



Decision and Reasons for Decision

Citation:	<i>F68 and Brisbane City Council [2022] QICmr 47 (1 November 2022)</i>
Application Number:	316290
Applicant:	F68
Respondent:	Brisbane City Council
Decision Date:	1 November 2022
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - applicant seeking his job application material under the <i>Information Privacy Act 2009</i> (Qld) - 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) - sections 47(3)(e) and 52(1) of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant, a former Brisbane City Council (**Council**) employee, applied¹ to Council under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to various documents, including: ‘...all job applications/outcomes, recruitment information...’ for the period March 2005 to May 2021.²
2. Council did not make a decision within the time allowed under the IP Act, and was therefore taken to have made a decision refusing access to information (**Deemed Refusal**).³ The applicant applied⁴ to the Office of the Information Commissioner (**OIC**) for external review of that Deemed Refusal.
3. Early in the review, the applicant refined the terms of his access application⁵ so as to only request, relevantly, documents relating to his applications for seven Council job vacancies created or received by Council between September 2018 and May 2021. Council located various relevant documents, which it released⁶ to the applicant (subject to the redaction of relatively limited amounts of information).

¹ By application received 4 June 2021.

² The access application sought a range of documents; for the purposes of this decision it is, as explained further below, only necessary to consider the aspect of the application quoted in this paragraph.

³ Section 66 of the IP Act.

⁴ External review application received 1 September 2021.

⁵ Letter from the applicant dated 12 October 2021. The applicant in this letter also requested copies of the front and back cover sheets to his Council personnel file; this is not a matter in issue in this review (see OIC’s letter to the applicant dated 17 May 2022, replying to the applicant’s 12 May 2022 letter).

⁶ Via email to the applicant dated 14 March 2022.

4. The applicant did not press for access to redacted information.⁷ He did, however, contend that Council had failed to identify and locate all relevant job application information.⁸ Council conducted additional searches, which located further documents. Council disclosed these further documents to the applicant.⁹
5. The applicant continues, however, to question the sufficiency of Council's search efforts.¹⁰
6. For the reasons stated below, I am satisfied that Council has taken all reasonable steps to locate and identify documents applied for by the applicant, and has therefore discharged its search obligations under the IP Act. Therefore, I find access to any further information may be refused on the grounds such information is nonexistent or unlocatable.

Background

7. Significant procedural steps are set out in the Appendix to this decision.

Reviewable decision

8. The decision under review is the Deemed Refusal which Council is taken to have made under section 66 of the IP Act.

Evidence considered

9. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and Appendix).
10. In making this decision I have had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information. I consider that in observing and applying the law prescribed in the *Right to Information Act 2009* (Qld) (**RTI Act**), an RTI decision-maker will be '*respecting and acting compatibly with*' this right and others prescribed in the HR Act, and that I have done so in making this decision, as required under section 58(1) of the HR Act. In this regard, I note Bell J's observations on the interaction between the Victorian analogues of Queensland's RTI Act and HR Act: '*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.*'

Issue for determination

11. The issue for determination is whether Council has taken reasonable steps to identify and locate information applied for by the applicant.

Relevant law

12. The functions of the Information Commissioner include investigating and reviewing whether agencies have taken reasonable steps to identify and locate documents applied for by applicants.¹¹ Relatedly, agencies such as Council may refuse access to information, where it is non-existent or unlocatable.¹²

⁷ And it is therefore not in issue, and not addressed in these reasons.

⁸ Submissions dated 12 and 31 May 2022.

⁹ Email advice from Council dated 19 August 2022, and further Council email dated 8 September 2022 confirming release of documents.

¹⁰ Submissions dated 31 August 2022.

¹¹ Section 137(2) of the IP Act.

¹² Sections 47(3)(e) and 52 of the RTI Act (applicable, as with other grounds for refusing access, to applications under the IP Act section 67 of the latter). Principles applicable to these provisions and their analogue predecessors in the former *Freedom of Information Act 1992* (Qld) have been discussed in various OIC decisions, including *PDE and University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009), *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at [21], and *V45 and Queensland Police Service* [2021] QICmr 30 (16 June 2021).

13. Dealing with 'sufficiency of search' cases of this kind generally requires OIC to consider whether there are reasonable grounds for suspecting that further documents exist in an agency's possession or under its control, and/or whether the agency has taken all reasonable steps to identify requested documents.¹³ While agencies such as Council bear the formal onus in an external review,¹⁴ a practical onus will often fall on an applicant to put forward material establishing reasonable grounds to believe that the agency may not have discharged its obligation to locate all relevant documents.¹⁵ A suspicion or mere assertion will not, of itself, generally be sufficient to satisfy this onus.

Discussion

Applicant's initial submissions

14. The applicant's initial sufficiency of search contentions were stated in submissions dated 12 May 2022,¹⁶ in which he made broad submissions to the effect Council had not located various types of documents¹⁷ relevant to his job applications.

OIC's preliminary view

15. By letter dated 31 August 2022, the Acting Right to Information Commission (**A/RTI Commissioner**) wrote to the applicant, setting out OIC's preliminary view that Council had taken reasonable steps to locate documents responsive to his application. Having summarised the relevant law and principles relevant to sufficiency of search reviews of this kind, the A/RTI Commissioner explained:

...In this case, you have applied for documents concerning your applications for a number of job vacancies. Council has identified and located various documents, including your application materials, and notes from Council's internal HR database. I have briefly discussed each specific vacancy and your sufficiency of search submissions below.

My 'overarching' preliminary view, however, is that the material Council has located would, in the specific context of this case, appear to be all that could reasonably be expected to be identified as relevant to your application.

16. The preliminary view letter went on to canvass salient aspects of Council's 'Re-employment and Engagement Policy', of consequence in this case due to:¹⁸

... the fact that you were previously employed by Council, which employment was terminated following a disciplinary process. Council's 'Re-employment and Engagement' policy expressly provides that:

- *applications from ineligible employees must not be considered; and*
- *ex-employees are ineligible for re-employment if the ex-employee has previously been dismissed for disciplinary reasons or unsatisfactory work.*

Council has, as noted, identified a range of documents, including, in some cases, material that can be characterised as 'decisions' and/or 'final outcomes' of the kind requested by you.

Council otherwise appears to have assessed your applications relatively summarily, which does not appear surprising in view of the terms of its Re-employment policy as set out above.

¹³ J6Q8CH and Office of the Health Ombudsman (No. 2) [2019] QICmr 27 (6 August 2019) (**J6Q8CH**).

¹⁴ Section 100 of the IP Act.

¹⁵ J6Q8CH, [72].

¹⁶ Reiterated in further submissions dated 31 May 2022, the latter made in response to OIC's letter dated 17 May 2022 which, among other things, requested further information from the applicant supporting his case.

¹⁷ I.e., 'correspondence, emails, file notes, chairperson notes, panel notes, decisions made by the decision maker, Human Resources Branch notes, all case notes associated with the decision that was made, final outcomes.'

¹⁸ The termination of the applicant's employment referred to in the following quotation, and the basis for that termination, is a matter known to OIC through a prior external review involving the applicant and Council, which involved documents concerning that termination. The applicant has not contested this statement. See also Council's letter to the applicant dated 9 July 2021.

In these circumstances, I do not consider it reasonable to expect that Council would have in its possession or under its control information beyond that which it has identified and dealt with. This is because none of your applications advanced to a point requiring the creation by Council of any significant volume of documentation.

17. The A/RTI Commissioner's letter then turned to consider Council's search efforts, and particular facts and circumstances bearing on the niceties of those efforts in this case:

Additionally, Council has provided me with a summary overview of searches undertaken by it in dealing with your access application. This summary¹⁹ discloses that Council conducted searches of various internal databases and document holdings, for each type of document requested by you, itemising numbers of documents located. I accept this advice.

Council has further explained that recruitment processes may vary somewhat from case to case, including where a particular process involves 'high volume bulk recruitment', which I understand may have been the case as regards at least some of the vacancies for which you applied. Given this, there may be some variation in the types of documents generated and or/maintained from one recruitment process to another. Additionally, Council's advice indicates that some records may have been disposed of at the conclusion of a given process, in accordance with Council's standard recruitment practices.

18. The A/RTI Commissioner concluded these opening passages of the 31 August 2022 preliminary view letter with an initial summation of the adequacy of Council's search efforts:²⁰

Taking all the above into account, Council's searches appear to me to have been appropriately targeted and adequate in their extent. Those searches have identified a deal of information, much of which comprises information of the kind you contend has not been located. There does not, in view of your status as an ineligible ex-employee, seem to me to exist reasonable grounds to expect that Council would hold any significant quantity of additional documentation, and my preliminary view is that Council appears to have taken reasonable steps to locate and identify responsive documents.

19. The A/RTI Commissioner's letter then set out a detailed 'vacancy-by-vacancy' analysis of the applicant's refined access application, and Council's search efforts in response to same. In summary terms, the A/RTI Commissioner pointed out to the applicant that much of the information he sought – e.g., 'Human resources branch notes', recording 'decisions made by the decision maker' (such as to 'not rehire' and/or 'reject' his various job applications), and 'final outcomes' on relevant applications had in fact been identified and disclosed to him by Council, as a consequence of the additional work undertaken by it during this review.²¹

20. The A/RTI Commissioner concluded the 31 August 2022 letter with several observations, reiterating and developing the comments extracted at paragraph 18 above:

Council's consideration of your applications was in each case brief (in one case, less than a week), every application having been assessed at a very early stage as unsuitable for progression (apparently in view of your status under the applicable Council re-employment policy).

The documentation supplied by Council relevant to each of your applications does, as noted, include several types of the information requested by you – notes, decisions, final outcomes – for example.

As I have also noted above, the information identified and dealt with by Council otherwise seems to be entirely consistent with the degree to which each of your job applications progressed. In my experience, applications eliminated from further consideration at a

¹⁹ A copy of which was supplied to OIC via Council email dated 26 February 2022.

²⁰ Footnotes have been omitted from this and further passages from OIC's 31 August 2022 letter extracted in paragraph 20.

²¹ See paragraph 3.

preliminary stage of a recruitment process – such as each of yours – are unlikely to generate much documentation. I would not, for example, expect Council to have created ‘chairperson notes’ or ‘panel notes’ in dealing with your applications, which documents are usually only brought into existence in evaluating applications that have advanced to the shortlisting and final candidate selection stage of a given process.

Ultimately, I am only required to be satisfied that Council has undertaken reasonable – not all possible or conceivable – steps to identify and locate documents. Taking all relevant circumstances into account, including:

- *Council’s Re-engagement and Employment policy*
- *the extent of searches undertaken to date*
- *Council’s explanation as to the variation that may occur between recruitment processes of the kind in question; and*
- *that there may occur some level of document disposal at the conclusion of a process,*

my preliminary view is that Council has met its search obligation in this case. Accordingly, my preliminary view is that Council taken all reasonable steps to locate relevant information, and access to any further information may be refused, on the grounds it is nonexistent or unlocatable.

Applicant’s further submissions

21. The applicant responded to the A/RTI Commissioner’s 31 August 2022 letter by way of submissions dated 5 October 2022. These submissions continue to contest the adequacy of Council’s searches, although on a more limited basis than the applicant’s broad 12 May 2022 submissions. The applicant now contends that, in the case of each vacancy, Council has only failed to locate ‘documentation’ – ‘file notes’ and the like – ‘stating’ or which ‘included or stated the notation “do not rehire”’, or ‘rejected,’ or similar wording as recorded in Council’s HR system.²²

22. The applicant’s submissions address each of the seven job vacancies analysed in our 31 August 2022 letter in largely identical terms. As such, it is sufficient to set out only the first of these submissions:

...[relevant job title and position number] - My submission is that there still appears to be a 'Sufficiency of Search' undertaken by the Brisbane City Council in relation to this position as the documents released to me to date, did not contain any documentation stating to "reject your application" made by the decision maker that you referred to in your letter to me dated 31 August 2022. (Therefore, I now ask that the Brisbane City Council provide all of the relevant documentation and materiel relating• to this decision that was made by HR to "reject your application" as these documents have not yet been provided to me).

23. As best as I understand, the applicant’s case is that Council should hold discrete notes, documents or memoranda of some kind, recording its determination in respect of each of his job applications – i.e., ‘do not rehire’ or ‘reject’, as the case may be – separate to and distinct from the HR system records containing these determinations (printouts of which latter documents have, as noted,²³ been identified and located by Council, supplied to the applicant,²⁴ and which were discussed in the A/RTI Commissioner’s 31 August 2022 letter to him).

24. I do not share the applicant’s view. As explained above, in view of his employment history with Council, the applicant appears to have been an ineligible employment candidate under the applicable re-employment policy, as regards all of the employment applications

²² Which wording as it appears in Council’s HR system was released to the applicant during this review (see paragraph 3), and discussed in the A/RTI Commissioner OIC’s 31 August 2022 letter to the applicant: paragraph 19.

²³ See above.

²⁴ Along with various other documents, such as email chains.

the subject of his access application.²⁵ Assessing and dealing with his multiple employment applications would thus not seem, as was noted in the A/RTI Commissioner's 31 August 2022 letter to the applicant, to have required involved contemplation or deliberation, nor to have generated large volumes of documentation.

25. To the contrary, the job applications stood – and largely appear – to have been dealt with on a relatively summary basis. In this context, I am prepared to infer that Council's decisions on each application would not have involved nor required the preparation of dedicated documentation of the kind the applicant asserts should exist. Rather, all that seems to me to have been required is that which appears to have occurred – the making of a simple notation recording Council's position on those applications,²⁶ entered directly into Council's HR management system.

Findings

26. I have carefully considered all relevant circumstances, particularly:

- those canvassed in the extracts from the A/RTI Commissioner's 31 August 2022 letter set out above at paragraphs 15-20;²⁷ and
- the absence of any probative material supporting the applicant's 5 October 2022 assertions.²⁸

27. Having done so, I do not, as a matter of fact, think it reasonable to expect that there would exist documents recording Council's decisions on each of the relevant job applications, beyond those identified, located, and released to the applicant.²⁹

28. Accordingly, I adopt as final the preliminary view stated in the A/RTI Commissioner's 31 August 2022 letter and excerpted in paragraph 19 above: Council has taken all reasonable steps to locate information applied for by the applicant, and access to any further information may be refused, on the grounds it is nonexistent or unlocatable.³⁰

29. I should address two final points before concluding these reasons. The first is the applicant's contention that Council may have '*mised*' OIC, having located additional documents during this external review '*despite them advising your office that there were no further documents*'.

30. I cannot see that Council did advise OIC there were no further documents, at least prior to it searching for and finding same. In any event, sufficiency of search issues are matters commonly considered by OIC on external review. The mere fact that an agency may conclude that it has located all relevant documents, only to subsequently discover additional materials on external review, is not of itself especially unusual or untoward.

31. Agencies, particularly large and complex entities such as Council, are generally required to handle multiple information access applications at any given time, within strict statutory timeframes. This may, in turn, require marshalling documents across work divisions, record management systems, and even physical locations. In this context, it is not surprising that sufficiency of search questions frequently arise on external review. Nor is

²⁵ Each of which was made after the late 2016 cessation of the applicant's employment with Council.

²⁶ Which notation, from the printouts of these records, appears to have been made by way of 'checking' a box or selecting an option from a 'dropdown' menu within Council's HR management system.

²⁷ Including Council's search efforts both in initially processing the access application, and on external review. Given the nature of those searches, and of the documents located by Council, I think it reasonable to expect that relevant searches would have identified any additional documentation of the kind raised in the applicant's 5 October 2022 submissions.

²⁸ Bearing in mind the practical onus borne by the applicant: paragraph 13.

²⁹ And, given this conclusion, obviously no reason to expect such nonexistent documents were ever 'kept in' any 'backup' system: section 52(2) of the RTI Act.

³⁰ Under sections 47(3)(e) and 52(1) of the RTI Act, applicable to IP Act access applications pursuant to section 67 of the IP Act.

it surprising that addressing those questions during a review³¹ not uncommonly leads to the identification of further relevant documents.

32. The second matter raised by the applicant was an insistence that OIC give him access to Council's 'Re-Employment and Engagement' policy. As information taken into account by OIC and informing this decision, it is, of course, necessary that we apprise the applicant of those parts of this policy on which we have relied, and the reasons for our doing so.³² I consider that OIC met our obligations in this regard, however, by way of the A/RTI Commissioner's letter dated 31 August 2022, summarising relevant elements of the policy and giving the applicant an opportunity to make submissions in reply.³³ Should the applicant wish to access this document, he would need to make a request of Council directly.

DECISION

33. I vary Council's Deemed Refusal, by finding that access may be refused to additional information of the kind specified in the applicant's 5 October 2022 submissions under sections 47(3)(e) and 52 of the RTI Act, and section 67 of the IP Act.
34. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

J Forbes
Acting Assistant Information Commissioner

Date: 1 November 2022

³¹ An exercise not bound by time limits, and which allows for a 'fresh set of eyes' to be cast over a given access application.

³² In accordance with the rules of procedural fairness.

³³ See paragraph 16 above.

APPENDIX

Significant procedural steps

Date	Event
1 September 2021	OIC received the external review application. OIC requested the preliminary documents from Council. OIC received the requested preliminary documents from Council.
15 September 2021	OIC advised the applicant and Council that the external review application had been accepted.
12 October 2021	The applicant narrowed the scope of his access application.
14 October 2021	OIC requested Council undertake further searches. OIC provided the applicant with an update.
16 November 2021	Council requested an extension of time to provide further searches.
17 November 2021	OIC granted Council an extension of time.
23 November 2021	OIC provided the applicant with an update.
30 November 2021	Council requested a further extension of time. OIC granted the extension of time.
27 January 2022	OIC provided the applicant with an update.
8 February 2022	OIC followed up Council on overdue response. Council provided an update.
23 February 2022	OIC followed up Council on overdue response. Council provided an update.
26 February 2022	Council provided the information requested by OIC on 14 October 2021.
28 February 2022	Council provided documents to OIC.
8 March 2022	OIC requested the applicant review the information to be disclosed to the applicant by Council. OIC requested Council release documents to the applicant.
14 March 2022	Council provided the documents to the applicant.
29 March 2022	The applicant requested an extension of time to review documents. OIC granted the extension of time.
12 May 2022	The applicant provided submissions in response to the documents released and raised sufficiency of search issues.
17 May 2022	OIC requested the applicant provide further submissions.
26 May 2022	OIC provided Council with an update.
31 May 2022	The applicant provided further submissions.
13 June 2022	OIC provided Council with an update. OIC requested further information from Council.
12 July 2022	OIC provided the applicant with an update.
14 July 2022	Council provided an update to OIC.

Date	Event
17 August 2022	OIC followed up Council on overdue response.
19 August 2022	Council provided OIC with the requested information.
24 August 2022	Council confirmed there was no objection to the disclosure of the further information to the applicant.
31 August 2022	OIC conveyed a preliminary view to the applicant. OIC requested Council release the information to the applicant.
8 September 2022	Council advised OIC that the information had been released to the applicant.
21 September 2022	The applicant requested extension of time to respond to OIC's preliminary view. OIC granted the extension of time.
5 October 2022	The applicant provided submissions in response to OIC's preliminary view.
7 October 2022	OIC advised the applicant that the matter would proceed to formal decision.