



Decision and Reasons for Decision

Citation:	<i>A52 and Brisbane City Council [2022] QICmr 44 (13 September 2022)</i>
Application Number:	316587
Applicant:	A52
Respondent:	Brisbane City Council
Decision Date:	13 September 2022
Catchwords:	<p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - LEGAL PROFESSIONAL PRIVILEGE - communication between agency officers and internal legal advisers - whether information would be privileged from production in a legal proceeding - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(a), 48, and schedule 3, section 7 of the <i>Right to Information Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST INFORMATION - payroll numbers and third party information - personal information and privacy - 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> (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 certain documents concerning Council '*wrongly accusing* [the applicant] *of a parking infringement*'.
2. Council located 104 pages² and decided³ to release 81 pages in full, 16 pages in part, and refused access to seven pages in full. This decision was affirmed on internal review.⁴

¹ Application dated 29 November 2021.

² The decision notice refers to 98 pages being located, however, this appears to be an administrative error.

³ Decision dated 12 January 2022.

⁴ Internal review decision dated 15 February 2022.

3. The applicant then applied to the Office of the Information Commissioner (**OIC**) for external review.⁵ During the review, Council agreed to release certain further information to the applicant.
4. For the reasons set out below, I vary⁶ Council's decision and find that access to the information remaining in issue may be refused on the basis that:
 - a. certain information is exempt as it would be privileged from production in a legal proceeding on the ground of legal professional privilege; and
 - b. certain information would, on balance, be contrary to the public interest to disclose.

Background

5. The significant procedural steps taken during the external review are set out in the Appendix.
6. The background to this matter is that the applicant was incorrectly nominated as being the driver of a vehicle. As a result, he received a parking infringement notice from Council. The applicant has raised concerns, both with Council and with OIC on external review, about his treatment by Council in relation to the matter and the time that was required for him to rectify the issue.⁷
7. As noted above, during the review, Council agreed to release further information to the applicant,⁸ and this information is no longer in issue in this review.

Reviewable decision

8. The decision under review is Council's internal review decision dated 15 February 2022.

Evidence considered

9. Evidence, submissions, legislation and other material I have considered in reaching this decision are referred to in these reasons (including footnotes and Appendix).
10. During the review, the applicant made submissions to OIC in support of his case.⁹ I have carefully reviewed those submissions. I note that certain concerns the applicant has raised are not matters that the Information Commissioner has jurisdiction to consider in conducting an external review under the IP Act.¹⁰
11. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.¹¹ I consider a decision maker will be '*respecting, and acting compatibly with*' that right and others prescribed in the HR Act, when applying

⁵ External review application received 22 February 2022.

⁶ In relation to page 12 and 13 of file 'CMX LM01161-2001' I have relied upon a different ground of refusal to Council.

⁷ As detailed in submissions dated 5 June 2022 and 23 June 2022.

⁸ Pages 5 and 6 of file 'CMX LM00679-2021', pages 5 and 7 of file 'CMX LM03967-2021', and parts of page 2 of file 'CMX LM01161-2001'.

⁹ Submissions dated 5 June 2022 (received 22 June 2022) and 23 June 2022.

¹⁰ For example, in his submission dated 5 June 2022, the applicant stated that he will '*leave it to [OIC] to consider whether it is appropriate that [he] should be treated so abysmally by these bullies. Please read the file in full and consider whether what they put me through is fair and just.*'

¹¹ Section 21(2) of the HR Act.

the law prescribed in the IP Act.¹² I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act.¹³

Information in issue

12. The information that remains in issue is comprised of:

- communications between Council and their internal legal advisers and information that reveals the substance of these communications (**City Legal Information**);¹⁴ and
- personal information of Council employees (**Payroll Numbers**)¹⁵ and personal information of other third parties (**Third Party Information**).¹⁶

Issues for determination

13. The issues for determination in this review are whether access may be refused to:

- a. the City Legal Information on the basis that it would be privileged from production in a legal proceeding on the ground of legal professional privilege; and
- b. the Payroll Numbers and the Third Party Information on the basis that disclosure would, on balance, be contrary to the public interest.

City Legal Information

Relevant law

14. Under the IP Act and the *Right to Information Act 2009* (Qld) (**RTI Act**),¹⁷ access may be refused to information that would be privileged from production in a legal proceeding on the ground of legal professional privilege.¹⁸

15. Legal professional privilege attaches to confidential communications between a lawyer and client made for the dominant purpose of giving or obtaining legal advice.¹⁹ It is well established that this privilege extends to:

- professional communications between an agency and salaried legal advisers²⁰
- draft working documents prepared by lawyers²¹
- copies of unprivileged documents attached to requests for, and provision of, legal advice;²² and

¹² *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].

¹³ 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'.

¹⁴ Contained in pages 3, 10, 11, 12 and 13 of file 'CMX LM01161-2021'.

¹⁵ In pages: 2, 3, 8 of file 'CMX LM00679-2021'; page 2 of file 'CMX LM00755-2021', pages 2-3 of file 'CMX LM01161-2021'; pages 2-3 of file 'CMX LM02635-2021'; pages 2-3 of file 'CMX LM03967-2021.'

¹⁶ In pages 16, 21, 28, 29, 30 of file 'Relevant DCO documents.'

¹⁷ Under section 67(1) of the IP Act, an agency may refuse access to a document under the IP Act in the same way and to the same extent as it could refuse access to the document under the RTI Act.

¹⁸ Section 47(3)(a), section 48 and schedule 3, section 7 of the RTI Act.

¹⁹ *Esso Australia Resources Ltd v Commission of Taxation* (1999) 201 CLR 49; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 552.

²⁰ *Waterford v Commonwealth of Australia* (1987) 163 CLR 54 at 63-64.

²¹ Including documents that record the legal work carried out by the lawyer for the benefit of the client, such as research memoranda, collations and summaries of documents, chronologies, and the like, whether or not they are actually provided to the client: *AWB Ltd v Cole* (No 5) (2006) 155 FCR 30 at [46].

²² *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 509.

- internal communications between agency officers repeating legal advice, whether verbatim or in substance.²³
16. Qualifications and exceptions to privilege (such as waiver and improper purpose) may, in particular circumstances, affect the question of whether information attracts or remains subject to privilege.

Findings

17. I am satisfied that the City Legal Information is comprised of confidential communications made for the dominant purpose of Council seeking/receiving legal advice from its in-house lawyers.²⁴
18. I have considered the applicant's submissions, including that disclosure would allow him to '*... consider the soundness of their position and fight back*'.²⁵ The applicant also submits that if the legal advice is in-house then '*fairness would dictate that [he is] entitled to view it*'.²⁶ The submissions also raise concerns that Council is hiding behind RTI legislation, and the 'farce' of legal professional privilege to ensure he is not privy to Council's reasoning and logic.²⁷ These are, essentially, public interest arguments. However, once the requirements of an exemption have been established, I am precluded from considering any arguments which seek to advance public interest factors favouring disclosure, no matter how forcefully argued.²⁸
19. There is nothing before me to suggest that the qualification or exceptions to privilege apply in this case.
20. Accordingly, I find that access to this information may be refused under section 47(3)(a) of the RTI Act as it is exempt under schedule 3, section 7 of the RTI Act.

Payroll Numbers and Third Party Information

Relevant law

21. Under the IP Act, an individual has a right to be given access to documents of an agency, to the extent they contain the individual's personal information.²⁹ This right is subject to some limitations, including grounds on which access can be refused, such as legal professional privilege discussed above.
22. Another ground of refusal arises where disclosing information would, on balance, be contrary to the public interest.³⁰ The term '*public interest*' generally 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.³¹

²³ *Brambles Holdings v Trade Practices Commission* (No. 3) (1981) 58 FLR 452 at 458-459, citing *Komacha v Orange City Council* (Supreme Court of New South Wales, Rath J, 30 August 1979, unreported).

²⁴ Or and information that reveals the substance of these communications.

²⁵ Submission received 23 June 2022.

²⁶ Submission received 23 June 2022.

²⁷ Submission dated 5 June 2022.

²⁸ Section 48(2) of the RTI Act. Under section 118(2) of the IP Act, the Information Commissioner does not have the power to direct that access be given to an exempt document or exempt information.

²⁹ Section 40 of the IP Act.

³⁰ Section 67(1) of the IP Act and section 47(3)(b) and section 49 of the RTI Act.

³¹ However, there are some recognised public interest considerations that may apply for the benefit of an individual. See Chris Wheeler, '*The Public Interest: We Know It's Important, But Do We Know What It Means*' (2006) 48 AIAL Forum 12, 14.

23. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision maker must:³²
- identify any irrelevant factors and disregard them
 - identify relevant public interest factors favouring disclosure and nondisclosure of the information in issue
 - balance the relevant factors favouring disclosure and nondisclosure; and
 - decide whether disclosure of the information in issue would, on balance, be contrary to the public interest.
24. Schedule 4 of the RTI Act contains non-exhaustive lists of irrelevant factors³³ and factors favouring disclosure and nondisclosure. I have considered all of the factors in schedule 4 in reaching this decision.

Findings

25. As outlined in paragraph 12, the remaining information in issue is comprised of Payroll Numbers and Third Party Information.
26. I have considered this information carefully and, given its limited nature, I am unable to identify any public interest factors favouring disclosure aside from the general public interest in promoting public access to government-held information.³⁴
27. The Payroll Numbers appear in an administrative or clerical context. These numbers generally appear next to a Council officer's name when they take action on a matter, as part of Council's record keeping. Similarly, the Third Party Information is very limited. It is comprised of the names, signatures, identifying and contact details of non-Council employees.
28. The applicant's submissions in support of his case focus on Council's actions in response to the incorrectly issued infringement, and his dissatisfaction with his treatment. For example, the applicant notes:³⁵

The issue is the fact that BCC refuses to explain why they are not liable for compensation for zealously and wrongly pursuing me and innocent victim to pay a fine for an infringement I did not commit. I have spent many hours and written over a dozen letters in support of my case. They have treated me with utter contempt and consider they are immune from sanction no matter what outrage they commit. They consider that as I am not a lawyer my time and effort is of no value and consequence...

29. I acknowledge that this is a matter of serious concern to the applicant. However, I cannot identify how disclosure of Payroll Numbers and Third Party Information would assist the applicant with understanding Council's actions or decisions made in relation to the infringement notice.³⁶ Council officer names have been released to the applicant, along with the actions taken by Council concerning the matter. Similarly, the Third Party Information is very limited, and by its nature, does not provide insight into Council's actions or decisions. The surrounding statutory declarations and telephone call notes have been released, and the applicant is able to see the information Council relied upon in dealing with the issue of the parking infringement. The applicant has indicated he is seeking compensation, but having considered this, I do not accept that disclosure of the

³² Section 49(3) of the RTI Act.

³³ I have considered the irrelevant factors set out in schedule 4, part 1 of the RTI Act, and I do not consider any arise in the circumstances of this matter.

³⁴ The pro-disclosure bias is set out in section 64(1) of the IP Act.

³⁵ Submission dated 5 June 2022.

³⁶ Factors favouring disclosure under schedule 4, part 2, item 1, 2, 3 and 11 of the RTI Act.

Payroll Numbers or Third Party Information would contribute to the administration of justice for him.³⁷

30. In contrast, release of the Payroll Numbers and Third Party Information would disclose personal information, and could reasonably be expected to intrude into the relevant third party/Council officers' *'personal spheres'*.³⁸ Although information relating to the day-to-day work duties and responsibilities of public sector officers is generally disclosed under the IP Act, I do not consider this extends to matters involving their payroll. In terms of the Third Party Information, I acknowledge that the applicant is aware of some of this information (and it is included in notes that record calls with him). Some of the information appears in a contentious setting (that is, a dispute over an infringement notice). I consider that in relation to both the Payroll Numbers and the Third Party Information, these factors carry some – albeit low to moderate – weight.
31. In summary, other than the general public interest in promoting public access to government-held information, I cannot identify any factors in favour of disclosure of the Payroll Numbers or Third Party Information. The applicant's submissions, in effect, focus on his views about the unfairness of the process in which Council engaged in dealing with the infringement notice and are primarily directed to the City Legal Information.³⁹
32. On balance, I am satisfied that the public interest factors favouring nondisclosure are determinative and access to the Payroll Numbers and Third Party Information may be refused as disclosure would, on balance, be contrary to the public interest.

DECISION

33. For the reasons set out above, I vary the decision under review and find that:
 - access to the City Legal Information may be refused under section 67(1) of the IP Act and section 47(3)(a) and 48 and schedule 3, section 7 of the RTI Act because it is exempt information;⁴⁰ and
 - access to the Payroll Numbers and Third Party Information may be refused under section 67(1) of the IP Act and section 47(3)(b) and 49 of the RTI Act because its disclosure would, on balance, be contrary to the public interest.
34. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

C Jones
A/Assistant Information Commissioner

Date: 13 September 2022

³⁷ Factors favouring disclosure under schedule 4, part 2, item 16 and 17. I do not consider they apply here.

³⁸ Giving rise to factors favouring nondisclosure under schedule 4, part 3, item 3 and part 4, section 6 of the RTI Act.

³⁹ Which I have addressed at paragraph 18 above.

⁴⁰ Two pages of the City Legal Information were refused by Council on a different basis. That is, that disclosure would, on balance, be contrary to the public interest.

APPENDIX**Significant procedural steps**

Date	Event
22 February 2022	OIC received the application for external review.
23 February 2022	OIC requested initial documents from Council.
28 February 2022	OIC advised the parties that the external review had been accepted. OIC requested Council provide information in issue. OIC received initial documents and information in issue from Council.
21 March 2022	OIC conveyed a preliminary view to Council.
27 April 2022	Council accepted the preliminary view.
29 April 2022	OIC conveyed a further preliminary view to Council. Council accepted the further preliminary view. Council agreed to release additional information to the applicant.
3 June 2022	OIC conveyed a preliminary view to the applicant.
22 June 2022	OIC closed the file on the basis that the applicant had not responded to the preliminary view.
23 June 2022	The applicant contacted OIC to raise concerns that he had provided submissions dated 5 June 2022 (not received by OIC). OIC invited applicant to provide further submissions.
24 June 2022	OIC received submissions from the applicant. OIC advised the parties that the external review had been reopened.
6 September 2022	Council agreed to release additional information to the applicant.