

**Decision D0092021 – Published in note form only**

***Re Threadgold and Shire of Augusta-Margaret River [2021] WAICmr 9***

**Date of Decision: 26 August 2021**

***Freedom of Information Act 1992 (WA): sections 27(1)(a) and 27(2)(c)***

On 3 February 2021, Stuart Threadgold (**the complainant**) applied to the Shire of Augusta-Margaret River (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to approved building permit drawings for a particular dwelling. The complainant excluded the names of the property owners and the builder, from the scope of the access application.

By notice of decision dated 8 March 2021, the agency decided to give the complainant access to an edited copy of ten documents (**the disputed documents**) by inspection, on the basis that to give the complainant access to a copy of the documents would involve an infringement of copyright belonging to a person other than the State, as described in section 27(2)(c) of the FOI Act.

As the decision was made by the agency's principal officer (the Chief Executive Officer), there was no right to internal review pursuant to section 39(3) of the FOI Act.

On 21 April 2021, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision to give him access to the disputed documents by way of inspection only.

The agency provided the Commissioner with its FOI file maintained in respect of the access application, together with a copy of the disputed documents.

On 4 August 2021, after considering all the information before her, the Commissioner provided the parties with her preliminary view of the matter. It was her preliminary view that to give the complainant a copy of the disputed documents would involve an infringement of copyright belonging to a person other than the State and that the agency's decision to give access by way of inspection, pursuant to section 27(1)(a) of the FOI Act, was justified.

The complainant was invited to accept the Commissioner's preliminary view or to provide further submissions.

The complainant made no further submissions other than to indicate that he did not accept the Commissioner's preliminary view.

Although copyright belonging to a person other than the State is not a ground of exemption under the FOI Act – nor is it a basis on which access to a document can be refused – it does have an effect in terms of the manner in which access to a document may be given: see *Re Zurich Bay Holdings Pty Ltd and City of Rockingham and Others [2006] WAICmr 12* at [109].

Section 27 sets out the ways in which an agency may give access to a document. Under section 27(2)(c), if an applicant has requested access in a particular way, the agency has to

comply with the request unless to do so would involve an infringement of copyright belonging to a person other than the State, in which case access may be given in some other way.

Copyright subsists in a work if it is an original literary, dramatic, musical or artistic work within the terms of the *Copyright Act 1968* (Cth) (**Copyright Act**), and it complies with the requirements of section 32 of the Copyright Act dealing with the authorship and the publication of the work.

Under section 35(2) of the Copyright Act, the author of the work is the owner of any copyright subsisting in the work. An 'artistic work' is defined in section 10 of the Copyright Act to include a drawing, whether the work is of artistic quality or not. 'Drawing' is defined in the same section to include a diagram, map, chart or plan.

Under section 31 of the Copyright Act, a copyright owner has the exclusive right to reproduce the relevant artistic work in a material form.

Section 36(1) of the Copyright Act provides that copyright in a work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner, does in Australia any act comprised in the copyright.

In this case, the Commissioner was satisfied that the disputed documents were architectural plans and therefore 'artistic works', within the terms of the Copyright Act, in which copyright subsists. Further, the Commissioner noted that the documents were stamped with the word 'Copyright' and the name of the entity, stated to be the owner of the copyright.

The complainant claimed that the builder had copied his plans and that the complainant was the owner of the copyright.

The Commissioner noted that, in *Re Apache Northwest Pty Ltd and Department of Mines and Petroleum and Anor* [2010] WAICmr 35, at [45], the former Commissioner considered that some of the disputed documents in that case were '*prima facie* the copyright of' the third party complainant and therefore that access to those documents should be by way of inspection.

The Commissioner accepted that the disputed documents in this case were *prima facie* the subject of copyright belonging to the entity whose name appeared as the copyright owner in the disputed documents. The Commissioner noted that it was not her role to settle a dispute on the ownership of copyright, but rather to determine, on the material before her, whether the decision of the agency regarding access to the disputed documents under the FOI Act was justified.

The Commissioner found that giving access to a copy of the disputed documents would involve an infringement of copyright belonging to a person other than the State and that access to the disputed documents should be by way of inspection only.

Accordingly, the Commissioner confirmed the agency's decision.