



FOI and Dogs, Disputes and Discontent

Alison McCubbin and Siobhan Turner,
Office of the Information Commissioner



**Office of the
Information Commissioner**

Freedom of information for Western Australia

Introduction

- FOI applications may involve a private dispute
- The agency's obligation:

Under section 102(1) of the FOI Act, the onus is on the agency to establish that its decision to grant access to edited copies of the requested documents is justified. Applicants are not required to establish that they are entitled to access the requested documents; it is up to the agency to establish a case for exempting a document or information from disclosure and to demonstrate that it has established the requirements of any exemption in its notice of decision.
- *Shuttleworth and Town of Victoria Park* [18].

- Guidance from previous decisions of the Information Commissioner
- Terminology – complaints, access applicants and ‘complainants’



Office of the
Information Commissioner

Freedom of information for Western Australia

Shuttleworth and Town of Victoria Park

Re Shuttleworth and Town of Victoria Park [\[2016\] WAICmr 13](#) (Shuttleworth)

THE FACTS

- Subdivision of land required a statutory declaration verifying that certain work was done prior to subdivision and sale as strata title block.
- The complainant purchased a block of land.
- Part of purchase documentation included the statutory declaration that the land was cleared of all septic sewer systems.
- When building commenced it was clear that the information in the statutory declaration was not correct. Remediation of the block was required at considerable expense.
- The complainant applied for access to the statutory declaration.
- The agency gave access to an edited copy, with personal information about the declarant deleted as personal information. No internal review because the initial decision was made by the principal officer.
- The complainant applied for external review with the Information Commissioner.



Office of the
Information Commissioner

Freedom of information for Western Australia

Shuttleworth (continued)

THE COMMISSIONER'S DECISION

The name, address and occupation of the third party are **not exempt** under clause 3(1) of Schedule 1 to the FOI Act

Having weighed the competing public interests, I consider that in the particular circumstances of this case, those against disclosure of the third party's signature outweigh those in favour of disclosure but those favouring disclosure of the name, address and occupation of the third party to ensure the administration of justice outweigh the public interest in the protection of the personal privacy of the third party.

The signature of the third party **was exempt** under clause 3(1) of Schedule 1 to the FOI Act.

Personal information of the witness was not in the scope of the application – complainant agreed this was not in scope.



Office of the
Information Commissioner

Freedom of information for Western Australia

Shuttleworth (continued)

BREAKING IT DOWN

1. Is the disputed information personal information as defined in the Glossary to the FOI Act?
information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead – (a) whose identity is apparent or can reasonably be ascertained from the information or opinion...
In this case - Name, address and occupation
2. On its face - Clause 3(1) exemption applies
Matter is exempt if its disclosure would reveal information or an opinion ... about an individual, ... whose identity is apparent or can reasonably be ascertained from the information or opinion ...
3. Consider the limitations of the exemption outlined in clauses 3(2) to 3(6)
4. Only relevant limitation on the exemption in this matter – clause 3(6) – the Public Interest



Shuttleworth (continued)

CONSIDERING THE PUBLIC INTEREST

DPP v Smith

The Public Interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and the well-being of its members. The public interest is not primarily concerned with the personal interests of the particular access applicant or with public curiosity. Rather, the question is whether disclosure of the information would be of some benefit to the public generally. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals.

The Information Commissioner [34]

The public interest is not primarily concerned with the personal interests of the particular access applicant or with public curiosity. Rather, the question is whether disclosure of the information would be of some benefit to the public generally.



**Office of the
Information Commissioner**

Freedom of information for Western Australia

Shuttleworth (continued)

WEIGHING THE PUBLIC INTERESTS FAVOURING DISCLOSURE

- *Volep and Queensland Police Service* [\[2013\] QICmr 10](#) – public interest where victim sought names and addresses of witnesses to an accident – but in *Shuttleworth* the complainant knows the identity of the third party.
- The public being able to rely on the contents of a statutory declaration as true and correct
- Persons being able to seek redress of compensation in particular circumstances - complainant acted in reliance on the statutory declaration to his detriment.
- Any person transacting in land within the State having the necessary information to ensure that parties act in good faith and in compliance with the law



Office of the
Information Commissioner

Freedom of information for Western Australia

Shuttleworth (continued)

PUBLIC INTERESTS FAVOURING NON-DISCLOSURE

- Strong public interest in maintenance of personal privacy – but this document was a declaration under oath made for the purpose that other parties, in dealing with land, could rely upon it.
- Potential damage to the public perception of the agency's ability to handle personal information – no information provided to establish that this was the case – not accepted
- Expose the agency to being found liable and potentially prejudicing lawful measures and procedures - section 104, 105 and 106 protections.
- A person's signature is a unique identifier peculiar only to that individual – the signature is exempt



Office of the
Information Commissioner

Freedom of information for Western Australia

Shuttleworth (continued)

CONCLUDING THE WEIGHING PROCESS

With regard to the name, address and occupation of the third party, I consider there is a strong public interest in disclosing this information for the reasons set out above. The public needs confidently to be able to rely upon statutory declarations made as true and correct statements of fact, and equally those executing statutory declarations need to understand their obligations to be truthful.

...

Having weighed the competing public interests, I consider that in the particular circumstances of this case, those against disclosure of the third party's signature outweigh those in favour of disclosure but those favouring disclosure of the name, address and occupation of the third party to ensure the administration of justice outweigh the public interest in the protection of the personal privacy of the third party. [53- 55]



Office of the
Information Commissioner

Freedom of information for Western Australia

Shuttleworth (continued)

What about the
third party?

I do not consider that the third party's objection to disclosure should be determinative in this matter. There is no automatic right of veto to disclosure by a third party. The third party's view is but one factor to be taken into account when the agency considers the matter and makes its decision [48]

NB– Under section 32, agencies must not give access to third party personal information unless it has taken such steps as are reasonably practicable steps to obtain the third party's views about whether the information is exempt under clause 3.



Office of the
Information Commissioner

Freedom of information for Western Australia

Case Study – disclosing the identity of a dog owner

- The complainant's dog was seriously injured by another dog. The injured party applied to the agency for access to the contact details of the owner of the attacking dog. The agency refused access on the ground that the information is 3rd party personal information and exempt from disclosure.
- During the external review process, the Commissioner accepted that the information about the dog owner is personal information, but in this case he considered that the public interest in disclosure of that information outweighed the public interest in protecting the privacy of the dog owner because:
 - the Dog Act provides that the owner of a dog causing injury to another dog is liable for any damages;
 - Non-disclosure of the information is likely to result in the denial of justice to individuals seeking damages for injury to people or animals; and
 - The ownership of the offending dog was not in dispute.
- The Commissioner gave the dog owner the opportunity to provide their views (s.32). The dog owner accepted the Commissioner's view and the agency disclosed the information to the complainant.
- The Commissioner considers that in cases where a person needs to pursue a legal remedy and there is no other means of obtaining information, there is a strong public interest in favour of disclosure of that information under the FOI Act. However each matter needs to be considered on its own merits and on the facts in each case.
- If an agency proposes to give access to personal information about someone other than the access applicant, it must take reasonable steps to seek that person's views about whether that information is exempt. That person does not have a right of veto but does have a right to provide their views and to seek review of an agency's decision to give access to their personal information.
- [2015/2016 Annual Report](#) - see Page 26 for "disclosing the identity of a dog owner"



Building blocks

Clause 3(1): Personal Information is exempt



Limitations on exemption(s): Clause 3(2) – 3(6)



Clause 3(6): Public Interest



Factors favouring disclosure

Factors favouring non-disclosure



Considering disclosure?



s.32 Consultation with 3rd Parties

Personal Information:
defined in the
Glossary to the FOI
Act



Office of the
Information Commissioner

Freedom of information for Western Australia

'Q' and City of Cockburn

Re 'Q' and City of Cockburn [2009] WAICmr 26 (Q and Cockburn) (Q and Cockburn)

THE FACTS

- Application for access to all documents relating to 2 properties within the local government boundaries of the agency. Specifically, applications for development and building licences approvals and investigations into boundary disputes and the location of dividing fences between the 2 properties
- The access applicants were in dispute with all other parties to a complaint regarding a boundary fence and they required access to the information held by the agency in order to resolve the dispute (adverse possession claim - Landgate).
- The agency decided to give access in full to some documents and edited copies of other documents, and refused access to some of the requested documents.
- During the course of dealing with the access application, in accordance with its obligations under s.32 of the FOI Act, the agency consulted with the several third parties. The complainants objected to the disclosure of the disputed documents in the edited manner proposed by the agency.
- The agency confirmed its initial decision on internal review. The complainants applied to the Information Commissioner seeking external review of that decision.

THE COMMISSIONER'S DECISION

The agency's decision was set aside and substituted. The disputed documents were exempt in full under clause 3(1):

...it appears to me that the public interest in protecting the personal privacy of third parties is not outweighed by the public interests favouring disclosure in this instance. I find that the disputed documents are exempt under clause 3(1) of Schedule 1 to the FOI Act."



Office of the
Information Commissioner

Freedom of information for Western Australia

Q and Cockburn (continued)

BREAKING IT DOWN

1. Requested information is personal information as defined in the Glossary to the FOI Act – in this case included: names, addresses, contact numbers, handwriting and other information.
2. On its face - Clause 3(1) exemption applies
3. What are the relevant limitations of the exemption outlined in clauses 3(2) to 3(6)
4. Clause 3(6) – the Public Interest - **DPP v Smith**

WEIGHING THE PUBLIC INTERESTS FAVOURING DISCLOSURE

- Applicants being able to access information about themselves (section 21) – satisfied to the extent certain documents provided.
- Agency being accountable for enforcement of regulations – but this would not be furthered by disclosure in these particular circumstances.

PUBLIC INTERESTS FAVOURING NON-DISCLOSURE

- Strong public interest in maintenance of personal privacy
- Agency maintaining its ability to receive and investigate complaints received from ratepayers without complainants needing to fear retribution to ensure that the needs of all members of the local community are met.



Office of the
Information Commissioner

Freedom of information for Western Australia

Q and Cockburn (continued)

CONCLUDING THE WEIGHING PROCESS

Weighing the competing public interests for and against disclosure, based on the information before me, I consider that those factors favouring non-disclosure of the disputed documents outweigh those factors favouring disclosure in this instance.

Based on the material presently available to me, it appears to me that the public interest in protecting the personal privacy of third parties is not outweighed by the public interests favouring disclosure in this instance. I find that the disputed documents are exempt under clause 3(1) of Schedule 1 to the FOI Act.

[28 -29]



Office of the
Information Commissioner

Freedom of information for Western Australia

Building Blocks for Building Plans

- Discontent over building plans
- Similar approach but also other factors
 - Copyright



Office of the
Information Commissioner

Freedom of information for Western Australia

'R' and City of Greater Geraldton

Re 'R' and City of Greater Geraldton and 'S' [\[2012\] WAICmr 25](#) (R and Geraldton)

THE FACTS

- Application for access to documents relating to Plans, elevations and sections of a current building licence on a neighbouring property.
- There was a long running boundary dispute between the complainant and the owner of the Property as well as other disputes concerning the property (including proceedings in the Magistrates' Court).
- The agency identified 7 documents and refused access to all of them on the basis the documents were exempt under clause 3(1). The agency's decision was confirmed on internal review.
- The complainant applied to the Information Commissioner for external review.
- During external review the Commissioner sought the views of the third party – the third party submitted that the security of the property would be endangered under Clause 5(1)(f)

THE COMMISSIONER'S DECISION

- The Commissioner set aside the Agency's decision and found that the disputed documents were not exempt under Clause 3(1) [or Clause 5(1)(f)].
- The Commissioner was however satisfied that s.27(2)(c) [copyright] of the FOI Act applied and considered that access should be given by way of inspection only.



Office of the
Information Commissioner

Freedom of information for Western Australia

'R' and Geraldton (continued)

BREAKING IT DOWN

1. Requested information is personal information as defined in the Glossary to the FOI Act – in this case included: address name of an individual and the size and certain external features of a buildings on the property.
2. On its face - Clause 3(1) exemption applies
3. What are the relevant limitations of the exemption outlined in clauses 3(2) to 3(6)
4. Clause 3(6) – the Public Interest - *DPP v Smith*

WEIGHING THE PUBLIC INTERESTS FAVOURING DISCLOSURE

- Agency being accountable for the way that it discharges its functions – actions and decisions should be as transparent as possible – long running dispute – public interest in both parties being fully informed
- Public interest in agencies giving the public access to information to enable it to assess the nature and quality of information forming the basis of decision-making, particularly where, as here, that decision-making has the potential to impact on a person's property - the accountability of government agencies includes informing the public, where possible, of the basis for decision-making and the material considered relevant to that process.
- Public interest in private individuals who have dealings with government agencies maintaining trust in those agencies and being – and being seen to have been – fairly dealt with. Those are interests common to all members of the community and for their benefit.

WEIGHING THE PUBLIC INTERESTS FAVOURING NON-DISCLOSURE

- Strong public interest in maintenance of personal privacy BUT the information is not particularly private or sensitive in nature – not persuaded that a general right to consider external facades private information – no real intrusion on privacy
- Did not accept submission that pricing information and costs would be revealed – no information to establish this.
- Complainant claimed clause 5(1)(f) – no information provided to suggest disclosure could reasonably expected to endanger the security of any property



Office of the
Information Commissioner

Freedom of information for Western Australia

'R' and Geraldton (continued)

Copyright:

- Copyright in itself not a ground for exemption under the FOI Act, but affects the manner in which access can be given;
- Section 27(2)(c) of the FOI Act – agency to comply with request for access to be given in a particular way **UNLESS** that way would involve an infringement of copyright;
- In which case access may be given in some other way e.g. by inspection



Jason Penfold and the Shire of Exmouth

Re PENFOLD and Shire of Exmouth and Others [\[2015\] WAICmr 8](#) (Penfold and Exmouth)

THE FACTS

- Application for access to application and approval plans for two properties.
- Agency gave access to a number of documents but refused access to the approved house plans on the basis they were exempt under clause 3(1).
- The disputed information consisted of external and internal plans for a commercial property.
- The agency confirmed its original decision on internal review.

THE COMMISSIONER'S DECISION

- The Commissioner set aside the agency's decision and found the disputed documents **NOT** exempt under Clause 3(1).
- The Commissioner was however, satisfied that s.27(2)(c) [copyright] of the FOI Act applied and considered that access should be given by way of inspection only.



Office of the
Information Commissioner

Freedom of information for Western Australia

Penfold and Exmouth (continued)

BREAKING IT DOWN

1. Requested information is personal information as defined in the Glossary to the FOI Act – in this case included: names and other specific identifying information about third parties.
2. On its face - Clause 3(1) exemption applies
3. What are the relevant limitations of the exemption outlined in clauses 3(2) to 3(6)
4. Clause 3(6) – the Public Interest - *DPP v Smith*

WEIGHING THE PUBLIC INTERESTS FAVOURING DISCLOSURE

- Agency being accountable the way that it discharges its functions – actions and decision should be as transparent as possible – public interest in individuals being able to access information about those actions and decisions
- Public interest in agencies giving the public access to information to enable it to assess the nature and quality of information forming the basis of decision-making, particularly where, as here, that decision-making has the potential to impact on a person's property - the accountability of government agencies includes informing the public, where possible, of the basis for decision-making and the material considered relevant to that process.
- Public interest in private individuals who have dealings with government agencies maintaining trust in those agencies and being – and being seen to have been – fairly dealt with.

WEIGHING THE PUBLIC INTERESTS FAVOURING NON-DISCLOSURE

- Strong public interest in maintenance of personal privacy BUT previously decided disclosure of **external plans** does not involve any real intrusion on personal privacy. Re **internal plans** - this is a commercial property and large number of people will see the inside of the building, local real estate agent holds the plans and could show it to prospective tenants – information is not particularly private – CF Re Post Newspapers Pty Ltd and Town of Cambridge [\[2006\] WAICmr 25](#)



Office of the
Information Commissioner

Freedom of information for Western Australia

Penfold and Exmouth (continued)

Copyright:

- Copyright in itself not a ground for exemption under the FOI Act, but affects the manner in which access can be given;
- Section 27(2)(c) of the FOI Act – agency to comply with request for access to be given in a particular way **UNLESS** that way would involve an infringement of copyright;
- In which case access may be given in some other way e.g. by inspection



Exercise

- Mr Tom is building a number of apartments which he intends to lease on a short term basis as holiday apartments.
- Mr Jerry is a resident within the same township. He is concerned about the (potential future) noise levels and wants to know the layout of the apartments as well as any outside areas. He has made an FOI request for the building plans and specifically stated that he knows the name of the developer.

Questions

1. Does Mr Jerry's statement that he knows the identity of Mr Tom affect your decision making process?
2. What are the views of Mr Tom? Do you also need to consult with any other third party? The architect perhaps?



Office of the
Information Commissioner

Freedom of information for Western Australia

What do you need to do?

1. The Facts
2. Breaking it down:
 - For example -
 1. Do any of the documents contain third party personal information?
 2. Does clause 3(1) exemption apply?
 3. Consider limitations in clause 3(2) – 3(6)?
 4. Clause 3(6) - the Public Interest - *DPP v Smith*
3. Weighing the Public Interests favouring disclosure
4. Weighing the Public Interests favouring non-disclosure
5. Copyright considerations
 - If access could be agreed to – in what form?
6. How are previous decisions (i.e. Shuttleworth) relevant?

The Commissioner is **not** bound by previous decisions
BUT it is good decision making to refer to previous decisions



Office of the
Information Commissioner

Freedom of information for Western Australia

Herbert and Ministry of Housing

Re Herbert and Ministry of Housing [\[2000\] WAICmr 41](#) (Herbert)

THE FACTS

- Application for access to [scaled] drawings of rental property for purpose of legal proceedings
- Agency advised complainant “not under FOI Act” and document may be exempt
- Agency decision – exempt under clause 5(1)(e) and (f)
- Confirmed on internal review BUT complainant given certain information (dimensions)
- During external review – the agency claimed document also exempt under Clause 3(1). The agency subsequently agreed to allow the complainant to inspect the document. He refused that offer.

THE COMMISSIONER’S DECISION

- The Commissioner varied the Agency’s decision and found that the disputed document was exempt under Clause 5(1)(f) .



Office of the
Information Commissioner

Freedom of information for Western Australia

Helpful comments in decision(s)

- *“The protection of an individual’s privacy is a very strong public interest that is recognised and enshrined in the FOI Act by clause 3. The FOI Act is not intended to open the private or professional lives of citizens to public scrutiny in circumstances where there is no demonstrable benefit to the public interest in doing so.” [21] R and Geraldton*
- *“In identifying factors that weigh against disclosure, the third party questions the complainant’s motives in seeking access to the disputed documents. Section 10(2) of the FOI Act provides that a person’s right to be given access is not affected by, among other things, the agency’s belief as to what the applicant’s reasons for wishing to obtain access may be.” [20] R and Geraldton*
- *“The exemption in clause 3(1) is intended to protect the privacy of individuals about whom personal information may be contained in documents held by State and local government agencies. Information of that kind is exempt under clause 3(1), subject to the application of any of the limits on exemption in clauses 3(2)-3(6).” [28] Penfold and Exmouth*
- *“There is no automatic right of veto to disclosure by a third party. The third party’s view is but one factor to be taken into account when the agency considers the matter and makes its decision.” [48] Shuttleworth*



Other Reading

I and Department of Agriculture and Food [\[No 2\] \[2016\] WASC 272](#)

Publications “For the Public”:

- [What is Personal Information?](#)
- [The Public Interest](#)
- [Can other people access information about me or my business?](#)

Publications “For Agencies”:

- [Consulting third parties](#)
- [The exemptions](#)



Office of the
Information Commissioner

Freedom of information for Western Australia

Questions



**Office of the
Information Commissioner**

Freedom of information for Western Australia