



Decision and Reasons for Decision

Citation:	<i>Castley-Wright and Mareeba Shire Council [2018] QICmr 25 (22 May 2018)</i>
Application Number:	313442
Applicant:	Castley-Wright
Respondent:	Mareeba Shire Council
Decision Date:	22 May 2018
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST - records relating to a complaint process initiated by the applicant - accountability and transparency of a local council - administration of justice - assist inquiry into possible deficiencies in conduct and administration - right to privacy of other individuals - personal information of other individuals - whether disclosure of information would, on balance, be contrary to the public interest - whether access to information may be refused under section 47(3)(b) of the <i>Right to Information Act 2009 (Qld)</i>

REASONS FOR DECISION

Summary

1. The applicant applied to Mareeba Shire Council (**Council**) under the *Right to Information Act 2009 (Qld)* (**RTI Act**) for access to information broadly relating to flying fox management and dispersal, Council's communications with an animal expert,¹ and any emails containing the applicant's name.²
2. Council located 40 pages in response to the application, granted full access to four pages and decided to refuse access to parts of 36 pages on the basis that disclosure of information would, on balance, be contrary to the public interest.³
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of Council's refusal of access decision and also submitted that Council had not located all relevant documents. During the external review, Council conducted further searches which resulted in more information being released to the applicant.⁴ In addition, following negotiations with OIC, Council and the animal expert agreed to release certain

¹ An individual contracted by Council to provide expert advice in relation to flying fox management and dispersal.

² Access application dated 2 May 2017.

³ Under section 47(3)(b) of the *Right to Information Act 2009 (Qld)* (**RTI Act**). Decision dated 16 June 2017.

⁴ Emails between the applicant and Council (**Further Emails**).

information to the applicant, to which access had originally been refused.⁵ However, the applicant elected not to accept this information in resolution of the issue in this review.

4. For the reasons set out below, I affirm Council's decision to refuse access to the information remaining in issue on the basis that its disclosure would, on balance, be contrary to the public interest.⁶

Background

5. Significant procedural steps taken by OIC in conducting the external review are set out in the Appendix to these reasons.
6. On 16 February 2017, the applicant was present at a scheduled attempt to disperse flying foxes, coordinated by Council. The applicant alleged that while he was attempting to take video footage of conversations between Council staff and the animal expert, he was assaulted by a Councillor (**Incident**). The applicant subsequently made a complaint to Council against the Councillor about the Incident, which was found to be lacking substance.

Reviewable decision

7. The decision under review is Council's decision dated 16 June 2017.

Evidence considered

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

Information in issue

9. The information that remains in issue in this review⁷ is limited to the following:

Description	Appears on pages
References to the subject of the applicant's complaint and information provided by that individual to Council in response to the allegations	6,8,10,11,13,14,16,18,20,21
Names and contact details of Council officers who provided statements in relation to the Incident, and personal information appearing in their statements	8,9,10,11,12,13,14,15,16
Mobile telephone numbers of Council officers and Council Chief Executive Officer (CEO)	4,6,9,11,15,18,20,24
Names and contact details of other individuals (external to Council) incidentally referred to in correspondence	5,17,22,24,27,29,30,32,33,34,37,38,40

10. In these reasons, I have collectively referred to the above information as Third Party Personal Information.

⁵ On 23 pages.

⁶ Under sections 47(3)(b) and 49 of the RTI Act.

⁷ The Further Emails and information which was released to the applicant during the course of the review are not in issue and therefore will not be considered in these reasons.

Issue for determination

11. The only issue for determination is whether access to the Third Party Personal Information may be refused under section 47(3)(b) of the RTI Act on the basis that its disclosure, would, on balance, be contrary to the public interest.⁸

Relevant law

12. The RTI Act provides a right of access to information in the possession or under the control of a Queensland government agency, including local councils.⁹ The RTI Act operates with a 'pro-disclosure bias'¹⁰ meaning that it is Parliament's intention for an agency to give access to information, unless the public interest favours nondisclosure.¹¹ Various factors may be relevant to deciding where the balance of the public interest lies¹² and a decision-maker is required to take specific steps in reaching a decision.¹³

Findings

13. No irrelevant factors arise in the circumstances of this case and I have not taken any into account in making my decision.

Factors favouring disclosure

14. The public interest will favour disclosure of information held by Government about an individual.¹⁴ Council has however, already disclosed the applicant's personal information¹⁵ which appears throughout the located documents, to him. In my view, Council adopted a pro-disclosure approach in redacting as minimal information as possible to ensure the applicant could have access to documents containing his personal information. Therefore, the public interest factor which would generally apply to favour disclosure of an applicant's personal information does not apply given the nature of the Third Party Personal Information.
15. I am satisfied that disclosure of the Third Party Personal Information would provide the applicant with a more comprehensive (to the extent that it would be unredacted) record of Council's communications following the Incident, and would disclose some further background and contextual information that informed Council's decision on the applicant's complaint.¹⁶ In determining the weight to be afforded to these factors, it is relevant that Council has provided the applicant with an outcome letter in relation to his complaint, advising that it was found to lack substance, and that the remaining pages in issue have all been partially released to the applicant, subject only to redaction of the Third Party Personal Information. I have also taken in to account that the Third Party Personal Information is limited to the names and personal information of Council officers

⁸ The issue of sufficiency of search was resolved during the review by virtue of Council locating the Further Emails. As the applicant did not raise any further concerns about missing documents, OIC proceeded on the basis that his sufficiency of search concerns had been addressed.

⁹ Section 3 of the RTI Act.

¹⁰ Section 44 of the RTI Act.

¹¹ Under section 47(3)(b) of the RTI Act, access to information may be refused where disclosure would, on balance, be contrary to the public interest.

¹² See schedule 4 of the RTI Act. The term 'public interest' refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests.

¹³ Section 49 of the RTI Act. The steps include: disregarding any irrelevant factors, identifying relevant factors favouring disclosure and nondisclosure, and balancing the relevant factors.

¹⁴ Schedule 4, part 2, item 7 of the RTI Act.

¹⁵ Schedule 5 of the RTI Act adopts section 12 of the IP Act which defines 'personal information' as follows: *information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.*¹⁵

¹⁶ Schedule 4, part 2, items 1 and 11 of the RTI Act.

and other external individuals and does not reveal any deliberations or discussions which preceded Council's decision. For these reasons, I afford these factors low weight in favour of disclosure.

16. The applicant has submitted that he reserves his '*right to civil action*'¹⁷ and has '*the right to challenge any perjury and have it removed or corrected*'.¹⁸ In view of these submissions, I have considered whether disclosing the Third Party Personal Information could reasonably be expected to contribute to the administration of justice, generally, or for a person, including procedural fairness.¹⁹ In *Willsford and Brisbane City Council*²⁰ the Information Commissioner found that the administration of justice factor will arise if an applicant can demonstrate that:
- they have suffered loss or damage of some kind of wrong, in respect of which a remedy is, or may be, available under the law
 - they have a reasonable basis for seeking to pursue the remedy; and
 - disclosing the information would assist the applicant to pursue the remedy, or to evaluate whether a remedy is available or worth pursuing.²¹
17. The applicant has referred to having '*proof of defamation*' and appears to be generally concerned about information about him being incorrectly recorded.²² Again, I observe that the substance of the documents, particularly the written statements given by Council officers who witnessed the Incident, has already been released to the applicant. The only information that remains redacted comprises the names and contact details of the officers, personal pronouns, descriptions of their emotions and opinions with respect to the Incident and extraneous actions of the Council officers. In the circumstances, I am not satisfied that the personal information of those officers would assist the applicant to pursue a remedy, or to evaluate whether a remedy is available or worth pursuing. Accordingly, I find that the public interest factors referred to in paragraph 16 do not apply to the Third Party Personal Information.
18. The applicant further submitted that full disclosure of the Third Party Personal Information would demonstrate Council officers '*have lied*' in their statements regarding the Incident as their accounts are not consistent with the video and audio evidence which the applicant obtained.²³ The applicant argued that '*this is a serious misconduct, which requires dismissal and the obstruction of justice is not in the public interest*'.²⁴ In view of these submissions, I have considered whether disclosing the Third Party Personal Information could reasonably be expected to:
- allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official;²⁵ or
 - reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct.²⁶
19. The Third Party Personal Information which has been redacted from the officers' statements is minimal, comprising their names and contact details, references to other

¹⁷ External review application dated 7 August 2017.

¹⁸ Written submissions dated 14 March 2018.

¹⁹ Schedule 4, part 2, items 16 and 17 of the RTI Act.

²⁰ (1996) 3 QAR 368 (*Willsford*).

²¹ *Willsford* at [17]. This approach was affirmed by the Information Commissioner in *10S3KF and Department of Community Safety* (Unreported, Queensland Information Commissioner, 16 December 2011).

²² Submissions supporting external review application dated 7 August 2017.

²³ Written submissions dated 14 March 2018.

²⁴ *Ibid.*

²⁵ Schedule 4, part 2, item 5 of the RTI Act.

²⁶ Schedule 4, part 2, item 6 of the RTI Act.

involved persons, personal pronouns and descriptions of the officers' feelings about the Incident. The Third Party Personal Information does not record anything about Council's actions or processes in dealing with the complaint. In my view, Council's actions and processes have already been made apparent to the applicant by virtue of the significant volume of information that has been disclosed to him. As noted above, all documents located by Council have been at least partially disclosed to the applicant, subject only to minimal redaction. For these reasons, I am unable to see how disclosure of the Third Party Personal Information could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of Council and in the circumstances, I consider there is even less likelihood that disclosure would reveal evidence of misconduct. Accordingly, I find that the factors at paragraph 18 do not apply in favour of disclosure.²⁷

Factors favouring nondisclosure

Protection of the right to privacy

20. The RTI Act recognises that where disclosure of information could reasonably be expected to prejudice the protection of an individual's right to privacy, the public interest will favour nondisclosure.²⁸ The concept of 'privacy' is not defined in the RTI Act, but can essentially be viewed as the right of an individual to preserve their 'personal sphere' free from interference from others.²⁹

21. The applicant submits that given the subject of his complaint, and witnesses to the Incident are public servants, they therefore do not have the same rights to privacy as a private individual. The applicant also considers there is reduced privacy in their statements as they were provided by way of a work email address. He contends:³⁰

the statements made are not as private persons disclosing accounts of what they witnessed and are material generated under routine work. It is a formal response to an enquiry of an alleged misconduct and assault ... presenting himself as a representative of the government performing his public duty and not as an individual.

22. I acknowledge the statements were given by the Councillor and officers in an employment context. However, I do not consider it comprises their routine work information.³¹ The information forms part of personal accounts of an incident involving serious allegations against a Councillor, made by a member of the public. I also observe that this case involves a rather unique set of circumstances which cannot be described as part of the routine day-to-day activities of a public servant. In my view, the context in which the information appears attracts a level of sensitivity which takes it beyond a routine day-to-day category.³² I acknowledge the applicant's submission that he is aware of the individuals' identities given his involvement in the Incident, however, I consider this serves only to slightly reduce the weight of the privacy nondisclosure factor. I am satisfied that the witnesses and subject of the complaint are entitled to some protection of their right to privacy in terms of their connection with the Incident, their personally held

²⁷ I have had regard to all of the factors listed in schedule 4, part 2 of the RTI Act, and in the circumstances of this review, I find that no other public interest factors apply to favour disclosure of the Third Party Personal Information.

²⁸ Schedule 4, part 3, item 3 of the RTI Act.

²⁹ Paraphrasing the Australian Law Reform Commission's definition of the concept in 'For your information: Australian Privacy Law and Practice' Australian Law Reform Commission Report No. 108 released May 2008, at paragraph 1.56.

³⁰ Written submissions dated 14 March 2018.

³¹ Generally, information relating to the day-to-day work duties of a public servant may be disclosed under the RTI Act. Despite it falling within the definition of personal information. However, agency documents can also contain personal information of public servants which is not routine work information: see *Gapsa and Department of Transport and Main Roads* (Unreported, Queensland Information Commissioner, 12 April 2013) at [71].

³² *Foot and Valuers Registration Board of Queensland* [2017] QICmr 59 (19 December 2017) at [33].

views, and the aspects of their statements that remain redacted. Accordingly, I afford the privacy factor moderate weight in favour of nondisclosure of this information.

23. The CEO and certain Council officers are provided with mobile telephones to perform work associated with their employment. I consider that a mobile telephone number which allows an individual to be contacted directly or potentially outside of working hours, also falls outside the realm of routine work information and attracts a level of privacy.³³ Similarly, I consider disclosing the names of other individuals, external to Council, who are incidentally referred to in the information (and may not even be aware of such references) could reasonably be expected to prejudice the protection of those individuals' right to privacy. I afford the privacy factor moderate weight in favour of nondisclosure of those categories of information.

Disclosure of personal information

24. The RTI Act also recognises that *disclosure* of another individual's '*personal information*' is a factor favouring nondisclosure which could reasonably be expected to lead to a public interest harm (**Harm Factor**).³⁴ The concept of 'disclosure' as used in the Harm Factor apprehends the giving of information to a person or entity not otherwise possessed of knowledge of that information.³⁵ Where releasing personal information would involve conveying to any person or entity information that they already know, it cannot be said such release would 'disclose' personal information within the meaning of the Harm Factor, and therefore, the factor will not apply
25. In this case, as the applicant was present at the flying fox dispersal attempt, I accept that certain aspects of the Third Party Personal Information will already be known him, for example, the names of other individuals involved. Therefore, the Harm Factor will not apply to such information. However, I am satisfied that the redacted contents of the statements given by other individuals about the Incident, and the exact words they used in describing their personal feelings and opinions are not already known to the applicant and therefore, the Harm Factor applies to such information.
26. I find that the extent of harm that could flow from disclosure is moderate as it would reveal the personal feelings of individuals involved in a sensitive matter involving serious allegations. This, in turn, could prejudice the ability of Council to obtain fulsome statements from its officers in any future complaint processes.

Balancing the public interest

27. In addition to the pro-disclosure bias, there is low weight to be afforded to enhancing Council's accountability, and revealing contextual and background information that was before Council in making a decision on the applicant's complaint. Balanced against this is the moderate weight I have afforded to protecting the right to privacy of other individuals, including the subject Councillor, and Council officers who provided statements about the Incident. The Harm Factor also carries moderate weight in terms of safeguarding the personal information of those individuals. I am satisfied that the weight of the nondisclosure factors that apply in this case is determinative.

³³ See *Kiepe and the University of Queensland* (Unreported, Queensland Information Commissioner, 1 August 2012 at [20]).

³⁴ Schedule 4, part 4, section 6 of the RTI Act.

³⁵ While 'disclose' as used in the Harm Factor is not defined in the RTI Act, the word is defined in section 23 of the IP Act as it relates to the application of the Information Privacy Principles – to '*disclose personal information*' relevantly means to give that information to an entity who does not otherwise know the information and is not in a position to find it out. This accords with the ordinary dictionary definition of '*disclose*': relevantly, to '*make known; reveal*': Macquarie Dictionary Online: www.macquariedictionary.com.au/ (accessed 11 May 2018).

28. I find that disclosure of the Third Party Personal Information would, on balance, be contrary to the public interest and that therefore, access to it may be refused under section 47(3)(b) of the RTI Act.

DECISION

29. I affirm Council's decision to refuse access to the Third Party Personal Information under section 47(3)(b) of the RTI Act.
30. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

K Shepherd
Assistant Information Commissioner

Date: 22 May 2018

APPENDIX

Significant procedural steps

Date	Event
7 August 2017	OIC received the external review application.
8 August 2017	OIC spoke to Council about third parties who were consulted when considering the access application.
9 August 2017	OIC asked Council to provide relevant procedural documents and received the requested procedural documents from Council.
25 August 2017	OIC notified Council and the applicant that the external review application had been accepted and asked Council to provide the documents located in response to the access application and a copy of any records of the searches conducted by Council.
5 September 2017	OIC received a copy of the located documents and search records from Council.
18 September 2017	OIC provided the applicant with an update on the status of the external review and the applicant provided oral submissions in support of his application.
16 February 2018	OIC conveyed a written preliminary view to Council that some further information could be released to the applicant on the basis its disclosure would not, on balance, be contrary to the public interest. OIC also asked Council to undertake further third party consultation and conduct additional searches for emails identified the applicant as missing.
20 February 2018	Council sought clarification from OIC about the request to conduct further searches.
21 February 2018	OIC received a copy of search records from Council and additional located documents. Council also confirmed that the consulted third party (animal expert) had raised no objection to disclosure of their correspondence with Council.
13 March 2018	<p>OIC wrote to the applicant advising Council had agreed to release some further information to him, including the newly located documents. OIC also conveyed a written preliminary view that access to the remaining information in issue may be refused as its disclosure would, on balance, be contrary to the public interest. OIC also conveyed a view that Council had taken all reasonable steps to locate information in response to the application.</p> <p>OIC asked Council to send the applicant the further information it had agreed to release, including the documents which were subject to third party consultation.</p>
14 March 2018	<p>Council notified OIC that the additional documents had been sent to the applicant.</p> <p>The applicant advised OIC that he did not accept OIC's preliminary view and provided submissions to OIC in support of his right of access.</p>
6 April 2018	OIC provided the applicant and Council with an update on the status of the external review.