



Decision and Reasons for Decision

Application Number: 310987

Applicant: Ellis

Respondent: Moreton Bay Regional Council

Third party: 46VHJW

Decision Date: 27 March 2013

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION – application for legal fees paid by underwriter of Council’s insurance – 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)*

REASONS FOR DECISION

Summary

1. The applicant applied to Moreton Bay Regional Council (**Council**) under the *Right to Information Act 2009 (Qld)* (**RTI Act**) for access to 55 categories of information.
2. Council refused to deal with the application on the ground¹ that a previous application made by the applicant sought the same documents.²
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for a review of Council’s decision.
4. OIC considered that Council could not refuse to deal with the application on the ground claimed. Council accepted this view, located 66 pages of correspondence responsive to the applicant’s application and released them in full.
5. Council and the applicant both made numerous submissions regarding the 55 categories of information sought by the applicant. By this process, the applicant reached a position where he accepted OIC’s view Council had taken all reasonable steps to locate documents responsive to particular categories, or Council located further information. In relation to this further information, generally Council provided access or the applicant accepted that disclosure was contrary to the public interest.

¹ Section 43 of the RTI Act.

² Decision dated 7 March 2012.

6. This decision addresses the one remaining issue in this review—whether or not it would, on balance, be contrary to the public interest to disclose parts of a letter that was located during one of Council’s searches for responsive documents.
7. For the reasons set out below, I am satisfied that:
 - Council may refuse access to the legal fees set out in the letter on the ground that disclosure would, on balance, be contrary to the public interest; and
 - no ground of refusal enables Council to refuse access to the remaining parts of the letter.

Background

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

Reviewable decision

9. The decision under review is Council’s decision dated 7 March 2012.

Issue for determination

10. The issue for determination is whether the disclosure of parts of a letter setting out legal fees paid to a law firm by an underwriter would, on balance, be contrary to the public interest.

Information in issue

11. The information in issue is parts of a letter from a law firm to Council. The letter sets out the legal fees that were paid to the law firm by the underwriter of an insurance policy held by Council. It appears that the letter was provided to Council so that it could fulfil future insurance disclosure obligations.
12. It should be noted that the parts of the letter that would reveal legal advice or representation provided by the law firm are not in issue, as the applicant has accepted that such information is subject to legal professional privilege.
13. The parts of the letter that comprise the **information in issue** may be described as:
 - **legal fees**—overall totals of legal fees (both excluding and including GST)
 - **legal firm information**—law firm’s name (on letterhead and signed at end of letter), contact details, file reference number/s, and names of acting solicitor/s; and
 - **matter status information**—a heading and final paragraph indicating the stage/s of progress for matter/s being dealt with by the law firm.

Material considered

14. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and appendix).

Findings

Would disclosure of the relevant parts of the letter, on balance, be contrary to the public interest?

15. Yes, in relation to legal fees. Otherwise, no.

Relevant law

16. The RTI Act identifies various factors that may be relevant to deciding the balance of the public interest. It also explains the steps that a decision-maker must take in deciding the public interest. To decide whether disclosing the information in issue would be contrary to the public interest, it is necessary to:²²

- 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 disclosing the information would, on balance, be contrary to the public interest.

Irrelevant factors

17. I have examined the irrelevant factors in schedule 4 of the RTI Act and am satisfied I have not taken into account any irrelevant factors in reaching my decision.

Factors favouring disclosure

Factors relevant to all information in issue

18. It is my view that disclosure of the information in issue could reasonably be expected to inform the community of Council operations,³ insofar as the information confirms that Council maintains insurance coverage in accordance with its policies⁴ and that claims are made with respect to such coverage.

19. Also, I am satisfied that disclosure of the information in issue could reasonably be expected to enhance Council accountability⁵ by enabling some examination of the general circumstances in which insurance claims are made by Council.

Factors relevant to the legal fees

20. I do not consider that disclosure of the legal fees in particular could reasonably be expected to further enhance Council accountability. While I acknowledge that the magnitude of the legal fees could reasonably be expected to indicate in broad terms the amount of legal work that was required for a matter related to Council, I do not accept that the amount of legal work required necessarily correlates with the amount by which Council has fallen short of acting accountably. In my view, the amount of legal work may relate to factors other than Council's accountability—for example, the complexity of the legal issues, the clarity with which they are presented, and the willingness of parties to resolve matters.

³ Schedule 4, part 2, item 3 of the RTI Act.

⁴ See Policy 12-2150-060 (at < [http://www.moretonbay.qld.gov.au/uploadedFiles/common/policies/MBRC%20Policy%20-%20Insurance\(1\).pdf](http://www.moretonbay.qld.gov.au/uploadedFiles/common/policies/MBRC%20Policy%20-%20Insurance(1).pdf)>).

⁵ Schedule 4, part 2, item 1 of the RTI Act.

21. The applicant submits that:⁶

The Public Sector Ethics Act 1994 specifically mentions waste of public resources – so we need to place a figure to that waste in order to correctly address these situations.

22. Ordinarily, it is OIC's view that parts of a legal bill of costs that do not reveal legal advice or representation and indicate total legal fees:

- do not attract legal professional privilege;⁷ and
- would not, on balance, be contrary to the public interest to disclose, given the strength of the public interest in ensuring effective oversight of expenditure of public funds.⁸

23. However, this view relates to legal fees *paid by an agency*. In the circumstances of this review, I do not consider that disclosure of legal fees *paid by Council's insurer's underwriter* could reasonably be expected to ensure effective oversight of Council's expenditure of public funds.⁹ This is because the fees do not constitute expenditure of any public monies. Rather, the fees comprise amounts paid to a law firm by the insurer's underwriter (possibly after negotiation between those two parties) under a commercial arrangement between the underwriter and the insurer regarding the risk that the underwriter would assume for the insurer. The law firm, the underwriter and the insurer are not public agencies.

24. The applicant submits that:¹⁰

Even if the Insurance firm/underwriter paid the fees, it is still public money that pays them and it is the public who will pay for the increase in premiums that could well follow.

25. Insofar as the applicant submits that the legal fees paid by the insurer's underwriter should be disclosed because the Council uses public monies to pay the insurer's premium, I am satisfied that this connection is insufficient to raise ensuring effective oversight of expenditure of public funds as a public interest factor favouring disclosure.

26. Insofar as the applicant's submission argues that making a claim on a Council insurance policy could result in a future premium increase for Council, I acknowledge that this is possible. However, I do not consider that this future possibility supports disclosure of the legal fees. In my view, obtaining quotes from potential insurance providers— all of which would take into account the legal fees where relevant, given Council's insurance disclosure obligations—provides an intervening step. I consider that it would be disclosure of the quotes on offer and Council's consideration of them, rather than disclosure of legal fees that were possibly taken into account in the calculation of the quotes, that could reasonably be expected to ensure effective oversight of expenditure of public monies.

⁶ By email sent on 15 March 2013.

⁷ *Murphy and Treasury Department* (1998) 4 QAR 446 (**Murphy**) at [20], *Ellis and Department of Environment* (Unreported, Queensland Information Commissioner, 20 October 1998) (**Ellis**) at [20]-[32] and *VSC and Public Trustee of Queensland* (Unreported, Queensland Information Commissioner, 30 June 2008) (**VSC**) at [49]-[51]. These decisions were made under section 43(1) of the repealed *Freedom of Information Act 1992* (Qld) (**FOI Act**) which is replicated by section 48 and schedule 3, section 7 of the RTI Act. Further, *Murphy* and *Ellis* were decided in the context of the sole (as opposed to dominant) purpose test – however OIC considers that their reasoning remains apposite.

⁸ *Kelly and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 13 March 2002) at [46], *Price and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 12 March 2002) at [44]-[46] and *VSC* at [63]-[66] consider legal fees. While these decisions were made regarding section 45(1) of the repealed FOI Act, they remain relevant in terms of the public interest test under section 49 and schedule 4 of the RTI Act.

⁹ Schedule 4, part 2, item 4 of the RTI Act.

¹⁰ By email sent on 15 March 2013.

27. The applicant also submits that:¹¹

It does not matter how much or how little legal work was involved, what matters is the unnecessary costs / fees that have been incurred as a result of negligence. The costs / fees is important because the Public/MBRC need to take history on board so as to create procedures to eliminate such un-necessary complaints in the future. If the cost/fee are swept under the carpet so to [sic] will the procedures and firewalls that should be instigated.

28. On the information before me,¹² it is apparent that a number of complaints, investigations and proceedings have already led to examination of the circumstances that the applicant alleges constitute negligence. I am satisfied that these processes could reasonably be expected to raise and prompt adjustment of Council procedures if required. In this context, I do not accept that disclosure of the legal fees could reasonably be expected to be necessary to ensure that any required reform of procedures either commences or is maintained.

Factors favouring nondisclosure

Factors relevant to the legal fees

29. The legal fees were paid pursuant to a type of insurance taken out by Council that covers legal work performed with respect to particular types of individuals regarding certain types of matters. Accordingly, the magnitude of the fees could reasonably be expected to indicate in broad terms the amount of legal work that was performed in relation to specific individual/s regarding matter/s involving the individual/s.¹³
30. In the circumstances of this review, I am satisfied that the legal fees comprise personal information regarding the individual/s, and factors favouring nondisclosure regarding personal information and privacy¹⁴ are relevant.

Factors relevant to legal firm information and matter status information

31. A third party submits that the legal firm information and the matter status information also comprise personal information, on the basis that these types of information could reasonably be expected to reveal whether or not legal work was performed regarding particular individual/s and – in relation to any legal advice that was provided – who gave it, how many files were opened to do so, and the stage/s of progress of the representation.¹⁵
32. On careful consideration of the circumstances of this review, I am satisfied that the legal firm information and the matter status information comprise personal information regarding particular individual/s in this sense, and factors favouring nondisclosure regarding personal information and privacy¹⁶ are therefore relevant.

¹¹ By email sent on 15 March 2013.

¹² Including information no longer in issue in this review.

¹³ Given that the third party claims that it is, on balance, contrary to the public interest to disclose the information in issue, section 108(3) of the RTI Act curtails my discussion of this aspect of the review.

¹⁴ Schedule 4, part 4, item 6 and schedule 4, part 3, item 3 of the RTI Act.

¹⁵ Again, given that the third party claims that it is, on balance, contrary to the public interest to disclose the information in issue, section 108(3) of the RTI Act curtails my discussion of this aspect of the review.

¹⁶ Schedule 4, part 4, item 6 and schedule 4, part 3, item 3 of the RTI Act.

Balancing the factors

33. On careful consideration of the information before me, I consider that limited weight should be afforded to the two factors favouring disclosure of the **information in issue** regarding informing the community of Council operations and Council accountability.
34. On the other hand, I also consider that some weight should be attributed to the factors favouring nondisclosure regarding personal information and privacy. In this regard, taking into consideration the nature of information already in the public domain (as evident from the applicant's access application and submissions made by the applicant and Council, including comments regarding each other's submissions), I am satisfied that information regarding the amount of work involved in providing legal representation regarding certain individual/s is substantially more personally sensitive than whether or not representation was provided and, if it was, its current status.
35. Accordingly, in terms of the **legal fees**, I consider that the weight of the factors favouring nondisclosure is significant, as the magnitude of the fees is broadly indicative of the amount of legal work involved in providing representation to certain individual/s.
36. In contrast, in relation to the **legal firm information** and the **matter status information**, it is my view that very limited weight should be attached to the factors favouring nondisclosure.
37. In conclusion, it is my view that, with respect to the **legal fees**, the factors favouring nondisclosure outweigh the factors favouring disclosure. Consequently, I am satisfied that Council may refuse access to the legal fees on the ground that disclosure would, on balance, be contrary to the public interest.
38. In relation to the **legal firm information** and the **matter status information**, it is my view that the factors favouring disclosure outweigh those favouring nondisclosure. Given the relative closeness of the balancing process, I note that the starting point of prodisclosure¹⁷ provides further support for my conclusion. In the circumstances, I am satisfied that Council cannot rely on the contrary to public interest ground for refusing access to the legal firm information and the matter status information.

DECISION

39. I vary the decision under review and find that:
 - Council may refuse access to the **legal fees** in the letter on the ground that disclosure would, on balance, be contrary to the public interest under sections 47(3)(b) and 49 of the RTI Act; and
 - there is no ground on which Council may refuse access to the **legal firm information** and the **matter status information**.
40. I have made this decision as a delegate of the Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

Jenny Mead
Right to Information Commissioner
Date: 27 March 2013

¹⁷ Section 44 of the RTI Act.

APPENDIX**Significant procedural steps**

Date	Event
5 March 2012	Council receives applicant's application seeking 55 categories of information
7 March 2012	Council issues its decision to refuse to deal with the application on the ground that the applicant made a previous application for the same documents
12 March 2012	OIC receives applicant's application for external review
21 May 2012	OIC conveys written view to Council that Council cannot refuse to deal with the application on the ground claimed. OIC requests that Council locate relevant documents and provide submissions regarding any that, in its view, should not be released
1 June 2012	Council advises OIC that it located 66 pages of correspondence created since the applicant's previous application and that these pages could be released in full. Otherwise, Council provides submissions regarding why each category of information sought by the applicant does not exist
19 June 2012	OIC conveys to applicant Council's explanation regarding why documents for each of the categories of information would not have been created
10 July 2012	Applicant provides a written submission regarding why he did not accept Council's explanation with respect to 16 of the 55 categories of information. In relation to one of the categories of information, applicant confirms he is seeking information about who engaged the law firm and who paid for their services
9 August 2012	OIC requests further information from Council regarding each of the 16 categories of information raised by the applicant
17 August 2012	Council provides further information requested by OIC on 9 August 2012
22 August 2012	OIC requests further information Council regarding its response of 17 August 2012
28 August 2012	Applicant accepts OIC staff member's oral view that access to most information regarding the law firm and its services may be refused on the ground that legal professional privilege attaches to the information. Applicant confirms he wishes to access information regarding legal fees
14 September 2012	Council provides the further information requested by OIC on 22 August 2012
22 October 2012	OIC requests further information from Council regarding the legal fees. Council advises that any payment would have been made by its insurer and it does not hold any documents regarding the fees
26 November 2012	OIC conveys written view to applicant that Council has taken all reasonable steps to locate documents responsive to the remaining 16 categories of information in issue, except in relation to the legal fees
3 December 2012	OIC requests further information from Council regarding its searches for documents regarding the legal fees
7 December 2012	Applicant provides a written submission to OIC, noting the ongoing issue regarding the legal fees, and advising that it accepts OIC's written view dated 26 November 2012, except in relation to two categories of information
13 December 2012	Council advises OIC that it has located two documents regarding the legal fees and that it considers that they are subject to legal professional privilege
21 December 2012	Applicant accepts OIC's staff member's oral view that one of the two categories of information referred to in his written submission to OIC dated 7 December 2012 was publicly available

4 January 2013	OIC requests further information from Council regarding the remaining category of information referred to in the applicant's written submission to OIC dated 7 December 2012
8 January 2013	Council advises that it has located a document relevant to the remaining category of information referred to in the applicant's written submission to OIC dated 7 December 2012 and that it does not object to release of it
8 January 2013	OIC conveys written view to Council that while parts of a letter setting out the legal fees are subject to legal professional privilege, there are no grounds to refuse access to the remaining parts. OIC also conveys this view to a third party and asks if it wishes to respond and/or become a participant in the external review
18 January 2013	The third party provides written submissions regarding the remaining parts of the letter
21 January 2013	Council advises that it supports the third party's submissions regarding the remaining parts of the letter
23 January 2013	Applicant requests reconsideration of documents previously that he accepted were subject to legal professional privilege
8 February 2013	OIC staff member confirms that legal professional privilege attaches relevant information
15 February 2013	Applicant raises a sufficiency of search issue. OIC confirms by telephone and in writing OIC's written view of 26 November 2012
25 February 2013	OIC conveys a further written view to Council and the third party that while parts of the letter are subject to legal professional privilege, there are no grounds to refuse access to the remaining parts
1 March 2013	Council advises that it supports the third party's submissions regarding the remaining parts of the letter
13 March 2013	The third party provides written submissions regarding the remaining parts of the letter
13 March 2013	OIC conveys a further written view to the third party and the applicant that access to the amount/s of the legal fees in the remaining parts of the letter may be refused on the ground that disclosure would, on balance, be contrary to the public interest
15 March 2013	Applicant provides a written submission to OIC regarding OIC's view dated 13 March 2013 and raises sufficiency of search issues
17 March 2013	The third party provides written submissions regarding the remaining parts of the letter
18 March 2013	Applicant raises further sufficiency of search issues by email
19 March 2013	OIC confirms to applicant that it remains OIC's view that Council has taken all reasonable steps to locate documents responsive to the application