



Decision and Reasons for Decision

Citation: *K19 and Brisbane City Council [2024] QICmr 25 (13 June 2024)*

Application Number: 317467

Applicant: K19

Respondent: Brisbane City Council

Decision Date: 13 June 2024

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - IRRELEVANT INFORMATION - information falling outside the scope of the applicant's request - whether deleted information is irrelevant to the terms of the access application - section 88 of the *Information Privacy Act 2009 (Qld)*

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - EXEMPT INFORMATION - LEGAL PROFESSIONAL PRIVILEGE - whether information would be privileged from production in a legal proceeding - whether access may be refused under section 67(1) of the *Information Privacy Act 2009 (Qld)* and sections 47(3)(a) and 48 and schedule 3, section 7 of the *Right to Information Act 2009 (Qld)*

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST INFORMATION - invoices from legal advisers for legal services rendered - prejudice to business, commercial or financial affairs - whether disclosure of information would, on balance, be contrary to the public interest - section 67(1) of the *Information Privacy Act 2009 (Qld)* and sections 47(3)(b) and 49 of the *Right to Information Act 2009 (Qld)*

REASONS FOR DECISION

Summary

1. The applicant applied¹ to Brisbane City Council (**Council**) for access under the *Information Privacy Act 2009 (Qld)* (**IP Act**) to all documents between 20 October 2021 and 20 March 2023 concerning a complaint that the applicant had made against Council to the Queensland Human Rights Commission (**QHRC**).

¹ Application received by Council on 20 March 2023 and made compliant on 27 March 2023.

2. In its initial decision,² Council decided to give the applicant full access to 1203 pages, partial access to 123 pages, and to refuse access in full to 611 pages. Council also decided that 2285 pages fell outside the scope of the access application.
3. The applicant applied for internal review.³ In its internal review decision,⁴ Council varied the initial decision by deciding to grant full access to 486 pages, partial access to 31 pages, and to refuse access in full to 1394 pages. Council again decided that 2285 pages fell outside the scope of the access application.
4. The applicant applied⁵ to the Office of the Information Commissioner (**OIC**) for external review of Council's decision.
5. For the reasons explained below, I affirm the decision under review.

Reviewable decision

6. The decision under review is Council's internal review decision dated 31 July 2023.

Evidence considered

7. Significant procedural steps relating to the external review are set out in the Appendix.
8. The evidence, submissions, legislation and other material I have considered in reaching my decision are set out in these reasons (including footnotes and the Appendix). I have taken account of the applicant's submissions to the extent that they contain information that is relevant to the issues for determination in this review.⁶
9. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.⁷ I consider a decision-maker will be '*respecting and acting compatibly with*' that right and others prescribed in the HR Act, when applying the law prescribed in the IP Act and the *Right to Information Act 2009* (Qld) (**RTI Act**).⁸ I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between equivalent pieces of Victorian legislation:⁹ '*it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act.*'¹⁰

Information in issue

10. A considerable volume of information was released to the applicant during the course of the review.¹¹ With the exception of these released pages or part pages, the

² Dated 3 July 2023.

³ On 3 July 2023.

⁴ Dated 31 July 2023.

⁵ On 31 July 2023.

⁶ Contained in the external review application dated 31 July 2023, and in emails on 6 October 2023, 30 November 2023, 22 April 2024 and 22 May 2024.

⁷ Section 21 of the HR Act.

⁸ *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

⁹ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹⁰ *XYZ* at [573].

¹¹ All or parts of 45 pages released to the applicant on 4 March 2024 (and re-released with amendments on 26 March 2024). All or parts of pages 676-705, 706-707, 743-753, 756-766, 772-776, 779-784, 787-792, 795-797, 800-803, 806-809, 811-815, 818-822, 825-896, 905-917, 920-934, 937, 939 and 941 (duplicates), 1086-1103, 1106-1119, 1122-1128, 1772-1805, 1810-1819, 1836-1869, and 1883-1895 released to the applicant on 13 May 2024 (and re-released by Council with amendments on 11 June 2024).

information remaining in issue is identified in the schedule to Council's initial decision dated 3 July 2023.

Issues for determination

11. The issues for determination are as follows:
- a) whether access to 2285 pages may be refused because the pages fall outside the scope of the access application (**Irrelevant Information**)
 - b) whether access to some information may be refused because it attracts legal professional privilege (**LPP Information**); and
 - c) whether access to some information may be refused because its disclosure would, on balance, be contrary to the public interest (**Billing Information**).

Findings

Issue a) - Irrelevant Information

12. Section 88 of the IP Act provides that an agency may give access to a document subject to the deletion of information it reasonably considers is not relevant to an access application. This is a mechanism to allow irrelevant information to be deleted from documents which are identified for release to an applicant.
13. In deciding whether information is irrelevant, it is necessary to consider whether the information has any bearing upon, or is pertinent to, the terms of the application.¹²
14. The information that Council decided was irrelevant comprises 2285 pages that concern the receipt and processing by Council of multiple previous IP Act access applications made to Council by the applicant.
15. I am satisfied that the pages do not relate to the applicant's request for access to documents concerning the complaint she made against Council to QHRC and may therefore be considered as information which is not relevant to the terms of the application, with access refused on that basis under section 88 of the IP Act.
16. While it is not strictly necessary for me to do so, given my finding above, I would simply note for completeness that access to these pages may also be refused under section 52(1)(b)(ii) of the IP Act and schedule 2, part 2, item 7 of the RTI Act. That is, they are documents created in connection with the exercise of the quasi-judicial functions of the Information Commissioner, which is an entity excluded from the RTI and IP Acts under schedule 2, part 2, item 7 of the RTI Act.¹³

Issue b) - LPP information

17. Schedule 3 of the RTI Act specifies the types of information Parliament has determined are exempt because release would be contrary to the public interest. Relevantly, information is exempt information if it would be privileged from production in a legal

¹² *O80PCE and Department of Education and Training* (Unreported, Queensland Information Commissioner, 15 February 2010) at [52] which was a decision made under the equivalent provision in the repealed *Freedom of Information Act 1992* (Qld).

¹³ See *T71 and Queensland Police Service* [2022] QICmr 10 (4 March 2022), applying the commentary of Hoeben J in *Carmody v Information Commissioner & Ors* (5) [2018] QCATA 18. Section 67(1) of the IP Act provides that an agency or Minister may refuse access in the same way and to the same extent as under section 47 of the RTI Act.

proceeding on the ground of legal professional privilege (**LPP**).¹⁴ This exemption reflects the requirements for establishing LPP at common law.¹⁵

18. Establishing whether LPP applies to information at common law requires that the information must comprise a communication:
 - made in the course of a lawyer-client relationship
 - that was and remains confidential; and
 - that was made for the dominant purpose of seeking or providing legal advice or for use in existing or reasonably anticipated legal proceedings.¹⁶
19. When each of these requirements is met, LPP is established.¹⁷
20. I have considered the information remaining in issue that Council claims is subject to LPP. I am satisfied that the information comprises:
 - confidential communications between Council and its external lawyers made for the dominant purpose of seeking or providing legal advice in connection with the QHRC proceedings; or
 - internal confidential communications between Council's legal officers and other staff of Council made for the dominant purpose of providing legal advice or assistance to Council and/or gathering and providing confidential information to Council's external lawyers for use in the QHRC proceedings; or
 - descriptions contained in invoices rendered to Council by its external lawyers of the legal services provided to Council by those lawyers that reveal the nature of confidential legal advice or assistance provided to Council.
21. I am further satisfied that the lawyers who provided the advice or assistance in question are suitably qualified and of a sufficiently independent character.¹⁸ There is nothing before me to suggest that the qualification or exceptions to privilege apply.
22. Accordingly, I am satisfied that the relevant information attracts LPP and is therefore exempt information.¹⁹ Access under the IP Act may be refused on that basis.

Issue c) - Billing Information

23. Under the IP Act, an individual has a right to be given access to documents of an agency, to the extent they contain the individual's personal information.²⁰ However, this right is subject to provisions of the IP Act and RTI Act including the grounds on which an agency may refuse access to documents. An agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.

¹⁴ Schedule 3, section 7 of the RTI Act.

¹⁵ The doctrine of legal professional privilege is both a rule of evidence and a common law right. The High Court in *Daniels Corporation International Pty Ltd v Australian and Consumer Commissioner* (2002) 213 CLR 543 (**Daniels**) at 552 relevantly noted 'It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings' (footnotes omitted). See also *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 (**Esso**).

¹⁶ *Esso* and *Daniels*.

¹⁷ However, qualifications and exceptions to privilege (such as waiver and improper purpose) may, in particular circumstances, affect the question of whether information attracts or remains subject to it, and therefore is exempt under the RTI Act.

¹⁸ *Waterford v Commonwealth* (1987) 163 CLR 54 at 62.

¹⁹ Section 67(1) of the IP Act and section 47(3)(a) and schedule 3, section 7 of the RTI Act. Council has not waived privilege in the LPP Information.

²⁰ Section 40 of the IP Act.

24. In assessing whether disclosure of information would, on balance, be contrary to the public interest,²¹ a decision maker must:²²
- identify factors irrelevant to the public interest and disregard them
 - identify factors in favour of disclosure of information
 - identify factors in favour of nondisclosure of information; and
 - decide whether, on balance, disclosure of the information would be contrary to the public interest.
25. Schedule 4 of the RTI Act contains non-exhaustive lists of factors that may be relevant in determining where the balance of public interest lies in a particular case. I have considered these lists,²³ together with all other relevant information, in reaching my decision. I have kept in mind the IP Act's pro-disclosure bias²⁴ and Parliament's requirement that grounds for refusing access to information be interpreted narrowly.²⁵
26. Some of the information remaining in issue comprises parts of invoices issued to Council by its external lawyers. These invoices contain a breakdown of the hourly rates charged by individual lawyers, as well as a description of the work carried out by the lawyers. In respect of the latter, as noted at paragraph 20 above, I am satisfied that such information attracts LPP.
27. In respect of the Billing Information, I note that Council has given the applicant access to the total amounts charged by the lawyers in accordance with the principles explained by OIC in previous decisions dealing with such documents.²⁶ The Information Commissioner has previously decided that disclosing information about the billing structure and hourly rates of a lawyer could reasonably be expected to prejudice the commercial and financial affairs of that entity²⁷ given the commercially competitive field in which law firms operate,²⁸ and would, on balance, be contrary to the public interest to disclose.²⁹ I afford these factors moderate weight in balancing the public interest in this matter.
28. I am unable to identify factors favouring disclosure of this information beyond the general public interest in accessing information held by government, and in the accountability of Council for its expenditure of public funds.³⁰ However, I do not accept, as argued for by the applicant,³¹ that the latter public interest extends beyond disclosure of the total amounts expended by Council on legal fees. I therefore afford these factors low weight in balancing the public interest.

²¹ Section 67(1) of the IP Act and section 47(3)(b) and 49 of the RTI Act. The term *public interest* refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that, in general, a public interest consideration is one which is common to all members of, or a substantial segment of the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.

²² Section 49(3) of the RTI Act.

²³ I have considered each of the public interest factors outlined in schedule 4 of the RTI Act, and any relevant factors are discussed below (in relation to each category of documents).

²⁴ Section 64 of the IP Act.

²⁵ Section 67(2) of the IP Act and section 47(2) of the RTI Act. In deciding whether disclosure of the information in issue would, on balance, be contrary to the public interest, I have taken no irrelevant factors into account in making my decision.

²⁶ See *Murphy and Treasury Department* (1998) 4 QAR 446 at [20]; *Ellis and Department of Environment* (Unreported Queensland Information Commissioner, 20 October 1998) at [20]-[34] and *VSC and Public Trustee of Queensland* (Unreported, Queensland Information Commissioner, 30 June 2008) at [49]-[51].

²⁷ Schedule 4, part 3, item 2 of the RTI Act.

²⁸ The same principles apply to the fees charged by government lawyers where, as in Council's case, they operate on commercial terms and charge for the legal services provided.

²⁹ In *Price and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 12 March 2002) at [44], the Information Commissioner found that disclosure of information about lawyers' billing structure and hourly charge-out rates might reasonably be expected to assist the lawyers' competitors to compete with them more effectively in the legal services market generally and would therefore be contrary to the public interest to disclose.

³⁰ Schedule 4, part 2, items 1 and 4 of the RTI Act.

³¹ Email of 19 December 2023.

29. In summary, I afford moderate weight to the factors favouring nondisclosure and low weight to the factors favouring disclosure. I am satisfied that the public interest in protecting the business and commercial affairs of external legal providers regarding the breakdown of the fees charged outweighs the public interest in the accountability of Council, which I consider is largely discharged by disclosure of the total amounts expended on legal fees. I am therefore satisfied that access to the Billing Information may be refused because its disclosure would, on balance, be contrary to the public interest.

DECISION

30. I affirm the decision under review by finding that:

- access to the Irrelevant Information may be refused under section 88 of the IP Act
- access to the LPP Information may be refused under section 67(1) of the IP Act and sections 47(3)(a) and 48 and schedule 3, section 7 of the RTI Act; and
- access to the Billing Information may be refused under 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.

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

R Moss
Principal Review Officer

Date: 13 June 2024

APPENDIX

Significant procedural steps

Date	Event
31 July 2023	OIC received the application for external review.
9 August 2023	OIC received preliminary documents from Council.
14 September 2023	OIC advised the parties that the application for review had been accepted.
29 September 2023	OIC received copies of the information in issue from Council.
6 October 2023	OIC received an email from the applicant regarding the scope of the access application.
9 November 2023	OIC communicated a preliminary view to the applicant.
30 November 2023	OIC received a submission from the applicant.
6 December 2023	OIC communicated a preliminary view to Council.
15 and 19 February 2024	OIC received a response from Council.
22 February 2024	OIC received advice from Council that it was prepared to release additional documents to the applicant. OIC requested that Council release the documents to the applicant as soon as possible.
28 February 2024	OIC communicated a further preliminary view to the applicant about the information remaining in issue.
4 March and 26 March 2024	Council released additional documents to the applicant.
22 April 2024	OIC received a response from Council to OIC's letter dated 28 February 2024 advising that it was prepared to release further documents to the applicant. OIC requested that Council release the documents to the applicant as soon as possible.
13 May 2024	OIC received advice from Council that it had released the additional documents to the applicant.
22 May 2024	OIC received an email from the applicant raising a number of issues concerning Council's redaction markings.
11 June 2024	Council re-released certain pages to the applicant.