



Decision and Reasons for Decision

Application Number: 210201, 210238, 210285 and 210286

Applicant: Ms L Sheridan

Respondents: South Burnett Regional Council
Local Government Association of Queensland Inc.
Dalby Regional Council

Third Party: Crime and Misconduct Commission

Decision Date: 9 April 2009

Catchwords: **FREEDOM OF INFORMATION – section 42(1)(ca) of the *Freedom of Information Act 1992* – matter relating to law enforcement or public safety – whether disclosure of the matter in issue could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation**

FREEDOM OF INFORMATION – section 29(4) of the *Freedom of Information Act 1992* – refusal to deal with application – agency’s or Minister’s functions – refusal to deal with the application without having identified any or all of the documents

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REASONS FOR DECISION

Summary

1. For the reasons set out below, I have decided:
 - the remaining matter in issue in each of these reviews qualifies for exemption from disclosure under section 42(1)(ca) of the *Freedom of Information Act 1992* (**FOI Act**)
 - to refuse to deal with the sufficiency of search issues under section 29(4) of the FOI Act, on the basis that it appears that any further documents responsive to the freedom of information (**FOI**) applications qualify for exemption under section 42(1)(ca) of the FOI Act.

Background

2. The Office of the Information Commissioner (**the Office**) has eight associated external review applications on foot from the applicant and Ms Susan Scott, one of the applicant's supporters. The Office has finalised six other associated external review applications.¹
3. The applicant is represented by Ms Susan Moriarty of Susan Moriarty & Associates (and previously of Kerin & Co). The applicant's submissions as referred to in this decision have been made by Ms Moriarty on behalf of her client.
4. This decision primarily concerns the application of section 42(1)(ca) of the FOI Act in the following external reviews involving the applicant:

External review	Respondent agency
210201	the former Nanango Shire Council (NSC) (now South Burnett Regional Council)
210238	the Local Government Association of Queensland Inc. (LGAQ)
210285	the former Dalby Town Council (DTC) (now Dalby Regional Council)
210286	the former Wambo Shire Council (WSC) (now Dalby Regional Council)

5. NSC did not specifically submit that section 42(1)(ca) applied to the matter in issue in external review 210201. Such submissions however were received in relation to the other three external reviews.
6. These four external review applications had been substantially dealt with to date. However, based on submissions received and a review of the eight external review applications currently before the Office as a whole, it was appropriate to consider the application of section 42(1)(ca) of the FOI Act in the applicant's four external reviews.

¹ External reviews 210240, 210241, 210330, 210318, 210377 and 210323.

7. The procedures to be followed on external review are within the discretion of the Information Commissioner. Proceedings are to be conducted with as little formality and technicality, and with as much expedition, as the requirements of the FOI Act and a proper consideration of the matters before the Information Commissioner permit. The Information Commissioner is not bound by the rules of evidence and may inform himself or herself on any matter in any way the Information Commissioner considers appropriate.²
8. Section 88(1)(b) of the FOI Act provides that in the conduct of a review, the Information Commissioner has power to decide any matter in relation to the application that could have been decided by an agency or Minister under the FOI Act. The Information Commissioner must also take into account relevant considerations which arise during the investigation and review of a decision.
9. In conducting a review the Information Commissioner is required to adopt procedures that are fair having regard to her obligations under the FOI Act and to ensure that each participant in the review has an opportunity to present their views. To this end the applicant was provided with a very detailed preliminary view which set out the factors that would be taken into account in any decision and affording the applicant an opportunity to make submissions in relation to the matters the Information Commissioner might rely upon and any other information/evidence the applicant thought might be relevant to any decision.
10. At the request of the Office, Mr Shane Gray, the former Chief Executive Officer (**CEO**) of NSC provided written and oral submissions to the Office in relation to his concerns about the release of documents to the applicant and Ms Scott under the FOI Act.

Employment

11. The applicant was employed by NSC and worked in the library. Her employment was terminated in 2006.
12. Mr Gray was the CEO of NSC for part of the time that the applicant was employed by NSC and when her employment was terminated. Mr Gray is no longer the CEO of NSC.

Grievance

13. On 12 August 2005 the applicant lodged a grievance with NSC in relation to a colleague (**Grievance**).
14. On 7 September 2005 NSC retained Assure Corporate to provide conflict management services to assist in the resolution of the Grievance.
15. In September 2005 Mr Jacklin of Assure Corporate interviewed the relevant members of staff in relation to the Grievance and issued a report which suggested a number of options for resolution, including mediation.
16. On 5 December 2005 the applicant was relocated from the library to the Visitor Information Centre.
17. In January 2006 NSC employed a Library Co-ordinator, Ms Val Hooper, and the applicant returned to work in the library.

² Section 72 of the FOI Act.

Australian Industrial Relations Commission proceedings

18. On 3 February 2006 the applicant's solicitor filed a Notification of Alleged Industrial Dispute in the Australian Industrial Relations Commission (**AIRC**) on behalf of her client which related to a number of issues relating to NSC officers.
19. On 8 February 2006 a conciliation conference was held for the AIRC dispute with Commissioner Spencer. The proceedings were adjourned so that NSC could determine whether an alternative position could be created for the applicant. Mediation was to occur if an alternative position could not be created.
20. NSC determined that an alternative position could not be created and sought to have the matter referred to mediation. The applicant did not accept NSC's request for a multilateral mediation.
21. NSC claimed that the applicant failed to keep information about the dispute and the conciliation conference confidential. On 16 March 2006 a letter from NSC addressed to the applicant's solicitor was delivered to the applicant's house requesting that the applicant and her solicitor ensure that the information was not published or made public.
22. On 17 March 2006 an article about the applicant and her employment with NSC was published in the South Burnett Times.
23. On 17 March 2006 Ms Crumpton and Mr Gray allegedly received threats with reference to the applicant.

Complaint to the Crime and Misconduct Commission

24. On 17 March 2006 the applicant's solicitor made a complaint on behalf of the applicant to the Crime and Misconduct Commission (**CMC**) about the conduct of Mr Gray and Mr Mercer relating to the delivery of a letter to the applicant's house on 16 March 2006 (**CMC Complaint**).

Termination of the applicant's employment

25. On 24 March 2006 the applicant's employment with NSC was terminated (**Termination**).

Further AIRC proceedings

26. On 11 April 2006 the applicant's solicitor filed an Application for Relief in respect of the Termination with the AIRC on behalf of the applicant. The matter was listed for hearing before Commissioner Bacon and settled informally.

Supreme Court proceedings

27. On 22 August 2006 the applicant's solicitor filed an application for judicial review in the Supreme Court of Queensland on behalf of the applicant. The application related to the referral by the CMC of the CMC Complaint to the Mayor of NSC.

28. In December 2006 the application for judicial review was heard in the Supreme Court before Justice Douglas. A declaration was made that the referral of the CMC Complaint to the Mayor of NSC was ineffective on the ground that the Mayor was not a relevant public official within in the meaning of the *Crime and Misconduct Act 2001*. An order was also made that the CMC and LGAQ pay part of the applicant's costs.
29. On 8 February 2007 the CMC advised that it had determined that no further action was warranted by the CMC or any other body in relation to the CMC Complaint.

Application to Local Government Workcare

30. The applicant lodged two applications with Local Government Workcare for compensation for an injury arising out of her employment with NSC. In her applications, the applicant alleged that:
 - she had developed a psychological condition following an accumulation of stress associated with her work colleagues and upper management who she maintained had been harassing and bullying her over a period of time
 - her condition had been exacerbated by the delivery of the letter to her house and the Termination.
31. Local Government Workcare rejected both applications.
32. The applicant appealed to QComp in relation to one of the applications. QComp decided to refuse the applicant compensation.
33. The matter was heard in the Magistrates Court of Queensland. On 7 November 2008 Magistrate Ehrich dismissed the applicant's appeal with costs.
34. The applicant appealed Magistrate Ehrich's decision.

Sheridan and South Burnett Regional Council

35. I refer to the decision of *Sheridan and South Burnett Regional Council*³ in external review 210240 in which the applicant was a participant.
36. I note that the decision considers the application of section 42(1)(ca) of the FOI Act to the specific matter in issue in that review. The First Assistant Commissioner decided that disclosure of the matter in issue in that review could not reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation.
37. The decision was based on the specific matter in issue and the particular submissions made by the parties in that review. At that time, there was insufficient evidence available to the First Assistant Commissioner to support the application of section 42(1)(ca) of the FOI Act. However, in the course of progressing the eight other external reviews involving the applicant and Ms Scott and obtaining more detailed submissions from Mr Gray at the request of the Office, consideration has now been given to these reviews as a whole.

External review 210201

38. By letter dated 30 May 2006 the applicant's solicitor applied to NSC for access under the FOI Act to 54 categories of documents on behalf of the applicant.

³ (Unreported, Queensland Information Commissioner, 23 June 2008).

39. NSC did not issue a decision within the timeframe provided by the FOI Act and was taken to have refused the applicant access to the requested documents.⁴
40. By letter dated 4 April 2007 the applicant's solicitor applied for external review of NSC's deemed decision on behalf of the applicant.

External review 210238

41. By letter dated 22 March 2007 the applicant's solicitor applied to LGAQ for access to a range of documents under the FOI Act on behalf of the applicant.
42. By letter dated 28 May 2007 LGAQ issued a considered decision⁵ and advised the applicant's solicitor that:
 - it had agreed to release a number of documents to the applicant
 - it had decided to refuse the applicant access to some documents under various provisions of the FOI Act (including section 42(1)(ca) of the FOI Act)
 - some documents the applicant requested did not exist.
43. By letter dated 8 June 2007 the applicant's solicitor applied for external review of LGAQ's considered decision on behalf of the applicant.

External review 210285

44. By an undated letter faxed to DTC on 25 March 2007 the applicant's solicitor applied for access under the FOI Act to documents which essentially comprise Mr Gray's personnel file on behalf of the applicant.
45. By letter dated 29 May 2007 DTC issued a considered decision⁶ and advised the applicant's solicitor that:
 - in accordance with section 35 of the FOI Act, DTC neither confirms nor denies the existence of the requested documents but if they did exist, they would be exempt documents
 - the FOI application relates to documentation that would include exempt matter under section 42(1)(ca) of the FOI Act.
46. By letter dated 7 June 2007 the applicant's solicitor applied for internal review of the considered decision on behalf of the applicant.
47. By letter dated 4 July 2007 DTC affirmed the considered decision.
48. By letter dated 25 July 2007 the applicant's solicitor applied for external review of the internal review decision on behalf of the applicant.

External review 210286

49. By letter dated 23 March 2007 the applicant's solicitor applied to WSC for access under the FOI Act to documents which essentially comprise Mr Gray's personnel file on behalf of the applicant.

⁴ Section 27(5) of the FOI Act.

⁵ Section 27B(4) of the FOI Act.

⁶ As above.

50. By letter dated 25 May 2007 WSC issued a considered decision⁷ and advised the applicant's solicitor that:
 - in accordance with section 35 of the FOI Act, WSC neither confirms nor denies the existence of the requested documents but if they did exist, they would be exempt documents
 - the FOI application relates to documentation that would include exempt matter under section 42(1)(ca) of the FOI Act.
51. By letter dated 7 June 2007 the applicant's solicitor applied for internal review of the considered decision on behalf of the applicant.
52. By letter dated 20 June 2007 WSC affirmed the considered decision.
53. By letter dated 25 July 2007 the applicant's solicitor applied for external review of the internal review decision on behalf of the applicant.

Decisions under review

54. The following decisions are under review:
 - the deemed decision of NSC in external review 210201
 - the considered decision of LGAQ dated 28 May 2007 in external review 210238
 - the internal review decision of DTC dated 4 July 2007 in external review 210285
 - the internal review decision of WSC dated 20 June 2007 in external review 210286.

Steps taken in the external review process

External review 210201

55. By email dated 10 April 2007 the Office requested that NSC provide certain initiating documents relevant to the review.
56. By letter dated 13 April 2007 NSC provided the relevant initiating documents.
57. By letter dated 13 April 2007 the First Assistant Commissioner requested that NSC advise whether it was prepared to grant the applicant access to the requested documents and, if not, to provide submissions outlining the reasons for refusing access under the FOI Act.
58. By letter dated 18 April 2007 NSC provided the Office and the applicant with a copy of its submissions dated 17 April 2007 setting out whether it was prepared to grant the applicant access to the requested documents.
59. By letter dated 9 May 2007 the First Assistant Commissioner advised the applicant's solicitor that NSC's deemed decision would be reviewed and invited the applicant's solicitor to provide any submissions in support of the applicant's case.

⁷ As above.

60. By letter dated 9 May 2007 the First Assistant Commissioner advised NSC that its deemed decision would be reviewed and asked it to provide a copy of the documents to which it intended to refuse access.
61. By letter dated 15 May 2007 the applicant's solicitor provided submissions and documentation in support of the applicant's case.
62. By letter dated 22 May 2007 the applicant's solicitor was invited to provide further submissions and evidence in support of the applicant's case in relation to the sufficiency of search issues she had raised.
63. By letter dated 23 May 2007 NSC provided the Office with a copy of the documents to which it intended to refuse access.
64. By letter dated 6 June 2007 the applicant's solicitor provided submissions in support of the applicant's case.
65. By letters dated 19 November 2007 the Acting Information Commissioner provided a preliminary view to a number of individuals. The individuals were invited to participate in the external review and to make submissions if they wished to object to release of the relevant information.
66. By letter dated 19 November 2007 the Acting Information Commissioner also provided a preliminary view to NSC and invited it to provide submissions in support of its case if it did not accept the preliminary view. NSC was also asked to provide submissions in relation to some of the sufficiency of search issues the applicant had raised.
67. On 27 November 2007 one of the individuals spoke with a staff member of the Office by telephone and advised that she accepted the preliminary view and did not object to disclosure of the relevant information. The other third parties did not respond to the preliminary view letter.
68. By letter dated 30 January 2008 NSC provided submissions in response to the preliminary view.
69. On 12 February 2008 a staff member of the Office contacted NSC to clarify certain aspects of its submissions.
70. By letter dated 4 March 2008 the Acting Information Commissioner provided a further preliminary view to NSC and requested further submissions in relation to some aspects of the external review.
71. On 5 March 2008 a staff member of the Office contacted NSC to clarify other parts of its submissions.
72. By letter dated 7 March 2008 the Acting Information Commissioner wrote to Livingstones Australia (**Livingstones**) (who were engaged by NSC in relation to the Termination) and requested information relevant to this review.
73. By letter dated 20 March 2008 Livingstones provided the requested information.
74. On 27 March 2008 and 17 April 2008 a staff member of the Office made enquiries with the AIRC registry in relation to the information provided by Livingstones.
75. By letter dated 25 March 2008 NSC provided further information relevant to the review.

76. By letter dated 4 April 2008 the Acting Information Commissioner made further enquiries with the AIRC in relation to the information provided by Livingstones.
77. By letter dated 16 April 2008 the AIRC provided the requested information to the Office.
78. By letter dated 28 April 2008 the First Assistant Commissioner provided a preliminary view to Livingstones (and NSC) in relation to a certain aspect of this review. Livingstones (and/or NSC) was invited to provide submissions in support of its case if it did not accept the preliminary view.
79. By letter dated 19 May 2008 Livingstones advised that NSC did not wish to contest the preliminary view.
80. By letter dated 30 May 2008 the First Assistant Commissioner provided a preliminary view to the applicant's solicitor and invited her to provide submissions in support of the applicant's case if she did not accept the preliminary view.
81. By letters dated 12 June 2008 and 18 June 2008 the applicant's solicitor responded to the preliminary view and provided submissions in support of the applicant's case.
82. On 24 June 2008 and 26 June 2008 a staff member of the Office made enquiries with NSC in relation to some of the applicant's submissions.
83. By letter dated 3 July 2008 the First Assistant Commissioner asked NSC to provide further information in relation to the matters raised in the applicant's submissions.
84. By letter dated 3 July 2008 the First Assistant Commissioner asked the applicant's solicitor to provide further information in relation to some of the applicant's submissions.
85. By letter dated 4 July 2008 the applicant's solicitor provided the requested information and documentation.
86. By letter dated 22 July 2008 NSC provided further submissions in support of its case.
87. On 19 August 2008 a staff member of the Office spoke to a NSC officer to confirm some of NSC's submissions.
88. By letter dated 25 August 2008 NSC provided further submissions to the Office in support of its case.
89. By letter dated 3 September 2008 the Acting Assistant Commissioner provided the applicant's solicitor with a preliminary view in relation to several items of the FOI application. The applicant's solicitor was invited to provide submissions in support of the applicant's case if she did not accept the preliminary view. The applicant's solicitor was advised that if the Office did not hear from her by 18 September 2008, the Office would assume that the applicant had accepted the preliminary view.
90. By letter dated 18 September 2008 the applicant's solicitor provided submissions in support of the applicant's case in response to the preliminary view.
91. By letter dated 20 November 2008 the applicant was asked to confirm whether, in view of the stated purpose of the applicant's external review application, the applicant wished to proceed with external review 210201.

92. By letter dated 20 November 2008 the applicant's solicitor advised that the applicant wished to proceed with external review 210201.

External review 210238

93. By letter dated 15 June 2007 the Office advised the applicant's solicitor that LGAQ's considered decision would be reviewed.
94. By letter dated 15 June 2007 the Office advised LGAQ that the considered decision would be reviewed and asked it to provide a number of documents relevant to the review, including the matter claimed to be exempt.
95. By letters dated 26 November 2007 and 27 November 2007 the requested documents were provided to the Office by LGAQ and LGAQ's solicitors, King & Company.
96. On 4 February 2008 a staff member of the Office telephoned LGAQ to make enquiries about certain aspects of the considered decision.
97. By email on 5 February 2008 the Office made further enquiries with LGAQ in relation to the considered decision.
98. By email on 13 February 2008 LGAQ clarified parts of its considered decision and provided submissions to the Office.
99. In a telephone call on 15 February 2008 with a staff member of the Office, LGAQ clarified submissions made in the email dated 13 February 2008.
100. On 27 March 2008 a staff member of the Office made enquiries with the CMC in relation to certain aspects of the external review.
101. By letter dated 27 March 2008 the CMC provided information relevant to the external review, including a copy of a letter from the CMC to Kerin & Co dated 8 February 2007 advising the outcome of the applicant's CMC Complaint.
102. By email dated 27 March 2008 the Office requested that LGAQ provide further documents and information in relation to part of the considered decision.
103. By letter dated 7 April 2008 the Acting Information Commissioner wrote to the applicant's solicitor to clarify the basis of the applicant's external review application and to seek further submissions in relation to certain aspects of the considered decision.
104. By letter dated 14 April 2008 LGAQ provided the documents and information as requested.
105. By email on 16 April 2008 the applicant's solicitor requested an extension of time to provide the Office with submissions in support of the applicant's case.
106. By email on 17 April 2008 the applicant's solicitor was granted an extension of time to provide submissions.
107. By letter dated 24 April 2008 the First Assistant Commissioner provided LGAQ with a preliminary view in relation to certain aspects of the external review. LGAQ was invited to provide submissions to the Office by no later than 9 May 2008 if it did not accept the preliminary view.

108. By letters dated 24 April 2008 and 28 April 2008 the First Assistant Commissioner consulted with the CMC and various individuals in relation to certain aspects of the external review. The CMC and the individuals were invited to participate in the external review and to make additional submissions if they wished to object to release of the relevant information.
109. On 30 April 2008 one of those individuals contacted a staff member of the Office by telephone and advised that, in the circumstances, he did not object to release of the relevant information in accordance with the letter.
110. By letter dated 1 May 2008 the CMC advised that it wished to participate in the external review and did not object to the relevant information being released.
111. By letter dated 1 May 2008 the applicant's solicitor provided submissions and documentation in support of the applicant's case in response to the preliminary view.
112. By letter dated 20 May 2008 LGAQ advised that it did not accept parts of the preliminary view dated 24 April 2008 and provided submissions in support of its case.
113. By letter dated 23 May 2008 the First Assistant Commissioner communicated a further preliminary view to LGAQ and requested further submissions. LGAQ was invited to provide submissions to the Office if it did not accept the further preliminary view.
114. By letter dated 23 May 2008 the First Assistant Commissioner communicated a preliminary view to the applicant's solicitor in relation to certain aspects of the external review. The applicant's solicitor was invited to provide submissions in support of the applicant's case if the applicant did not accept the preliminary view.
115. By letter dated 6 June 2008 the applicant's solicitor advised that the applicant did not accept parts of the preliminary view and provided submissions and documentation in support of the applicant's case.
116. By letter dated 11 June 2008 LGAQ advised the Office that it did not accept parts of the further preliminary view and provided submissions in support of its case.
117. By letter dated 12 June 2008 the First Assistant Commissioner provided the applicant's solicitor with a preliminary view in relation to other aspects of the external review. The applicant's solicitor was invited to provide submissions in support of the applicant's case if the applicant did not accept the preliminary view.
118. On 13 June 2008 a staff member of the Office spoke with a staff member of the CMC to determine whether the CMC objected to the release of part of the matter in issue. That staff member advised that the CMC did not object to release of that information under the FOI Act.
119. By letter dated 23 June 2008 the applicant's solicitor advised that the applicant did not accept part of the preliminary view and provided submissions in support of the applicant's case.

120. By letter dated 29 July 2008 the Acting Assistant Commissioner provided the applicant's solicitor with a preliminary view in relation to an aspect of the external review. The applicant's solicitor was invited to provide submissions in support of the applicant's case if the applicant did not accept the preliminary view. The Acting Assistant Commissioner advised the applicant's solicitor that, unless she indicated otherwise by 12 August 2008, the Office would assume that the applicant accepted the preliminary view.
121. The applicant's solicitor did not respond to the preliminary view letter dated 29 July 2008 and therefore it was assumed that the applicant accepted the preliminary view on that issue.
122. By letter dated 20 November 2008 the applicant's solicitor was asked to confirm whether, in view of the stated purpose of the applicant's external review application, the applicant wished to proceed with external review 210238.
123. By letter dated 20 November 2008 the applicant's solicitor advised that the applicant wished to proceed with external review 210238.

External review 210285

124. By letter dated 25 July 2007 the Office advised the applicant's solicitor that DTC's internal review decision would be reviewed.
125. By letter dated 25 July 2007 the Office advised DTC that the internal review decision would be reviewed and asked it to provide submissions in support of its decision.
126. By letter dated 15 August 2007 DTC provided the requested submissions.
127. By letter dated 7 November 2007 the Office asked DTC to forward a copy of the matter in issue to the Office.
128. By letter dated 22 November 2007 DTC provided the requested documents.
129. On 29 October 2008 a staff member of the Office telephoned DTC. DTC withdrew its claim under section 35 of the FOI Act but maintained its claim that the matter in issue is exempt from disclosure in its entirety under section 42(1)(ca) of the FOI Act.
130. By letter dated 29 October 2008 DTC provided a copy of Mr Gray's submissions.
131. By letter dated 20 November 2008 the applicant's solicitor was asked to confirm whether, in view of the stated purpose of the applicant's external review application, the applicant wished to proceed with external review 210285.
132. By letter dated 20 November 2008 the applicant's solicitor advised that the applicant wished to proceed with external review 210285.

External review 210286

133. By letter dated 27 July 2007 the Office advised the applicant's solicitor that WSC's internal review decision would be reviewed.
134. By letter dated 27 July 2007 the Office advised WSC that the internal review decision would be reviewed and asked it to provide submissions in support of its decision.

135. By letter dated 8 August 2007 WSC provided the requested submissions.
136. By letter dated 7 November 2007 the Office asked WSC to forward a copy of the matter in issue to the Office.
137. By letter dated 19 November 2007 WSC provided the requested documents.
138. On 29 October 2008 a staff member of the Office telephoned WSC. WSC withdrew its claim under section 35 of the FOI Act but maintained its claim that the matter in issue is exempt from disclosure in its entirety under section 42(1)(ca) of the FOI Act.
139. By letter dated 20 November 2008 the applicant's solicitor was asked to confirm whether, in view of the stated purpose of the applicant's external review application, the applicant wished to proceed with external review 210286.
140. By letter dated 20 November 2008 the applicant's solicitor advised that the applicant wished to proceed with external review 210286.

Steps taken in relation to the question of the application of section 42(1)(ca) of the FOI Act in external reviews 210201, 210238, 210285 and 210286

141. By email on 23 October 2008 NSC provided the Office with a copy of a further FOI application made by Ms Scott.
142. On 27 October 2008 a staff member of the Office telephoned a staff member of NSC to confirm certain background events relevant to this review.
143. On 20 November 2008 a staff member of the Office telephoned Mr Gray to:
 - clarify submissions he had made to the Office in a previous external review involving the applicant
 - seek his permission to refer to those submissions in relation to external reviews 210201, 210238, 210285 and 210286
 - invite him to provide further submissions in support of his concerns.

Mr Gray provided submissions in support of his concerns during that telephone conversation.

144. On 4 December 2008 and at the request of the Office, Mr Gray met with the Acting Assistant Commissioner and another staff member of the Office. Mr Gray provided more detail on the previous submissions he had made to the Office.
145. On 17 December 2008 Mr Gray provided the Office with documents in support of his submissions to the Office.
146. By letter dated 19 December 2008 the applicant's solicitor was provided with a preliminary view in relation to the application of section 42(1)(ca) of the FOI Act in external reviews 210201, 210238, 210285 and 210286. The preliminary view included the following attachments:
 - written submissions made by LGAQ, DTC and WSC
 - written submissions made by Mr Gray
 - examples of the applicant and people claiming to be her supporters having used public notices and the media to publicise their grievances with Mr Gray

- print-outs from the website www.bunyawatch.com (**Bunya Watch**)
- FOI applications made to various agencies.

The applicant's solicitor was afforded an opportunity to provide submissions in support of the applicant's case by 19 January 2009 if the applicant did not accept the preliminary view.

147. By letter dated 7 January 2009 the applicant's solicitor requested an extension of time to provide submissions in support of the applicant's case.
148. By letter dated 12 January 2009 the applicant's solicitor was given an extension of time in which to provide submissions.
149. By letter dated 27 February 2009 the applicant's solicitor provided submissions in response to the preliminary view and various documents in support of the applicant's case.
150. By email on 12 March 2009 NSC provided the Office with a copy of the decision dated 12 November 2008 which was issued to Ms Susan Scott in response to her recent FOI application to NSC (which is not subject to external review at this time).
151. On 18 March 2009 NSC provided the Office with a copy of the report broadcast on A Current Affair relating to the Termination.
152. By letter dated 18 March 2009 the Office wrote to the applicant's solicitor and invited her to provide further submissions on behalf of her client in relation to two issues relevant to the reviews.
153. On 23 March 2009 a staff member of the Office telephoned Mr Gray to clarify certain information he had provided to this Office.
154. On 23 March 2009, a staff member of the Office made enquiries with the CMC in relation to a previous FOI application by the applicant.
155. On 25 March 2009 a staff member of this Office made further enquiries with NSC in relation to information Mr Gray provided to the Office.
156. By letter dated 26 March 2009 the applicant's solicitor provided further submissions and supporting documentation in support of her client's case.
157. On 27 March 2009, NSC provided further information relevant to these reviews.
158. The following material was taken into account in making this decision:
 - the applicant's FOI applications dated 30 May 2006,⁸ 22 March 2007⁹ and 23 March 2007¹⁰ and the undated FOI application faxed to DTC on 25 March 2008¹¹

⁸ External review 210201.

⁹ External review 210238.

¹⁰ External review 210286.

¹¹ External review 210285.

- the considered decision of LGAQ dated 28 May 2007,¹² the internal review decision of DTC dated 4 July 2007¹³ and the internal review decision of WSC dated 20 June 2007¹⁴ and the submissions made by NSC by letter dated 17 April 2007¹⁵
- the correspondence and submissions provided to the Office by the respondent agencies throughout the course of the external reviews
- file notes of conversations between staff members of the Office and the respondent agencies
- the correspondence, submissions and supporting documents provided to the Office by the applicant's solicitor throughout the course of the external reviews, including her submissions dated 27 February 2009 and 26 March 2009
- information provided by individuals consulted in relation to release of documents to the applicant throughout the course of the reviews
- the submissions provided to the Office by Mr Gray throughout the course of the external reviews and supporting documents (including the submissions provided to the Office by Mr Gray in external review 210240 as referred to in the decision of *Sheridan and South Burnett Regional Council*¹⁶)
- file notes of conversations between staff members of the Office and Mr Gray
- the four associated external review applications before the Office made by Ms Scott
- examples of the applicant and people claiming to be her supporters having used public notices and the media to publicise their grievances with Mr Gray
- print-outs from Bunya Watch referred to in this decision
- the report from A Current Affair relating to the Termination
- the information provided by the CMC and the former Murgon Shire Council (**MSC**) (now South Burnett Regional Council)
- the various FOI applications made by the applicant and other associated people
- the matter in issue
- relevant case law and previous decisions of the Information Commissioner
- relevant provisions of the FOI Act.

Issue for determination

159. In light of all the associated external review applications, a threshold question to be answered in these external reviews is whether disclosure of the matter in issue in these reviews could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation.

Matter in issue

160. The remaining matter in issue in these reviews (**Matter in Issue**) is set out below.

External review 210201

161. In external review 210201, the remaining Matter in Issue in relation to the refusal of access issues is:

¹² External review 210238.

¹³ External review 210285.

¹⁴ External review 210286.

¹⁵ External review 210201.

¹⁶ (Unreported, Queensland Information Commissioner, 23 June 2008).

Item	Document/s sought
In relation to Shane Gray:	
3	[Shane Gray's] contract of employment as CEO for NSC
5	Shane Gray's delegations as CEO, including financial delegations
9	letters of complaint concerning the library dating from November 2005
In relation to Michael Hunter:	
1	[Michael Hunter's] resume
2	references supporting his application for (re)employment with the NSC
5	documents in respect of the incident filed by Julie Sheehan
6	[Michael Hunter's] performance reviews
In relation to Iris Crumpton:	
1	all contracts of employment in respect of her employment with the library including her recent appointment to 5 days per week
4	[Iris Crumpton's] resume
In relation to Kathy Cope:	
1	the memo [Kathy Cope] wrote to all Council staff requesting their signature to a public notice supporting the CEO published in April 2006
2	documented responses, or emails relating to the memo

162. In external review 210201, the remaining Matter in Issue in relation to the sufficiency of search issues relates to the following items of the FOI application:

Item	Document/s sought
In relation to Shane Gray:	
1	[Shane Gray's] application for the position of CEO, NSC
4	[Shane Gray's] resume
6	letters/memos to the ASU in respect of Leigh Sheridan's grievance and employment
7	letters/memos to and from Assure Corporate in respect of Leigh Sheridan's grievance, including the Jacklin report
8	all memos to and from the Mayor in respect of Leigh Sheridan's employment, grievance and proposed termination
12	staff meeting minutes in respect of the termination of Leigh Sheridan's employment
16	all documentation relating to verbal reports made to Council about Leigh Sheridan at Council meetings
19	internal memos, emails or documentation sent from Shane Gray to all and/or any Councillors concerning Leigh Sheridan
20	Shane Gray's performance reviews
21	emails sent to Shane Gray from nschanango@yahoo.com
22	emails sent to Mr Gray by Audrey Sampson and Iris Crumpton relating to Leigh

Item	Document/s sought
	Sheridan, Shane Gray's responses thereto
23	documentation of Council's authorisation to Shane Gray to use a solicitor to sue Nola Boddington
24	tax invoices from Edge Wood Solicitors
30	all documents, emails, memos and briefings sent to and from the Mayor in relation to Leigh Sheridan
In relation to Michael Hunter:	
3	briefings and memos to the CEO and/or the Mayor and to Council in respect of Mr Hunter's complaint to police alleging malicious damage to his property circa 12/13 December 2005
7	emails sent to Michael Hunter from Audrey Sampson and Iris Crumpton regarding Leigh Sheridan, his responses thereto
8	emails sent to Michael Hunter from nscnanango@yahoo.com
In relation to Iris Crumpton:	
2	[Mrs Crumpton's] traineeship
In relation to Kathy Cope:	
3	the tax invoice in respect of the public notice
4	payment details and the receipt in respect of the payment of the public notice

External review 210238

163. In relation to external review 210238, the remaining Matter in Issue in relation to the refusal of access issues is:

Item	Document/s sought
8	letter from LGAQ to the CMC dated 4 April 2007
10	draft investigation report by Gabrielle Walsh dated August 2006

164. In external review 210238, the remaining Matter in Issue in relation to the sufficiency of search issues relates to the following items of the FOI application:

Item	Document/s sought
2	investigation plan relating to the complaint lodged by Leigh Sheridan on 17 March 2006
3	file notes relating to Leigh Sheridan and NSC
4	running sheet/log of the investigation
9	copy of all documentation including correspondence (letters, emails, faxes, verbal reports) to Local Government Workcare in relation to Leigh Sheridan
12	copies of the minutes of meetings attended by LGAQ Liaison Officer held by the CMC in 2005, 2006 and 2007

External review 210285

165. The remaining Matter in Issue in relation to the refusal of access issues is 231 pages (essentially comprising Mr Gray's personnel file)

External review 210286

166. The remaining Matter in Issue in relation to the refusal of access issues is 112 pages (essentially comprising Mr Gray's personnel file).

The law

Section 42(1)(ca) of the FOI Act

167. Section 42(1)(ca) of the FOI Act provides:¹⁷

42 Matter relating to law enforcement or public safety

(1) *Matter is exempt if its disclosure could reasonably be expected to—*
...

(ca) *result in a person being subjected to a serious act of harassment or intimidation.*

Legislative history of section 42(1)(ca) of the FOI Act

168. Section 42(1)(ca) of the FOI Act is a relatively new exemption provision inserted into the FOI Act by the *Freedom of Information and Other Legislation Amendment Act 2005* with commencement on 31 May 2005. There is no equivalent provision in other Australian jurisdictions, the United Kingdom or Canada, interpretation of which might provide guidance regarding the provision.

169. Section 42(1)(ca) of the FOI Act was enacted in response to Report No 32 of the Legal, Constitutional and Administrative Review Committee (**LCARC Report**).¹⁸

170. The LCARC Report referred to section 42(1)(c) of the FOI Act and noted that:¹⁹

In some circumstances the disclosure of matter could risk harm to an individual which falls short of endangering their life or physical safety. For example, the disclosure of information could cause a person to apprehend harassment or intimidation. Harassment does not satisfy s42(1)(c) unless there is evidence of a risk that disclosure of the matter in issue would endanger a person's life or physical safety. (Re Murphy and Queensland Treasury (1995) 2 QAR 744 at paras 53, 90-91.) The QIC submitted that, for these reasons, the provision should be extended to also exempt matter which could reasonably be expected to subject a person to acts of serious harassment.

171. The LCARC Report also stated:²⁰

¹⁷ Section 42(1) of the FOI Act is subject to section 42(2) which provides that matter is not exempt under subsection (1) if it consists of matter described in paragraph (a) of subsection (2), unless its disclosure would, on balance, be in the public interest. I am satisfied that the Matter in Issue is not of a type described in paragraph (a) and therefore subsection (2) of section 42 does not apply in this matter.

¹⁸ Legal, Constitutional and Administrative Review Committee, *Freedom of Information in Queensland*, December 2001, Report No 32.

¹⁹ At page 203.

²⁰ At page 204.

The committee agrees that potential harm to an individual, apart from the risk of endangering a person's life or physical safety, justifies the non-disclosure of material under the Act. In particular, people should not be deterred from providing information to investigative authorities, and professionals responsible for preparing reports about individuals should not be deterred from providing full and frank reports. In this regard, s 42(1)(c) should be extended to situations where disclosure of information could be reasonably expected to:

- ◆ *subject a person to serious acts of harassment; or*
- ◆ *substantially prejudice the mental well-being of a person.*

Each of these components is necessary. The first relates to likely possible acts against the person, whereas the second is focussed on any reasonable apprehension of harm which a person may have. Care should be taken in drafting the new provision to ensure that it is no broader than is necessary to protect the well-being of third parties who might be affected.

The definition of 'detriment' for the purposes of the Criminal Code, chapter 33A (Unlawful stalking) appears to provide an appropriate precedent for an amended provision.

172. The LCARC Report contained the following recommendation:²¹

In relation to the exemptions contained in s 42 (Matter relating to law enforcement or public safety), s 42(1)(c) should be extended to also exempt matter if its disclosure could reasonably be expected to:

- ◆ *subject a person to serious acts of harassment; or*
- ◆ *substantially prejudice the mental well-being of a person.*

The definition of 'detriment' for the purposes of the Criminal Code, chapter 33A (Unlawful stalking) appears to provide an appropriate precedent for an amended provision.

173. In the explanatory notes to the *Freedom of Information and Other Legislation Amendment Bill*, section 42(1)(ca) of the FOI Act was described as follows:²²

Clause 24 amends section 42 to create a new exemption to prevent disclosure where it is reasonably expected that such disclosure could subject a person to serious acts of harassment or intimidation. Such harassment or intimidation would be a consequence of, for example, the applicant having knowledge of the content of the information or of the provider of the information. For example, potential disclosure of information provided by a victim about the offence, upon the application of an offender, could constitute harassment or intimidation. Harassment or intimidation includes, for example, the threat of violence. This implements LCARC finding 177.

Interpretation of section 42(1)(ca) of the FOI Act

174. Section 4 of the FOI Act relevantly provides:

4 Object of Act and its achievement

- (1) *The object of this Act is to extend as far as possible the right of the community to have access to information held by Queensland government.*
- (2) *Parliament recognises that, in a free and democratic society—*
 - (a) *the public interest is served by promoting open discussion of public affairs and enhancing government's accountability; and*

²¹ Committee finding 177 – recommendation, at page 204.

²² At page 14.

- (b) *the community should be kept informed of government's operations, including, in particular, the rules and practices followed by government in its dealings with members of the community; and*
- ...
- (3) *Parliament also recognises there are competing interests in that the disclosure of particular information could be contrary to the public interest because its disclosure in some instances would have a prejudicial effect on—*
 - (a) *essential public interests; or*
 - (b) *the private or business affairs of members of the community about whom information is collected and held by government.*
- (4) *This Act is intended to strike a balance between those competing interests.*
- (5) *The object of this Act is achieved by—*
 - (a) *giving members of the community a right of access to information held by government to the greatest extent possible with limited exceptions for the purpose of preventing a prejudicial effect on the public interest of a kind mentioned in subsection (3); and*
- ...
- (6) *It is Parliament's intention that this Act be interpreted to further the object stated in subsection (1) in the context of the matters stated in subsections (2) to (5).*

175. Consistent with Parliament's intention expressed in section 4(6) of the FOI Act, section 42(1)(ca) of the FOI Act must be interpreted in a way that best achieves the purpose of the FOI Act²³ as:

*the primary objective of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute.*²⁴

176. Section 4(1) of the FOI Act recognises that the community has a right to access information held by the Queensland government. However, sections 4(2)-(5) of the FOI Act provide that the right of access to documents under the FOI Act is subject to a balancing of competing public interests. Accordingly, section 42(1)(ca) should be interpreted in a way that extends as far as possible the right of the community to access information held by agencies whilst recognising that section 42(1)(ca) is one of the limited exceptions that may apply because disclosure '*could be contrary to the public interest*' as it '*would have a prejudicial effect*' on '*essential public interests*' or on '*the private or business affairs of members of the community about whom information is collected and held by government.*'

177. Accordingly, in interpreting section 42(1)(ca) of the FOI Act it is necessary to consider any '*essential public interests*' and '*private or business interests*' that, absent the provision, may be prejudiced by disclosure of documents through the right of access under section 21 of the FOI Act.

²³ Section 14A(1) of the *Acts Interpretation Act 1954*.

²⁴ *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381.

178. The LCARC Report specifically addresses the public interest in ensuring that people are not deterred from providing information to investigative authorities and similarly, that professionals are not deterred from providing full and frank reports to agencies through concern that disclosure could lead to serious harassment or intimidation.²⁵ The Committee agreed that potential harm to an individual justifies non-disclosure.
179. In addition to the public interests identified by LCARC, section 42(1)(ca) also works to protect the public interest in disclosure not having a prejudicial effect on the private or business affairs or individuals.
180. Though the term ‘*personal affairs*’ appears throughout the FOI Act, the term ‘*private affairs*’ does not otherwise appear.
181. In *ABC v Lenah Game Meats Pty Ltd*²⁶ Gleeson CJ noted that:

There is no bright line which can be drawn between what is private and what is not. Use of the term “public” is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.

182. In accordance with section 4(6) of the FOI Act, section 42(1)(ca) of the FOI Act may be interpreted as a limited exception to the right of access which allows non-disclosure of information or professional advice provided to an agency where that disclosure could reasonably be expected to result in serious harassment or intimidation of person/s. Such disclosure would therefore be contrary to the public interest in the supply of this information as well as the public interest in protecting such individuals from conduct that would prejudice their private affairs.
183. Section 42(1)(ca) of the FOI Act must be interpreted in the context of the FOI Act as a whole.
184. Paragraph (ca) was inserted into subsection 42(1) of the FOI Act by an amending Act which also inserted section 96A into the FOI Act.
185. Under section 96A of the FOI Act, the Information Commissioner may declare a person a vexatious applicant if the Commissioner is satisfied that the person has made repeated applications under the FOI Act and those applications ‘*involve an abuse of the right of access, amendment or review*’ under the FOI Act. Section 96A(4) gives an example of conduct which amounts to an abuse of the right of access, amendment or review:

²⁵ Section 42(1)(ca) of the FOI Act does not contain a public interest test, however, the public interest considerations discussed above are relevant to how section 42(1)(ca) of the FOI Act is interpreted.

²⁶ (2001) 208 CLR 199 at 226.

For subsection (3)(b), repeated applications involve an abuse of the right of access, amendment or review if, for example, the applications were made for the purpose, or have had the effect, of –

- (a) harassing or intimidating an individual or an employee or employees of the agency or agencies; or*
- (b) unreasonably interfering with the operations of the agency or agencies.*

186. Considered together, the amending provisions in relation to sections 96A and 42(1)(ca) reflect Parliament's intent to limit, prevent or terminate access applications which are improper or amount to abuse of the rights conferred under the FOI Act.

187. In considering the FOI Act as a whole, the following observations can be made about the operation of section 42(1)(ca):

- a) The conduct contemplated in section 42(1)(ca) is more '*serious*' than some conduct that may be contemplated by section 96A(3)(b).
- b) Some degree of harassment or intimidation is contemplated as permissible before the right to access documents under the FOI Act is removed.
- c) The subjective purpose of the applicant is not a relevant consideration.
- d) Section 42(1)(ca) may apply in respect of a single access application, that is, neither the application nor the applicant need be characterised as vexatious for the provision to apply.
- e) Under section 42(1)(ca) the exemption may be available where it is reasonably expected that disclosure will result in a single serious act of harassment rather than '*repeated attacks*' or '*persistent disturbances*' which may be a requirement under section 96A of the FOI Act.

188. There are no definitions of the words or phrases contained in section 42(1)(ca) in either the FOI Act or the *Acts Interpretation Act 1954*. Therefore, in accordance with the rules of statutory interpretation, this decision gives effect to the ordinary meaning of those words, except where there is relevant interpretation.

'Could reasonably be expected to'

189. In *Attorney-General v Cockcroft*,²⁷ (**Cockcroft**) which dealt with the interpretation of the phrase '*could reasonably be expected to prejudice the future supply of information*' in the context of the section 43(1)(c)(ii) (business affairs) exemption contained in the Commonwealth FOI Act, Bowen CJ and Beaumont J said:²⁸

²⁷ (1986) 64 ALR 97.

²⁸ *Cockcroft*, at 106.

In our opinion, in the present context, the words "could reasonably be expected to prejudice the future supply of information" were intended to receive their ordinary meaning. That is to say, they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that those who would otherwise supply information of the prescribed kind to the Commonwealth or any agency would decline to do so if the document in question were disclosed under the Act. It is undesirable to attempt any paraphrase of these words. In particular, it is undesirable to consider the operation of the provision in terms of probabilities or possibilities or the like. To construe s.43(1)(c)(ii) as depending in its application upon the occurrence of certain events in terms of any specific degree of likelihood or probability is, in our view, to place an unwarranted gloss upon the relatively plain words of the Act. It is preferable to confine the inquiry to whether the expectation claimed was reasonably based (see Jason Kioa v. The Honourable Stewart John West, High Court, unreported, 18 December 1985 per Mason, J. at p 36; see also per Gibbs, C.J. at p 12).

190. The Justices' interpretation of the phrase '*could reasonably be expected to*' and the proposed line of inquiry, while made in the context of the business affairs exemption contained in Commonwealth FOI legislation, is relevant in the context of the exemption contained in section 42(1)(ca) of the FOI Act.
191. Accordingly, the phrase '*could reasonably be expected to*' in this context requires a consideration of whether the expectation that disclosure of the Matter in Issue could result in a serious act of harassment or intimidation is reasonably based.
192. Shepherd J also noted in *Cockcroft* that it is not necessary for a decision-maker '*to be satisfied upon a balance of probabilities*' that disclosing the document will produce the anticipated prejudice.²⁹
193. Depending on the circumstances of the particular review, a range of factors may be relevant in determining whether an act could reasonably be expected to occur. These factors may include, but are not limited to:
 - past conduct or a pattern of previous conduct
 - the nature of the relevant matter in issue
 - the nature of the relationship between the parties and/or third parties
 - relevant contextual and/or cultural factors.

'Harassment'

194. The plain meaning of the word '*harass*', as defined in the Macquarie Dictionary³⁰ includes:

to trouble by repeated attacks, ... to disturb persistently; torment

'Intimidation'

195. The plain meaning of the word '*intimidate*',³¹ includes:

to make timid, or inspire with fear; overawe; cow ... to force into or deter from some action by inducing fear

²⁹ *Cockcroft*, at 106.

³⁰ *Macquarie Dictionary Online* (Fourth Edition) www.macquariedictionary.com.au.

³¹ As above.

‘A serious act of harassment or intimidation’

196. Section 42(1)(ca) of the FOI Act requires that an anticipated act of harassment or intimidation be *serious*.

197. The plain meaning of the word ‘*serious*’,³² includes:

giving cause for apprehension; critical

and in the New Shorter Oxford Dictionary (4th Edition) includes:

having (potentially) important, esp. undesired, consequences; giving cause for concern.

198. As I have noted above, the definition of ‘*harassment*’ refers to persistent or repeated conduct. However, I consider that section 42(1)(ca) of the FOI Act can apply where what is expected to result from disclosure is a *single* act of serious harassment and it is not necessary for me to consider whether disclosure of the Matter in Issue could reasonably be expected to result in more than one act of serious harassment.

199. Therefore, I am satisfied that a ‘*serious act of harassment*’ in the context of section 42(1)(ca) of the FOI Act means an action that attacks, disturbs or torments a person and that causes concern or apprehension or has undesired consequences.

200. Accordingly,

- Acts which induce fear or force a person into some action by inducing fear or apprehension are acts of intimidation.
- Acts of intimidation which have undesired consequences or cause concern and/or apprehension are *serious* acts of intimidation.
- Acts which persistently trouble, disturb or torment a person are acts of harassment.
- Acts of harassment which have undesired consequences or cause concern and/or apprehension are *serious* acts of harassment.

How relevant information is considered

201. The question of whether disclosing the Matter in Issue in these reviews could reasonably be expected to result in a serious act of harassment or intimidation should be considered objectively, in light of all relevant information, including information from and/or about the claimed source of harassment or intimidation.³³

202. Section 42(1)(ca) of the FOI Act does not require a causal link to be drawn between a specific person and the conduct; nor does it require the conduct to be that of the applicant.

³² As above.

³³ *Price and Queensland Police Service* (Unreported, Queensland Information Commissioner, 29 June 2007) at paragraph 63; see also the comments of the Information Commissioner at paragraph 47 of *Murphy and Queensland Treasury* (1995) 2 QAR 744 regarding section 42(1)(c) of the FOI Act.

Submissions and relevant information

Submissions by the respondent agencies

203. The submissions made by LGAQ, DTC and WTC to the Office in relation to the application of section 42(1)(ca) of the FOI Act can be summarised as follows:

- The potential risk to the ongoing welfare of employees of NSC outweighs the subjective assessment adopted by the Office of the evidence and whether the risk is real or perceived, its potential for harm to their health and safety rests in the minds of the employees (not the Office).
- The release of certain information that might lead to harassment has the potential to cause unnecessary stress and anxiety to NSC employees. The relevant employees have not sought to be involved in this matter but have been forced to endure this matter as a result of their being asked to contribute to the good governance of NSC through their participation in an investigation.
- LGAQ refers to the following as the evidence it relies on to support its claim for exemption:
 - statements by Mr Gray in relation to the assault which was reported to police and the ongoing harassment he has endured in relation to this matter
 - the report on the alleged threat supplied by the acting librarian
 - the continuing campaign in the media and electronically against NSC representatives
 - reported damage to public property.
- Anyone who was seen to be involved in any activity that might be seen as detrimental to the applicant was personally targeted.
- LGAQ contends that the person who is subject to the behaviour is best positioned to determine whether the threat to their safety is serious or trivial as that person has to live and work in that particular environment and different people have different tolerance levels for such matters.
- Care must be taken by any third party in determining whether a threat to another person should be constituted as serious or not, as it is not the assessor who has to live with the result and is not in a position to assess the culture, tolerance or behavioural standards that apply in any particular but remote environment.

204. LGAQ is of the view that the behaviour listed above cannot be construed any way other than as an intention to intimidate.

205. In its submissions dated 15 August 2007, DTC states that:

Mr Gray detailed a long history of the applicant's nuisance actions and behaviours that he stated had led to his decision to relocate his family from Nanango ... in an effort to improve their personal safety and wellbeing.

Specific alleged actions and behaviours of the applicant and her supporters towards Mr Gray and his staff at Nanango Shire Council include:

- *A threat made against Mr Gray's children with reference to the applicant from an unknown caller*
- *Repeated telephone calls from the applicant and her supporters*

- *Damage to individual's property involved in the issue*
- *Persistent innuendo and defamation in relation to Mr Gray and his staff published on a public discussion page hosted on the www.bunyawatch.com website.*
- *Numerous formal and informal requests from the applicant, her solicitor and supporters to view files held by Nanango Shire Council, Mr Gray, all staff involved in the applicant's employment as well as the previous employers of Mr Gray and his staff*
- *Numerous challenges and/or FOI's lodged on behalf of the applicant in relation to decisions by CMC, QIRC, AIRC, LGAQ, QCOMP and LGW.*

Information provided by Mr Gray

206. In telephone conversations with a staff member of the Office and in a meeting with two staff members of the Office on 4 December 2008, Mr Gray provided submissions which can be summarised as follows.
- a) Mr Gray relocated his family from Nanango shortly after the Termination purely because of the incidents associated with the Termination.
 - b) The incidents have caused significant stress to him and his family and have impacted on his personal financial circumstances and career.
 - c) After the Termination, people were driving past his residence at night and yelling obscenities relating to the applicant. This continued for around two or three months.
 - d) On at least one occasion, Mr Gray was followed by a supporter of the applicant while driving his car and, in the context of the other incidents, this made him feel anxious.
 - e) Mr Gray received around half a dozen phone calls on his work mobile phone and home phone between the hours of midnight and 3am. Mr Gray's work mobile phone number was not publicly available. All of those phone calls made reference to the applicant. One of the callers said something like 'You'll get what you deserve for what you did to Leigh Sheridan'. Mr Gray started receiving these calls around one or two months after the Termination and he received more calls after any significant decision was made relating to the applicant. Mr Gray reported a number of these calls to police.
 - f) Around the time of the Termination, Mr Gray received a phone call from an anonymous caller while at work. The caller made a threat against Mr Gray's children with reference to the applicant. Mr Gray reported the matter to the police.
 - g) The applicant and a number of people claiming to be her supporters appeared on A Current Affair and discussed the Termination and Mr Gray.
 - h) Approximately six to eight weeks after the Termination, Mr Gray was shoulder charged by a man in the street in the presence of his children. The man made an obscene comment to Mr Gray's children about Mr Gray with reference to the applicant. Mr Gray had never seen the man before.

- i) Mr Gray has observed that staff of NSC have become visibly upset during the processing of the FOI applications relating to the applicant and in the context of the circumstances described above. Mr Gray remains concerned for the emotional well being of some NSC employees as a result of the incidents surrounding the Termination.
- j) Damage was done to NSC wheelie bins located around 200 metres from the applicant's residence around the time of the CMC Complaint. The wheelie bins had offensive comments written on each face including the lid (in the form of homosexual slurs) using the names of two NSC employees who were involved in the CMC Complaint.
- k) Other NSC officers have received threatening phone calls and some have taken periods of stress leave as a result of the incidents surrounding the Termination.
- l) When information is released to the applicant or people claiming to be her supporters, the information is used to make new FOI applications. There have been numerous FOI applications made to NSC seeking information in relation to Mr Gray, including seeking information from his previous employers.
- m) Since the Termination, each year on his birthday, Ms Scott has sent a card to Mr Gray expressing a sentiment to the effect that she wishes him '*all he deserves*'. Mr Gray considers the cards are linked with the applicant (for example one card has a picture of a frog on the cover and the frog is a common theme related to the applicant). Ms Scott's name and address are written on the back of the envelopes.

207. Mr Gray also provided submissions in external review 210240 (which are set out in the decision *Sheridan and South Burnett Regional Council*).³⁴ With those submissions, Mr Gray provided:

- examples of the applicant and people claiming to be her supporters having used public notices and the media to publicise their grievances with him
- print-outs from Bunya Watch.

Information contained on Bunya Watch

208. The applicant describes Bunya Watch as:³⁵

... an environmental action site. The Mission Statement of Bunya Watch is "showing the world what is really happening in the South Burnett and the Bunya Mountains area". To date the site has had 97 661 visitors. The "Bunya Chatter" page has a number of topics that are discussed and includes comments on matters involving the former Nanango Shire Council and the current South Burnett Regional Council (SBRC). The issues discussed are mainly environmental, social and political...'

209. An anonymous posting on Bunya Watch from 11 April 2007 states in part:

i have been asked by Leigh to let you all know she hasn't given up ... she has asked that bunyawatchers stick with her. Also she needs help to keep the pressure on. Don't be afraid to call the mongrels that did this to her. night time is best. especially the ceo.

210. A further undated posting from 'observer' states:

³⁴ (Unreported, Queensland Information Commissioner, 23 June 2008).

³⁵ At page 30.

Keep up the FOI's and phone calls as it is starting to get to them. Leigh will have her day and it will serve them right.

211. A posting titled 'Re: Freedom of Information Mockery in NSC' by an anonymous person on 21 April 2007 provides:

i have an idea, lets call a public meeting, get dorothy pratt to chair it and ask tarong, feedlotowners, council and bunyawatchers including susan, leigh, pam, godbee, newsonto debate the whole us versus them conspiracy theory ... i for one would like to hear all about the knowledge of the bunyawatchers as they destroy the credibility of the bastards ...

212. The following postings on Bunya Watch are examples of people claiming to be the applicant's supporters using threatening language to publicly discuss their negative views of Mr Gray and other employees of NSC:

- An undated posting:

What would you do?? You trained someone and that person then stabbed you in the back, and pressed until you were fired, simply because they wanted your job?? Lucky Nanango has a water shortage, otherwise some concrete boots may be on the shopping list!

- An undated posting from 'Darling Jim' about Michael Hunter:

I believe that he is known in some circles as "The Weed". Suits him. Needs spraying.

- A posting dated 15 January 2007 from 'a sad ratepayer':

Mr Gray, if you are so well liked and confident of your position, a true test would be for you to throw open your door and invite those to your abode to discuss their concerns. Only joking, as if the people of Nanango Shire knew where you hide in Kingaroy, they would storm your front lawn like the US marines did at Omaha beach and we all know what happened there.

213. In a number of postings on Bunya Watch, people claiming to be the applicant's supporters use insulting language to publicly discuss their negative views of Mr Gray and other employees of NSC by, for example, comparing Mr Gray to Adolf Hitler³⁶ and referring to NSC employees as 'mongrels',³⁷ 'wankers',³⁸ 'dickheads',³⁹ 'despicable creatures',⁴⁰ and 'bastards'.⁴¹

214. The following postings on Bunya Watch are examples of people claiming to be the applicant's supporters using insulting and derogatory language to publicly discuss their negative views of Mr Gray and other employees of NSC:

- A posting on 8 January 2007 from 'ex library user':

³⁶ Posting 15 January 2007.

³⁷ Posting 6 January 2007 from 'Hijau' and anonymous posting on 11 April 2007.

³⁸ Posting 17 January 2007 from 'Spotted Dog' and posting on 8 March 2007 from 'Hijau'.

³⁹ Posting 18 December 2006.

⁴⁰ Posting 8 March 2007 from 'Hijau'.

⁴¹ Anonymous posting 21 April 2007.

... Iris, the pathetic and jealous person who had a "history" with the ceo while they were both still at Murgon Council (along with the other slime weed) Micheal Hunter...

- A posting on 11 January 2007 from 'Hijau':

Yeah Leigh, give it a go. I'd love to see the look on scumbag-gray's face when you told him his contract is not being re-newed because of his attitude and unprofessionalism, Maybe you could flush out a few more of the bludgers as well...

- A posting on 14 January 2007 from 'Darling Jim':

Couldn't agree more about snivelling suckhold iris. My God it's sickening to watch. Dump her gray or she will drag you down. But then that might be a good thing, afterall!

- A posting on 15 January 2007 from 'Darling Jim':

Does that mean Michael (slimebag) Hunter would walk out too? Or should I say "ooze out". That I would have to see. What a pathetic slithery little piece of crap he is.

- A posting from 18 January 2007 from 'A Hole':

It seems Iris is being blamed for the demise of Leigh Sheridan. Are you sure it was all Iris and she wasn't under instructions from the ceo. If you can't find Iris in the library I have heard she can be found in an Adult Shop. Is she picking up a bucket supply of ky jelly for the ceo so he can shaft us. Obviously for-play is not his forte. As appearances go you would swear he was a rock-ape. Sorry animal lovers.

- An anonymous posting from 18 January 2007:

ky jelly and iris hmmm is it true she enjoys sex parties? could this be rumor no ? for capt canary

- A posting on 19 January 2007 from 'Hijau':

And WHAT is going on here now at Nanango? Even an arrogant airheaded wanker like gray must realise that iris is a liability to him. Hope she drags him down with her! We would be ecstatic to be rid of the pair of them. "Go, in God's name go and let us be rid of the lot of your perfidious works" (Oliver Cromwell 1650).

- A posting on 17 April 2007 from 'Pam':

... What a disgraceful clown Reg was-IS. ... By the by, has anyone checked out the size of the CEO lately? He looks like a bloated, ugly toad. When did he become so hideous? The corruption from within is obvious without.

- A posting on 18 April 2007 from 'Darling Jim':

That's because he IS a fat ugly toad, wrong, make that a hideous toad. Are they blaming Leigh for all this? No? It's a wonder. About time we had a cleanout. Get rid of: 1) the clown (reg) 2) the hideous, never wrong toad (s gray) 3) the fool (m hunter) 4) the half-wit (iris) 5) & other assorted arse lickers in (as some-one said) bullying castle. Start fresh with GOOD & HONEST people who have the welfare of their ratepayers at heart. Can we? WILL we? soon!

- An undated posting from 'Hijau':

You are the one who should grow up, mr/mrs/ms head-in-sand council a-licker. The case of Mrs Sheridan can be summed up thus: 1) someone wanted her job (which I believe she was very good at). 2) they and others within the nsc bullied and harassed her for over a year. 3) when she complained (as was her right and within council's policy) she was sacked. Where is the truth and justice in that? I believe that you are probably a nsc plant or one of the bullies or their friends. Remember this "The mills of God grind slowly but they grind exceedingly fine"

Information from the report on A Current Affair

215. A report was televised on the current affairs program A Current Affair after the Termination. The applicant, the applicant's solicitor and a number of people claiming to be supporters of the applicant were interviewed for the report.
216. The report indicated that Ms Scott and three other individuals who claim to be supporters of the applicant had started a petition for Mr Gray to be sacked.

Information from other agencies

217. By letters dated 22 March 2007, the applicant made FOI applications to the CMC and MSC.
218. The CMC issued a decision to the applicant dated 11 July 2007 and deferred access to parts of the requested documents. The CMC has advised the Office that the applicant did not request the documents to which access was deferred at the completion of the process.
219. The FOI application to MSC was subject to external review.⁴² On 23 June 2008, the Office issued a decision to the applicant and decided that a number of documents were not exempt under the FOI Act and were to be released to the applicant. By letter dated 23 June 2008, the applicant's solicitor was advised to contact MSC to make arrangements to access the documents to be released. The Office has been advised that the applicant has not collected those documents.

Other information

220. Of concern is that at least one other probative source of information has not been prepared to participate and be identified in these external review proceedings because of fear of further serious acts of harassment and intimidation from people claiming to be the applicant's supporters.

The applicant's submissions

221. By letter dated 27 February 2009 the applicant's solicitor provided submissions and supporting documents in response to the preliminary view letter dated 19 December 2008 on behalf of the applicant. I have summarised those submissions for convenience under a number of sub-headings and address them below.

⁴² External review 210240.

Submissions by the respondent agencies

222. The applicant was provided with a copy of the submissions made by the respondent agencies in relation to section 42(1)(ca) of the FOI Act. These are summarised at paragraphs 203 - 205 above.

223. In relation to the submissions made by LGAQ, the applicant submits:⁴³

- The claims are lacking in particularity thus making it difficult for the applicant to adequately respond and should not be given any weight on external review.
- The applicant is unaware of and has not seen any documentation in relation to the assault referred to in the submissions.
- Individuals seen to be supportive of the applicant were also targeted and the applicant has provided a statement from one of her supporters for consideration by the Office (although she asks that the statement not be disclosed to other participants in the review as she alleges Mr Gray has previously behaved in a threatening way towards this individual).⁴⁴
- LGAQ has made its assessment based on evidence provided by Mr Gray but the evidence is not sufficiently particularised nor is it appended to the submissions. LGAQ have not sought submissions from the applicant and as such the assessment is open to criticism for its basic lack of adherence to any principles of natural justice not to mention its lack of factual basis.
- The view of LGAQ appears to be based wholly and solely on the evidence of Mr Gray and the alleged anecdotal assertions made by unknown individuals. At no point has the applicant been asked to provide submissions or rebut any of these allegations that are unparticularised and lacking in substance.

224. In relation to the submissions made by DTC, the applicant submits:⁴⁵

- Mr Gray has deliberately lied to prejudice DTC and WSC against her and thus prevent her accessing the documents that she requested.
- She did not threaten nor did she arrange to threaten Mr Gray and/or his children. She finds it abhorrent that Mr Gray would have this view of her and appalled that he would make this accusation without even a skerrick of evidence to substantiate his claims.
- She has never telephoned Mr Gray and would never consider telephoning Mr Gray.
- She is not responsible for the content published on Bunya Watch.
- Mr Gray made a number of deliberate misrepresentations and provides, as an example, her belief that Mr Gray in fact moved his family from Nanango *prior* to the Termination (and not after as he submits).

⁴³ At pages 20 – 22.

⁴⁴ At page 48.

⁴⁵ At pages 22 – 23.

- DTC adopted Mr Gray's submissions without making enquiries with her, suggesting apprehended bias, if not actual bias on the part of the relevant DTC officer.
- The photographs of the wheelie bins that Mr Gray provided to DTC with his submissions are unintelligible.

Information provided to the Office by Mr Gray

225. The applicant makes a range of complaints about the information Mr Gray provided to the Office and submits that:

- Mr Gray has not provided sufficient evidence to substantiate his baseless, spurious allegations against her and this evidence appears to be hearsay and anecdotal in nature and lacking a factual basis. It would be unlikely to stand up in a court of law⁴⁶ and as a result, less weight should be allocated to the information he provided to the Office.⁴⁷
- There are grave implications for democracy when career government officers like Mr Gray seek exemption from their responsibilities under the FOI Act by resorting to unsubstantiated allegations, misleading representations and personal pleas made during private interviews with members of the Office.⁴⁸
- The applicant asks a series of questions about the evidence provided by Mr Gray and provides examples of the types of evidence that should be obtained by the Office from Mr Gray. For example:⁴⁹

In relation to the obscenities allegation, what evidence did Mr Gray provide to your Office to substantiate the allegations against my client? What obscenities were yelled at Mr Gray? Has he got any recordings of these obscenities? Has he kept a log of when these alleged incidents occurred? Has Mr Gray made any complaints to the Police about these alleged incidents? If so my client has not been interviewed by the Kingaroy police. This office has not received any correspondence from Mr Gray in relation to this allegation and this is the first instance that my client has become aware that Mr Gray holds her responsible for these alleged incidents.

- It is arguable that the veracity or accuracy of the incidents as described has not been sufficiently tested before it is relied upon to support an adverse finding and the applicant invites me to weigh the submissions very carefully before providing a decision in these reviews.⁵⁰

226. The applicant also makes the following submissions in relation to Mr Gray's motivation for objecting to disclosure of the Matter in Issue:

- Mr Gray has made prejudicial statements to paint the applicant in the worst possible light and prevent her from accessing documents that have been legally requested.⁵¹

⁴⁶ At page 33.

⁴⁷ At page 41.

⁴⁸ At page 32.

⁴⁹ At page 26.

⁵⁰ At page 19.

⁵¹ At page 34.

- *There is something sinister in [the respondent agencies'] collective and identical complaint to your Office. It raises the possibility that Mr Gray has manipulated these agencies in order to advance a grievance against my client's use of the FOI Act. It suggests that Mr Gray is the author of a studied and deliberate attempt to injure my client's rights under the FOI Act.*⁵²
- The underlying reason that Mr Gray does not want documents released to the applicant is that he is aware that there is information contained in those documents that would be useful to the applicant in terms of any legal recourse left to her and he has used every possible means at his disposal to avoid providing those documents to the applicant.⁵³
- Mr Gray is a critical witness in the applicant's personal injuries action against NSC and a former employee of NSC. He has a powerful interest in ensuring that documents which might embarrass him and NSC are not disclosed. There are a number of important decisions on employer liability which have been determined on the basis of disclosures and admissions set out in documents held by the defendant employer. The Office should be mindful of the motives of organisations seeking to obstruct a citizen's right to know.⁵⁴

Involvement in the alleged incidents

227. In response to the information provided by Mr Gray to the Office, the applicant submits:

- The preliminary view provided to the applicant by the Office purports to establish a link between her and the alleged conduct⁵⁵ and the Office assumes, prejudicially, that the applicant is guilty of the unsubstantiated incidents of harassment and/or intimidation referred to by Mr Gray, which, she submits, raises a serious apprehension of bias on the part of the Office.⁵⁶
- It appears that the applicant has not been afforded natural justice and that the conduct of the Office suggests that the Office has 'pre-judged' the applicant's culpability and finds her guilty of the allegations made against her by Mr Gray.⁵⁷ The applicant submits that the preliminary view was based solely on the submissions of the respondent agencies and Mr Gray and did not give any consideration to any submissions she might have wished to make.⁵⁸
- That the applicable evidence rule is '*... that an administrative decision must be based upon logical proof of evidentiary material. Investigators and decision makers should not base their decisions on **mere speculation or suspicion**. Rather, an investigator or decision maker should be able to **clearly point to the evidence** on which the inference or determination is based'*⁵⁹

⁵² At page 44.

⁵³ At page 46.

⁵⁴ At page 18.

⁵⁵ At page 19.

⁵⁶ At page 35.

⁵⁷ At page 37.

⁵⁸ At page 38.

⁵⁹ At page 38.

- The applicant then submits that in determining whether or not an allegation has been proven in this decision, the finding must be based on logically probative evidence and a higher standard of proof is required, that is, the principle from *Briginshaw v Briginshaw*.⁶⁰

- The applicant refers to the following explanation of the *Briginshaw* principle:⁶¹

It is relevant to note the standard of proof required to establish dishonesty or professional incompetence on the plaintiff's part. While the civil standard applies, it has been recognized by the courts that the graver the allegation the greater should be the strictness of proof required, with regard also to the gravity of the consequences flowing from a particular finding.

- There is insufficient evidence to demonstrate 'the causal nexus advocated by the Commissioner'.⁶²
- It is unfair for the Office to hold the applicant accountable for the actions of others, notwithstanding that those individuals have not been identified nor been provided with an opportunity to respond themselves to the allegations.⁶³

228. The applicant also states that she:

- did not threaten nor arrange to threaten Mr Gray or his children⁶⁴
- has never telephoned Mr Gray and would not consider doing so⁶⁵
- is not responsible for any of the content published on Bunya Watch⁶⁶
- cannot comment on when Mr Gray relocated from Nanango⁶⁷ and believes that he moved his family from Nanango prior to the Termination⁶⁸ and suggests it may have been for the purpose of 'furthering his career in local government foreshadowed by the proposed Council amalgamations'⁶⁹
- has not driven past Mr Gray's residence and does not know where he resides⁷⁰
- has never yelled obscenities at Mr Gray and has never encouraged anyone to do so⁷¹
- has never contacted Mr Gray on either his mobile phone or house phone and has never encouraged anyone else to do so⁷² (but notes that his mobile phone number is publicly available)
- had nothing to do with the alleged act of physical violence⁷³
- does not own a wheelie bin and considers what other constituents wish to express on their wheelie bins is a matter for them⁷⁴

⁶⁰ *Briginshaw v Briginshaw* (1938) 60 CLR 336 (***Briginshaw***).

⁶¹ At page 38 referring to the decision of the Supreme Court of New South Wales in *P.J. Vickers v Conveyancers Licensing Committee No. 030064/94* [1995] NSWSC 60 (6 October 1995).

⁶² At page 45.

⁶³ At page 44.

⁶⁴ At pages 22 and 34.

⁶⁵ At pages 22 and 34.

⁶⁶ At pages 23, 43 and 45.

⁶⁷ At page 24.

⁶⁸ At page 22.

⁶⁹ At page 24.

⁷⁰ At page 26.

⁷¹ At page 26.

⁷² At pages 27 and 35.

⁷³ At pages 27 and 34.

⁷⁴ At page 27.

- has never sent Mr Gray a birthday card.⁷⁵

229. The applicant submitted that:

- She was interviewed for A Current Affair and was also contacted by a number of other current affairs programs. She states it was a legitimate news story as there was great public interest in the issue of people being arbitrarily sacked after the Howard government brought in its new Workplace legislation. The sacking was published in a variety of media.⁷⁶
- She placed a paid public notice in the South Burnett Times thanking people for their support and attempted to have it published in the Country Focus also but the owner refused to publish it.⁷⁷
- She made a number of FOI applications, but at all times has adhered to the tenets of the FOI Act.⁷⁸

230. The applicant submits that the experience has caused her significant stress and has impacted on her personal and financial circumstances and her career⁷⁹ and notes that she has personal experience of the meaning of the words 'harassment' and 'intimidation' from her employment at NSC during the period that Mr Gray was CEO.⁸⁰

231. The applicant also states that individuals who were seen to be supportive of her were targeted,⁸¹ although she does not indicate who targeted those individuals.

Bunya Watch

232. In relation to the Bunya Watch postings, the applicant submits:

- Bunya Watch is neither created, orchestrated, nor moderated by the applicant.⁸²
- The applicant did not authorise the postings which are referred to in the preliminary view letter and does not know who made them.⁸³
- The applicant does not consider herself a 'bunyawatcher'.⁸⁴
- Mr Gray has deliberately provided a random selection of uncomplimentary postings from Bunya Watch. He has not included the previous or following postings so the context of the postings is unclear.⁸⁵ Mr Gray has not included any postings of a defamatory nature made against other posters of material on Bunya Watch.⁸⁶

⁷⁵ At page 34.

⁷⁶ At page 27.

⁷⁷ At page 34.

⁷⁸ At page 35.

⁷⁹ At page 24.

⁸⁰ At page 19.

⁸¹ At page 20.

⁸² At pages 30 and 37.

⁸³ At pages 31, 32, 33, 37 and 45.

⁸⁴ At page 31.

⁸⁵ At pages 24 and 30.

⁸⁶ At page 31.

- The issues discussed on Bunya Watch have placed sections of the community in opposition to NSC. It would seem inevitable that the injustice committed against the applicant by NSC and Mr Gray would attract strong attention from the individuals who watch and post on Bunya Watch. That other individuals choose to do this does not make the applicant responsible for the fact that these individuals are choosing to exercise what they perceive as their right to free speech.⁸⁷
- The postings on Bunya Watch are nothing extraordinary and postings of a similar nature can be located on other blog sites. Mr Gray was a public figure and staff members of NSC are public servants. By virtue of their employment with NSC, their actions are the subject of public comment in a variety of media. This is part of the territory of being a public official.⁸⁸ The individuals have made postings on Bunya Watch as an exercise in their right to free speech.⁸⁹
- One would assume that if Mr Gray found this material to be as offensive and as intimidatory as he claims, he would have instructed his solicitors to email the moderator of Bunya Watch and request the immediate removal of the offending material. Alternatively, Mr Gray had the option of placing a public notice in the paper in relation to same.⁹⁰

233. In relation to the Bunya Watch posting referred to at paragraph 209 above, by letter dated 26 March 2009, the applicant made submissions which can be summarised as follows:

- It does not appear that anyone has made a posting agreeing with the contents of the anonymous posting 'go leigh go', nor do there appear to be any postings from anyone saying that they have acted on the urgings of the anonymous post.
- There is no substance to the contention that the applicant is the author of the post or that she authorised its contents. The applicant denies any knowledge of the author, the post or its contents and has confirmed that she has never telephoned or contacted Mr Gray nor instructed, suggested, incited or conspired with third parties with a view to telephoning or contacting Mr Gray in a way which he would experience as harassing. The applicant is not the author of the anonymous post and does not know who is the anonymous author of the post.

FOI applications

234. The applicant makes the following submissions in relation to the FOI applications:

- The applicant has had to make repeated FOI applications to attempt to acquire documentation which the agencies in question have refused to supply.⁹¹
- The applicant admits that her FOI applications are detailed and that similar requests have been lodged with other agencies. She also submits that she has requested employment records concerning Mr Gray from his various employers.⁹²

⁸⁷ At page 30.

⁸⁸ At page 37.

⁸⁹ At page 45.

⁹⁰ At page 31.

⁹¹ At pages 38 – 39.

⁹² At page 40.

- In addition to the 23 FOI applications that the Office is aware of, the applicant has also made FOI applications to the State Library of Queensland, the Department of Education, the Endeavour Foundation and WorkCover Qld.⁹³
- The applicant submits that she is not a vexatious applicant and submits she has had to break her FOI applications down into a series of requests so that the agency in question would process it and not refuse to deal with it under section 29(1) of the FOI Act.⁹⁴

235. The applicant makes the following submissions in relation to her reasons for making the FOI applications:

- The applicant does not have an issue with Mr Gray personally. She seeks accountability through the FOI Act for a range of documents relating to decisions and conduct which resulted in the applicant's dismissal from a position she had held for 15 years. It is her right to do so.⁹⁵
- NSC did not comply with the obligation of disclosure in the AIRC proceedings and as a result, the applicant lodged an FOI application to try and obtain the documents in the event that NSC did not disclose them.⁹⁶
- The applicant made a number of FOI applications to a number of agencies to attempt to access the documentation necessary for her to explore her legal avenues⁹⁷ and she initially wanted the documents to assess their potential as evidence in any possible legal proceedings that she may have recourse to. It is now coming up to the third year and she still does not have the documents that she requested. Her legal options are disappearing.⁹⁸
- The applicant has requested employment histories for a number of reasons, amongst them to ascertain whether particular individuals hold the particular qualifications necessary to make managerial decisions. The applicant has also explored the possibility that this has happened to other individuals.⁹⁹ The applicant has been trying to discover if Mr Gray is manifesting a pattern of behaviour and the most logical way to ascertain this is to request Mr Gray's personnel file from his previous employers. That Mr Gray has seen this as harassment is indicative to the applicant that there may be documents in Mr Gray's personnel file that would support the applicant's hypothesis.¹⁰⁰
- The applicant also requests these documents for closure, so that she may have some kind of understanding as to how her *'15 year unblemished career as Council Librarian could have ended in such an undignified and personally shameful manner as her being sacked'*.¹⁰¹

⁹³ At page 35.

⁹⁴ At pages 17 – 18 and 33.

⁹⁵ At page 32.

⁹⁶ At page 12.

⁹⁷ At page 17 and 33.

⁹⁸ At page 28.

⁹⁹ At page 28.

¹⁰⁰ At page 40.

¹⁰¹ At page 28.

- ‘... *at no point* have the various FOI applications that have been lodged ... been for the purpose to ‘torment and wear staff of an Agency down’, and quite simply it is ludicrous to think so. **Indeed, I am disturbed by the fact that a former high-ranking government officer would offer that interpretation of what can only be described as my client’s attempts to use statutory rights to obtain accountability and explanations from documents held by government.**’¹⁰²

236. The applicant makes allegations about the motivations of NSC staff and Mr Gray in the processing of the FOI applications:

- NSC through Shane Gray (as principal FOI officer) has deliberately attempted to prevent the applicant from accessing documents that should be provided by the auspices of the FOI Act.¹⁰³
- NSC’s conduct in managing its FOI obligations suggests it holds the Act in contempt.¹⁰⁴ NSC officers have failed to disclose documents under the FOI Act which suggests a policy of active non-compliance adopted by NSC in response to its statutory obligations.¹⁰⁵
- From Mr Gray’s reaction, the applicant can only conclude that there is something in Mr Gray’s personnel file that would support the applicant’s allegations against him.¹⁰⁶
- Not only did the applicant’s FOI applications fail to receive acknowledgment, but the ‘*timelines set out under the statute disappeared for months without explanation*’.¹⁰⁷
- The first response of the respondent agencies has been to resort to the exemption section of the FOI Act for the express purpose of obstructing, denying, refusing and justifying their concerted non-compliance with the FOI Act.¹⁰⁸ ‘*Documents which should ordinarily have been found were said not to exist, or could not be found (not in the care custody or control of Council), or were the private affairs of people who were clearly acting in an official capacity when those documents were generated. In short, these agencies who now seek to exempt themselves from the operation of the Act do so because they disrespect the statutory obligations cast upon them by the State. For these reasons, my client rejects outright your assertion that her FOI applications are an abuse of access rights*’.¹⁰⁹

¹⁰² At pages 38 – 39.

¹⁰³ At page 17.

¹⁰⁴ At pages 38 – 39.

¹⁰⁵ At page 4.

¹⁰⁶ At page 28.

¹⁰⁷ At page 38.

¹⁰⁸ At page 18.

¹⁰⁹ At pages 38 – 39.

- Mr Gray has been derelict in his duty of care to his staff if he has subjected them to the ‘trauma’ of receiving FOI applications for the applicant. The applicant is of the understanding that only Mr Gray and Ms Frank were privy to the complete FOI application process. The applicant understands that the parties named as subject matter should be consulted as part of the third-party process but fails to see how the FOI applications should result in staff members becoming visibly upset and that it is an extraordinary reaction. The applicant asks what is hidden in these documents to provide such extreme reactions. The applicant is particularly concerned to discover that Mr Hunter had some involvement in the processing of the applicant’s early FOI applications and submits that Mr Hunter and Ms Frank did not have a delegation to process the FOI applications.¹¹⁰
- *‘... at no point have these applications been made with a view to harass or intimidate anyone and my client does not understand why her applications have been perceived in such a manner. My client can only speculate that there are documents contained within her application that would support her position and that that is the underlying reason for Mr Gray’s extreme reaction in refusing access to my client’.*¹¹¹
- The conduct of the respondents needs to be examined and carefully considered in my final ‘cogitations’, in particular, the significant reluctance they have individually and collectively brought to the task of complying with their obligations under the FOI Act.¹¹²

Likely effect of disclosure

237. In relation to the likely effect of disclosure, the applicant submits:

- It is equally likely that there will not be a serious act of harassment or intimidation if the Matter in Issue is disclosed. *‘.. Mr Gray has enacted this provision of the Act because it paints my client in the worst possible light and it has been encumbent on my client to provide evidence of her innocence, which has been difficult given the unparticularised and ambiguous nature of the allegations made against her. By virtue of this provision, the FOI Act virtually ensures that the documents requested will never be provided to my client. My client does not regard this as being either fair or balanced...’*¹¹³
- If the applicant was provided with the documents that she has requested access to, she would not need to lodge further FOI applications and finally the matter would be laid to rest.¹¹⁴
- *‘... whilst it might be reasonable to conclude that further FOI applications might be lodged, my client invites the Commissioner to consider that if the documents requested are supplied, there is no need to lodge further FOI applications. Owing to the comprehensive nature of the already lodged FOI applications, my client does not consider that there is a need to lodge further FOI applications as she has requested every document that she thought might be relevant.’*¹¹⁵

¹¹⁰ At page 29.

¹¹¹ At page 40.

¹¹² At page 19.

¹¹³ At page 46.

¹¹⁴ At page 42.

¹¹⁵ At page 42.

- If the documents negate any theories that the applicant is currently exploring, providing this documentation to the applicant would be one way to ensure that she need not make further use of the FOI Act with further FOI applications.¹¹⁶

Information from other agencies

238. The applicant has not collected documents released to her in accordance with a decision of the CMC and a decision of the Office in relation to FOI applications dated 22 March 2007. The applicant was asked for submissions as to why I should not consider that there is an adverse inference in the applicant's failure to access documents, that the primary purpose of the FOI applications was in fact to wear the agencies down. By letter dated 26 March 2009 the applicant provided the following submissions:

- The applicant's solicitor wrongly assumed the documents would be posted to her in due course.
- The applicant's solicitor received the correspondence notifying her to collect the documents whilst she was in the process of relocating offices. The correspondence was filed with the intention of actioning it following the move to the new location but it was inadvertently not placed on a bring up system.
- Relocation logistics involved the usual co-ordination issues and involved a substantial amount of disruption to IT and communication facilities which took nearly six weeks to resolve. In that period of time, there were a number of deadlines involving other clients which required immediate action.
- The applicant's solicitor has now written to both agencies seeking delivery of the documents.

Findings

239. During the course of these external reviews, I have carefully considered the information provided by the respondent agencies, the applicant, Mr Gray, information from associated external reviews and exempt matter. Where considered necessary, the Office asked Mr Gray to provide further details and documents in support of his concerns. Staff members of the Office also met with Mr Gray to further clarify his submissions. Staff of the Office independently verified those of Mr Gray's submissions where it was possible to do so. Mr Gray's submissions are generally consistent with information contained in matter that I consider is exempt from disclosure. In light of the fact that the Information Commissioner is not bound by the rules of evidence and may inform himself or herself on any matter in any way the Information Commissioner considers appropriate, I consider the information before me is sufficient to enable a proper consideration of the matters and on that basis I do not accept the applicant's submissions that the information provided to the Office by Mr Gray should not be relied upon.

240. On the information available to me, I am satisfied that:

- a) Mr Gray, as CEO of NSC was responsible for management decisions with which the applicant did not agree and was responsible for the decision to terminate the applicant's employment.

¹¹⁶ At pages 38 – 39.

- b) A number of employees of NSC were in some way associated with processes that led to the Termination or subsequent events.
- c) The personal and employment related affairs of each of these employees have been the subject of various FOI applications made by the applicant and people claiming to be her supporters.
- d) The applicant and/or people claiming to be her supporters were and remain highly aggrieved by Mr Gray's decisions despite the applicant exercising her legal rights with respect to those disputes in various forums.
- e) Some or all of the incidents, acts of harassment or intimidation by people claiming to be supporters of the applicant as described in submissions did occur and were directly related to the Termination. In particular I am inclined to accept Mr Gray's version of events that:
 - a threat was made by an unknown caller against Mr Gray's children with reference to the applicant
 - Mr Gray has received repeated telephone calls at night at his home from people claiming to be the applicant's supporters
 - Mr Gray was subject, in the presence of his children, to an act of physical violence and a comment was made with reference to the applicant.
- f) Mr Gray has relocated his family from Nanango as a result of the events.
- g) The applicant and people claiming to be her supporters have directly or indirectly used a petition, the internet, public notices and the media to publicise their grievances with Mr Gray.
- h) Bunya Watch has been used by people claiming to be the applicant's supporters as a forum to publicly discuss their negative views of Mr Gray and other employees of NSC. Some of the postings use threatening and insulting language.
- i) The applicant, Ms Scott and another person have made 23 FOI applications¹¹⁷ to agencies where Mr Gray has been employed and other agencies concerning:
 - the personal and employment affairs of employees associated with the Termination
 - Mr Gray's decision-making
 - the Grievance
 - the AIRC proceedings
 - the Termination
 - the CMC Complaint.

241. On the basis of Mr Gray's submissions and Ms Scott's admission that she sent them, I find that Mr Gray received a malicious birthday card each year from Ms Scott since the Termination.

¹¹⁷ The applicant advised the Office that an additional four FOI applications have been made (bringing the total to 27 FOI applications) however the Office is only aware of the content of 23 of those applications and therefore this decision refers only to the 23.

242. On the basis of Mr Gray's submissions and verbal verification by the FOI decision maker in these reviews, I find that NSC staff involved in processing the FOI applications have become visibly upset when receiving FOI applications from the applicant and Ms Scott.
243. On the basis of Mr Gray's submissions and verification by way of legible photographs, I find that offensive comments about two NSC employees who were involved in the Termination and the CMC Complaint were painted onto NSC wheelie bins.
244. The applicant submits that Mr Gray provided information to DTC directly accusing her of certain alleged events. Given the phrasing used in DTC's submissions, the applicant's conclusion is understandable. I have however reviewed a DTC file note recording the information Mr Gray provided to DTC by telephone. The information provided by Mr Gray recorded in that file note does not attribute any responsibility to the applicant in relation to the reported incidents. I am satisfied that this aspect of the information DTC provided to the Office does not accurately reflect the information provided by Mr Gray to DTC. The information Mr Gray provided to DTC is consistent with the information he provided to the Office.
245. Throughout her submissions the applicant implies that Mr Gray is personally involved in the FOI process and suggests that he is attempting to frustrate the purpose of the FOI Act and injure her rights under the FOI Act because he has something to hide and is embarrassed by the content of the requested documents.
246. It would be unacceptable for an agency not to meet its statutory obligations because the content of the documents may embarrass it or staff. There is nothing in the deliberations of the FOI decision makers to suggest that this irrelevant factor was taken into account by them and it is not a factor taken into account in this review.
247. While I note that the applicant does not accept the veracity of the information provided by Mr Gray, there is nothing in the applicant's submissions that suggests that the information provided by Mr Gray is unreliable or that the information he has provided is inaccurate.
248. I refer to the applicant's submission that she has not been afforded natural justice and that the Office has 'pre-judged' her culpability by finding her guilty of the allegations made by Mr Gray.
249. The applicant has not been accused of any criminal wrongdoing by any person. At no stage has that proposition been considered or put to the applicant by the Office. My findings do suggest, however, that unidentified people claiming to be supporters of the applicant, are responsible for some of the acts.
250. The applicant asserts that a higher standard of proof is required in respect of allegations of criminal conduct by her, relying on the *Briginshaw* principle. Although no standard of proof is prescribed for findings of fact, it would be neither reasonable nor logical to conclude that an event occurred if, on the evidence, it was more likely than not that the event did not occur. It follows that, generally speaking, findings of fact should be based on the balance of probabilities. Where an alleged event is inherently unlikely, then logically the evidence required to persuade a decision-maker that the event occurred will be of a higher order than for an event that is more inherently likely.

251. If it were necessary to make findings as to whether or not either applicant had engaged in criminal conduct, the evidence to support such a finding would require a higher threshold and be more rigorously examined. Such findings are not necessary and have not been made in this decision. It follows that the *Briginshaw* principle has no application to the findings of fact in this decision.
252. In relation to the applicant's submission that she has not been afforded natural justice, to ensure procedural fairness, the applicant was provided with a preliminary view which set out in detail the factors that would be taken into account in any decision. The applicant was afforded the opportunity to provide submissions to the Office in support of her case and in response to the information provided by Mr Gray. As a result, the applicant provided extensive submissions and supporting documents which I have considered. The applicant's contention that the forming of a preliminary view raises a serious apprehension of bias is incorrect. The presentation of a preliminary view is a step often and properly taken to clarify issues and test possible conclusions.¹¹⁸
253. As noted above, it is not necessary for me to find that all the past conduct is that of the applicant in considering the application of section 42(1)(ca) of the FOI Act in these reviews or to make a finding as to who posted each of the relevant entries on Bunya Watch or who may have prompted or carried out each of the acts. It is the cumulative effect and the ongoing, sequential and encouraging (though not necessarily orchestrated) nature of some of those acts by the applicant and people claiming to be the applicant's supporters that is of concern and is the subject of my findings in this decision.
254. I am cognisant that a possible result of the application of section 42(1)(ca) of the FOI Act is the potential for third parties, over which an applicant may exercise little or no control, to put into jeopardy an applicant's access rights. However, an overriding public interest contemplated by Parliament was the protection of individuals from serious acts of intimidation and harassment.
255. I generally accept the applicant's submissions that she has not been involved in many of the acts that Mr Gray described. The applicant has made numerous FOI applications, appeared on A Current Affair in relation to the Termination and placed a paid public notice in the South Burnett Times. Alone, none of these acts can be considered acts of harassment or intimidation.
256. In her submissions, the applicant denies any personal knowledge of most of the events reported by Mr Gray. It follows that the applicant is unable to provide any relevant evidence as to those events. The fact that the events are unknown to the applicant does not make it more likely that the events did not occur or that Mr Gray's information about the events is unreliable. Contrary to the applicant's contention, I am not prevented from accepting information provided by Mr Gray merely because it is not verified or accepted by the applicant. This is particularly so where the information is not within the applicant's knowledge.
257. The acceptance of information which cannot be confirmed or contradicted by an applicant, is not a basis for apprehending prejudice on the part of a decision-maker. The information provided by Mr Gray has been tested by requests for further details and particulars. I have found that information to be consistent with and to some extent corroborated by independent evidence in the form of the postings on Bunya Watch and that contained in exempt material.

¹¹⁸ *Community Care Inc v Taylor* [2007] QSC 148 at [21].

258. The applicant submits that Mr Gray has made a deliberate misrepresentation to the Office in stating that his mobile phone number is not publicly available.¹¹⁹ In support of her case, the applicant provided a document printed from the internet on 29 January 2009 where Mr Gray is listed as the Interim CEO. Mr Gray has advised a staff member of the Office that at the time he was receiving the calls at night, his mobile phone number was only available to staff of NSC or to people he gave his business card to but that it was not available to the public generally.
259. The applicant submits that, although she cannot comment with accuracy about when Mr Gray chose to relocate from Nanango, she suggests that it was prior to the Termination and for the purpose of furthering his career. Mr Gray has confirmed that he relocated from Nanango shortly after the Termination, purely because of the incidents surrounding the Termination (including the threatening phone call) and his relocation was unrelated to any interest in furthering his career.

Serious acts of harassment and intimidation

260. To reach a decision on whether the requirements of the exemption provision are made out, it is unnecessary for me to make a finding with respect to each and every past act of alleged harassment and intimidation. However, it is necessary for me to consider whether it is reasonable to expect that disclosure of the information sought could result in a person being subjected to a serious act of harassment or intimidation.
261. Mr Gray has pointed to a number of incidents which in my view amount to serious acts of harassment and/or intimidation of Mr Gray and/or NSC staff. These include:
- his receipt of a threatening telephone call
 - the act of physical violence
 - numerous postings on Bunya Watch
 - multiple FOI applications in the context of the above.
262. These incidents are dealt with in more detail under the corresponding headings below.

Threatening phone call and act of physical violence

263. The threatening phone call and the act of physical violence are acts of intimidation. These acts have caused Mr Gray a level of concern and apprehension sufficient for him to relocate his family from Nanango. I am satisfied that these acts amount to serious acts of intimidation.

Bunya Watch postings

264. I accept the applicant's submissions that she is not responsible for creating, orchestrating nor moderating Bunya Watch or for all of the postings on that website. These propositions were never considered or put to the applicant by the Office.
265. However the Office provided the applicant with a copy of a posting dated 13 January 2008 posted by one S. H. Scott. That posting contained details of the response NSC gave to the author's FOI application and contained the following comment:

ONE of my FOI requests to NSC was for a full and proper accounting of just what it had cost us ratepayers to implement the CEO's campaign to replace our former librarian of 15 years excellent service with his "very good friend".

¹¹⁹ At page 27.

...

It is also interesting to note that the Local Government Act and NSC's Local Laws both insist that these expenses are outside the "Normal day-to-day matters of Councils delegation to the CEO, and therefore must be authorised by the FULL Council" – There is No record of this in any of the NSCs minutes. Does this mean that we can expect Reimbursement of these questionable expenditures and supposedly made on our behalf, rather than favouritism benefiting an acknowledged "very good friend"

266. On the basis of the detailed knowledge about the FOI application held by the author, I find that the person posting this comment was Ms Scott. I also find that the comment contains an unsubstantiated allegation that Mr Gray acted unlawfully.

267. I acknowledge the applicant's submissions that:

- The Termination and related matters have attracted strong attention from the individuals who watch and post on Bunya Watch.
- By virtue of their employment with NSC, the actions of NSC officers are the subject of public comment in a variety of media and that this is part of the territory of being a public official.

268. Bunya Watch has been used as a public forum in which site users have discussed and commented on Mr Gray and other NSC officers in insulting and threatening language and prompted others to 'keep up the pressure'. There are instances in which the language used to describe officers involved in the Termination on Bunya Watch (for example, 'mongrels' and 'bastards') is aggressive and derogatory.

269. The criticism and derision of Mr Gray and other NSC officers on Bunya Watch takes the form of personal attacks and is not confined to matters relating to the substantive workplace issues involving the applicant. The threats made in some of the postings in my view go further than an acceptable level in the 'rough and tumble' of public debate.

270. The context of the postings, that is, the discussion threads which show the postings before and after the cited postings, does not in my view change the characterisation I have given to those postings that have been selected as examples. In any context, the postings identified in this decision are aggressive and derogatory.

271. I accept the applicant's submission that being subject to community action and public comment in the media and other forums is an accepted part of public administration for many public officials and more importantly exemplifies the shared value of freedom of expression and in some cases the implied constitutional freedom of freedom of political communication. However I am of the view that Mr Gray has been subject to a campaign of ongoing harassment and denigration by virtue of his employment with NSC which goes beyond what is reasonable and acceptable in the circumstances.

272. I am satisfied that:

- Many past Bunya Watch postings publicly deride Mr Gray and others and may have effected their reputations.
- The personal nature of the criticism of Mr Gray and others and the aggressive and threatening tone of them goes beyond what is reasonably acceptable in the public discussion of public officials and matters of public interest.

- The postings on Bunya Watch have persisted over a period of time and included relatively recent entries.¹²⁰
- Some of the postings contain threats directed at staff associated with the Termination.
- Some entries encourage and have already led to further entries and other harassing and intimidating conduct.
- The postings have given Mr Gray and undoubtedly others, cause for concern.

273. Accordingly, I consider the numerous postings on Bunya Watch directed at Mr Gray and other employees associated with the Termination to be serious acts of harassment because they comprise attacks which have disturbed and tormented the subject of the attack and given cause for concern or apprehension.

FOI applications

274. The applicant has made FOI applications to NSC, WSC, DTC, LGAQ, the CMC, MSC, the State Library of Queensland, the Department of Education, the Endeavour Foundation and WorkCover Qld.

275. In relation to the FOI applications, the applicant states she is not a vexatious applicant and has been forced to make her FOI applications as a series of requests because if she had lodged one application requesting access to everything she wanted, it would have been rejected on the grounds that it would involve an unreasonable use of the agency's resources.

276. The proposition that the applicant is vexatious was not put to the applicant in the preliminary view letter and no finding to that effect is made in this decision.

277. The applicant has submitted that the respondent agencies are 'guilty of concerted non-compliance' with the FOI Act and that she has had to make repeated FOI applications to attempt to acquire documentation which the agencies in question have refused to supply.

278. I do not accept the applicant's submission that she has had to make repeated FOI applications to attempt to acquire documentation which the agencies in question have refused to supply for two reasons. Firstly, where an applicant does not agree with an agency's decision to refuse access to documents under the FOI Act, the FOI Act provides the applicant with rights of review. Secondly, the FOI applications made to LGAQ, DTC and WSC were all made in March 2007, prior to the applicant seeking review of NSC's deemed decision in external review 210201.

279. The applicant's first FOI application with NSC dated 30 May 2006 contained a request for 54 separate categories of documents. NSC did not refuse to deal with the FOI application on the basis that it would involve an unreasonable use of NSC's resources. NSC did not issue a decision within the statutory time frame. Prior to requesting external review, the applicant lodged two further FOI applications dated 23 March 2007 and 30 March 2007 with NSC.

¹²⁰ The most recent entry relating to the applicant and Mr Gray is the posting by S. H. Scott dated 4 July 2008.

280. In relation to the applicant's other three FOI applications the subject of these reviews, the respondent agencies did not refuse to deal with the FOI applications on the basis that they would involve an unreasonable use of resources.
281. I note that the decision by LGAQ was issued a matter of days outside the statutory timeframe. The FOI Act contemplates this situation and LGAQ issued a 'considered decision' before the applicant exercised her right to external review.¹²¹ Similarly the initial decisions by DTC¹²² and WSC¹²³ were issued only a few days outside the statutory timeframe and the internal review decisions were issued within time. Amendments were made to the FOI Act in 2007 to allow agencies to continue dealing with an application after the lapsing of the timeframe and this is what LGAQ, DTC and WSC have done. Therefore I do not accept the applicant's suggestion that the respondent agencies are guilty of '*concerted non-compliance*' with the FOI Act in a procedural sense.
282. The applicant alleges that NSC through Mr Gray (as principal FOI officer) has deliberately attempted to prevent the applicant from accessing documents that should be provided under the auspices of the FOI Act¹²⁴ and suggests that:
- other NSC officers were involved in processing the FOI applications and did not have delegated decision making power in accordance with the FOI Act
 - the respondent agencies have resorted to the exemption sections of the FOI Act for the express purpose of obstructing, denying, refusing and justifying their concerted non-compliance with the FOI Act
 - refused the applicant access to documents by saying the documents could not be found or were exempt.
283. With respect to the first dot point, NSC was deemed to have refused access by the FOI Act when it failed to make a decision within the statutory timeframe. No decision making power was exercised by any NSC officer. There is therefore no factual basis for this supposition.
284. With respect to the second dot point, DTC and WSC utilised the same exemption provisions in their decision after submissions from Mr Gray. LGAQ also utilised the section 42(1)(ca) exemption. The question of whether or not each agency had justification to apply the exemptions is a question to be determined on review. The applicant has exercised her review rights.
285. With respect to the third dot point, in the reviews subject of this decision, LGAQ was the only agency to refuse access to documents on the basis the documents did not exist. It made that decision with respect to certain documents, while also releasing other documents to the applicant. This aspect of LGAQ's decision is considered in this decision under the heading 'Sufficiency of search'. I note that the applicant was provided with a preliminary view on the issue of the sufficiency of LGAQ's searches and was invited to provide submissions in support of her case on this issue for consideration by the Office.
286. The applicant claims that she does not have an issue with Mr Gray personally and has made the FOI applications for the following reasons:

¹²¹ See paragraph 42 for decision outcome.

¹²² See paragraph 45 for decision outcome.

¹²³ See paragraph 50 for decision outcome.

¹²⁴ At page 17.

- to seek accountability and explanations through the FOI Act by requesting a range of documents relating to decisions and conduct which resulted in the Termination
- to explore her legal avenues and assess the potential to use the documents as evidence in any possible legal proceedings that she may have recourse to
- to ascertain whether particular individuals hold the particular qualifications necessary to make managerial decisions
- to determine whether similar things have happened to other individuals
- to discover if Mr Gray is manifesting a pattern of behaviour
- for closure.

287. While I accept that these are the reasons for the applicant's FOI applications, and while the motivation of FOI applicants is irrelevant in making decisions with respect to them, consideration of the applicant's FOI applications and submissions shows that the applicant is also utilising FOI laws to investigate the performance and/or conduct of Mr Gray and other staff involved in the Termination on the off chance those records show any prejudicial information about them. For example, the applicant requests access to '*Shane Gray's performance reviews*'¹²⁵ and a '*copy of Michael Hunter's work diary 2000, 2004, 2005, 2006, 2007*'.¹²⁶

288. Risk and performance management are important to the public service being managed in an ethical, efficient, effective and economical way. Formal mechanisms are in place to protect workers from unfair treatment in these processes. There is an essential public interest in ensuring that managers are not deterred from carrying out this aspect of their duty by being subject to multiple FOI applications from members of the community conducting their own investigations into personnel to attempt to uncover information that points to wrongdoing or poor performance and which is essentially unrelated to the merits of the decision by which they are aggrieved. There are appropriate authorities to impartially deal with such concerns circumventing the need for citizens to take matters into their own hands.

289. While the applicant's requests largely relate to Mr Gray in his professional capacity, many of the requested documents contain information relating to the personal affairs of Mr Gray and other NSC officers. For example, the applicant seeks access to:

- time sheets and pay slips for a number of NSC officers who were in some way involved in the Termination or subsequent events
- Mr Gray's superannuation beneficiary forms, which clearly do not relate to Mr Gray as a manager.¹²⁷

290. My consideration of the use of the FOI applications in the application of section 42(1)(ca) of the FOI Act relates to the nature and effect of all the FOI applications, not just the applicant's, on Mr Gray and other officers of NSC. In this regard, it is relevant for me to consider the 23 FOI applications made by the associated people, not just those the applicant has made.

¹²⁵ FOI application dated 30 May 2006.

¹²⁶ FOI application dated 30 March 2007.

¹²⁷ FOI application dated 23 March 2007.

291. Section 21 of the FOI Act gives a person a legal right (subject to the provisions of the FOI Act) to access documents of an agency and to have access to information held by Queensland government. In decision-making, my role is to ensure that a person's right to access information is extended as far as possible, in accordance with the FOI Act. In that regard, FOI laws may be legitimately used by an individual to try to uncover a reason, other than the one given to them by government, for a decision affecting them. I also have a duty, in accordance with section 4(6) of the FOI Act, when interpreting the provisions of the FOI Act, to identify and consider any prejudicial effect that disclosure of the information may have by reason of the right of access under the FOI Act. As a result, the right to access information can be fettered in certain circumstances as discussed at paragraphs 176 - 182 above.
292. Parliament recognises that the public interest is served by enhancing government's accountability and keeping the community informed of government's operations, including the rules and practices followed by government in its dealings with members of the community.¹²⁸ Parliament also recognises that there are limited exceptions to a person's legal right of access to information. While multiple FOI applications by various individuals will not always constitute an abuse of access rights, Parliament considered through the amendments discussed above that access rights may be fettered in certain circumstances where harassment and/or intimidation could reasonably be expected to occur.
293. In *Australian Competition and Consumer Commission v Maritime Union of Australia*,¹²⁹ Hill J considered the meaning of 'undue harassment or coercion' in the context of section 60 of the *Trade Practices Act 1974* (Cth). His Honour said:¹³⁰

60. The word "harassment" in my view connotes conduct which can be less serious than conduct which amounts to coercion. The word "harassment" means in the present context persistent disturbance or torment. In the case of a person employed to recover money owing to others, as was the first respondent in *McCaskey*, it can extend to cases where there are frequent unwelcome approaches requesting payment of a debt. However, such unwelcome approaches would not constitute undue harassment, at least where the demands made are legitimate and reasonably made. On the other hand where the frequency, nature or content of such communications is such that they are calculated to intimidate or demoralise, tire out or exhaust a debtor, rather than merely to convey the demand for recovery, the conduct will constitute undue harassment: see per French J in *McCaskey* at [48]. Generally it can be said that a person will be harassed by another when the former is troubled repeatedly by the latter. The reasonableness of the conduct will be relevant to whether what is harassment constitutes undue harassment. Like French J in *McCaskey* at [47] I get little assistance from cases in the context of sexual harassment where the word has almost taken on a technical meaning.

[my emphasis]

294. The processing of a high volume of FOI applications or FOI applications that seek access to a large range of documents may be considered an annoyance or inconvenience for some agencies. However, an act of annoyance or inconvenience does not amount to a serious act of harassment or intimidation and it would be inappropriate to apply section 42(1)(ca) of the FOI Act in that circumstance. As indicated earlier, it is apparent that section 42(1)(ca) of the FOI Act contemplates that some degree of inconvenience, annoyance and even a certain level of harassment should be tolerated before a curtailment of access rights is considered.

¹²⁸ Section 4(2) of the FOI Act.

¹²⁹ 114 FCR 472.

¹³⁰ At paragraph 60.

295. The applicant submits that her FOI applications have not been for the purpose of harassing, intimidating, tormenting or wearing down anyone and she does not understand how the FOI applications have been perceived in this manner.¹³¹ Although the applicant asserts that it was not her intention or purpose to torment or wear down NSC staff by making numerous FOI applications, I am satisfied that this has resulted from the combined effect of the repeated and persistent use of FOI applications by the applicant and associated people. This is an undesirable consequence and one that might lead to the application of section 42(1)(ca) of the FOI Act.
296. The Bunya Watch posting referred to at paragraph 210 above suggests that the people claiming to be supporters of the applicant understand the FOI applications are being used as a tool to wear staff of NSC down. Such a characterisation is reasonable. Only three people have made FOI applications to NSC in relation to the Termination and related events – the applicant, Ms Scott and one other associate. Having accepted the applicant's submission that she did not authorise this posting or know who posted it,¹³² these circumstances tend to suggest that:
- either one of those three applicants may be responsible for the Bunya Watch posting referred to at paragraph 210 above or alternatively, information provided by one of those individuals led to the posting by another
 - information about the processing of the FOI applications is being shared by one of those individuals with a supporter who is responsible for the postings.
297. The 23 FOI applications from the applicant, Ms Scott and another associated person all concern similar matter: the personal and employment affairs of employees associated with the Termination, Mr Gray's decision-making, the Grievance and AIRC proceedings, the Termination and the CMC Complaint. The most recent FOI application was made by Ms Scott on 19 September 2008 to NSC. The Office is not aware of the content of the four FOI applications the applicant has made additional to the 23 FOI applications considered in this decision.
298. Many of the FOI applications run to several pages of detailed requests for documents. In a number of instances, repeated requests have been made by the applicant, Ms Scott and another associated person to NSC for similar documents. There have also been requests made to different agencies for the same documents/types of documents. A number of requests seek Mr Gray's employment records from his employers prior to NSC.
299. These FOI applications and their subsequent external reviews conducted in relation to FOI applications by the applicant and Ms Scott have required and would continue to require the significant involvement of Mr Gray, the agencies and a number of NSC officers.
300. Because of the volume, pattern of requests, the encouragement of the making of FOI applications on Bunya Watch, the posting of information obtained under the FOI Act on Bunya Watch and the fact that the applicant and Ms Scott are known to each other, I am satisfied that the FOI applications are associated with each other and that, despite any other legitimate purpose they may serve, they have resulted in the wearing down of the staff of the agencies and the staff involved in the Termination. The FOI applications themselves became persistent or repeated conduct with undesirable consequences. For example, staff of NSC involved in the processing of the FOI applications have been visibly upset.

¹³¹ At pages 38 – 40.

301. I note that the applicant also made FOI applications to the CMC and MSC which relate to Mr Gray's employment affairs and the CMC Complaint; categories of documents that I consider are exempt from disclosure under section 42(1)(ca) of the FOI Act for the reasons set out in this decision. In these matters the applicant failed to exercise her right of access to documents the agencies were prepared to release. Despite the reasons given by the applicant's solicitor for failing to access the documents and, in consideration of the reason put forward for the applications,¹³³ the failure suggests the FOI applications did not have a serious purpose or value.
302. In the context of the other acts of intimidation which have occurred, it would not be unreasonable for NSC staff to see the FOI applications as another vehicle through which they are being harassed. For these reasons I am satisfied that the FOI applications made to date constitute serious acts of harassment.
303. In some instances, I also consider that serious acts of harassment or intimidation including further FOI applications and/or postings on Bunya Watch have occurred as a result of:
- an agency's refusal to grant the applicant or Ms Scott access to documents under the FOI Act
 - the disclosure of documents under the FOI Act.
304. An example of an agency's refusal to grant the applicant or Ms Scott access to documents under the FOI Act resulting in further FOI Applications is as follows:
- By letter dated 30 May 2006, the applicant requested access to *'the memo [Kathy Cope] wrote to all Council staff requesting their signature to a public notice supporting the Chief Executive Officer published in April 2006'* and *'documented responses or emails relating to the memo'*. By letter dated 17 April 2007, NSC advised the applicant that access to the requested documents was refused under the FOI Act.
 - By letter dated 12 June 2007, the applicant again sought access to the *'email from Kathy Cope dated 31.03.07 sent at 11.05 am with attachment'*.
 - By letter dated 7 September 2007, Ms Scott sought access to the *'email Kathy Cope sent to council staff members on 31st March 2006 at 11:05 am in relation to a proposed public notice, which was later published in the South Burnett Times'*.
305. An example of the disclosure of documents under the FOI Act leading to the posting of information on Bunya Watch is as follows:
- Ms Scott posted information on Bunya Watch in relation to the expenses that NSC has incurred in relation to the Termination and related matters.¹³⁴ This information was contained in documents released under the FOI Act. In commenting on the information, Ms Scott publicly insinuates that Mr Gray has acted outside his lawful authority.
306. An example of the disclosure of documents under the FOI Act leading to a further FOI application is as follows:

¹³³ For example, for the applicant to explore her legal options and to assess the potential of the documents as evidence in any possible legal proceedings that she may have recourse to.

¹³⁴ Bunya Watch posting dated 13 January 2008.

- In an FOI application dated 2 July 2007, Ms Scott requested access to a ‘copy of the library policy for Nanango Shire introduced 17th May 2005 with the added PLS suggestions (as stated on page 1 of 4 – “Notes compiled by Audrey and Iris following CLS training in Brisbane 11 to 17 July 2005” – and also numbered 000022 in documents obtained from you under FOI’ [my emphasis].

Could disclosure of the Matter in Issue reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation?

307. Under the above sub-heading ‘*Serious acts of harassment and intimidation*’, I have found there to have been past acts of serious harassment and intimidation related to the Termination against Mr Gray and staff of NSC. I consider the past occurrences of serious acts of harassment and intimidation alone provide a reasonable basis for Mr Gray and the staff of NSC to expect to be subjected to a further serious act of harassment or intimidation. However, for matter to be exempt under section 42(1)(ca) of the FOI Act, I must be satisfied that the disclosure of the Matter in Issue could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation.

308. In these reviews, I consider the following factors relevant to determining that issue:

- the nature of the relevant Matter in Issue
- the likely effect of disclosure of the Matter in Issue
- the past conduct of people claiming to be the applicant’s supporters
- the nature of the relationship between the parties and/or third parties.

Nature of the Matter in Issue and likely effect of disclosure

309. The applicant submits:

- It is equally likely that there will not be a serious act of harassment or intimidation if the Matter in Issue is disclosed.
- If she is provided with the documents that she has requested access to, she would not need to lodge further FOI applications and finally the matter could be laid to rest as she has requested every document that she thought might be relevant.
- If the documents negate any theories that the applicant is currently exploring, providing the Matter in Issue to her would be one way to ensure that she need not make further use of the FOI Act with further FOI applications.

310. Throughout the course of these reviews the applicant raised numerous sufficiency of search issues and, in many instances, the respondent agencies claimed the requested documents were unlocatable or nonexistent. In some instances, the respondent agencies have claimed documents are exempt from disclosure under other provisions of the FOI Act. Therefore, even if section 42(1)(ca) of the FOI Act was not applicable to the Matter in Issue in these reviews, the Office would still have to determine the other issues and there is no certainty that the applicant would be provided with all the documents she requested.

311. I am mindful of the fact that disclosure under the FOI Act is, minimally, disclosure to the applicant. Once information is disclosed, there is no way of controlling the ultimate extent of the disclosure. While the disclosure of information under the FOI Act is not always to be regarded as disclosure to the world,¹³⁵ I am reminded of this possibility by:
- the recent publication on Bunya Watch of selected excerpts of a decision of the Information Commissioner concerning a related external review application involving the applicant¹³⁶
 - Ms Scott posting information she obtained under the FOI Act on Bunya Watch in relation to costs associated with the Termination.¹³⁷
312. As explained above, Ms Scott has made a serious allegation against Mr Gray in a public forum based on supposition in the context of her posting information obtained under the FOI Act. It is reasonable to expect she will do so again. I consider the release of even innocuous information to the applicant is likely to be shared with Ms Scott and/or other people claiming to be supporters of the applicant. It is likely that further postings will be made on Bunya Watch. The further dissemination of the information is likely to result in further acts of serious harassment and/or intimidation against Mr Gray or staff of NSC, namely further FOI applications and postings on Bunya Watch.
313. The Matter in Issue in each external review concerns the matters related to the Termination, including the personal and employment affairs of people involved in the Termination, and more particularly work processes/decision-making involving Mr Gray. The categories of documents sought by the applicant in these reviews fall into the same categories of documents sought in the other associated FOI applications.
314. The previous disclosure of documents falling within these categories has resulted in serious acts of harassment and intimidation, being further FOI applications and the use of public forums to personally denigrate Mr Gray and/or NSC officers, examples of which are set out at paragraphs 305 - 306 above.
315. Further FOI applications and further use of public forums will involve Mr Gray and officers of NSC in further consultation in relation to the administration of the FOI Act, and are likely to involve further adverse publicity giving them cause for concern - an undesirable consequence of the FOI applications.
316. A significant amount of the information sought about Mr Gray concerns his former places of employment. In view of the nature of the discussion on Bunya Watch, that is, participants encouraging one another to contribute further 'information' to the discussion as a means of further publicly deriding Mr Gray and others, I consider that disclosure of even innocuous information may be used by Bunya Watch participants to further this end.

¹³⁵ *Victoria Police v Marke* [2008] VSCA 218.

¹³⁶ External review 210240.

¹³⁷ Posting by S.H. Scott on 13 January 2008.

Past conduct

317. As expressed earlier, I consider that Mr Gray and other employees involved in the Termination have been subjected to serious acts of harassment and intimidation in the past and these acts have all been linked to the Termination. Though past conduct is not necessarily indicative of future conduct, I consider in these reviews it provides a reasonable basis to expect that further serious acts of harassment or intimidation could reasonably be expected to occur. Some of the serious acts of harassment or intimidation that have occurred in the past have resulted from the disclosure of matter that falls within the same categories as the Matter in Issue in these reviews.

Nature of the relationship between the parties

318. Based on the applicant's submissions, I consider that the applicant remains highly aggrieved by Mr Gray's decisions and has made various allegations about him including:

- speculating that there is something in Mr Gray's personnel file that supports her views about him¹³⁸
- that he has deliberately lied to and manipulated the respondent agencies to prejudice them against her¹³⁹
- that he has made misleading representations to the Office¹⁴⁰
- that she has experienced intimidation and harassment from her employment at NSC during the time Mr Gray was CEO which has resulted in a personal injuries claim against NSC.¹⁴¹

319. As explained above, I also consider the people claiming to be the applicant's supporters remain highly aggrieved by Mr Gray's decisions and have been actively involved in expressing their negative views about Mr Gray and officers of NSC in public forums.

320. While I accept the applicant's submissions that she has not been involved in any way with the physical acts of violence and intimidation directed at Mr Gray by some of the other people claiming to be her supporters, the applicant has engaged in her own acts of harassment by making repeated and numerous FOI applications for documents which may assist in her personal investigation into the performance and/or conduct of Mr Gray and other staff involved in the Termination and which are largely unrelated to the substantive merit of Mr Gray's decisions in relation to her.

321. The applicant's FOI applications, like the associated FOI applications, are aimed at 'investigating' the staff of NSC involved in the Termination.

322. The personalised nature of the Bunya Watch entries, the threatening phone call and the act of physical violence suggest that the conduct which amounts to serious acts of harassment and/or intimidation is not directly linked to any objective assessment of the substantive merit of the decisions in relation to the Termination or a respect for the rule of law which provides appropriate avenues of redress for the applicant.

323. Therefore, on the information available to me, I am satisfied that:

¹³⁸ At pages 28 and 40.

¹³⁹ At pages 22 – 23 and 44.

¹⁴⁰ At page 32.

¹⁴¹ At page 19.

- Disclosure of the Matter in Issue in these reviews could reasonably be expected to result in further FOI applications by the applicant and people claiming to be her supporters.
- The further FOI applications would themselves be acts of serious harassment.
- Disclosure of the Matter in Issue in these reviews could reasonably be expected to result in further public vilification of Mr Gray and other people by people claiming to be the applicant's supporters.
- Any further public vilification would constitute acts of serious harassment and/or intimidation.
- Disclosure of the Matter in Issue in these reviews could reasonably be expected to result in a serious act of physical violence, threats or other acts of intimidation in relation to Mr Gray and staff of NSC.

324. Accordingly, I am satisfied that the Matter in Issue is exempt from disclosure in its entirety under section 42(1)(ca) of the FOI Act.

Sufficiency of search

325. Section 29(4) of the FOI Act provides:

29 Refusal to deal with application—agency's or Minister's functions

...

(4) If—

- (a) *an application is expressed to relate to all documents, or to all documents of a stated class, that contain information of a stated kind or relate to a stated subject matter; and*
- (b) *it appears to the agency or Minister that all of the documents to which the application relates are exempt documents;*

the agency or Minister may refuse to deal with the application without having identified any or all of the documents

326. On the information currently available to me, I am satisfied that the documents the applicant claims have not been located by the respondent agencies concern:

- Mr Gray's decision-making
- the Grievance & the AIRC proceedings
- the Termination
- the CMC Complaint
- the employment or personal affairs of employees associated with the Termination, including Mr Gray.

327. This matter, if it exists, falls within the classes of matter that I consider could reasonably be expected to result in a person being subjected to a serious act of harassment and/or intimidation if disclosed. I am satisfied that this matter, if it exists, is exempt under section 42(1)(ca) of the FOI Act and therefore the documents to which the applicant's sufficiency of search concerns pertain are exempt documents.

328. On this basis I am satisfied that I should, under section 29(4) of the FOI Act, decline to deal with these parts of the external review applications without directing NSC to undertake further searches.

DECISION

329. For the reasons set out above, I:

- set aside the deemed decision of NSC in external review 210201
- vary the considered decision of LGAQ dated 28 May 2007 in external review 210238
- vary the internal review decision of DTC dated 4 July 2007 in external review 210285
- vary the internal review decision of WSC dated 20 June 2007 in external review 210286

by deciding:

- the remaining Matter in Issue in each of these reviews qualifies for exemption from disclosure under section 42(1)(ca) of the FOI Act
- to refuse to deal with the sufficiency of search issues under section 29(4) of the FOI Act, on the basis that it appears to me that any further documents responsive to the FOI applications qualify for exemption under section 42(1)(ca) of the FOI Act.

Julie Kinross
Acting Information Commissioner

Date: 9 April 2009