personal Assistant to Director, Community Services: *'that my only involvement/contact with Mr Simon Thomson was a telephone conversation in approximately 2008... I have had no documentation in relation to this conversation'*
- Judy Collie, Corporate Records Supervisor/RTI Coordinator: *'Searches have been conducted for documents responding to [the FOI Application]... all relevant documents that are located within my area of responsibility have been located, irrespective of whether the applicant should otherwise have a copy of such documents, and have been provided to the applicant... There are no other documents within the scope of the application which are being withheld because they relate to potential legal processes which Council intends to bring against Mr Thomson.'*
- Tracy Ryan, Manager, Planning & Environment: *'Searches have been conducted for documents responding to [the FOI Application]... all relevant documents that are located within my area of responsibility have been located, including those documents which have not been recorded on the ECM document system'*
- Nina Bertram, Senior Environmental Health Officer: *'Searches have been conducted for documents responding to [the FOI Application]... all relevant documents that are located within my area of responsibility have been located, including all documents in relation to inspections of Mr Thomson's property, including photographs... all documents in relation to complaints against Mr Thomson'*
- Joseph Carpenter, Planning Cadet Officer: indicating that he did not recall having any conversations with the Applicant, nor could he find any diary entries relating to him.²⁶

89. Council's RTI Coordinator indicates that she spent 12.5 hours completing a further search and enquiry process in December 2009 and January 2010.²⁷ This included searches of: property files, day boxes²⁸ (involving searches of more than 100 boxes for the relevant period), the Environmental Health Officer's directory to search for photographs and the electronic data management system. The RTI Coordinator also made inquiries with the Manager, Planning & Environment, the Manager,

²⁶ On 31 March 2010, OIC confirmed that Mr Carpenter had not signed off any correspondence to the Applicant.

²⁷ On 31 March 2010, OIC clarified with Council's RTI Coordinator that references in the search record to documents located related to documents previously provided to the Applicant.

²⁸ Which contain all incoming documents including faxes, letters and reports. The RTI Coordinator indicated that all documents in the day boxes should be entered into Dataworks, however, she undertook this search to ensure that no documents had 'eluded capture' in Dataworks.

Environmental Health and staff of this section and the Director, Community Services' personal assistant regarding any possible further documents. The RTI Coordinator also confirmed that:

- further searches were conducted for documents concerning the 'wattle tree' issue, but no documents could be located
- she could find no documents within the scope of the FOI Application being withheld because of a potential legal process; and
- no photographs are held on physical files because they are downloaded onto the Environmental Health Officer's computer.

Issue 1: Inspection by Ms Nina Bertram

90. The Applicant informed OIC that he believed that Ms Bertram had driven past his property prior to an arranged meeting. He sought access to documents relating to this 'incident'.
91. Council provided a statutory declaration from Ms Bertram dated 11 September 2009, in which Ms Bertram stated that she *"did not attend Mr Thomson's residence prior to the arranged meeting and at the relevant time, did not own or drive a 'maroon coloured sedan' or similar vehicle."*
92. I accept Ms Bertram's statutory declaration as evidence that she did not inspect the Applicant's property prior to the arranged meeting and it is my view that there are therefore reasonable grounds to be satisfied that documents sought in relation to Issue 1 do not exist because they were not created.

Issue 4: Multiple complaints

93. The Applicant noted his concern on a number of occasions, that Council had informed him that many complaints had been received, however, only documents concerning one complaint were provided by Council. A letter from Council to the Applicant dated 2 November 2005 seems to confirm this: *'Council had received a number of complaints concerning the untidiness of [the Applicant's] property.'*
94. In relation to the issue of complaints, Council submitted that:
- environmental health complaints are often received by telephone and there is no general practice of recording these complaints, instead, a call coming into customer service would be directed to the health officer who would likely follow up the matter straight away; and
 - after receiving a complaint and attending the relevant property, there is not necessarily any documentation created prior to issuing a show cause notice.
95. Council provided an email from Ms Bertram to Mr Domrow dated 21 February 2010 which states *'Council received a number of complaints from Cr Neuendorf concerning the untidiness of [the Applicant's] property. Cr Neuendorf was contacted directly by people in the community and he then notified Council Officers of these complaints verbally.'*

96. In response to further queries from OIC, Council provided additional complaint documents on the following dates during the external review:
- 14 September 2009: three additional complaint documents
 - 28 May 2010: four additional complaint documents; and
 - 1 July 2010: seven additional complaint documents.
97. Several of these additional complaint documents related to the alleged untidiness of the Applicant's property in accordance with Council's letter to the Applicant dated 2 November 2005 referred to in paragraph 93 above.
98. In relation to two of the three complaint documents located on 14 September 2009, Council submitted that these documents had not been located originally because they were not registered under the relevant property identifier. The documents were located in a subsequent search using the name of the person who provided the information.
99. In relation to the third complaint document located on 14 September 2009, Council's RTI Coordinator indicates that in her initial searches she used the Applicant's name and address but this search did not locate the Rural Fire Brigade letter. At a later time, she made inquiries with Mr Domrow, Director of Community Services in relation to this letter. Mr Domrow, who was aware that this matter had been raised at Council, directed Council's RTI Coordinator to the relevant file in Data Works, where the letter was located. Council indicates that the reason the letter wasn't located in the initial search was that although the Applicant's address was contained in the letter, the document was stored as an image, rather than a word document and the address had not been entered into the précis, thus rendering it unlocatable through a search of Data Works.
100. Ms Collie explained under oath at the Hearing that the additional complaint documents provided to OIC on 28 May 2010 were located as a result of opening and checking all of the documents on the electronic database, rather than by making an assessment based on their description.
101. The seven additional complaint documents provided to OIC on 1 July 2010 were located as a result of the questions raised at the Hearing. Ms Collie explained that some of the additional documents were located on another document index called "Dossier" which had not been searched because it had been out of use for several years. In addition, Mr Sellers explained that several documents had not been located as the owner of the property at that time was not Mr Thomson.
102. Having:
- reviewed the documents in issue
 - reviewed Council's record keeping systems; and
 - questioned the relevant Officers under oath at the Hearing,

I find that Council has taken all reasonable steps to locate the documents sought in relation to this issue and there are reasonable grounds to be satisfied that no further complaint documents can be located.

Issue 5: Visit from Acting Engineering Department Head

103. In the External Review Application, the Applicant raised a concern that Council did not provide documents in relation to a visit *'from a very high level [C]ouncil officer advising*

[the Applicant] of a complaint [C]ouncil had received'. The Applicant explained further on 11 November 2009, that an Acting Engineering Department Head had visited him a couple of years previously, advising that Council had received a complaint that the Applicant had been butchering trees.²⁹

104. On 25 March 2010, an OIC officer contacted Mr Don Lee. Mr Lee confirmed that during his time as Acting Engineering Department Head for Council, he did not attend the Applicant's property in relation to a complaint about trees being butchered, nor any other complaint. Subsequently, Mr Howard Carl, Director of Engineering at Council, confirmed to OIC that the only other officers who acted in his position in the relevant period and who may have attended the Applicant's property are no longer with Council.
105. Taking into account Council's processes in relation to receipt of complaints of this nature and the searches undertaken by Council, I find that Council has taken all reasonable steps to locate the documents sought in relation to this issue and there are reasonable grounds to be satisfied that these documents cannot be located.

Issue 6: Signed Local Rural Fire Brigade letter

106. The Applicant raised a concern that Council had not provided a copy of a letter from the local rural fire brigade, which the Applicant says he requested on a number of occasions.
107. On 14 September 2009, Council advised OIC that it had located additional documents, one of which was a letter from the Rural Fire Brigade.
108. Upon receiving a copy of the letter, the Applicant requested an explanation as to why the letter from the Fire Brigade was not signed. On 25 March 2010, Ms Collie confirmed that Council was provided with a copy of this letter by the local Rural Fire Brigade and the copy provided was unsigned.
109. I accept Council's submission on this issue and find that there are reasonable grounds to be satisfied that Council does not hold a signed copy of this letter because it does not exist.

Issue 7: Documents which the Applicant says he has that Council has not provided

110. The Applicant noted on a number of occasions that he had copies of documents which Council had not provided.
111. Despite repeated requests for this information by OIC, the Applicant did not provide specific information that would assist OIC to investigate this issue.
112. It was also unclear whether the Applicant actually sought access to his own correspondence or whether his argument was that because there was so much correspondence, there must have been other internal Council documents generated by the correspondence. OIC sought to clarify whether the Applicant sought his own correspondence. No clear response was forthcoming.
113. OIC confirmed with Council that it was required to provide documents, even if Council believed that the Applicant already had copies of these documents. OIC also identified

²⁹ This appears to relate to the complaint the Applicant refers to in a letter dated 29 October 2008 to Councillor Neuendorf regarding his cutting down wattle trees on his footpath.

a number of documents referred to in documents provided to the Applicant which had not been located.

114. Council located a number of additional documents during the external review and copies of these documents were provided to the Applicant (subject to the removal of personal affairs information).
115. Councillor McDonald indicates that he received 'a couple of emails' from the Applicant which he responded to, however, he deleted these from his computer and they were not recoverable. Further that any documents sent by Council to the Councillor were returned to Council for destruction every meeting. Councillor Milligan also indicated that she had nothing in her possession other than what she had already provided as she had replaced her computer following a hard drive crash.
116. The Councillors' submissions at paragraph 115 above indicate that Council has been in possession of some further correspondence between the Councillors and the Applicant but I accept that these documents cannot now be located. In view of the searches undertaken by Council and the certifications provided by Council officers and Councillors, I am satisfied that Council has taken all reasonable steps to locate these documents but they cannot be located and access can be refused under section 28A(2) of the FOI Act.
117. Without further assistance from the Applicant in specifying any further documents which were not provided, I am unable to identify any additional sufficiency of search issues to be investigated in this regard. Taking into account the searches undertaken by Council, I am satisfied that Council has taken all reasonable steps to locate documents responding to this item and there are reasonable grounds to be satisfied that the documents sought cannot be located.

Issue 8: Council allegedly taking pictures of Applicant's property

118. The Applicant alleged that Council had attended the Applicant's property and had taken pictures whilst the Applicant was not there, but these pictures were not provided.
119. Council initially submitted that the photographs that were located were held on the health officer's work computer and that as the relevant health officer is the only person who would attend premises to take such photographs, Council would not expect any more photographs to be held anywhere else. Council's RTI Coordinator also informed OIC that she personally observed the health officer undertaking searches for photographs and was satisfied that they were properly conducted.
120. Ms Collie also provided an email from the health officer, Ms Bertram, to Mr Domrow dated 21 February 2010 which states '*Council officers were not at the Applicant's property taking pictures while the Applicant was not there – Pictures were taken from the roadside and have been provided*' and a certification from Ms Bertram states that '*Searches have been conducted for documents responding to [the FOI Application]... all relevant documents that are located within my area of responsibility have been located... including photographs*'.
121. However, when asked to provide electronic copies of the photographs to the Applicant in April 2010, Mr Bertram located an additional eight photographs. When questioned under oath at the Hearing about the discovery of these additional photographs, Ms Bertram stated that the initial search had not been thorough on her part and that she had not initially thought to search the compact discs. According to Ms Bertram, the

request for *electronic* photographs had triggered her to remember the photographs stored on compact disc.

122. On the basis of the evidence provided by Ms Bertram under oath at the Hearing, I am satisfied that Council has taken all reasonable steps to locate all photographs responding to the FOI Application and there are reasonable grounds to be satisfied that no further photographs can be located in relation to the FOI Application.

Issue 9: Dated photographs

123. The Applicant requested access to dated photographs.
124. Council's RTI Coordinator initially informed OIC that although it is Council procedure to date all photographs, the health officer had neglected to do so in this instance. However, when Ms Bertram located photographs on a compact disc in April 2010 (see paragraph 121 above), she also located data relating to the dates on which some of the photographs were taken. Council agreed to provide this data to the Applicant. It should be noted that this data may not be exact because it is dependent on the camera settings being set correctly.
125. I find that Council has taken all reasonable steps to locate dated photographs responding to the FOI Application and there are reasonable grounds to be satisfied that no further documents in relation to the dates of the photographs can be located.

Issue 10: Best resolution photographs in electronic form

126. The Applicant requested access to photographs in electronic form in the best resolution available.
127. The RTI Coordinator submits that Council was not able to provide a better resolution of the photographs provided to the Applicant.
128. Access to documents may be given in any of the forms listed in section 30(1) of the FOI Act. Forms of access include relevantly: by inspection, by providing a copy of the document, or in some circumstances, arranging for images to be viewed. If an applicant requests access in a particular form, access must be given in that form.³⁰
129. On 6 April 2010, Council agreed to provide the Applicant with electronic copies of the photographs already provided to him. As this resolved the issue informally, I will not consider this issue further in this decision.

Issue 12: Meeting of 12 August 2009

130. As a result of the discussion at a Council meeting attended by the Applicant on 12 August 2009, the Applicant became concerned that Council was withholding documents for the purposes of bringing a legal action against him at a later date.
131. Councillors Tanya Milligan, David Neuendorf, Jim McDonald, Graham Moon, Peter Friend, Janice Holstein and Mayor Steve Jones provided signed certifications that searches had been conducted and all documents located provided to the Applicant. I accept these certifications as evidence of the Councillors' searches.

³⁰ Section 30(2) of the FOI Act.

132. In addition to this, OIC obtained a copy of the recording of the meeting and I am satisfied that the Councillor who made the statement was not personally involved in the Applicant's review, did not say what the Applicant alleged and was merely pointing out that exemptions may potentially apply under the FOI Act.
133. Mr Kay, who personally conducted the inspection of the Applicant's property which resulted in the issuing of the Show Cause Notice, indicates that no further action was taken as a result of the Show Cause Notice. Therefore, although Council may have anticipated proceedings being commenced against the Applicant, these did not eventuate.
134. Lastly, Ms Collie provided a certification that *'There are no other documents within the scope of the application which are being withheld because they relate to potential legal processes which Council intends to bring against Mr Thomson.'*
135. Taking into account Council's evidence as to its searches and the information provided by Mr Kay, I find that Council has taken all reasonable steps to locate the documents sought in relation to this issue and there are reasonable grounds to be satisfied that these documents do not exist because they were not created or received by Council.

Issue 15: Relationship between Applicant and Council

136. On 11 November 2009, the Applicant informed OIC that after all of the years of trouble with Council, the Applicant did not believe that there would be so little correspondence.
137. This concern was raised with Council, however, in the absence of further details from the Applicant, OIC was unable to further investigate this issue.

Issue 16: Why weren't the additional documents located originally?

138. The Applicant requested an explanation for the initial omission of the additional documents. This is relevant to the sufficiency of search enquiries as it may reveal deficiencies in the searches conducted by Council.
139. I note that the Information Commissioner of Western Australia has previously commented in respect of agency searches that:³¹

Applicants requesting access to documents must rely on the integrity of the search conducted by the relevant agency. In some instances there may be justification for an applicant's belief that further documents should exist and when additional searches uncover documents which were not identified initially it is understandable that an applicant will be sceptical about the record keeping practices in that agency. However, I do not believe that the FOI Act requires agencies to guarantee that their systems are infallible. That would be expecting the impossible. I recognise that documents may not be readily found for a number of reasons including:

- *misfiling;*
- *poor record keeping;*
- *ill-defined requests;*
- *proliferation of record systems;*
- *unclear policies or guidelines;*
- *inadequate training in record management; and*
- *non-existence.*

³¹ *Doohan and Police* (Office of the Information Commissioner WA, unreported, 5 August 1994).

140. The following table sets out the additional documents located by Council during the external review process:

Date	Additional documents
14 September 2009	Three additional documents: <ul style="list-style-type: none"> • Lockyer Valley Regional Council Councillor Request form dated 19 August 2008 (including a phone message dated 19 August 2008) • complaint letter dated 12 April 2006; and • Iredale Flagstone Rural Fire Brigade letter dated 8 October 2007.
20 November 2009	Letter dated 29 October 2008 from the Applicant to Councillor Milligan.
23 February 2010	<ul style="list-style-type: none"> • Show Cause Notice dated 24 September 2008 • letter dated 30 October 2008 from Council to Applicant • letter dated 1 November 2007 from Council to Applicant; and • four emails between Ms Bertram, Ms Collie and the Applicant.
19 March 2010	31 emails between Ms Collie and the Applicant.
7 April 2010	Eight further photographs.
28 May 2010	<ul style="list-style-type: none"> • Four complaint documents (including a Gatton Shire Council Customer Request form dated 29 October 2004, letter from third party to Council dated 26 September 2003, letter from third party to Council dated 23 September 2003 and letter from third party to Council dated 7 April 2003); and • nine emails.
9 June 2010	Notes regarding one of the above complaints.
1 July 2010	Thirteen additional documents: <ul style="list-style-type: none"> • letter from Mr Domrow to a third party dated 16 April 2003 • two separate Gatton Shire Council Customer Request forms dated 1 February 2005 • Gatton Shire Council Customer Request form dated 7 February 2005 • Gatton Shire Council Customer Request form dated 11 May 2005 • Letter dated 1 September 2005 from Mr Domrow to Mr Thomson • Ms Bertram's undated action list • Ms Bertram's action list dated 12 February 2007 • email from Mr Domrow to Ms Bertram dated 7 July 2006 • email from Joel Cranston to Mr Domrow dated 7 July 2006; and • three appointments dated 6 and 8 March 2007 and 30 October 2007.

141. An explanation for the discovery of the three additional documents located on 14 September 2009 is provided at paragraphs 98 and 99 above.
142. The additional document provided by Councillor Milligan on 20 November 2009 was located as a result of Ms Collie asking each of the Councillors to conduct their own searches and complete certifications.
143. Three additional letters and four additional emails were provided to OIC by Council on 23 February 2010. These documents were located by Council in response to specific sufficiency issues raised by OIC. OIC identified these sufficiency of search issues upon a review of all of the documents in issue. The review was conducted as the Applicant insisted that further documents existed, but failed to provide guidance to OIC as to which documents remained outstanding. These four additional documents were not originally located because Council had not undertaken a similar review of the documents in issue.
144. Ms Collie explained under oath at the Hearing, why 31 additional emails were located on 19 March 2010. Ms Collie assumed that the Applicant did not want a copy of correspondence of which he should already have a copy, despite being reminded by OIC on a number of occasions that the scope of the FOI Application included those documents to which the Applicant should already have access.
145. Regarding the failure to discover the additional photographs and information regarding the dates of the photographs, it has already been explained at paragraph 121 above that Ms Bertram did not think to search the compact discs until she was asked to provide electronic copies of the photographs.
146. On 28 May 2010, Council provided OIC with a further four complaint documents, a number of emails and one letter from the Applicant to Council, all of which had not previously been provided. In response to a telephone call with OIC on 9 June 2010, Ms Collie also located the notes accompanying one of above complaints. Ms Collie explained under oath at the Hearing that these further documents were located as a result of opening and checking all of the documents on the electronic database, rather than by making an assessment based on their description.
147. An explanation for the discovery of the thirteen additional documents located on 1 July 2010 is provided at paragraph 101 above.
148. I am satisfied that the above explanations provided by Council do not raise any further sufficiency of search concerns, although it highlights the importance for agencies of putting in place and adhering to appropriate record-keeping protocols to ensure that information entered into electronic systems can be retrieved.

Issue 17: Audio Recordings

149. On 11 November 2009, the Applicant enquired as to why audio copies of Council meetings in which his property had been mentioned had not been provided.
150. Section 22 of the FOI Act provides that an agency may refuse access to a document in a number of circumstances, including as follows:

22 Documents to which access may be refused

An agency or Minister may refuse access under this Act to—

- (a) *a document the applicant can reasonably get access to under another enactment, or under arrangements made by an agency, whether or not the access is subject to a fee or charge...*

151. Under this section, access can be refused by an agency if the documents sought are reasonably available to the Applicant under an alternative access scheme, even if the Applicant is required to pay a fee under that arrangement.
152. Section 22(a) of the FOI Act is designed to ensure that more specialised schemes for accessing documents are not overridden by the access regime provided for in the FOI Act.³²
153. As Council has confirmed that audio copies of Council meetings are available to the public for purchase and meeting minutes available on the website for free, I am satisfied that Council is not required to provide copies of the Audio Recordings to the Applicant through the FOI process.

Issue 18: Documents relating to Cr Neuendorf's Request Form 2153

154. On 11 November 2009, the Applicant enquired whether Council held any other paperwork in relation to Councillor Neuendorf's Request Form No 2153 dated 19/8/08. The Applicant alleged that it was strange that there was *'no Action Officer, No Forward date, no response to Cr Neuendorf whatsoever*.
155. Councillor Neuendorf provided a certification on 11 November 2009 that *'all relevant documents that are located within my area of responsibility have been located'*.
156. Council's submissions regarding its usual processes (at least at that time) in relation to receipt of complaints suggests that, in accordance with usual practice, no documentation of the type described by the Applicant would necessarily be created in response to the Councillor's Request Form.
157. On the basis of the above, the certifications provided by Council officers and the searches conducted by Council, I find that:
- Council has taken all reasonable steps to locate documents sought in relation to this issue; and
 - there are reasonable grounds to be satisfied that these documents do not exist because they were not created.

Issue 19: Complaint to CEO dated 14 November 2008

158. In an email dated 1 December 2009, the Applicant referred to a written complaint he sent to the CEO on 14 November 2008, a copy of which, the Applicant claimed, was not provided by Council. However, this document was one of the 65 pages initially located and released to the Applicant by Council in response to his FOI Application. Therefore, I will not consider this document further.

³² *JM and Queensland Police Service* (1995) 2 QAR 516 at paragraph 24.

Issue 20: Documents concerning the Show Cause Notice

159. In an email dated 1 December 2009, the Applicant raised a concern that there was no internal documentation relating to the Show Cause Notice provided by Council to the Applicant.
160. During the course of the external review, an officer of OIC spoke with Mr David Kay, Director of Planning and Environment Services at Council. Mr Kay indicated that:
- he became aware of the Applicant's property in either a Council or Committee meeting when concerns were raised about the property being unsightly
 - he was not aware of any minutes being taken at this meeting
 - he reviewed the file held by the Environmental Health section and decided to inspect the property in order to determine whether the issue was more correctly identified as a junk yard issue
 - he personally conducted the inspection of the Applicant's property which resulted in the issuing of the Show Cause Notice
 - he did not make any notes in relation to this inspection
 - he personally drafted the Show Cause Notice from his memory of the inspection;
 - no further action was taken as a result of the Show Cause Notice and there are no further documents that he is aware of
 - the reason that there was no supporting documentation was that the inspection was conducted shortly after Council amalgamation and there were no established processes; and
 - since amalgamation, a process has been developed so that officers who inspect properties must make a record of their inspection and submit a recommendation regarding whether a show cause notice is to be issued.
161. A certification was also provided by Ms Ryan who was involved in the show cause process, stating that *'Searches have been conducted for documents responding to [the FOI Application]... all relevant documents that are located within my area of responsibility have been located.*
162. I accept Mr Kay's submissions above. On the basis of those submissions and the evidence of Council's searches, I find that there are reasonable grounds to be satisfied that documents sought in relation to this issue do not exist because they were not created.

Summary – sufficiency of search

163. I am obliged under the FOI Act to make a decision about whether Council has taken all reasonable steps to locate the documents requested by the Applicant.³³ If I think that there are more searches Council could reasonably conduct, I have the power to require Council to do so under the Act.³⁴
164. Throughout the 14 month duration of the external review, I frequently requested that Council conduct further searches. Council produced additional documents on **eight occasions** throughout the external review, with **69 pages** of additional documents being located in total.

³³ Section 89.

³⁴ Section 88(2).

165. In my experience, it is highly unusual for an agency to produce additional documents this number of times upon external review. It is understandable that an applicant would be sceptical about any assurances made by an agency regarding the thoroughness of its searches in these circumstances. Mr Sellers, Acting Chief Executive Officer of Council acknowledged at the Hearing that whilst the various omissions made by Council were not intentional or malicious, Council had not given this external review the priority that it deserved.
166. The evidence provided by Council during the Hearing as to its record-keeping processes was concerning. Council has no clear over-arching record-keeping policy. Rather, I received evidence of a mixture of different arrangements. When there are inconsistencies in record keeping practices, it makes the task of staff in the FOI unit of Council difficult, if not impossible. Whilst the amalgamation may go some way to explaining the array of different record-keeping practices, it is now more than two years since Council was formed and it can no longer rely on the amalgamation as a justification.
167. I was assured by Mr Sellers in the Hearing that steps were being taken to reform Council's record-keeping system so that in future, it would not be as difficult to locate documents.
168. However, the question which arises in this external review is what happens when all reasonable steps are taken but the record keeping systems are so poor that it is impossible to be certain whether all documents have been located? In circumstances such as these, it is impossible for me to be confident that Council has produced all documents responding to the FOI Application.
169. However, under the FOI Act, I am not required to be certain of whether all documents have been located, I am required to be satisfied that Council has taken all reasonable steps to locate the documents.
170. I acknowledge that this is an unsatisfactory result for the Applicant. However, it is not my role to intervene in the record-keeping policies of Council. Bodies such as the Queensland Ombudsman have the appropriate jurisdiction to deal with such concerns. It is my role to determine whether Council has taken all reasonable steps to locate those documents which Council holds. If the records were not created to begin with, not maintained or improperly disposed of, this is not something that I have jurisdiction to consider.
171. Despite the difficulties created by the record-keeping system, as a result of this external review, Council has undertaken an extensive search and inquiry process for documents that respond to the FOI Application, as explained in this decision. I am satisfied that inquiries have been made of all relevant Council officers³⁵ who would have knowledge of the documents sought by the Applicant, including those involved with complaint handling processes. I am not aware of any further searches I could reasonably require Council to conduct.
172. Having considered the search efforts undertaken and the information provided by Council in its submissions and in response to OIC's inquiries, I find that:
- access can be refused to the documents referred to in paragraphs 93, 103, 110, 115, 118 and 123 under section 28A(2) of the FOI Act, ie. that Council has

³⁵ Where officers remain with Council.

conducted all reasonable searches, but further documents cannot be located;
and

- access can be refused to the further documents the Applicant contends Council has not located under section 28A(1) of the FOI Act as I am satisfied on the basis of the searches conducted and the inquiries made by both Council and OIC that those documents do not exist.

DECISION

173. I vary the decision under review by finding that:

- the information deleted by Council from the complaint documents qualifies for exemption under section 44(1) of the FOI Act
- Council may refuse to deal with Items 8-11 of the FOI Application under section 29(1) of the FOI Act on the basis that dealing with this aspect of the application would substantially and unreasonably divert the agency's resources from their use by the agency in performing its functions
- Council is entitled to refuse access to the Audio Recordings sought by the Applicant in accordance with section 22(a) of the FOI Act
- access can be refused to the documents referred to in paragraphs 93, 103, 110, 115, 118 and 123 under section 28A(2) of the FOI Act; and
- access can be refused to the further documents the Applicant contends Council has not located under section 28A(1) of the FOI Act.

Julie Kinross
Information Commissioner

Date: 23 September 2010