



Decision and Reasons for Decision

Citation:	<i>P83 and Brisbane City Council</i> [2020] QICmr 55 (25 September 2020)
Application Number:	314938
Applicant:	P83
Respondent:	Brisbane City Council
Decision Date:	25 September 2020
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - applicant contends agency did not locate all relevant documents - whether agency has taken all reasonable steps to locate documents but the documents cannot be found or do not exist - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(e) and 52 of the <i>Right to Information Act 2009</i> (Qld)

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 any information about him from 1 September 2018 to 21 June 2019.
2. Council decided² to refuse access to some of information on the basis it would be, on balance, contrary to the public interest to disclose. Council also refused documents on the basis they were nonexistent or unlocatable.
3. The applicant applied³ for internal review, particularly in relation to missing documents. On internal review,⁴ Council did not locate any additional documents.
4. The applicant applied⁵ for external review, particularly in relation to documents that the applicant considered should exist, but were refused by Council on the basis that they were nonexistent or unlocatable.
5. For the following reasons I affirm Council's decision refusing access to the documents requested on external review on the basis that they are nonexistent or unlocatable.⁶

¹ On 14 June 2019.

² On 1 August 2019.

³ On 28 August 2019.

⁴ On 23 September 2019.

⁵ On 22 October 2019.

⁶ Section 67(1) of the IP Act and sections 47(3)(e) and 52 of the *Right to Information Act 2009* (Qld) (**RTI Act**).

Evidence considered

6. Significant procedural steps relating to the external review are set out in the Appendix.
7. 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).
8. I have also had regard to the *Human Rights Act 2019* (Qld),⁷ particularly the right to seek and receive information.⁸ 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 RTI Act.⁹ 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 legislation¹⁰: '*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.*'¹¹

Reviewable decision

9. The decision under review is Council's internal review decision of 23 September 2019.

Matters outside the scope or jurisdiction of this external review

10. Some issues were raised by the applicant that are outside the scope of this external review.¹² These included concerns about a possible misuse of the applicant's personal information by Council and concerns about Council's original decision. The powers of the Information Commissioner on external review are set out in the IP Act and RTI Act,¹³ and jurisdiction on external review is limited to review of an access or amendment decision.¹⁴ The applicant has been provided with information on OIC's jurisdiction and powers as well as information about the process of pursuing a privacy complaint. I have not assessed the applicant's privacy concerns during this external review.
11. The applicant has also raised concerns about Council's inconsistencies in marking up personal information and questioned the level of disclosure that Council generally makes in this regard.¹⁵ In his external review application, the applicant raised concern that the name of another individual had been disclosed to him.¹⁶ This again does not raise an issue I can consider in the review. During external review OIC explained to the applicant that these concerns may be addressed by way of a privacy complaint or further communications with Council directly.
12. Towards the end of this review, the applicant also submitted¹⁷ that if the particular record he is seeking, being a record of a meeting is unlocatable, that Council should now create a further detailed record of that meeting and that 'if this does not happen' Council should agree to placing a notation on his record on the basis he considers his personal

⁷ Referred to in these reasons as the **HR Act**, and which came into force on 1 January 2020.

⁸ Section 21 of the HR Act.

⁹ *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].

¹⁰ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹¹ *XYZ* at [573].

¹² Section 99 and schedule 5 of the IP Act sets out the reviewable decisions that I can consider.

¹³ Sections 111 to 122 of the IP Act, and sections 98 to 109 of the RTI Act.

¹⁴ Sections 99 of the IP Act.

¹⁵ Applicant's email to OIC dated 17 April 2020.

¹⁶ External review application dated 22 October 2019.

¹⁷ In an email dated 11 June 2020.

information has not been accurately recorded by Council.¹⁸ In this particular external review, I cannot consider the applicant's request for the creation of new documents by Council or for the inclusion of any notations.¹⁹

Issue/s for determination

13. Having considered the applicant's external review application and subsequent submissions on external review, the issue for my determination is whether Council was entitled to refuse access to particular documents requested by the applicant on the basis that they are nonexistent or unlocatable.²⁰

Relevant law

14. Access to a document may be refused if the document is nonexistent or unlocatable.²¹
15. 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:²²
 - 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.
16. 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.
17. 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.²³
18. The Information Commissioner's external review functions include investigating and reviewing whether agencies have taken reasonable steps to identify and locate

¹⁸ I note that a notation can only be placed on an individual's Queensland government record following an amendment application process as outlined in the IP Act. There is no evidence before me that the applicant has applied to Council to amend his personal information held by Council and I am unable to consider this issue of amendment, or notation, as part of this current external review of the access decision by Council.

¹⁹ Applicant email to OIC dated 11 June 2020.

²⁰ Section 67(1) of the IP Act and sections 47(3)(e) and 52 of the RTI Act.

²¹ 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.

²² *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).

²³ *Pryor* at [21].

documents applied for by applicants.²⁴ 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.²⁵ 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.

Applicant's submissions

19. The applicant contends that Council has not located all of the documents that he requested. The applicant identified a meeting between a Council officer and the Worker's Compensation Regulator (**Meeting**), and a brief file note created by the Council officer (**Ms Z**) referencing the part of the Meeting where the applicant's worker's compensation matter was mentioned. The applicant submitted that it *'was important enough a meeting that it reasonably ought to have been documented by BCC outside of the claim file note.'*²⁶
20. The applicant made further submissions²⁷ that, in his view, he considered that a more detailed record should have been created by Ms Z and submitted that:
 - *if OIC is satisfied...that a meeting note doesn't exist because [Ms Z] did not create one, then [the applicant believes] that Council should have documented this meeting, in detail*
 - *a note of the meeting (ie Meeting Records) should be created (by Brisbane City Council) and a copy of same is then provided to [the applicant]*
 - *If a meeting note (Meeting Record) of 16 May 2019 is not locatable, then [the applicant believes] an accurate meeting note (a Meeting Record) **should be created to place such a record on file within Brisbane City Council.** If this does not happen, then [the applicant wishes] to associate a document stating a request to associate a statement that [the applicant believes his] personal information has not been accurately noted with regard to the meeting of 16 May 2019 ie [his] personal information is inaccurate, out of date, incomplete, irrelevant or misleading.*^[28] [sic]
21. The applicant maintains that he does not consider it reasonable to expect that the meeting records do not exist and has requested a formal determination of this issue.²⁹

Analysis

22. As part of OIC's evaluation of whether Council had undertaken all reasonable steps to locate documents in this matter, including the specific Meeting record, OIC asked Council for its search records relating to the original access decision and internal review decision.
23. Council provided these search records to OIC. A number of Council officers within the Field Services Group, Human Resources, and City Workcover conducted searches for responsive documents, and provided located documents to Council's RTI Unit.

²⁴ 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.

²⁵ Section 87(1) of the RTI Act.

²⁶ In the applicant's external review application on 22 October 2019.

²⁷ Received by OIC on 11 June 2020.

²⁸ By email on 11 June 2020. It appears in this email the applicant is seeking to amend his personal information with Council on the basis it is inaccurate, incomplete, out of date or misleading. An amendment application is a separate application under section 44 of the IP Act and I am unable to ask Council to 'associate a statement' to the applicant's record with Council as part of this external review. If the applicant makes an amendment application to Council, and Council refuses to amend the document or record, the applicant may issue a notice requiring a notation to be added to his record, under section 76 of the IP Act.

²⁹ By email on 11 June 2020.

24. In relation to Ms Z, Council's RTI officer asked Ms Z to undertake searches for responsive documents and particularly attempt to locate any deleted emails about the applicant. Ms Z responded:³⁰

'I can confirm I was unable to locate any deleted emails relating to [the applicant]. [The applicant] was concerned about a lack of response to a certain email and I was unable to locate it, hence we had not responded. I satisfied myself that the email had not been overlooked/deleted making those enquiries. I have again checked the deleted emails for [Ms A] and CityCover email addresses and I am unable to locate any relating to [the applicant].'

25. On internal review, Council's internal review decision maker contacted Council's RTI Unit and other officers for assistance, including Ms Z, in locating documents identified as missing by the applicant. In response, Ms Z advised that:³¹

- the first part of the file note referred to a telephone conversation with an officer from the Office of Industrial Relations (**OIR**) about what was occurring in relation to Council's response to the applicant. She did not need notes as the actions were occurring (a second RTI/IP release) and there was no new or unknown information to be recorded; and
- the meeting on 16 May 2019 was to discuss general insurance issues, changes with OIR, proposed legislative and other changes. The applicant's complaint to OIR was mentioned at this meeting, but she did not make any records of the discussion beyond the brief file note.

26. In considering whether the documents sought by the applicant on external review exist, the question for my consideration is whether Council has taken all reasonable steps to locate them.³² The applicant's submissions contend that Council 'should' have created a more detailed record of the reference to his matter at this Meeting. In this regard, the Information Commissioner has previously held that:³³

'[An] applicant's assertion or belief that a record of the meeting should have been created does not mean that such a record was in fact created. OIC's jurisdiction does not extend to determining whether [an agency] has failed to meet the requirements of the Public Records Act 2002... I am only required to determine if there are reasonable grounds to expect that the documents do not exist or cannot be located.'

27. Having considered the searches and enquiries outlined above, I am satisfied that Council has undertaken all reasonable steps to locate all responsive documents, including any records or notes from the Meeting, including making two direct enquiries with the relevant Council officer, Ms Z. Council has undertaken appropriately targeted searches of all relevant locations where it was reasonable to expect that the types of information requested in the access application would be found.

28. Accordingly, I am satisfied that there are reasonable grounds to be satisfied that access to the documents requested by the applicant on external review may be refused on the basis they are nonexistent or unlocatable.³⁴

³⁰ Email dated 9 July 2019 and provided to OIC by Council on 21 April 2020.

³¹ By email on 11 September 2019.

³² *Goodman and Department of Justice and Attorney-General* [2014] QICmr 4 at [23].

³³ *McCrystal and Queensland Building and Construction Commission (No. 2)* [2017] QICmr 50 (6 October 2017) at [59].

³⁴ Section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.

DECISION

29. I affirm Council's internal review decision and find that access to the documents requested on external review may be refused on the basis they are nonexistent or unlocatable.³⁵
30. 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: 25 September 2020

³⁵ Section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
22 October 2019	OIC received the applicant's external review application.
10 December 2019	OIC notified the applicant and Council that the application for external review had been accepted and requested further information from Council.
16 December 2019	OIC received the requested information from Council.
16 January 2020	OIC updated the applicant.
28 February 2020	OIC updated the applicant.
4 March 2020	OIC requested submissions from the applicant.
27 March 2020	OIC reiterated its request for submissions from the applicant, noting no response to the previous request.
9 April 2020	Closure letters sent by OIC to Council and the applicant, on the basis the applicant had not responded to our requests for submissions, and we could not progress the external review without his participation.
14 April 2020	Email received from applicant advising he had responded to OIC's previous requests. External review file reopened and Council notified of the issues and reopened review.
15, 16 and 17 April 2020	OIC emailed applicant requesting copies of emails and submissions.
20 April 2020	OIC emailed Council requesting copies of search records.
21 April 2020	OIC received the requested search records from Council.
14 May 2020	OIC conveyed a preliminary view to the applicant.
11 June 2020	OIC received the applicant's final submissions.
24 July 2020	OIC confirmed the applicant's submissions and that a formal decision would be issued later in the year.