

# Recent decisions in Freedom of Information

Catherine Coombs  
Principal Legal Officer



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# Outline

- Sources of decisions and the relevance of those decisions for the decision maker
- Recent decisions that consider:
  - the onus to establish that information is exempt
  - the nature of personal information and the clause 3 exemption
  - balancing public interests for and against disclosure of documents
  - the clause 4 exemption



# Decisions that may assist an FOI decision maker

- Decisions of the Information Commissioner WA
- Decisions of the Western Australian Supreme Court
- As a general rule, Commonwealth legislation is different



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# The onus to establish the exemption

- Section 102
  - The onus is on the agency to establish the decision is justified.
  - The onus is on a third party opposing the giving of access to establish that access should not be given.
  - Where information is not exempt if its disclosure would, on balance, be in the public interest, the onus is on applicant to establish that disclosure would, on balance, be in the public interest.



# Personal information decisions

- Is the requested information personal information?
  - *Re McNally and Town of Victoria Park* [\[2018\] WAICmr 9](#)
  - *Re Crawford and City of Melville* [\[2018\] WAICmr 11](#)
  - *Re Goiran and Department of Health* [\[2018\] WAICmr 6](#)



# Personal information decisions

- Is disclosure of particular personal information, on balance, in the public interest?
  - *Re Goiran and Department of Health* [\[2018\] WAICmr 6](#) [very specific medical information about an individual]



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# What about prescribed details?

Clause 3(3):

- *Matter is not exempt **merely** because its disclosure would reveal, in relation to a person who is or **has been** an officer of an agency, prescribed details relating to –*
  - (a) *the person; or*
  - (b) *the person's position or functions as an officer; or*
  - (c) *things done by the person in the course of performing functions as an officer.*



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# Regulation 9 – FOI Regulations 1993

- (a) the person's name; or*
- (b) any qualifications held by the person relevant to the person's position in the agency; or*
- (c) the position held by the person in the agency; or*
- (d) the functions and duties of the person, as described in any job description document for the position held by the person; or*
- (e) anything done by the person in the course of performing or purporting to perform the person's function or duties as an officer as described in any job description document for the position held by the person...*





# *I v Department of Agriculture and Food* [No 2] [\[2016\] WASC 272](#) – WA Supreme Court

The term ‘officer of an agency’ in the limitation on the exemption in clause 3(3) (dealing with prescribed details) is to be interpreted as officer of *the agency to which the access application was made*.

See the OIC guide: [Dealing with personal information about an officer of an agency](#)



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# *Public Transport Authority* [2018]

## WASC 47

**Justice Smith at [77]:**

*Having considered the actions of the officers in PTA 11, it is conceded, on behalf of the appellant, that the images of the officers are deemed not to be an exempt matter by operation of cl 3(3) of sch 1, as the images of the officers depict actions by each of them carried out in the course of performing their functions as an officer.*



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# CCTV footage

Whether or not CCTV footage is exempt under clause 3 is an issue to be decided based on the facts associated with each particular access application.

- *Re Seven Network (Operations) Limited and Public Transport Authority* [\[2017\] WAICmr 12](#)
- *Public Transport Authority* [\[2018\] WASC 47](#)



# *Re Seven Network (Operations) Limited and Public Transport Authority [2017]*

## WAICmr 12

**Following previous decisions IC considered the following:**

- The complexity of steps required to ascertain identity
- The number of people who had the necessary knowledge
- Quality of the CCTV footage/ Size and resolution of the image
- Degree to which the individual's face and other identifying characteristics are visible



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# *Public Transport Authority* [2018] WASC 47

**Justice Smith, at [72]:**

*The question to be asked is whether, on an objective assessment of all relevant circumstances when examining CCTV footage, it can reasonably be said that at least one or more persons, including the persons whose image(s) are shown in the CCTV footage, could have the necessary knowledge or contextual information to ascertain the identity of the individual or individuals.*



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# Clause 4(2) – commercial and business information

*(2) Matter is exempt matter if its disclosure-*

- (a) would reveal information (other than trade secrets) that has a commercial value to a person; and*
- (b) could reasonably be expected to destroy or diminish that commercial value.*



# Clause 4(3) – commercial and business information

*(3) Matter is exempt matter if its disclosure-*

- (a) would reveal information (other than trade secrets or information referred to in subclause (2)) about the business, professional, commercial or financial affairs of a person; and*
- (b) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.*





# But remember...

## The exemptions are limited if:

- (4) *...disclosure would reveal information about the business, professional, commercial or financial affairs of an agency.*
- (5) *...disclosure would reveal information ... of the applicant.*
- (6) *... the person concerned consents to the disclosure of the matter...*
- (7) *...disclosure would, on balance, be in the public interest*





# *Re Cockburn Cement Limited and Department of Water and Environmental Regulation [2017] WAICmr 24*

- Application for documents relating to surveys and reports into odour at Cockburn Cement Limited (**CCL**);
- agency took into account views of CCL ;
- exemptions claimed – clauses 4(1), 4(2) and 4(3);



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# *Re Cockburn Cement Limited and Department of Water and Environmental Regulation [2017]*

## WAICmr 24

### Issues

- Did the information have a commercial value?
- Could disclosure reasonably be expected to destroy or diminish that value?
- IC considered that the very specific information about the production process had a commercial value and that its disclosure could reasonably be expected to diminish that value.



# *Re Gaffney and Department of Jobs, Tourism, Science and Innovation* [\[2019\] WAICmr 3](#)

- Request for access to the Community Development Plan (**CDP**) and annual reports submitted to the Minister on the implementation of the CDP referred to in a Schedule to the Iron Ore (Robe River) Agreement Act 1964 (WA).
- Agency took into account views of third party;
- Exemption claimed – 4(3)



# *Re Gaffney and Department of Jobs, Tourism, Science and Innovation [\[2019\] WAICmr 3](#)*

## **Issues**

- Would disclosure of the documents reveal information about the business, professional, commercial or financial affairs of a person
- Would disclosure adversely affect the affairs of the person
- Would disclosure prejudice the future supply of information of that kind to the Government of an agency
- Disclosure of information about over 100 third parties



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# *Re Gaffney and Department of Jobs, Tourism, Science and Innovation [\[2019\] WAICmr 3](#)*

## **IC held**

- disclosure would reveal business information about the third parties
- disclosure would not have an adverse effect on the affairs of the third party
- disclosure would not prejudice the future supply of information as it was required to be provided by the agency in order to continue its operations – agency argued detail of information, but IC decided it was still ‘information **of that kind**’ regardless of the detail



# *Re Bennett & Philp Pty Ltd and Gold Corporation* [2019] WAICmr 1

**Our very first clause 15 decision – the exemption specific to Gold Corporation!**

- Gold Corporation is a government trading organisation
- the documents contained information about gold or precious metal transactions between the agency and its customers
- disclosure would reveal information about those transactions
- therefore, documents were exempt under clause 15(1)(b)



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# Tips when applying decisions

- Read the whole decision.
- Apply the principles outlined in the decision to the particular facts of the access application you are dealing with.
- Just because a particular document is or is not exempt in a particular decision, does not mean that will be the case for your access application.
- Read the whole decision. Again.



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# Find all the Commissioner's decisions

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<https://www.oic.wa.gov.au/en-au/UR100>



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# Questions



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