

Decision D0102020 – Published in note form only

Re Deturt and Department of Mines, Industry Regulation and Safety [2020] WAICmr 10

Date of Decision: 18 September 2020

Freedom of Information Act 1992 (WA): Schedule 1, clauses 3(1), 4(3) and 4(7)

On 8 February 2019, Ms Kerry Deturt (**the complainant**) applied to the Department of Mines, Industry Regulation and Safety (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to individual house inspection compliance audits including the following information for each property: the address, the builder, the faults identified in each house, the type of structures inspected, actions taken for defects, any remedies, who any remedy orders were given to, whether there was compliance with the remedy order, any prosecutions carried out and any penalties from those prosecutions.

By agreement, the scope of the access application was amended to copies of 30 site audit reports with the highest risk rankings for the period 2015-2017, including communications between the agency and the builder in relation to the audits.

On 29 April 2019 the agency decided to give the complainant access to an edited copy of the requested documents (**the disputed documents**). The agency had deleted the addresses of the individual houses and the names of the builders, on the ground the information was exempt under clause 3(1). The complainant sought internal review of the agency's decision and on 15 May 2019 the agency confirmed its decision.

By email dated 22 May 2019, the complainant applied to the Information Commissioner (**Commissioner**) for external review of the agency's decision. The agency provided the Commissioner with its FOI file maintained in respect of the access application, together with the disputed documents.

By email dated 5 March 2020, the complainant confirmed that she did not seek access to the street names of the properties audited. Accordingly, the scope of the external review was limited to the names of the builders, that being the only remaining information that had been deleted from the disputed documents (**the disputed information**). The disputed information included the name of a building company, but in three instances it also included the name of an individual.

On 31 July 2020 the Commissioner provided the parties with her preliminary view. It was her preliminary view that the disputed information comprising individual names is exempt under clause 3(1) of Schedule 1 to the FOI Act, and that the disputed information comprising the names of building companies is exempt under clause 4(3) of Schedule 1 to the FOI Act.

The Commissioner considered that all of the information that comprises the names of building companies generally, is not information about an individual but rather concerns a company and is not personal information as defined in the FOI Act. Therefore, she did not consider that information exempt under clause 3(1). However, the Commissioner considered whether the exemption in clause 3(1) applies to the names of individuals. The purpose of the exemption in clause 3(1) is to protect the privacy of individuals about whom personal information may be contained in documents held by State and local government agencies.

The Commissioner considered that the disputed information comprising the names of individuals was personal information and therefore, on its face, exempt under clause 3(1). The Commissioner, in considering the public interest in clause 3(6) found that there was nothing before her to suggest that those individuals were anything other than private individuals. Accordingly, in weighing the public interests the Commissioner was not persuaded that the public interest in disclosing the personal information about those individuals to the complainant outweighed the public interest in protecting the privacy of those individuals. Therefore, the Commissioner considered that the disputed information comprising the names of individuals is exempt under clause 3(1).

Section 76(1)(b) provides that the Commissioner may decide any matter in relation to the access application that could have been decided by the agency. As a result, although the agency had claimed that the disputed information is exempt under clause 3(1), the Commissioner considered whether, on the information before her, the disputed information is exempt under clause 4(3).

The exemption in clause 4(3) is concerned with protecting from disclosure information about the business, professional, commercial or financial affairs of a person. The exemption consists of two parts and the requirements of both parts (a) and (b) must be satisfied in order to establish a prima facie claim for exemption. If the requirements of both parts (a) and (b) are satisfied, the application of the limit on the exemption in clause 4(7), the public interest, must also be considered.

The Commissioner accepted that disclosure of the disputed information would reveal information about the business, professional, commercial or financial affairs of a person. The Commissioner also considered that disclosure of the disputed information could reasonably be expected to have an adverse effect on those affairs, in particular in relation to the reputations of the builders.

In considering clause 4(7), the Commissioner considered that the objects of the FOI Act, as described at section 3(1), are to make the persons and bodies that are responsible for State and local government more accountable to the public. The Commissioner considered that the complainant's submissions were more about the accountability of the builders rather than the agency. The Commissioner recognised a public interest in the public having confidence that the building industry is being properly regulated. However, the Commissioner considered that the information to which the complainant had been given access satisfied this public interest and did not consider that disclosure of the names of the builders would further that public interest.

The complainant was invited to accept the Commissioner's preliminary view or to provide further submissions. The complainant did not accept the Commissioner's preliminary view, and made additional submissions. However, the complainant did not make any new submissions relevant to the issue for the Commissioner's determination. Having considered the complainant's additional submissions and reviewed all of the material before her, the Commissioner was not dissuaded from her preliminary view.

The Commissioner varied the agency's decision. The Commissioner found that the disputed information comprising individual names is exempt under clause 3(1) of Schedule 1 to the FOI Act, and that the disputed information comprising the names of building companies is exempt under clause 4(3) of Schedule 1 to the FOI Act.