



## Decision and Reasons for Decision

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**Citation:** *R43 and Brisbane City Council [2024] QICmr 71 (12 December 2024)*

**Application Number:** 317941

**Applicant:** R43

**Respondent:** Brisbane City Council

**Decision Date:** 12 December 2024

**Catchwords:** 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 - personal information - business, commercial, financial information - 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 applied<sup>1</sup> to Brisbane City Council (**Council**) for access under the *Information Privacy Act 2009* (Qld) (**IP Act**) to documents<sup>2</sup> concerning a complaint made to the Queensland Human Rights Commission that was subsequently referred to the Queensland Civil and Administrative Tribunal (**QCAT**).
2. In its initial decision,<sup>3</sup> Council decided to give the applicant full access to 422 pages, partial access to 18 pages, and to refuse access in full to 1,537 pages. Access to information was refused either because it comprised exempt information, or because its disclosure would, on balance, be contrary to the public interest.

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<sup>1</sup> Application received by Council on 22 November 2023.

<sup>2</sup> From between 4 July 2023 and 22 November 2023.

<sup>3</sup> Dated 10 January 2024.

3. The applicant applied for internal review.<sup>4</sup> In its internal review decision,<sup>5</sup> Council affirmed its initial decision.
4. The applicant applied<sup>6</sup> to the Office of the Information Commissioner (**OIC**) for external review of Council's decision.
5. A significant volume of additional information was released to the applicant during the course of the review. In respect of the remaining information, and for the reasons explained below, I decide to vary the decision under review by finding that access to this information may be refused under the IP Act because it is exempt information or because its disclosure would, on balance, be contrary to the public interest.

### Reviewable decision

6. The decision under review is Council's internal review decision dated 19 March 2024.

### 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.<sup>7</sup>
9. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.<sup>8</sup> 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**).<sup>9</sup> 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:<sup>10</sup> '*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.*'<sup>11</sup>

### Information in issue

10. As noted above, a significant volume of additional information was released to the applicant during the course of the review as a result of Council accepting OIC's preliminary view that additional information should be released to the applicant. The information remaining in issue is the information redacted from the 1,973 pages that Council released to the applicant on 11 October 2024 (as attachments to a series of 16 emails) (**Information in Issue**).

### Issues for determination

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<sup>4</sup> On 5 March 2024 (Council agreed to extend the timeframe for the internal review application, as per section 96(c) of the IP Act).

<sup>5</sup> Dated 19 March 2024.

<sup>6</sup> On 14 April 2024.

<sup>7</sup> Contained in the external review application dated 14 April 2024 and in an email on 15 November 2024.

<sup>8</sup> Section 21 of the HR Act.

<sup>9</sup> *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].

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

<sup>11</sup> *XYZ* at [573].

11. The issues for determination are as follows:
  - a) whether access to some information may be refused because it attracts legal professional privilege (**LPP Information**)
  - b) whether access to some information may be refused because its disclosure would, on balance, be contrary to the public interest (**Personal 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**).

### **Submissions/complaints by the applicant**

12. As noted above, on 11 October 2024, Council released a considerable volume of additional information to the applicant. OIC's email to the applicant of 14 October 2024 expressed a preliminary view regarding the categories of the information remaining in issue.
13. In response, the applicant expressed her dissatisfaction regarding the form of some of the redaction notations appearing on the released pages. By email on 15 November 2024, the applicant provided a 13 page submission in which she listed each page in the bundle of 1,973 released pages that she complained was missing a notation for a redaction box, or that she considered contained an inadequate notation. In respect of the latter, the applicant complained that the ground for refusal of the information was not properly notated, or that the format of the notations was not consistent.
14. The bulk of the applicant's submission is concerned with her complaints about redaction notations and only briefly addresses OIC's preliminary view about the grounds on which access to the Information in Issue may be refused. To the extent that any argument of relevance to OIC's preliminary view was raised by the applicant, it will be discussed further below.
15. OIC has explained to the applicant on a number of occasions that there is no requirement in the IP Act to notate redaction boxes with the ground of refusal, or to use any particular format if doing so. The only requirement under section 68 of the IP Act is that the applicant is given a prescribed written notice that contains reasons for finding that the refused information is exempt information or contrary to the public interest information etc, and that identifies the refusal provision relied upon. How that is achieved is a matter for the agency. Agencies may, for example, identify the ground for refusal of information in a schedule attached to their reasons for decision.
16. Nevertheless, I acknowledge that OIC recommends that agencies make notations on released documents so as to identify the ground for refusal of any redacted information.<sup>12</sup> I also acknowledge that, in undertaking the task of reviewing the Information in Issue and re-marking pages for the purpose of expressing a preliminary view to Council about the release of additional information, some redaction notations were made by OIC. While some may appear in a different format to the already existing notations on the documents that were made by Council,<sup>13</sup> I do not accept that this is the source of any confusion as regards identifying the ground of refusal.
17. Nor do I accept that the applicant's contention that the redaction notations made by OIC or Council are inadequate to identify the ground for refusal. This is particularly the case when the notations are considered in conjunction with the explanation contained

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<sup>12</sup> <<https://www.oic.qld.gov.au/guidelines/for-government/access-and-amendment/accessing-documents/providing-access-to-documents>>

<sup>13</sup> Council and OIC use different Redax programs.

in OIC's email of 14 October 2024, which was sent to the applicant shortly after Council's release of the Information in Issue to her, and which stated:

*As previously advised, it is my preliminary view that access to the redacted information may be refused under the IP Act because:*

- *it attracts legal professional privilege and is therefore exempt information under schedule 3, section 7(1) of the RTI Act (marked as 'sch. 3(7)' or '3(7)'); and/or*
- *it is contrary to the public interest information comprising the personal information of individuals other than you the disclosure of which would prejudice their right to privacy (marked as 'personal information'), or comprising commercial/financial information in the form of legal costing breakdowns, as well as legally privileged information in the form of descriptions of legal work performed (marked as 'Business/Financial/LPP information').*

18. I consider that these notations, as described above, adequately identified the ground for refusal of the relevant categories of information, and OIC's preliminary view email confirmed that ground. The applicant has extensive experience with the operation of the IP and RTI Acts, having made many IP Act access applications since 2019, and many external review applications to OIC. In a significant number of those external reviews, OIC has issued decisions that have explained:

- the application of the legal professional privilege exemption under schedule 3, section 7 of the RTI Act
- why disclosing the personal information of another individual (including their private contact details) would, on balance, be contrary to the public interest; and
- why disclosing commercial/financial information of legal providers (namely, their charge-out rates) contained in legal invoices would, on balance, be contrary to the public interest.<sup>14</sup>

19. Given the applicant's familiarity with the grounds for refusal of information in this review, I consider that notating the redacted information in the manner described in paragraph 17 above sufficiently identified the ground for refusal. In particular, given the number of previous reviews involving the applicant where she has been refused access to the personal information of other individuals on public interest grounds, I do not consider that notating a redaction as '*personal information*' rather than '*4/4/6*' (which is how Council has notated this ground of refusal in previous reviews involving the applicant and about which the applicant has not complained)<sup>15</sup> is of any consequence or could reasonably be regarded as the source of any confusion regarding the ground of refusal.

20. In terms of missing notations, I acknowledge that, in a chain of emails passing between a Council lawyer and a private individual (which chain is repeated multiple times throughout the 1,973 pages in issue),<sup>16</sup> redactions of a reference to what is clearly the email address of the private individual have mistakenly not been notated with the ground of refusal (i.e., as information that is contrary to the public interest to disclose because it is the personal information of the individual).<sup>17</sup> OIC has published an extensive volume of external review decisions (including, as noted, a considerable number involving the applicant), wherein it has been explained that it is, on balance, contrary to the public interest to disclose the personal information of an individual that

<sup>14</sup> The first and third bullet points were, in fact, dealt with in the decision most recently issued to the applicant by OIC.

<sup>15</sup> Referring to the public interest harm factor contained in schedule 4, part 4, section 6 of the RTI Act that recognises the harm caused by disclosing the personal information of another person.

<sup>16</sup> A complete copy of the email chain is located at pages 462-467 of the bundle released to the applicant on 11 October 2024.

<sup>17</sup> The name of the individual has been released to the applicant. The redacted information is the email address that appears immediately beside the name of the individual in the header to the email.

consists of their private contact details. OIC's Information Sheet '*What is personal information?*'<sup>18</sup> states that an individual's private email address is their personal information.

21. As such, I am satisfied that, despite the redacted information not containing a notation, it is clear that it comprises a private email address. I will record my reasons below for finding that this information comprises the personal information of a person other than the applicant, and that its disclosure would, on balance, be contrary to the public interest.

## Information in Issue - Findings

### Issue a) - LPP Information

#### Relevant law

22. 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.<sup>19</sup> Relevantly, information is exempt information if it would be privileged from production in a legal proceeding on the ground of legal professional privilege (**LPP**).<sup>20</sup> This exemption reflects the requirements for establishing LPP at common law.<sup>21</sup>
23. 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.<sup>22</sup>
24. When each of these requirements is met, LPP is established.<sup>23</sup>

#### Discussion

25. I have considered the LPP Information. I am satisfied that it comprises:
- confidential communications between Council and its external lawyers made for the dominant purpose of seeking or providing legal advice in connection with the QCAT 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

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<sup>18</sup> <<https://www.oic.qld.gov.au/guidelines/for-government/access-and-amendment/introduction-to-the-acts/what-is-personal-information>>

<sup>19</sup> 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. Section 47(3)(a) of the RTI Act allows refusal of access to exempt information.

<sup>20</sup> Schedule 3, section 7 of the RTI Act.

<sup>21</sup> 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**).

<sup>22</sup> *Esso* and *Daniels*.

<sup>23</sup> 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.

assistance to Council and/or gathering and providing confidential information to Council's external lawyers for use in the legal proceedings; or

- descriptions contained in invoices rendered to Council by its external lawyers of the professional legal services provided to Council by those lawyers that reveal the nature of confidential legal advice or assistance provided to Council.

26. I am further satisfied that the lawyers who provided the advice or assistance in question are suitably qualified and of a sufficiently independent character.<sup>24</sup> There is nothing before me to suggest that the qualification or exceptions to privilege apply.
27. The only submissions made by the applicant concerning the LPP Information were that she questioned the application of LPP to 'entire files', and that she considered that some of the pages in question consisted of QCAT forms, to which she considered access should be granted.<sup>25</sup>
28. In respect of the first issue, the volume of pages to which access is refused is irrelevant. The issue is whether each of the communications in question satisfies the test for attracting LPP. If the test is satisfied, access may be refused regardless of how many pages are involved. In a matter where Council was instructing external lawyers in respect of ongoing legal proceedings, it is perhaps not surprising that a large volume of pages contain privileged communications.
29. In respect of the applicant's second issue, Council has given her access to copies of final form, executed, and filed QCAT forms. I am satisfied that unexecuted draft versions that are the subject of a request for, or the provision of, legal advice or assistance, or that are privileged copies of non-privileged originals,<sup>26</sup> satisfy the test for LPP.

### **Finding**

30. For the reasons stated above, I find that the LPP Information satisfies the requisite test and is therefore exempt information.<sup>27</sup> Access under the IP Act may be refused on that basis.

### **Issue b) – Personal Information**

#### **Relevant law**

31. Under the IP Act, a person has a right to be given access to documents of an agency to the extent they contain the individual's personal information.<sup>28</sup> This right is subject to other provisions of the IP Act and the RTI Act, including the grounds on which an agency may refuse access to information.<sup>29</sup> One ground of refusal is where disclosure would, on balance, be contrary to the public interest.<sup>30</sup>
32. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision-maker must:<sup>31</sup>
- identify factors irrelevant to the public interest and disregard them

<sup>24</sup> *Waterford v Commonwealth* (1987) 163 CLR 54 at 62.

<sup>25</sup> Submission dated 15 November 2024.

<sup>26</sup> *Commissioner, Australian Federal Police and Anor v Propend Finance Pty Ltd and Ors* (1996) 141 ALR 545.

<sup>27</sup> Section 67(1) of the IP Act and section 47(3)(a) and schedule 3, section 7 of the RTI Act.

<sup>28</sup> Section 40 of the IP Act.

<sup>29</sup> Section 67(1) of the IP Act and section 47 of the RTI Act.

<sup>30</sup> Section 47(3)(b) of the RTI Act.

<sup>31</sup> Section 49(3) of the RTI Act.

- 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.

33. Schedule 4 of the RTI Act contains non-exhaustive lists of factors that may be relevant in determining where the balance of the public interest lies in a particular case. I have considered these lists,<sup>32</sup> together with all other relevant information, in reaching my decision. I have kept in mind the IP Act's pro-disclosure bias<sup>33</sup> and Parliament's requirement that grounds for refusing access to information be interpreted narrowly.<sup>34</sup>

## Discussion

34. The Personal Information consists of references to the private email address of an individual,<sup>35</sup> as well as to discussions about the personal circumstances of this individual and others involved in the QCAT proceedings in terms of their availability to attend QCAT hearings and conferences, etc.

35. I am satisfied that this information is properly characterised as the personal information<sup>36</sup> of the relevant individuals. A public interest harm in its disclosure therefore automatically arises,<sup>37</sup> to which I afford moderate weight in applying the public interest balancing test, given the sensitive nature of some of the information. I afford the same weight to the associated nondisclosure factor concerned with protecting the right to privacy of the relevant individuals.<sup>38</sup>

36. I am unable to identify any public interest factors favouring disclosure of the Personal Information to the applicant (and the applicant has identified none in her submission) other than the general public interest in accessing government-held information, to which I afford low weight in the circumstances of this review. The Personal Information does not concern the applicant and has no direct relevance to the conduct of the QCAT proceedings, such that its disclosure could reasonably be expected to enhance the accountability or transparency of Council<sup>39</sup> in respect of the conduct of the proceedings.

## Finding

37. Upon balancing the various public interest factors weighing both for and against disclosure of the Personal Information, I am satisfied that the factors favouring nondisclosure outweigh those favouring disclosure, such that disclosure of the Personal Information would, on balance, be contrary to the public interest. Access may be refused on that basis.

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<sup>32</sup> I have considered each of the public interest factors outlined in schedule 4 of the RTI Act.

<sup>33</sup> Section 64 of the IP Act.

<sup>34</sup> 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.

<sup>35</sup> See paragraphs 20-21 above.

<sup>36</sup> Within the meaning of section 12 of the IP Act. 'Personal information' is defined in section 12 of the IP Act as 'information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.' Given its context, the information cannot be characterised as the routine work information of the Council officers involved in the QCAT proceedings.

<sup>37</sup> Schedule 4, part 4, section 6 of the RTI Act. The concept of 'privacy' is not defined in either the IP Act or the RTI Act. It can, however, essentially be viewed as the right of an individual to preserve their personal sphere free from interference from others (paraphrasing the Australian Law Reform Commission's definition of the concept in "For your information: Australian Privacy Law and Practice" Australian Law Reform Commission Report No. 108 released 11 August 2008, at paragraph 1.56).

<sup>38</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>39</sup> Schedule 4, part 2, item 1 of the RTI Act.

### **Issue c) – Billing Information**

38. The Billing Information comprises parts of invoices issued to Council by its external lawyers for legal services provided to Council. 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 25 above, I am satisfied that such information attracts LPP.
39. In respect of the remaining 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 these types of documents.<sup>40</sup> In *Price and Department of Justice and Attorney-General*,<sup>41</sup> 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. The Information Commissioner was satisfied that disclosing such information could reasonably be expected to prejudice the commercial and financial affairs of the relevant firm/entity<sup>42</sup> given the commercially competitive field in which law firms operate, and would, on balance, be contrary to the public interest to disclose. I afford moderate weight to these nondisclosure factors.
40. The applicant has not identified any public interest factors that she contends weigh in favour of disclosure of the Billing Information. I am unable to identify factors favouring disclosure beyond the general public interest in accessing information held by government, and in the accountability of Council for its expenditure of public funds.<sup>43</sup> However, I do not accept 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.
41. 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.

### **Finding**

42. Upon balancing the various public interest factors weighing both for and against disclosure of the Billing Information, I am satisfied that the factors favouring nondisclosure outweigh those favouring disclosure, such that disclosure of the Billing Information would, on balance, be contrary to the public interest. Access may be refused on that basis.

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<sup>40</sup> 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].

<sup>41</sup> (Unreported, Queensland Information Commissioner, 12 March 2002).

<sup>42</sup> Schedule 4, part 3, item 2 and schedule 4, part 4, section 7(1)(c) of the RTI Act.

<sup>43</sup> Schedule 4, part 2, items 1 and 4 of the RTI Act.



## DECISION

43. I vary the decision under review by finding that:

- 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
- access to the Personal Information may be refused under 67(1) of the IP Act and sections 47(3)(b) and 49 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.

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

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R Moss  
**Principal Review Officer**

**Date: 12 December 2024**

**APPENDIX****Significant procedural steps**

<b>Date</b>	<b>Event</b>
14 April 2024	OIC received the application for external review.
15 April 2024	OIC requested preliminary documents from Council.
30 April 2024	OIC received copies of preliminary documents from Council.
13 May 2024	OIC advised the parties that the application for review had been accepted. OIC requested that Council provide copies of the information in issue.
5 June 2024	OIC received copies of the information in issue from Council.
4 July 2024	OIC communicated a preliminary view to Council.
5 September 2024	OIC received a response from Council.
17 September 2024	OIC asked Council to release additional information to the applicant.
30 September 2024	OIC received an email from Council attaching an email from the applicant concerning the release of the additional information by Council.
7 October 2024	OIC received an email from the applicant concerning the release by Council of the additional information.
10 October 2024	OIC asked Council to re-release the information in issue to the applicant.
11 October 2024	OIC received confirmation from Council that it had re-released the information in issue to the applicant.
14 October 2024	OIC communicated a preliminary view to the applicant.
15 November 2024	OIC received a submission from the applicant.