



Decision and Reasons for Decision

Citation:	<i>W55 and Brisbane City Council [2024] QICmr 13 (17 April 2024)</i>
Application Number:	317034
Applicant:	W55
Respondent:	Brisbane City Council
Decision Date:	17 April 2024
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT OR UNLOCATABLE DOCUMENTS - request for information about a local council reserve and gate installation - concerns about lack of correspondence records and approval documentation - whether agency has taken all reasonable steps to locate documents - whether access to further documents may be refused on the basis that the documents do not exist - sections 47(3)(e) and 52(1) of the <i>Right to Information Act 2009 (Qld)</i>

REASONS FOR DECISION

Summary

1. The applicant applied¹ to Brisbane City Council (**Council**) under the *Right to Information Act 2009 (Qld)* (**RTI Act**) for access to a broad range of documents in connection with a local reserve (**Council Reserve**) including complaints, installation of a gate and issues relating to access through the Council Reserve to neighbouring properties.
2. Council located seven pages and decided to grant full access to two pages, partial access to three pages and access by way of inspection to two pages.²
3. The applicant applied³ to the Office of the Information Commissioner (**OIC**) for external review of Council's decision on the basis that Council should have located more documents. The applicant was particularly concerned that such a small number of documents had been located and submitted that Council should have located records of his discussions with Council employees, and records containing information that had been conveyed to him through Council's external contractor involved in the gate installation (**Contractor**).⁴

¹ On 14 October 2022.

² Decision dated 16 November 2022.

³ On 12 December 2022.

⁴ Submissions received 31 January 2023.

4. On external review, Council conducted further searches and located an additional 871 pages.⁵ Council agreed to disclose 116 of those pages to the applicant⁶ but claimed that the remaining pages were exempt due to legal professional privilege, contained contrary to public interest information or were otherwise available through the Queensland Courts system. Some information was also identified as out of scope of the external review.⁷
5. The applicant remains dissatisfied with what Council has released to him and contends that further documents should have been located.⁸ In his submissions, the applicant argues that, due to the scale of the project, many more documents should exist, including correspondence records, directions to the Contractor and approval documentation.
6. For the reasons set out below, I find that Council has taken all reasonable steps to identify and locate responsive documents and may refuse access to further documents on the basis they do not exist.⁹

Background

7. The applicant's residential property neighbours the Council Reserve. The information available to OIC shows that:
 - the applicant has used the Council Reserve to access his property
 - the applicant has, for some time, been in dispute with the Council in connection with gaining access to his property through the Council Reserve
 - in 2022, Council installed a swing gate limiting vehicular access to the Council Reserve; and
 - the applicant is currently involved in legal proceedings against Council in connection with property access issues associated with the Council Reserve.

Reviewable decision

8. The decision under review is Council's decision dated 16 November 2022.

Evidence considered

9. The evidence, submissions, legislation and other material I have considered in reaching this decision are included in these reasons (including footnotes and Appendix).¹⁰
10. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information¹¹. I consider a decision-maker will be '*respecting and acting compatibly with*' that right and others prescribed in the HR Act, when

⁵ Council's City Legal unit located 839 pages and the City Standards unit located 32 pages.

⁶ Including screenshots from Council's maintenance database, internal Council email correspondence, invoices from the Contractor issued to Council, communications between the applicant's lawyer and Council between May and October 2022 and related court documents.

⁷ Due to it falling outside the date range or concerning different subject matter (eg. another Council project). On review, the applicant has not contested the out of scope information.

⁸ Submissions received on 4 April 2024.

⁹ Sections 47(3)(e) and 52(1)(a) of the RTI Act.

¹⁰ Including the submissions made by the applicant in the external review application on 12 December 2022, and in correspondence received on 31 January 2023 and 4 April 2024.

¹¹ Section 21 of the HR Act.

applying the law prescribed in the RTI Act.¹² 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 by Bell J on the interaction between equivalent pieces of Victorian legislation:¹³ *it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act.*¹⁴

11. The significant procedural steps taken in this external review are set out in the Appendix.

Issue for determination

12. The applicant's outstanding concerns¹⁵ relate to Council's searches to locate documents responding to items 3-7 of his application, the full terms of which are set out below:

All documents from 16 November 2021 to 14 October 2022, regarding and related to:

3) a right of access and access exercised through [Council Reserve] by the residents of [applicant's address], and

4) a BCC decision to install a gate to block access through the [Council Reserve] Car park to [Council Reserve] by the residents of [applicant's address] or any other 3rd parties or users of [Council Reserve];

5) a BCC decision to order the fabrication and installation of a gate (the gate) and placement of an order to fabricate and install a gate in the [Council Reserve] car park access way to [Council Reserve] and to block/restrict access from the car park and any request for reinforcing of concrete footings for the gate post/s to be installed;

6) requests by and including emails between BCC officers and third parties and including communications to and from officers in the BCC Parks Department; and [the Parks Technical Officer] of BCC Construction and City Standards and [Works Supervisor, Steel Fabrication] of BCC Construction and City Standards and [the Parks Coordinator] of BCC Parks /and Gardens and [Contractor] and [Local] Ward Office and its staff and any other BCC officers regarding the installation of the gate including any arrangements for locking the gate and issuing of keys to various third parties including the residents of [applicant's address] and including installation of a dual pin lock and arrangements for issuing keys to access the lock and arrangements for the installation of the gate lock;

7) the removal of a section of [Council Reserve] car park copper log fence in about June 2022 and BCC communications (including [Local] Ward Office) and / with [Contractor] about removal of a section of the [Council Reserve] copper log fence.

¹² *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

¹³ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹⁴ *XYZ* at [573]. OIC's approach to the HR Act set out in this paragraph has recently been considered and endorsed by the Queensland Civil and Administrative Tribunal in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23] (noting that Judicial Member McGill saw 'no reason to differ' from our position).

¹⁵ During the review, the scope of issues was narrowed through the applicant's willingness to participate in OIC's informal resolution processes and due to Council locating additional documents. In summary, the applicant agreed to limit the scope of the external review to items 3-7 of his access application, Council also agreed to disclose 116 pages to the applicant that it located following further searches, and the applicant did not contest my preliminary view of 25 January 2024 in relation to the grounds for refusal in sections 47(3)(a), (b) and (f) of the RTI Act, or information identified as outside scope.

13. The issue for determination in this external review is whether Council has taken all reasonable steps to locate documents responding to the above scope, and whether it may therefore, refuse access to further documents on the basis they do not exist.¹⁶
14. As I have noted, the applicant did not contest my preliminary view in relation to exempt information subject to legal professional privilege, information to which other access is available through the Queensland Courts Registry or website, or information refused on contrary to public interest grounds.¹⁷ While the validity of those refusal grounds is not in issue in this review, in making this decision, I have still had regard to the *searches* Council undertook to locate all 871 additional pages, and the nature of the located documents to the extent those matters are relevant to the issue for determination set out in the preceding paragraph.

Relevant law

15. Under section 23 of the RTI Act, a person has a right to access documents of an agency or Minister. This right is not absolute but subject to the provisions of the RTI Act itself, including grounds of refusal. Relevantly in this review, access to a document may be refused if the document is nonexistent.¹⁸
16. A document will be *nonexistent* if there are reasonable grounds to be satisfied it does not exist.¹⁹ To be satisfied that a document does not exist, the Information Commissioner has previously had regard to various key factors including the agency's record-keeping practices and procedures (including, but not limited to, its information management approaches).²⁰ By considering the relevant factors, the decision maker may conclude that a particular document was not created because, for example, the agency's processes do not involve creating that specific document. In such instances, it is not necessary for the agency to search for the document. Rather, it is sufficient that the relevant circumstances to account for the nonexistent document are adequately explained by the agency.²¹
17. In determining whether a document is nonexistent, the Information Commissioner may also take into account the searches and inquiries conducted by an agency. The key question then is whether those searches and inquiries amount to '*all reasonable steps*'.²² What constitutes reasonable steps will vary from case to case, as the search and inquiry process an agency will be required to undertake will depend on which of the key factors are most relevant in the particular circumstances. Such steps may include inquiries and searches of all relevant locations identified after consideration of relevant key factors.²³
18. The functions of the Information Commissioner on external review include investigating and reviewing whether an agency has taken reasonable steps to identify and locate documents applied for by applicants.²⁴ While the agency bears an onus to justify an

¹⁶ Section 47(3)(e) and 52(1)(a) of the RTI Act.

¹⁷ Issued on 25 January 2024.

¹⁸ Section 47(3)(e) and 52(1) of the RTI Act.

¹⁹ Section 52(1)(a) of the RTI Act. For example, a document has never been created.

²⁰ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) (*Pryor*) at [19] which adopted the Information Commissioner's comments in *PDE and University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*) at [37]-[38]. *PDE* addresses the application of section 28A of the repealed *Freedom of Information Act 1992* (Qld). Section 52 of the RTI Act is drafted in substantially the same terms as the provision considered in *PDE* and, therefore, the Information Commissioner's findings in *PDE* are relevant.

²¹ *Mewburn and Department of State Development* [2015] QICmr 9 (21 April 2015) at [19].

²² As set out in *PDE* at [49].

²³ As set out in *PDE* at [38].

²⁴ Section 130(2) of the RTI Act.

adverse decision against an applicant,²⁵ if the applicant maintains further documents exist, the Information Commissioner has recognised there is a practical onus placed on the applicant to demonstrate that the agency has not discharged its obligation.²⁶ Suspicion and mere assertion will not satisfy this onus.²⁷

19. In assessing an agency's searches, the Information Commissioner has recently confirmed the relevant question is whether the agency has taken all *reasonable* steps to identify and locate documents, as opposed to all *possible* steps.²⁸ This follows the approach taken by the Queensland Civil and Administrative Tribunal where His Honour Judge McGill reasoned that it is open to reach a finding that an agency has taken all reasonable steps '*even if, at least in theory, further and better searches might possibly disclose additional documents.*'²⁹

Applicant's submissions

20. In his submissions³⁰ the applicant insists that the scale of the gate installation project at the Council Reserve was such that it should have generated many more documents and communications. He rejects Council's submission that installation of the gate was a '*standard maintenance request*' as he considers it is '*not supported by the conduct of the BCC officers nor information recorded by BCC*'. On this point, he submits as follows:

...it seems unlikely that the fabrication and installation of the ... gate - in breach of a Supreme Court order – where no gate restricting access had been in place (and the very issue that is integral to my RTI application) - was ordered by [Council employee] through his delegate -with extra- large footings with reo to make sure it is difficult to remove' and prior to receipt of the contractor's 'low cost' quote at '< \$10,000' - could reasonably be considered as a 'standard maintenance request'.

21. To support his arguments as to the existence of further documents, the applicant also:³¹
- states that he had personal discussions with Council officers and the Local Councillor and Local Ward Office for which contemporaneous records have not been located; and
 - submits that the Contractor communicated with Council '*regarding his work instructions*' to '*refabricate the lock box*' and records of these communications should have been located.
22. The applicant maintains that there are reasonable grounds to require Council to conduct further searches and inquiries with the relevant Councillor and their Ward Office, and certain named employees at Council, including the Parks Coordinator.

Council's searches

23. Council provided OIC with information about the searches and inquiries conducted during its initial processing of the application, and the further searches conducted on external review.³² In summary, those searches included:

²⁵ Section 87(1) of the RTI Act.

²⁶ *Mewburn and Department of Local Government, Community Recovery and Resilience* [2014] QICmr 43 (31 October 2014) at [13].

²⁷ *Dubois and Rockhampton Regional Council* [2017] QICmr 49 (6 October 2017) at [36].

²⁸ *S55 and Queensland Police Service* [2023] QICmr 3 (30 January 2023) at [23].

²⁹ *Webb v Information Commissioner* [2021] QCATA 116 at [5]-[6].

³⁰ Submission received by OIC on 4 April 2024.

³¹ *Ibid.*

- searches by the Parks Coordinator of email records (Microsoft Outlook) regarding correspondence about the gate and installation³³
- direct enquiries with relevant Council employees involved in the gate installation project³⁴
- searches at the Local Ward Office for phone call file notes and emails/letters in the requested timeframe regarding installation of a gate and complaints regarding vehicle access to the Council Reserve³⁵
- City Legal conducted searches of relevant court proceeding files in its Records Manager database³⁶
- the Microsoft Outlook account of Council's City Legal, Legal Counsel, was searched for email correspondence with relevant Council employees;³⁷ and
- a manual review of all documents in the Network Drive folder relating to the applicant's address was conducted and the documents were interrogated against the date range and scope.³⁸

24. As a result of these searches, City Legal located 839 pages responding to the scope of the external review, and City Standards located 39 pages³⁹ responding to the scope of the external review. Generally, those documents fall into the following categories:

- screenshots showing Council's electronic maintenance request for the swing gate, two Contractor invoices, email correspondence between Council employees regarding the gate manufacture and installation, communications between the applicant's lawyer and Council, and related court documents (**Released Documents**)
- communications involving City Legal officers and external legal counsel in connection with court proceedings involving the applicant and Council
- two audio recordings previously considered in an earlier review; and
- court documents relating to proceedings between the applicant and Council or proceedings in the Planning and Environment Court involving other parties.

25. Council also provided information in relation to its recordkeeping practices associated with park maintenance works in the nature of the gate installation project. In summary, Council submitted that because the project was a '*standard maintenance request*' any '*phone conversations are not recorded or formally documented*'.⁴⁰ Council also provided the following information regarding the scale of the project and associated approval processes:

The approval of the gate installation was by ... the Parks Coordinator, this job had a low cost <\$10,000, was undertaken by our internal staff and was general maintenance of a park. The delegation for low cost items did not require a high level approve (eg Manager approval).

³² On 4, 5 and 8 December 2023. These include email responses from the Parks Coordinator and a signed search certification and completed search record table from the City Legal Unit. Council also provided information on 16 January 2023 about its initial search requests, which included the Local Ward Office and City Standards unit.

³³ Email from the Parks Coordinator to Council's RTI unit on 14 November 2022.

³⁴ Email from the Parks Technical Officer to the Parks Coordinator on 14 November 2022, and Council submissions to OIC on 8 December 2023.

³⁵ Email from Council's RTI unit to the Local Ward Office on 31 October 2022. One document was located within scope – a letter dated 5 May 2022 from the applicant's lawyer to Council regarding the gate installation, copied to the Local Ward Councillor and the Contractor.

³⁶ Record of searches provided to OIC by Council, signed by City Legal, Legal Counsel, dated 4 December 2023.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Seven pages originally and 32 pages on external review.

⁴⁰ Council's search submissions received by OIC on 8 December 2023.

26. Council further explained that the Parks Coordinator *'had conversations with ... the Parks Technical Officer [who] managed the quotation, ordering and installation of the gate'* and that he also communicated with other City Standards employees regarding the request but *'they had no direct role in the assessment or procurement of the installed gates'* and in any event are no longer employed by Council.⁴¹

⁴¹ Submissions received on 8 December 2023.

Findings

27. I accept that the original searches conducted by Council in processing the access application did not identify all documents relevant to the scope of the application. However, during the external review⁴² Council has undertaken further searches of relevant locations and made direct inquiries with Council officers⁴³ with working knowledge of the gate installation project (ie. City Standards) and the applicant's associated legal matters (ie. City Legal). Those searches and inquiries resulted in a significant volume of information being located in response to the scope of the application. I acknowledge however, that the majority of those documents have not been released to the applicant due to grounds for refusal of access as claimed by Council.⁴⁴
28. Notwithstanding the refusal of access documents, the Released Documents have afforded the applicant access to some information about the gate installation project within the date range of the application. Having examined Council's search records, I am satisfied these documents were located through searches targeted to appropriate locations and inquiries with relevant Council employees. I am also satisfied those documents align with Council's submissions about the nature and extent of documents created in connection with a project of this scale, and associated recordkeeping practices. In this regard, I have taken into account that the applicant received access to:
- several email communications involving City Standards employees between December 2021 and June 2022 constituting the original request for installation of the swing gate, follow up communications and specification drawings⁴⁵
 - invoices issued by the Contractor which demonstrate that the total of the invoiced works fell under \$10,000; and
 - purchase order screenshots from Council's database through which maintenance jobs are logged.
29. I accept that the Released Documents, as described above, are relatively limited in nature and contain only basic details about the gate installation project. However, they do show the originating request, the ordering of the work through the Contractor and the invoicing for the completed works and some internal follow up communications within City Standards. Based on the information available to me, I find that the total of the invoiced works align with the evidence submitted by Council that it was a 'low cost' general maintenance request. Taking this into account, I am satisfied the Released Documents reflect what Council could reasonably have been expected to locate in connection with a maintenance request of this particular scale.⁴⁶
30. I recognise that the Released Documents have not met the applicant's expectations. Given the limited number of documents originally located, it is understandable that the applicant has outstanding doubts about Council's search efforts. I also recognise that the gate installation and Council Reserve access issues are of great personal significance to the applicant and, as I understand it, he firmly believes there should have been more comprehensive consideration of the issues by Council in connection with the gate installation. However, it is not within the jurisdiction of the Information Commissioner to make findings on whether a government agency should have

⁴² As demonstrated at paragraphs 23 to 26 above.

⁴³ Excluding officers who are no longer employed by Council.

⁴⁴ Which, as noted earlier, do not require determination in this review as the applicant has not contested those refusal grounds.

⁴⁵ Access was granted to the drawings by way of inspection due to copyright of the Contractor.

⁴⁶ As an aside, I note that last financial year, Council was responsible for the maintenance of 2187 parks ([Brisbane City Council - Annual Report 2022-23](#), page 25).

generated *more* documentation on a particular subject matter/project. The issue I must determine in this review is whether Council has taken *reasonable steps* to locate all documents relevant to the scope of the application.

31. I have carefully considered the applicant's submissions in support of why he considers further documents should exist, particularly his submissions in relation to records of communications of which he says he is aware because he was either a party to verbal communications or is directly or anecdotally aware they occurred between Council employees, or between Council and the Local Ward Office/Councillor and/or the Contractor involved in the gate installation. I acknowledge that he considers there should be contemporaneous file notes or records of phone calls/conversations held by Council. The applicant has not, however, provided any evidence to demonstrate that the communications (for which no documents have been located) occurred, other than his assertions and general recollections of events. That said, I do not have any reason to believe that the verbal communications did not occur; and it is, in any event, unnecessary for me to make a finding of fact on that issue.
32. As noted above in paragraph 25, Council's position is that phone conversations are not recorded or formally documented by City Standards in connection with standard maintenance requests such as the gate installation project. In view of this practice and taking into account that Council's searches of City Standards did not locate any contemporaneous file notes or written records of phone/verbal communications as sought by the applicant, I consider it is reasonable to conclude that such documents do not exist because they were not created.⁴⁷
33. I have also considered the Local Ward Office search records and results that were included with Council's submissions to OIC.⁴⁸ I am satisfied these were reasonable given what appears to be limited involvement of the Local Ward Office in the gate installation project during the relevant timeframe.⁴⁹ The applicant refers to discussions involving the Local Ward Office extending back to 2015.⁵⁰ However, given that the timeframe stated in his application was 16 November 2021 to 14 October 2022, I am satisfied the applicant would need to consider making another access application to Council for information from 2015 and other years outside the stated timeframe.⁵¹
34. Having regard to the matters outlined above and the material before me, including the scope of the external review, the searches completed by Council during its processing and on external review, the documents located by Council, the information provided by Council regarding the recordkeeping practices of City Standards, and the applicant's submissions, I am satisfied that Council has taken all reasonable steps to locate responsive documents; there is a reasonable basis to be satisfied that further documents do not exist; and access may be refused to further documents on this basis.⁵²

⁴⁷ While the applicant's focus is Council documents, for completeness, I observe that any documents held by the Contractor (a private sector entity) in relation to the gate installation project are not subject to the RTI Act.

⁴⁸ The Local Ward Office completed searches following Council's request on 31 October 2022. Council provided copies of these search records and results to OIC on 16 January 2023.

⁴⁹ One relevant document was located: a copy of a letter dated 5 May 2022 sent by the applicant's solicitor to Council.

⁵⁰ Submissions received 4 April 2024.

⁵¹ The applicant concedes that he would be open to making a further RTI application to seek any documents falling outside the timeframe of his application which is the subject of this review. However, I make no finding on whether any such documents exist, or whether such documents have been the subject of a previous application by the applicant.

⁵² Sections 47(3)(e) and 52(1)(a) of the RTI Act. I am also satisfied that, in the circumstances of this review, Council is not required to conduct a search of its backup system under section 52(2) of the RTI Act

DECISION

35. For the reasons set out above, I vary the decision under review and find that Council may refuse access to any further documents under sections 47(3)(e) and 52(1)(a) of the RTI Act on the basis that they do not exist.
36. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

K Shepherd
Assistant Information Commissioner

Date: 17 April 2024

APPENDIX**Significant procedural steps**

Date	Event
12 December 2022	OIC received the application for external review. OIC requested that Council provide preliminary documents.
13 December 2022	OIC received the preliminary documents.
6 January 2023	OIC advised the parties that the application for external review had been accepted. OIC requested that Council provide a copy of the located documents and search records. OIC requested further information from the applicant.
16 January 2023	OIC received a copy of the located documents and search records.
31 January 2023	OIC received a submission from the applicant.
31 August 2023	OIC issued a preliminary view to Council and requested Council conduct further searches and provide a copy of search records.
5 September 2023	OIC confirmed the scope of the external review and expressed a preliminary view to the applicant.
17 and 20 November 2023	OIC received a response from Council. OIC requested further information from Council.
4, 5 and 8 December 2023	OIC received further search records, documents and information from Council.
22 January 2024	OIC consulted the Contractor regarding proposed disclosure of its information.
25 January 2024	OIC asked Council to release additional documents to the applicant. OIC confirmed the scope of the external review and expressed a second preliminary view to the applicant.
29 January 2024	Council released additional documents to the applicant.
7 February 2024	OIC asked Council to release further additional documents to the applicant.
8 February 2024	Council released further additional documents to the applicant.
13 and 14 February 2024	The applicant was granted an extension of time to respond to OIC's preliminary view.
22 February 2024	OIC asked Council to release certain documents to the applicant. Council released the requested documents to the applicant.
19 March 2024	The applicant requested and received further time to respond to OIC's preliminary view.
4 April 2024	OIC received written submissions from the applicant contesting part of OIC's preliminary view in respect of Council's searches.