



Decision and Reasons for Decision

Citation:	<i>U24 and Brisbane City Council</i> [2021] QICmr 61 (22 November 2021)
Application Number:	316160
Applicant:	U24
Respondent:	Brisbane City Council
Decision Date:	22 November 2021
Catchwords:	<p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - IRRELEVANT INFORMATION - information falling outside the scope of the applicant's request - whether deleted information is irrelevant to the terms of the access application - section 88 of the <i>Information Privacy Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST INFORMATION - personal information of other individuals - personal information and privacy - prejudice to management function of Council - prejudice to ability to obtain confidential information - whether disclosure of information would, on balance, be contrary to the public interest - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(b) and 49 of the <i>Right to Information Act 2009</i></p> <p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - whether agency has conducted reasonable searches - whether access to further documents may be refused on the basis they are nonexistent or unlocatable - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(e) and 52(1) of the <i>Right to Information Act 2009</i> (Qld)</p>

REASONS FOR DECISION

Summary

1. The applicant applied¹ to Brisbane City Council (**Council**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to information contained on Council's Ethical

¹ Application received 28 January 2021.

Standards Unit (**ESU**) complaint/assessment file concerning a complaint the applicant had made about a named Council officer.

2. Council decided² to give the applicant access to some information, but refused access to other information on the grounds that it was irrelevant information, or that its disclosure would, on balance, be contrary to the public interest.
3. The applicant applied³ for internal review of Council's decision. Council varied its initial decision by deciding⁴ to give access to some additional information, but refusing access to the remainder on the same grounds as identified in the initial decision.
4. The applicant applied⁵ to the Office of the Information Commissioner (**OIC**) for external review of Council's refusal of access. On external review, the applicant also raised a sufficiency of search issue.
5. For the reasons explained, I affirm the decision under review. I also find that the searches and inquiries that Council conducted in an effort to locate all responsive documents were reasonable in all the circumstances of this case and that access to any additional documents may be refused on the basis that they are nonexistent or unlocatable under section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.

Background

6. The applicant has made a number of access applications to Council arising out of her interactions with Council occurring either on her own behalf, or while acting as an agent for another person in relation to multiple access applications made to Council by that person.
7. The applicant complained to Council by email on 23 August 2020 about correspondence she had received from Officer A advising her of the outcome of a complaint she had made about Officer B. The applicant considered that Officer A had a conflict of interest and should not have been involved in the complaint about Officer B. Officer A contacted the applicant again after receipt of the complaint email of 23 August 2020. The applicant considered this contact *'inappropriate, unprofessional, unwelcome, disrespectful and intimidating/harassing ...'*⁶ and made a formal complaint to Council about Officer A on 28 September 2020. In this review, she seeks access to information concerning ESU's handling of this complaint about Officer A.
8. ESU assessed the complaint and decided there were no observable acts of misconduct or corrupt conduct on the part of Officer A, and nor was there evidence of a conflict of interest.⁷

Reviewable decision

9. The decision under review is Council's internal review decision dated 31 May 2021.

² Decision dated 4 March 2021.

³ On 3 May 2021.

⁴ Decision dated 31 May 2021.

⁵ Application received 24 June 2021.

⁶ As contained in the complaint of 28 September 2020.

⁷ The applicant was advised of the outcome of her complaint in a letter from Council dated 14 January 2021.

Evidence considered

10. Significant procedural steps relating to the external review are set out in the Appendix.
11. The evidence, submissions, legislation and other material I have considered in reaching my decision are set out in these reasons (including footnotes and the Appendix). I have taken account of the applicant's submissions to the extent that they are relevant to the issues for determination in this review.⁸
12. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.⁹ I consider a decision-maker will be '*respecting and acting compatibly with*' that right and others prescribed in the HR Act, when applying the law prescribed in the IP Act and the *Right to Information Act 2009* (Qld) (**RTI Act**).¹⁰ I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between equivalent pieces of Victorian legislation:¹¹ '*it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act.*'¹²

Information in issue

13. During the review, Council agreed to give the applicant access to additional information which is no longer in issue in this review.
14. The information remaining in issue may be categorised as follows:
 - irrelevant information¹³ (**Irrelevant Information**); and
 - contrary to the public interest information¹⁴ (**Investigation Information**).

Issues for determination

15. The issues for determination are:
 - whether the Irrelevant Information may be deleted on the basis it is irrelevant to the terms of the access application; and
 - whether access to the Investigation Information may be refused because its disclosure would, on balance, be contrary to the public interest.
16. Late in the review, the applicant also raised a sufficiency of search issue, as well as querying whether Council had conducted a search of its email system for responsive emails using a *SourceOne* search. It is also therefore necessary to determine whether the searches and inquiries that Council has conducted in an effort to locate responsive documents have been reasonable in the circumstances.
17. To the extent that the applicant has made submissions that are relevant to these issues, I will discuss them below.

⁸ Including the external review application and email received on 14 November 2021.

⁹ Section 21 of the HR Act.

¹⁰ *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

¹¹ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹² *XYZ* at [573].

¹³ Part 1: pages 8, 12; Part 2: pages 18, 19, 27-32, 36-40, 43-46, 52; Part 3: pages 3-5, 9, 12, 15, 19 and 21; Part 4: pages 1, 11-15, 19-23, 27-32, 36-44, 48-52, 56-64, 68-69, 72, 75, 76, 79-80, 83.

¹⁴ Part 1: pages 7-8, 10, 18-19, 22-23; Part 2: pages 1-2, 14, 25; Part 3: page 28.

Complaints by the applicant

18. Many of the procedural issues and complaints that the applicant raised during the course of the review about Council generally, or about the processing of her application by Council,¹⁵ are either outside OIC's jurisdiction under the IP Act, or are irrelevant on external review because, as has been explained to the applicant on numerous previous occasions, OIC conducts a merits review of Council's decision. OIC's role is to consider the information to which Council has refused access and decide whether that refusal of access was correct. OIC has no jurisdiction to investigate an agency's record-keeping procedures. In respect of the applicant's continuing complaints about, for example, footers and watermarks applied or not applied by Council to released documents, I would simply observe that there are no legislative requirements with which an agency is required to comply regarding such matters, and OIC has no jurisdiction under the IP Act to deal with these types of administrative/record-keeping issues.
19. The applicant also raised concerns about the fact that additional information was released to her by Council on internal review, and again during the external review process. She submitted that this highlighted the *'ongoing problems within Council's RTI Unit'* which concerned her greatly *'because clearly Council, with respect, gets it wrong!'*¹⁶ However, I note that the purpose of internal and external reviews is for another decision-maker to consider the decision under review, and the information in issue, and make a fresh decision. The fact that a new decision-maker may consider that additional information should be released does not necessarily indicate that the initial decision was incorrect, particularly when the application of the public interest balancing test is concerned, which can involve a decision-maker applying their own individual judgment regarding the weighting to be given to the various public interest factors when deciding where the balance of the public interest lies.

Irrelevant information

Relevant law

20. Section 88 of the IP Act provides that an agency may give access to a document subject to the deletion of information it reasonably considers is not relevant to an application. This is a mechanism to allow irrelevant information to be deleted from documents which are identified for release to an applicant.
21. In deciding whether information is irrelevant, it is necessary to consider whether the information has any bearing upon, or is pertinent to, the terms of the application.¹⁷
22. The information in issue contains references to the applicant's complaint about Officer B. Council decided that this information was irrelevant on the basis that the terms of the access application were reasonably to be interpreted as requesting access to information concerning the applicant's complaint about Officer A.

Applicant's submissions

23. The applicant submits that she requested access to *'any and all information ... regarding the complete complaint/assessment file and associated information of Council's Ethical Standards Unit (ESU) complaint file of ... [Officer A] (ref:O-2020-1149)'*.¹⁸ She contends

¹⁵ These ranged from complaints about alleged inconsistencies in Council's treatment of information, to complaints about footers and watermarks: see the applicant's email of 14 November 2021.

¹⁶ Submission of 14 November 2021.

¹⁷ *O80PCE and Department of Education and Training* (Unreported, Queensland Information Commissioner, 15 February 2010) at [52] which was a decision made under the equivalent provision in the repealed *Freedom of Information Act 1992* (Qld).

¹⁸ Applicant's access application of 28 January 2021.

that because Council finalised both of her complaints against Officer A and Officer B in a single outcome letter, the complaints are 'associated' and it is not correct to regard references to her complaint against Officer B contained in Officer A's ESU complaint file as irrelevant.

Finding

24. I find that the applicant's application should reasonably be interpreted as requesting access to information concerning her complaint against Officer A only. The fact that Council's ESU file contains references to her complaint against Officer B is not sufficient to bring this information within the scope of the application. Regardless of whether Council advised the applicant of the outcome of both complaints in a single letter, the complaints were separate – they were investigated separately by ESU and were allocated separate reference numbers. Had the applicant wished, in her access application, to also seek access to information concerning her complaint against Officer B, it was a simple matter to include this request in the wording of the access application. However, by her wording, the applicant requested access to information about her complaint against Officer A, and used the relevant reference number for that complaint.
25. I am therefore satisfied that the information that Council deleted under section 88(1) of the RTI Act is properly to be regarded as not relevant to the access application.

Investigation Information

Relevant law

26. Under the IP Act, a person has a right to be given access to documents of an agency.¹⁹ However, this right is subject to provisions of the IP Act and RTI Act including the grounds on which an agency may refuse access to documents.²⁰ An agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.²¹
27. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision maker must:²²
- identify factors irrelevant to the public interest and disregard them
 - identify factors in favour of disclosure of information
 - identify factors in favour of nondisclosure of information; and
 - decide whether, on balance, disclosure of the information would be contrary to the public interest.
28. Schedule 4 of the RTI Act contains non-exhaustive lists of factors that may be relevant in determining where the balance of public interest lies in a particular case. I have considered these lists,²³ together with all other relevant information, in reaching my

¹⁹ Section 40 of the IP Act.

²⁰ Section 67(1) of the IP Act provides that an agency may refuse access to a document in the same way and to the same extent it could refuse access to the document under section 47 of the RTI Act were the document to be the subject of an access application under the RTI Act.

²¹ Section 67(1) of the IP Act and section 47(3)(b) and 49 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. However, there are some recognised public interest considerations that may apply for the benefit of an individual.

²² Section 49(3) of the RTI Act.

²³ I have considered each of the public interest factors outlined in schedule 4 of the RTI Act, and any relevant factors are discussed below.

decision. I have kept in mind the IP Act's pro-disclosure bias²⁴ and Parliament's requirement that grounds for refusing access to information be interpreted narrowly.²⁵

Discussion

29. I have taken no irrelevant factors into consideration in making my decision.
30. I consider that the following public interest factors apply in favour of disclosure:
- disclosure could reasonably be expected to enhance Council's accountability regarding its handling of the complaint;²⁶ and
 - disclosure could reasonably be expected to reveal background or contextual information that informed Council's decision regarding the complaint.²⁷
31. I find that these factors should be afforded moderate weight when balancing the public interest given that Council has already advised the applicant of the process it undertook to investigate her complaint, and of the outcome of the complaint. I consider the information that has already been released to the applicant by Council serves to reduce the weight to be afforded to these factors. As has been explained to the applicant in other reviews, the Information Commissioner has decided that the requirement on an agency to be accountable and transparent in the conduct of disciplinary investigations does not oblige the agency to provide the applicant with access to its entire investigation file, nor reveal all of the information it gathered in dealing with the investigation.²⁸
32. I consider that the following nondisclosure/harm factors apply to the Investigation Information:
- disclosure could reasonably be expected to disclose the personal information of other persons²⁹ and prejudice the protection of their right to privacy³⁰
 - disclosure could reasonably be expected to prejudice the fair treatment of individuals and the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct;³¹ and
 - disclosure could reasonably be expected to prejudice the management function of an agency.³²
33. The Investigation Information contains the personal information of persons other than the applicant, including the subject of the applicant's complaint. This automatically gives rise to a public interest harm in disclosure. Given that the information is of a sensitive nature, having been gathered in the course of investigating a complaint about an officer's conduct, I place significant weight on this public interest harm factor, as well as on the associated prejudice to the protection of the right to privacy of the relevant persons.
34. I also afford the fair treatment nondisclosure factor significant weight when balancing the public interest in circumstances where Council investigated the applicant's complaint and decided that there were no observable acts of misconduct or corrupt conduct on the part of the subject officer.

²⁴ Section 64 of the IP Act.

²⁵ Section 67(2) of the IP Act and section 47(2) of the RTI Act..

²⁶ Schedule 4, part 2, item 1 of the RTI Act.

²⁷ Schedule 4, part 2, item 11 of the RTI Act.

²⁸ *8A3BPQ and Queensland Police Service* [2014] QICmr 42 (30 October 2014) at [22] to [24].

²⁹ Schedule 4, part 4, section 6 of the RTI Act.

³⁰ Schedule 4, part 3, item 3 of the RTI Act.

³¹ Schedule 4, part 3, item 6 of the RTI Act.

³² Schedule 4, part 3, item 19 of the RTI Act.

35. In respect of the management function nondisclosure factor, I consider that disclosing communications within an agency and its ESU concerning the investigation of a complaint about an officer's conduct could reasonably be expected to have a negative impact on the future free exchange of such information, with an associated negative effect on the agency's staff management processes. Again, I afford this factor significant weight in balancing the public interest.

Finding

36. After balancing the public interest factors favouring disclosure and nondisclosure, I find that the factors favouring nondisclosure outweigh those favouring disclosure such that disclosure of the Investigation Information would, on balance, be contrary to the public interest and access may be refused on that basis.

Sufficiency of search

Relevant law

37. Access to a document may be refused if the document is nonexistent or unlocatable.³³
38. To be satisfied that documents are nonexistent, a decision-maker must rely on their particular knowledge and experience and have regard to a number of key factors, including:³⁴
- the administrative arrangements of government
 - the agency structure
 - the agency's functions and responsibilities
 - the agency's practices and procedures (including but not exclusive to its information management approach); and
 - other factors reasonably inferred from information supplied by the applicant including the nature and age of the requested document/s and the nature of the government activity to which the request relates.
39. If searches are relied on to justify a decision that the documents do not exist, all reasonable steps must be taken to locate the documents. What constitutes reasonable steps will vary from case to case as the search and enquiry process an agency will be required to undertake will depend on the particular circumstances.
40. To determine whether a document exists, but is unlocatable, the RTI Act requires consideration of whether there are reasonable grounds for the agency to be satisfied that the requested document has been or should be in the agency's possession; and whether the agency has taken all reasonable steps to find the document. In answering these questions, regard should again be had to the circumstances of the case and the key factors.³⁵
41. The Information Commissioner's external review functions include investigating and reviewing whether agencies have taken reasonable steps to identify and locate

³³ Section 67(1) of the IP Act and sections 47(3)(e) and 52 of the RTI Act. A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist—section 52(1)(a) of the RTI Act. A document is unlocatable if it has been or should be in the agency's possession and all reasonable steps have been taken to find the document but it cannot be found - section 52(1)(b) of the RTI Act.

³⁴ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) (*Pryor*) at [19] which adopted the Information Commissioner's comments in *PDE and the University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009).

³⁵ *Pryor* at [21].

documents applied for by applicants.³⁶ Generally, the agency that made the decision under review has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant.³⁷ However, where an external review involves the issue of missing documents, the applicant has a practical onus to establish reasonable grounds to be satisfied that the agency has not discharged its obligation to locate all relevant documents. Suspicion and mere assertion will not satisfy this onus.

Applicant's submissions

42. At a late stage of the review, the applicant queried whether Council had conducted a search of its email system, using a *SourceOne* search, to locate any responsive emails.³⁸ The applicant submitted that there appeared to be an email trail referred to in the information in issue that had not been located. She also argued that, because she had stated in her access application that *'other Council officers/managers may be involved in this ESU complaint file, outside of those of the ESU... including the Chief Executive Officer or other senior members of Council'*, additional searches should be conducted.

Discussion

43. As noted above, where a sufficiency of search issue is raised on external review, the issues for OIC to determine are:
- whether there are reasonable grounds for believing that additional responsive documents exist in the agency's power or possession, and, if so;
 - whether the searches and inquiries conducted by the agency in an effort to locate the additional responsive documents have been reasonable in all the circumstances.
44. In response to the applicant's assertion that the CEO or other senior officers of Council may have been involved in her complaint, there is no evidence before me, including in the information in issue, to indicate any involvement of these senior officers. As noted, suspicion and mere assertion by an applicant are not sufficient to discharge the onus on the applicant to establish reasonable grounds for believing that additional responsive document sought to exist.
45. The applicant also asserts that there is a missing email chain in the Part 1 documents³⁹ and asked for confirmation that any missing emails form part of the refused information. While I am prevented, under section 121(3) of the IP Act, from discussing information that is claimed to be contrary to the public interest information, I would simply note that the refused information suggests that the relevant discussion took place in a meeting rather than through an exchange of emails.
46. As regards the applicant's assertion generally that Council should be required to conduct a *SourceOne* search of its entire email system in an effort to locate any additional responsive emails, I am not satisfied that this is reasonably necessary based on the applicant's submissions and the searches conducted by Council. The difficulties associated with conducting a *SourceOne* search of Council's email system were

³⁶ Section 137(2) of the IP Act. The Information Commissioner also has power under section 115 to require additional searches to be conducted during an external review.

³⁷ Section 87(1) of the RTI Act.

³⁸ Applicant's submission of 14 November 2021.

³⁹ The applicant referred to page 10 of the Part 2 documents in error.

discussed in detail in another recent OIC decision involving the applicant and Council: *T74 and Brisbane City Council*.⁴⁰

47. The applicant requested access to Council's ESU file. Council searched that file and located and dealt with the responsive documents contained in it. I am satisfied it is reasonable to expect that this targeted search was sufficient in the circumstances to identify and locate all documents responding to the access application. The applicant's submissions have not satisfied me that there are reasonable grounds for believing that additional responsive documents exist that could reasonably be expected to be located through a *SourceOne* search of Council's email system.

Finding

48. I am satisfied it is reasonable to expect that the targeted searches that Council conducted when processing the access application were sufficient to identify and locate all documents responding to the access application. In the absence of the identification by the applicant of specific missing documents that it would be reasonable to expect that only a *SourceOne* search would locate, I do not consider that requiring Council to conduct such a search is reasonable in all the circumstances of this review.

DECISION

49. I affirm the decision under review by finding that:
- access to the Irrelevant Information may be refused under section 88 of the IP Act; and
 - access to the Investigation Information may be refused under section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.
50. I also find that the searches and inquiries that Council conducted in an effort to locate all responsive documents were reasonable in all the circumstances of this case and that access to any additional documents may be refused on the basis that they are nonexistent or unlocatable under section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.
51. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

S Martin
Assistant Information Commissioner

Date: 22 November 2021

⁴⁰ [2021] QICmr 54 (21 October 2021).

APPENDIX

Significant procedural steps

Date	Event
24 June 2021	OIC received the applicant's application for external review. OIC requested that Council provide preliminary information.
25 June 2021	OIC received additional supporting information from the applicant.
29 June 2021	Council provided preliminary information.
2 August 2021	OIC advised the applicant and Council that the applicant's application had been accepted.
23 August 2021	Council provided copies of the information in issue.
25 August 2021	OIC expressed a preliminary view to Council.
27 September 2021	OIC requested Council's response.
5 October 2021	Council provided its response.
11 October 2021	OIC expressed a preliminary view to the applicant.
26 October 2021	The applicant requested an extension of time to provide a response.
14 November 2021	The applicant provided a submission.