



## Decision and Reasons for Decision

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**Citation:** *L36 and Lockyer Valley Regional Council [2023] QICmr 59*  
(8 November 2023)

**Application Number:** 317264

**Applicant:** L36

**Respondent:** Lockyer Valley Regional Council

**Decision Date:** 8 November 2023

**Catchwords:** ADMINISTRATIVE LAW - RIGHT TO INFORMATION - RIGHT OF ACCESS - DOCUMENT OF AN AGENCY - request to access sound recordings made by an independent environmental noise consultant - whether a 'document of an agency' - whether a right of access exists - sections 13 and 40 of the *Information Privacy Act 2009* (Qld) and section 12 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - FORM OF ACCESS - COPYRIGHT - noise monitoring report - whether giving access to a copy of the report would involve an infringement of the copyright of a person other than the State - section 83(4)(c) of the *Information Privacy Act 2009* (Qld)

## REASONS FOR DECISION

### Summary

1. The applicant applied<sup>1</sup> to Lockyer Valley Regional Council (**Council**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to sound recordings<sup>2</sup> and a related report arising from an investigation into a noise complaint that the applicant made to Council.
2. Council purported to make a decision in response to the application, however, the decision was issued outside the statutory timeframe contained in the IP Act and Council was therefore deemed to have refused access to the requested information.<sup>3</sup> Council's purported decision was as follows:<sup>4</sup>

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<sup>1</sup> Access application dated 16 March 2023 and received by Council on 17 March 2023.

<sup>2</sup> Recorded between 12 and 25 January 2023 (**Sound Recordings**).

<sup>3</sup> Section 66 of the IP Act.

<sup>4</sup> Contained in a letter emailed to the applicant on 27 April 2023 at 3:30pm. Council had requested an extension of time from the applicant on 26 April 2023 at 5:56pm, which was the date the decision was due. While Council did not receive a refusal from the applicant to the extension request, Council did receive notification that the applicant had sought external review prior to purporting to issue its decision on 27 April 2023.

- refuse access to 25 pages, comprising a noise monitoring report (**Report**), on the basis that its disclosure would, on balance, be contrary to the public interest; and
  - refuse access to Sound Recordings on the basis they are nonexistent.
3. The applicant applied<sup>5</sup> to the Office of the Information Commissioner (**OIC**) for external review of Council's deemed refusal of access.
  4. During the review, Council agreed that full access to the Report could be granted by way of inspection only<sup>6</sup> (in light of a copyright claim by the Report's author). However, the applicant rejected the offer of inspection and continued to pursue access to a copy of the Report.
  5. For the reasons explained below, I vary Council's deemed refusal of access by finding that:
    - access to the Sound Recordings may be refused on the ground that they are not documents of Council and there is therefore no right of access to them under the IP Act; and
    - providing a copy of the Report to the applicant would involve infringement of the copyright of persons other than the State, and so access to the Report in that form may be refused and given in another form (i.e., by way of inspection).

## Background

6. The applicant made a complaint to Council about excessive noise originating from a neighbouring property. Council engaged an independent noise consultant to assess whether the level of noise was within permissible ranges, and to provide Council with a report. As part of that assessment process, a noise recording device was placed outside the applicant's home. The applicant remained aggrieved by the noise emanating from the neighbouring property and sought access to the Sound Recordings as well as to the Report containing the consultant's findings.<sup>7</sup>

## Reviewable decision

7. The decision under review is Council's deemed refusal of access taken to have been made by Council on 26 April 2023.

## Evidence considered

8. Significant procedural steps relating to the external review are set out in the appendix to this decision. The evidence, submissions, legislation, and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and the appendix).
9. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.<sup>8</sup> I consider a decision-maker will be '*respecting and acting compatibly with*' these rights and others prescribed in the HR Act, when

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<sup>5</sup> External review application dated 26 April 2023, emailed to OIC at 8:41pm.

<sup>6</sup> Email to OIC dated 26 July 2023.

<sup>7</sup> The applicant also complained in her emails of 17 and 23 August 2023 that her privacy had been breached by placing the recording device outside her bedroom/office window for a period of two weeks. The applicant was advised that OIC does not have jurisdiction to consider her privacy complaint within the context of her external review application.

<sup>8</sup> Section 21(2) of the HR Act.

applying the law prescribed in the IP Act.<sup>9</sup> I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act.<sup>10</sup>

### Issues for determination

10. The issues for determination are:

- whether access to the Sound Recordings may be refused because they are not a document of Council within the meaning of section 13 of the IP Act (applying the definition contained in section 12 of the *Right to Information Act 2009* (Qld) (**RTI Act**)) and there is therefore no right of access to them under section 40(1)(a) of the IP Act; and
- whether providing a copy of the Report to the applicant would involve infringement of the copyright of persons other than the State, so that access in that form may be refused and access may be given in another form.

### Sound Recordings

11. While the applicant indicated that she no longer sought access to the Sound Recordings during a telephone conversation with OIC,<sup>11</sup> she stated as follows in a subsequent written submission: '*I hold the right to access copies of all relevant files and recordings by law*' and requested that OIC '*expedite the release of the requested files without further delay*'.<sup>12</sup> I have therefore addressed the issue of access to the Sound Recordings in this decision.

### Relevant law

12. Section 40(1)(a) of the IP Act provides that, subject to the IP Act, a person has a right to be given access to '*documents of an agency*'.<sup>13</sup>
13. Section 13 of the IP Act provides that '*document of an agency*' means anything that is a document of an agency under the RTI Act.
14. '*Document of an agency*' is defined in section 12 of the RTI Act as follows:

#### **12 Meaning of document of an agency**

*In this Act, **document**, of an agency, means a document, other than a document to which this Act does not apply, in the possession, or under the control, of the agency whether brought into existence or received in the agency, and includes—*

- (a) *a document to which the agency is entitled to access; and*
- (b) *a document in the possession, or under the control, of an officer of the agency in the officer's official capacity.*

<sup>9</sup> *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]. I note that OIC's approach to the HR Act set out in this paragraph was considered and endorsed by the Queensland Civil and Administrative Tribunal in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23] (where Judicial Member McGill saw '*no reason to differ*' from OIC's position).

<sup>10</sup> I also note the following observations made by Bell J in *XYZ* at [573], on the interaction between equivalent pieces of Victorian legislation (namely, the *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic)): '*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*'.

<sup>11</sup> On 17 August 2023.

<sup>12</sup> Submission of 17 August 2023.

<sup>13</sup> Only to the extent that they contain the individual's personal information. I would note that, even if the Sound Recordings could be regarded as documents of Council, it would then need to be considered whether they contain the applicant's 'personal information' within the meaning of section 12 of the IP Act.

15. If the requested document is not a document of an agency under section 12 of the RTI Act, there is no right of access to it under section 40(1)(a) of the IP Act.
16. A document not in the physical possession of an agency will nevertheless be a document of an agency for the purposes of the RTI Act, if it is *'under the control'* of the relevant agency.<sup>14</sup> The Information Commissioner has previously explained that a document will be under the control of an agency<sup>15</sup> where the agency has a present legal entitlement to take physical possession of the document.<sup>16</sup>
17. The meaning of *'document of an agency'* was discussed more recently by the Queensland Civil and Administrative Tribunal in the *Carmody* series of decisions. Justice Hoeben decided as follows:<sup>17</sup>
  - a) *"possession" is not defined in the RTI Act or the Acts Interpretation Act 1954 (Qld). Its meaning depends upon the context in which it is used. Previous Information Commissioners have found that the word "possession" in the context of freedom of information legislation requires that the relevant documents be in the physical possession of an agency. The concept of possession is extended by the words "or under the control ... of", words which have been considered by previous Information Commissioners to "convey the concept of a present legal entitlement to control the use or physical possession of a document".*
  - b) *"possession" must, however, be read in context and subject to the limitation that whatever possessory interest DJAG has, allows DJAG to legally provide an access applicant with those documents (see ss 23, 47(3)(e) and 68(1) RTI Act). Unlike the analogous context of disclosure (where disclosure is required even of documents not capable of being produced), the RTI Act confers a right to access documents where DJAG is able to provide a copy (or produce one). The expression "possession", where used to describe the documents of an agency, must be construed in a way consistent with that, so as not to capture documents where DJAG is not able to in fact produce them (or where to do so would interfere with judicial independence). The High Court has held in the context of subpoenas, that the concept of "possession" assumes that a person to whom it is directed "has the ability or capacity to produce them".*
18. As such, His Honour limited the concept of possession in section 12 of the RTI Act to instances where the agency is legally entitled to produce the requested documents.

### **Council's submissions**

19. OIC requested that Council provide further information about its engagement of the noise consultant in order to assess whether Council had a legal entitlement to possession of the Sound Recordings.
20. Council confirmed that it did not possess a copy of the Sound Recordings and submitted as follows:<sup>18</sup>
  - following receipt of the applicant's complaints, Council engaged an environmental consultant to conduct a noise monitoring investigation and to provide Council with a report

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<sup>14</sup> Or under the control of an officer of the agency in the officer's official capacity, and includes documents to which the agency is entitled to access.

<sup>15</sup> Or one which it is entitled to access.

<sup>16</sup> *Price and the Nominal Defendant* (1999) 5 QAR 80, at [18]. The Information Commissioner also explained that the *'...ruling test imposed by the definition of "document of an agency" is comprised in the words "in the possession or under the control of an agency". The remaining words of the definition illustrate, rather than extend, the ruling test.'*

<sup>17</sup> *Carmody v Information Commissioner & Ors* (No 4) [2018] QCATA 17 at [66].

<sup>18</sup> Submissions to OIC dated 19 June 2023 and 11 July 2023.

- the consultant performed ‘attended’ and ‘unattended’ noise monitoring at the applicant’s residence
- the report prepared by the consultant and provided to Council outlined the findings and/or results of the noise monitoring
- there was no written or verbal agreement or requirement for the consultant to provide Council with any sound recordings it had made as a result of its ‘attended’ and ‘unattended’ noise monitoring; and
- the fee proposal which the consultant provided to Council at the time of its engagement contained no requirement for the sound recordings to be provided to Council.

### **Finding**

21. Based on the information provided by Council, I am satisfied that the Sound Recordings to which the applicant seeks access are not documents of Council within the meaning of section 12 of the RTI Act and that there is therefore no right of access to them under section 40(1)(a) of the IP Act. The Sound Recordings are not in the physical possession of Council<sup>19</sup> and there is nothing before me that evidences the existence of a present legal entitlement of Council to control the use or physical possession of the Sound Recordings.

### **Report**

22. Council’s purported decision was to refuse access to the Report on the grounds that its disclosure would, on balance, be contrary to the public interest. During the review, OIC raised with Council the fact that the Report appeared to be subject to a claim of copyright by its author, in which case access could only be provided by way of inspection in any event. Council accepted this position and agreed to give the applicant full access to the Report by way of inspection only. However, the applicant continued to pursue access to a copy of the Report.

### **Relevant law**

23. Generally, OIC is not involved in reviewing ‘form of access’ decisions by agencies that involve copyright because the IP Act specifically excludes these matters from OIC’s jurisdiction.<sup>20</sup> However, as explained above, the reviewable decision in this matter is a deemed decision<sup>21</sup> by Council refusing access to the Report. Where OIC determines on external review that access to a document may be given, it falls to OIC to consider the issue of form of access, insofar as it relates to copyright.<sup>22</sup>
24. Section 83(4)(c) of the IP Act provides that, if giving access in the form requested by the applicant would involve an infringement of the copyright of a person other than the State, access in that form may be refused and given in another form. Accordingly, in order to determine whether access to the Report in the form sought by the applicant (being provided with a copy) may be refused and instead given in another form (by way of inspection), it is necessary to consider whether copyright subsists and if so, whether

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<sup>19</sup> An alternative finding, as expressed to the applicant during the review, would therefore be that access to the Sound Recordings may also be refused because they are nonexistent: see section 67 of the IP Act and sections 47(3)(e) and 52 of the RTI Act.

<sup>20</sup> Section 99 of the IP Act provides that ‘[a] person affected by a reviewable decision may apply to have the decision reviewed by the information commissioner’. ‘Reviewable decision’ in Schedule 5 of the IP Act includes ‘(k) a decision giving access to documents in a form different to the form applied for by the applicant, **unless access in the form applied for would involve an infringement of the copyright of a person other than the State**’ [my emphasis].

<sup>21</sup> A ‘deemed decision’ is a reviewable decision – see the definition of ‘reviewable decision’ in Schedule 5 of the IP Act.

<sup>22</sup> The Information Commissioner has the power to decide any matter in relation to an access application that, under the IP Act, could have been decided by the agency (section 118(1)(b) of the IP Act).

it would be infringed by Council making a copy of the Report and releasing it under the IP Act.

## Discussion

### Does copyright subsist?

25. Section 32(1) of the *Copyright Act 1968* (Cth) (**Copyright Act**) provides that copyright subsists in an original literary, dramatic, musical or artistic work that is unpublished and of which the author was a qualified person at the time when the work was made.
26. Relevantly, a literary work is anything that is reduced to writing which is not trivial in content. A literary work includes fictional and nonfiction books, technical manuals, instructional manuals, usage guides, reports, annual reports and other documents. I am satisfied that the Report is not trivial and is a literary work.
27. The word 'original' is not defined in the *Copyright Act* but has been taken to mean that the work originates from the author, i.e., it was not copied,<sup>23</sup> and will result where the author has applied his/her knowledge, judgement, skill or labour.<sup>24</sup> As the Report was created by the consultant applying their special skill and knowledge in their field, and does not appear to have been copied from another source, I am satisfied that it is an original work for the purpose of the *Copyright Act*.
28. There is no evidence before me to suggest that the Report has been published.<sup>25</sup>
29. A 'qualified person' means an Australian citizen or a person resident in Australia.<sup>26</sup> Given the Report was authored by staff of a registered Australian company and relates to property located in Australia, I am satisfied that the person who authored the Report is likely to be an Australian citizen or resident.
30. Based on the above, I am satisfied that the Report is an original artistic work that is unpublished and of which the author was a qualified person at the time when the work was made. Therefore, I find that copyright subsists in the Report.

### Would providing a copy infringe copyright?

31. Copyright in relation to an artistic work such as the Report is an exclusive right to do various acts, including reproducing the work in a material form, unless the contrary intention appears.<sup>27</sup> The company whose staff authored the Report is the owner of the copyright subsisting in the Report.<sup>28</sup>
32. Section 36(1) of the *Copyright Act* provides that copyright is infringed when a person who is not the owner of the copyright, and does not have the licence of the owner, does in Australia, or authorises the doing in Australia of, any act comprised in the copyright. The *Copyright Act* does, however, provide that some acts do not infringe copyright – for example, fair dealings for the purpose of criticism or review, research or study, parody

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<sup>23</sup> *Acohs Pty Ltd v Ucorp Pty Ltd* (2012) 201 FCR 173 at [57]; *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601 at 608-610 and Dixon J in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor & Ors* (1937) 58 CLR 479 at 511.

<sup>24</sup> *MacMillan and Co Ltd v Cooper* (1923) 1B IPR 204 at 212-213; *Interfirm Comparison (Aust) Pty Ltd v Law Society of New South Wales* [1975] 2 NSWLR 104 at 115 and *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458 at 478-481 per French CJ, Crennan and Kiefel JJ.

<sup>25</sup> Section 29(1)(a) of the *Copyright Act* provides that an artistic work shall be deemed to have been published only if reproductions of the work have been supplied to the public.

<sup>26</sup> Section 32(4) of the *Copyright Act*.

<sup>27</sup> Section 31(1)(b)(i) of the *Copyright Act*.

<sup>28</sup> Section 35(6) of the *Copyright Act*.

or satire, reporting news, judicial proceedings or giving professional advice,<sup>29</sup> and acts done for the services of the Crown.<sup>30</sup> Therefore, in order to determine whether a particular act would involve an infringement of copyright, it is necessary to consider:

- does the person have the licence of the copyright owner to do the act?; and
- does the act fall within any of the exceptions that the *Copyright Act* specifies do not constitute infringement of copyright?

33. Here, the act in question is Council's copying (i.e., reproducing) the Report for the purpose of providing access to the Report under the IP Act.

#### Licence

34. There is no evidence to suggest that the copyright owner provided any licence or authority for Council to copy the Report for the purpose of releasing the Report under the IP Act.

35. I therefore find that Council does not have licence of the owner of the Report for the purpose of providing access to the Report under the IP Act.

#### Crown use

36. Section 183(1) of the *Copyright Act* provides a statutory licence for acts done in the service of the Commonwealth or States as follows:

*The copyright in a literary, dramatic, musical or artistic work or a published edition of such a work, or in a sound recording, cinematograph film, television broadcast or sound broadcast, is not infringed by the Commonwealth or a State, or by a person authorised in writing by the Commonwealth or a State, doing any acts comprised in the copyright if the acts are done for the services of the Commonwealth or State.*

37. Where this statutory licence is used, the copyright owner must be notified and terms agreed.<sup>31</sup>

38. It is unclear whether the Crown use provision extends to local governments such as Council.<sup>32</sup> In this respect, the Australian Law Reform Commission (**ALRC**) observed in its Report on Copyright and the Digital Economy in 2013:<sup>33</sup>

*Local governments are subject to state and territory FOI laws, and they are not covered by the statutory licence in the Copyright Act. The effect is that they risk copyright infringement when using copyright material in a way that is required by an FOI law. It has been necessary to make special provision in FOI laws so that, if access to a document in the form requested would breach copyright, then access in that form may be refused and access given in another form. The only form of access that does not breach copyright is making the document available for inspection, which is an inadequate approach in the digital age.*  
[footnotes omitted]

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<sup>29</sup> Part III, Division 3 of the *Copyright Act*— *Acts not constituting infringements of copyright in works.*

<sup>30</sup> Section 183(1) of the *Copyright Act*.

<sup>31</sup> Section 183(4) and (5) of the *Copyright Act*. The inclusion of section 83(4) of the IP Act indicates that there are some circumstances in which the statutory licence does not apply.

<sup>32</sup> 'State' means a State of the Commonwealth (section 2B of the *Acts Interpretation Act 1901* (Cth)). See J Bannister, 'Open Government: From Crown Copyright to the Creative Commons and Culture Change' (2011) 34 UNSW Law Journal 1080, 1098.

<sup>33</sup> ALRC, *Copyright and the Digital Economy* Report No 122 (2013) at [15.53]. See also ALRC *Copyright and the Digital Economy* Issues Paper 42, (2012) at [207].

39. The ALRC made the following recommendation:<sup>34</sup>

*Recommendation 15–4: The Copyright Act should provide for a new exception for uses where statutes require local, state or Commonwealth governments to provide public access to copyright material.*

40. It does not appear that this amendment has been adopted, however an update to the statutory licencing scheme to permit use by government of correspondence and other material sent to government, if the use is for non-commercial purposes, is being considered.<sup>35</sup>

41. Based on the material before me, I consider that it is not open to conclude that Council's copying of the Report for the purpose of providing access to the Report under the IP Act would be an act done for the services of the Commonwealth or State falling within the purview of the statutory licence contemplated in the Crown use provision.

### **Findings**

42. For the reasons outlined above, I am not satisfied on the material before me that Council has an express, implied or statutory licence of the copyright owner to copy the Report for the purpose of providing access to it under the IP Act. I am also not satisfied that the act of copying the Report falls within the fair dealing exceptions noted above. Indeed, I consider that providing access under the IP Act is a type of dealing not envisaged by any of the fair dealing exceptions in the *Copyright Act*. In these circumstances, I am satisfied that, if Council copied the Report in order to give the applicant access to it under the IP Act, this would constitute reproduction in a material form, which would infringe the exclusive copyright of the author of the Report.

43. I find that access to the Report in the form sought by the applicant (being provided with a copy) may be refused and instead given in another form (by way of inspection) under section 83(4)(c) of the IP Act.<sup>36</sup>

### **DECISION**

44. For the reasons explained above, I vary Council's deemed refusal of access by finding that:

- the Sound Recordings are not documents of Council under section 12 of the RTI Act and there is therefore no right of access to them under section 40(1)(a) of the IP Act; and
- access to the Report in the form sought by the applicant (being provided with a copy) may be refused and instead given in another form (by way of inspection) under section 83(4)(c) of the IP Act on the ground that providing a copy of the Report under the IP Act would infringe the copyright of persons other than the State.

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<sup>34</sup> ALRC, *Copyright and the Digital Economy* Report No 122 (2013) at [15.67].

<sup>35</sup> See <<https://www.communications.gov.au/departmental-news/copyright-access-reforms>>.

<sup>36</sup> I note a number of decisions of the New South Wales Civil and Administrative Tribunal have considered similar documents (e.g., engineering reports, surveys, drainage and building plans) under substantially similar provisions of the *Government Information (Public Access) Act 2009* (NSW) (**GIPA Act**) and, in circumstances where there was no express, implied or statutory licence to provide a copy for the purpose of the GIPA Act, determined that the copying of documents for the purpose of release under the GIPA Act would constitute an infringement of copyright, and therefore access may be limited to inspection.

45. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

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**R Moss**  
**Principal Review Officer**

**Date: 8 November 2023**

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

<b>Date</b>	<b>Event</b>
26 April 2023	OIC received the application for external review.
27 April 2023	OIC requested that Council provide preliminary information.
4 May 2023	OIC received the preliminary information from Council.
29 May 2023	OIC advised the applicant and Council that the application for external review had been accepted. OIC requested Council provide a copy of the located document and a submission.
19 June 2023	OIC received a copy of the located document and a submission from Council.
4 July 2023	OIC requested that Council provide further information in support of its position.
11 July 2023	OIC received a submission from Council.
26 July 2023	Council agreed to grant full access to the located document by way of inspection only.
3 August 2023	OIC conveyed a preliminary view to the applicant.
9 August 2023	OIC received a submission from the applicant. OIC confirmed the preliminary view to the applicant.
17 August 2023	OIC received a verbal and written submission from the applicant.
23 August 2023	OIC wrote to the applicant about her submission. OIC received a submission from the applicant.