

**OFFICE OF THE INFORMATION  
COMMISSIONER (W.A.)**

**File Refs: F2004082&F2004097  
Decision Ref: D0172006**

Participants:

**Joseph John Poprzeczny and  
Carolyn Dorothy Simmonds**  
Complainants

- and -

**Water Corporation**  
Respondent

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – documents relating to Infill Sewerage Program - clause 3(1) - personal information - clause 3(6) - whether disclosure on balance is in the public interest - [section 26](#) – whether reasonable grounds to believe that documents exist or should exist – sufficiency of searches.

*Freedom of Information Act 1992*: ss. 24, 102(3); Schedule 1, clauses 3(1), 3(3), 3(6); Glossary

*Freedom of Information Regulations 1993*: regulation 9(1)

*Water Agencies (Powers) Act 1984*

*Transfer of Land Act 1893*

*DPP v Smith* [1991] 1 VR 63

*McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142

*Re Oset and Ministry of the Premier and Cabinet* [1994] WAICmr 14

*Re Doohan and Police Force of Western Australia* [1994] WAICmr 13

*Re Uren and Minister for Planning* [1995] WAICmr 21)

*Re Williamson and Department of Health* [2004] WAICmr 21

*Police Force of Western Australia v Helen Louise Winterton* (1997) WASC 504

## DECISION

The decisions of the agency to refuse access on the following grounds are confirmed:

- the information deleted from Documents A-ZE, 5.1, 23 and 24 and claimed to be exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992* is exempt under clause 3(1);
- Document 5.2 is exempt under clause 3(1);
- the “objections” documents, as described in paragraphs 135 to 140 of my reasons for this decision, are outside the scope of the first application;
- the documents relating to the “event histories” of the vacant blocks, as described in the second dot point of paragraph 85 of my reasons for this decision, are also outside the scope of the first application;
- the documents relating to the York 1A, Busselton 2L and 8L and Boyanup 1A infill sewerage projects, as described in paragraph 77 to 79 of my reasons for this decision, are outside the scope of the second application; and
- all reasonable steps have been taken to find the requested documents and any further documents either do not exist or cannot be found.

D A WOOKEY  
A/INFORMATION COMMISSIONER

30 June 2006

## REASONS FOR DECISION

1. These two complaints arise from decisions made by the respondent agency, the Water Corporation ('the agency'), to refuse Mr Poprzeczny and Ms Simmonds ('the complainants') access to certain documents requested by them under the *Freedom of Information Act 1992* ('the FOI Act').

## BACKGROUND

2. In 1994 the Western Australian Government and the agency launched a program to eradicate the use of septic tanks in Western Australia. I understand that the program is known as the "Infill Sewerage Program". The program has, since its inception, extended to over 111,000 properties in metropolitan Perth and in country areas. In 1998, the agency contracted with a number of civil construction firms to carry out the design and installation of reticulated infill sewerage within the Perth metropolitan area. The firm Ove Arup and Partners, Consulting Engineers ('Ove Arup') was contracted by the agency to provide design and consultancy services in relation to the installation of reticulated infill sewerage in the areas of metropolitan Perth known as Morley 5B and Morley 26L. The construction firm Macmahon Contractors Pty Ltd ('the third party') was contracted by the agency to install reticulated infill sewerage in Morley 5B and Morley 26L. I understand that the third party commenced the sewerage installation work in late May 2000 and completed that work by mid-2001.
3. By letter dated 6 March 1998, the agency wrote to the owners of properties located in Morley 26L ('the owners'), advising them that it intended to investigate the provision of reticulated sewers to Morley 26L ('the Notice of Entry letter'). The agency attached an indicative plan of the area of Morley 26L to that letter and advised the owners that it might be necessary for employees of the agency and contractors working for the agency to visit their properties at various stages during the investigation and design period, which the agency expected would extend over a period of several months.
4. By letter dated 2 July 1999, the agency wrote to the owners, advising them that it proposed to construct and install reticulated infill sewerage in Morley 26L ('the Notice of Proposal letter'). The agency attached a plan of the proposed works to that letter and advised the owners of their right to lodge objections to the proposed works, in writing, with the agency on or before 30 July 1999. Following that, by letter dated 22 September 1999, the agency notified the owners that a firm had been commissioned to carry out testing of soil and rock conditions in Morley 26L. The agency asked for the owners' co-operation when access to their properties for the required testing work may have been necessary.
5. By letter dated 24 May 2000, the third party notified the owners that it had been appointed by the agency to carry out the installation of the reticulated infill sewerage in Morley 26L ('the Contractor's letter'). That letter advised the owners that construction work would commence in late May 2000 and continue for approximately nine months and it included some general information and advice about the sewerage installation process.

6. The complainants are the owners of a vacant block of land in Dianella ('the block'). The block is located in the sewerage infill area of Morley 26L. By letter dated 10 April 2001, the Regional Manager of the agency notified the complainants that it had completed the installation of sewer mains in Morley 26L, that a sewer connection for their property was then available and that it would start billing them for sewerage charges from 1 May 2001.
7. In late 2003, the complainants decided to sell the block. However, a potential buyer declined to pay the full asking price for the block because of the existence of a sewer line on the block. The complainants say the potential buyer was an employee of the agency and that at that time they were unaware of the existence of a sewer line on the block. The complainants made inquiries with the agency about the existence of the sewer line. As a result, they discovered that a sewer line had been installed down the full length of the block during the installation of reticulated infill sewerage in Morley 26L. The complainants say they did not receive the Notice of Proposal letter from the agency in July 1999 and, as a result, the agency failed to notify them, as the registered owners of the block, of the proposal to install a sewer connection point on the block and of the proposal to install a separate sewer line through their block, in order to service two properties located in a street in Dianella at the rear of the block.
8. On 4 November 2003, the complainants met with three officers of the agency, to seek further information as to the reasons why they did not receive the Notice of Proposal letter from the agency. They asked the officers in attendance at the meeting to provide them with further information and documents relating to the decision to install the sewer line on the block. They subsequently confirmed their understanding of the matters discussed at the meeting, by an email to the Principal Engineer, Civil and Standards, Infrastructure Design Branch ('the Principal Engineer') on 26 November 2003. The complainants did not receive a reply to that email.
9. On 1 December 2003, the Manager, Infrastructure Design Branch ('the Manager') wrote to the complainants in the following terms:

*"The unresolved issue at the above address...has recently been referred to me for resolution.*

*The facts as I understand them are that you were advised of the pending sewerage works by a notice of entry. However you did not receive a notice of proposal to construct in July 1999 and later you did receive a letter from the Contractor (MacMahons). As the same data was used on each occasion to prepare the mailing list, the Corporation is at a total loss to explain why you missed out on the notice of proposal to construct. The Corporation nevertheless apologies [sic] for this lapse which as far as we are aware only occurred once in this infill area.*

*Having examined your particular property and the fact that the sewer along your side boundary only serves two properties at the rear, I am prepared to waive the normal building over sewer conditions on this occasion. However if earthworks were to reduce the cover on the sewer from 1.30 metres currently to less than 0.75 metres special protection to the sewer may be required. In such a circumstance the Corporation would meet any reasonable additional cost of such protection work*

*provided the Corporation was notified of its extent before such work was undertaken.*

*I have checked the design that required the laying [sic] the sewer in your property and I am satisfied that the Consultant achieved a reasonable outcome. Had you been given the opportunity to object the best outcome you could have achieved is the same as the outcome I am now proposing, namely virtually an unrestricted building site.*

*I hope this proposal is acceptable to you. You will need to formally agree in writing to this proposal so that the Corporation records can be updated accordingly. This will then ensure that any future landowner will be afforded the same consideration as afforded to you in this letter.”*

### **The first application**

10. By letter dated 2 December 2003, the complainants lodged an access application with the agency (‘the first application’) seeking access to the following documents:

- “1. *All documents relating to the planning, decision making, consultation process and work undertaken resulting in a connection point provided on the block, to service it.*
2. *All documents relating to the planning, decision making, consultation process and work undertaken resulting in a sewer pipe laid on the block, to service two properties on [the rear street].*
3. *All documents relating to our telephone contacts in October and November, 2003, with Ms Vanessa Farrell, Mr Nick Sarapunas and Mr Ian Mitchell-Moore, our meeting on Tuesday, November 4, 2003, with Ms Farrell, Mr John Bond, and Mr Mitchell-Moore; and our emails to Mr Bond dated November 25 and November 27 2003.*
4. *Without limiting this application to the same, we request the following specific documents:*
  - *The internal policy or policies governing the provision of information to property owners affected by infill sewerage projects.*
  - *The internal policy or policies governing the handling of objections to infill sewerage proposals.*
  - *Design dated July 2, 1999, described by Mr John Bond, Principal Engineer, Infrastructure Development, at a meeting held at the Water Corporation on Tuesday, November 4, 2003, as “the original design”, and all iterations of this design.*
  - *Plan FF78-3-2 in File D36211, Project C-S00331, approved 24/01/2000, and all iterations of this Plan prior to it being approved.*
  - *The building rules and regulations, including the limitations, now applying to the block as a result of the works described above.*
5. *All documents relating to any and all objections made in relation to the original infill sewerage proposal for the relevant area, namely the area including the block, which we understand is Morley 26L.*

Please note the following:

- *Regarding 1, 2, 3, and 4 we are NOT asking at this stage for ALL paperwork and electronic transactions relating to the sewerage infill project in our area (which we understand is Morley 26L): we are asking ONLY for those relating to the block.*
  - *Regarding 4 and 5, we are happy, at this stage at least, for you to delete from the documents any “third party” information, such as names and addresses, which might be deemed to be exempt under the FOI Act.*
  - *For the purposes of this application “documents” means any and all documents of the Corporation and any contractor(s) carrying out the work described above, including reports, briefing papers, ministerials, engineering drawings, designs, proposals, files notes, correspondence, telephone messages, emails and all other electronic transactions, post-it notes, plans, diagrams, etc, relating to 1, 2, 3, 4 and 5, subject only to the limitations referred to above.”*
11. By letter dated 30 December 2003, the complainants wrote to the Manager in response to his letter of 1 December 2003. Among other things, they advised the Manager that his letter of 1 December 2003 contradicted information previously provided to them by telephone and by the officers of the agency who had attended the meeting on 4 November 2003. The complainants advised the Manager that they had previously been told by other officers of the agency that:
- *“...there were ‘others’ in the area who, like ourselves, did not receive the Notice of Proposal. Your letter says that “this lapse...only occurred once in this infill area”;*
  - *there were a number of other options for connecting the two properties in [the rear street] to the infill system other than by laying a sewer in our property. Your letter says the design “required” the laying of the sewer in our property; and*
  - *there have been occasions where, in response to objections, the Water Corporation has redesigned a system to remove a sewer. Your letter says that an unrestricted building site would have been “the best outcome” we could have achieved had we been given the opportunity to object at the relevant time.”*
12. The complainants advised the Manager that, with regard to his proposed resolution, they remained concerned about natural buyer resistance to purchasing a ‘tainted’ property and the impact the existence of the sewer had on the value of the block, because the potential purchaser, an employee of the agency who had alerted them to the existence of the sewer line, had argued for a significant reduction in the sale price because of the sewer. The complainants advised the Manager that they did not believe that they were then in a position to make an informed decision about what they could reasonably expect as a just and fair resolution of the matter as the agency had not then provided them with the information and documents they requested at the meeting of 4 November 2003.
13. At the conclusion of that letter, the complainants asked the Manager to provide them, at the earliest opportunity, with copies of the promised information and documents as well as copies of the agency’s policies and procedures which

empowered him to put forward the proposed resolution set out in his letter of 1 December 2003.

### **Initial decision on first application**

14. On 19 January 2004, the agency's FOI Coordinator made the initial decision on access in response to the first application. The agency identified forty nine (49) documents within the scope of the first application, which were listed and described in five schedules attached to the agency's notice of decision. The complainants were given full access to thirty four (34) documents, given edited copies of fourteen documents (14) and refused access to one document.
15. Four of the edited documents released to the complainants were copies of minutes of site meetings attended by officers of the agency and employees of the third party on 16 May 2000, 18 July 2000, 1 August 2000 and 15 August 2000 in relation to the Morley 26L infill sewerage programme. The agency claimed exemption for the information deleted from those four documents under clause 3(1) of Schedule 1 to the FOI Act or, in the alternative, that the information fell outside the ambit of the first application because it was information about the Morley 5B infill sewerage programme and not the Morley 26L infill sewerage programme.
16. Nine of the edited documents released to the complainants were copies of documents described in one of the agency's schedules as 'Query/Objection – Position of Sewerage line'. Each of those documents consists of a record of a response to the Notice of Proposal letter received by the agency from the owner of a property located in Morley 26L. The agency claimed exemption for the information deleted from those nine documents under clause 3(1).
17. The remaining edited document consisted of a copy of a single-page containing the complainants' names and address and some information relating to the block. That document was extracted from a document described in one of the agency's schedules as a 'Computer Listing - Infill letters – Morley 26L' and it was identified in the relevant schedule by the number 1. That document was further described in one of the agency's schedules as the listing showing the names and addresses of the residents/landowners for the letter dated 6 March 1998, the Notice of Entry letter. The agency claimed exemption for the information deleted from that document under clause 3(1).
18. The complainants were also refused access to another mailing list described in one of the agency's schedules as a 'Computer Listing - Infill letters – Morley 26L'. That document was identified in the same schedule by the number 3 and it was further described by the agency as the listing showing the names and addresses of the residents/landowners for the letter dated 2 July 1999, the Notice of Proposal letter. Access to that document was refused on the ground that it was exempt under clause 3(1). The agency advised the complainants that the list contained the names, addresses and details of residents/landowners in the Morley 26L area in July 1999 but that it did not contain any information about them.

19. By letter dated 22 January 2004, the Manager responded to the complainants' letter of 30 December 2003. The Manager noted that the agency was then dealing with the first application and, in response to their letter of 30 December 2003, he advised the complainants as follows:

*“As I stated in my earlier letter of 1 December 2003 I am primarily interested in resolving the issue satisfactorily from both parties [sic] perspective. I believe the Corporations [sic] proposed resolution as outlined in that correspondence (to waive the normal building over sewer conditions in this case) achieves that aim. The Corporation will thereby accept any risk in view of the Corporations [sic] failure to follow its normal preliminaries to work procedures and protocol in this case. This means that the lot owner can effectively ignore the existence of the sewer and build whatever the Local Government Department will allow without having to set aside any part of the lot for a septic system or indeed incur the expense of such a system. Furthermore if the sewer requires protection during the development (excavation) on the lot the Corporation will bear any reasonable cost to protect the sewer provided it is consulted beforehand.*

*As Manager Infrastructure Design Branch I am responsible for the engineering design aspects of the Corporations [sic] new assets including the development of engineering standards and policy. I have fulfilled that role with the Corporation to the complete satisfaction of several Managing Directors since 1987. Where special circumstances apply (such as [the block]) I am empowered on matters for which the Branch has responsibility and expertise to take reasonable alternative steps to resolve issues fairly by waiving normal Corporation policy if necessary. This is just one small aspect of the job I undertake as an empowered Manager of the Corporation.*

*With regard to the apparent contradictory information in my letter of 1 December 2003 and that you received earlier at a meeting on 4 November 2003.[sic] I can only confirm that at 1 December 2003 Mr John Bond advised that in this infill area only one lapse of this nature was confirmed during the investigation he conducted after your meeting of 4 November 2003. (For example several of the lots that allegedly missed notification were vested in the Shire who would not receive individual letters for each property. On other occasions multiple block owner [sic] were involved which only required one letter). The other statement I made that “I am satisfied the Consultant achieved a reasonable outcome” is correct. The design that resulted in the sewer being laid in your vacant property to serve two properties at the rear could not be criticized from the point of view of engineering design best practice. Certainly at an additional cost (\$30,000) deeper sewers could have been laid in nearby streets to avoid entering your property but such a design would have left one of your neighbors at the rear considerably disadvantaged with a deep sewer connection at the front of that developed property with all the existing plumbing falling naturally to the rear.*

*The Ministers [sic] instructions however are to sewer as many properties as possible with the limited allocation given the extent of the backlog programme statewide. Provided property owners are not seriously disadvantaged sewers on private property is considered a very reasonable practice. There are thousands of properties in the metropolitan area similar to yours but sewer location in streets is always the designers [sic] preferred outcome all things being equal. Based on practical experience of over thirty years in dealing with issues of this nature I know where sewers are located on vacant land to achieve the overall optimum design the land owners [sic] objection to the Minister is not considered sufficient grounds to change*



*the proposed sewer route. I do agree that you should have had the opportunity to put your point of view to the Minister which however you were denied and for this the Corporation has previously apologized.*

*Finally your concern about natural buyer resistance to purchasing a “tainted” property and impact on the value of the block. [sic] Can I respectfully point out that generally when suburbs are sewerred as part of the infill programme, property values have “soared” in many locations soon after. Developers and real estate merchants pester the Corporation constantly to find out what our “infill” programme is so they can purchase properties beforehand and take advantage of the inevitable rise in property values or redevelopment potential of living in a sewerred location. As the Corporation has waived its building over sewer condition in your case the block is hardly devalued overall. Your earlier potential buyer (Water Corporation employee) was not well informed and sounds to me like he wanted to gain an advantage in an “uncertain” situation. You did well to stand your ground and reject his offer.*

*When you are in a position to make an informed decision about what you believe is a just and fair resolution of this matter please communicate with me again. Meanwhile I will initiate the proposal I have outlined so that any building over sewer restriction on [the block] is removed forthwith.”*

20. On 25 January 2004, the complainants wrote to the Manager, asking him to provide them with copies of documents relating to various statements that he had made to them in his letter of 22 January 2004. The Manager did not reply.

#### **Application for internal review re first application**

21. By letter dated 11 February 2004, the complainants applied to the agency for internal review of the decision on access in respect of the first application. They attached a twelve-page schedule to their application for internal review, detailing various matters of concern to them about the agency’s initial decision, including concerns about the manner in which the agency had edited the documents released to them and the agency’s apparent failure to identify all of the requested documents described in the first application.
22. By letter dated 19 February 2004, the agency’s FOI Coordinator advised the complainants that she was making further inquiries into the issues raised in their application for internal review. The FOI Coordinator requested their consent for the agency to treat the application for internal review as a second part of the first application. By letter dated 22 February 2004, the complainants advised the FOI Coordinator that they did not agree to the agency’s request.
23. In the complainants’ view, any agreement to the agency’s request would have had the effect of further delaying the processing of the first application (which they noted had been lodged with the agency on 2 December 2003) and of also delaying their right of appeal to the Information Commissioner. The complainants further noted that there had already been significant delays by the agency in processing the first application. However, by way of compromise, they agreed to extend the time allowed to the agency to make the decision on internal review until 5 March 2004.

## The second application

24. On 4 March 2004, the complainants wrote to the agency's FOI Coordinator. That letter bears the heading "*Re: FOI Application No.2*". The complainants advised the FOI Coordinator that, as the Manager had not replied to their letter of 25 January 2004, they were then applying to the agency ('the second application') under the FOI Act for access to the following documents:

- "1. *All documents relating to the determination of the \$30,000 "additional cost" referred to in Mr Murphy's letter.*

*Mr Murphy's letter stated that "Certainly at an additional cost (\$30,000) deeper sewers could have been laid in nearby streets to avoid entering your property..."*

*Please note that, as in the request to Mr Murphy, this application includes a request for, but is not limited to, all documents showing when this determination was first made and how it was calculated including any underlying assumptions. We also request the name(s) of the person(s) who made the determination.*

2. *All documents relating to the cases known to Mr Murphy "...where sewers are located on vacant land to achieve the overall optimal design (and) the land owners' objection to the Minister is not considered sufficient grounds to change the proposed sewer route."*

*Please note that, as in the request to Mr Murphy, this application includes a request for, but is not limited to, all documents showing when and how the owners of the vacant blocks in question were informed about or became aware of the sewer lines on their blocks.*

3. *All documents relating to cases where sewers have been located on vacant land to achieve the overall optimal design and the land owners' objections to the Corporation and/or to the Minister have been successful.*

*Mr Murphy's letter also referred to three other matters that, to date, appear to have been overlooked by all parties in relation to disclosure of documents under our previous FOI application. Therefore, as part of this application, we now specifically request the following:*

4. *All documents relating to the investigation by Mr John Bond conducted after the meeting held at the Water Corporation on 4 November 2003, and attended by ourselves, Mr Bond, Mr Mitchell-Moore, and Ms Farrell.*

*The letter from Mr Murphy, stated "...at 1 December 2003, Mr John Bond advised that in this infill area only one lapse of this nature was confirmed during the investigation he conducted after your meeting on 4 November 2003 (emphasis added).*

*Please note, we pointed out in our reply to Mr Murphy that our first FOI application included a request for "All documents relating to...our meeting on Tuesday November 4 2003." We also pointed out to him that your initial reply*

*to that application had not referred to any investigation or to the results of the same or given any reasons for these omissions.*

5. *All documents relating to the planning, decision making, consultation process and work undertaken on all lots “that allegedly missed notification” (referred to below as “The Lots”).*

*Mr Murphy’s letter stated that “several of the lots that allegedly missed notification were vested in the Shire who would not receive individual letters for each property. On other occasions, multiple block owners were involved which only required one letter.” Without limiting this application to the same, we request the following specific documents relating to this matter:*

- *All computer mailing lists notifying/informing property owners and residents of The Lots during the various different stages of the process for reticulating Reticulation Area Morley 26L.*
  - *All internal policies practices and procedures setting out the general principles on which The Lots and/or any other lots in Reticulation Area Morley 26L or in any other reticulation area can or should be omitted from any and all mail outs of information or notices.*
  - *All documents relating to the decision making process that resulted in the failure to inform/notify the property owners and residents of The Lots.*
  - *All documents relating to any information or notifications received by the property owners and residents of The Lots from the commencement of the reticulation process to the current day, advising them and/or providing them with details of the reticulation works carried out on their lots.*
6. *All documents relating to the “considerable disadvantage” that Mr Murphy says would have been experienced by the neighbours at the rear of our block if the Water Corporation had connected them to infill sewerage via a deep sewer connection at the front of their properties.*

*Without limiting this application to the same, we request the following specific documents relating to this matter:*

- *All documents relating to when and how the Water Corporation, either directly or through its contractors and subcontractors including the designer ARUP, became aware of this matter.*
- *The name of the Water Corporation staff member or contractors/subcontractors and their staff members who first became aware of this matter.*
- *All documents relating to the actions/decisions taken by the Water Corporation, either directly or through its contractors and subcontractors including the designer ARUP, as a result of this awareness.*

*Please note the following:*

- *All documents requested in this application relate either directly or indirectly to the manner in which the Water Corporation, its employees or contractors and subcontractors, treated our block (specifically, or by virtue of its status as a vacant block) in the course of providing infill sewerage in Reticulation Area Morley 26L.*
- *Regarding 4 and 5, we are happy, at this stage at least, for you to delete from the documents “third party” information, limited however to names and addresses, which might be deemed to be exempt under the FOI Act.*
- *For the purposes of this application, “documents” means any and all documents of the Corporation and any contractor(s) carrying out the work described above, including reports, briefing papers, ministerials, engineering drawings, designs, proposals, files notes, correspondence, telephone messages, emails and all other electronic transactions, post-it notes, plans, diagrams, etc, subject only to the deletion of the names and addresses of third parties not related by employment or contract to the Water Corporation.”*

### **Decision on internal review re first application**

25. On 8 March 2004, the FOI Coordinator made the decision on internal review in respect of the first application. On internal review, the agency identified an additional forty five (45) documents as falling within the scope of the first application. The forty five documents so identified were listed and described in a twenty-page schedule attached to the agency’s notice of decision on internal review. However, six of the documents described in that schedule had previously been released to the complainants by the agency (two in full and four with editing) when it made the initial decision on access in respect of the first application. Those six documents were among the forty nine documents originally identified by the agency as the documents falling within the scope of the first application.
26. On internal review, the agency gave the complainants full access to twenty two (22) documents, including a full copy of the minutes of the site meeting held on 16 May 2000. That document had previously been released to the complainants by the agency, with editing, as part of the initial decision on access.
27. The agency also gave the complainants access to edited copies of twenty three (23) documents. Three of the documents released to the complainants were edited copies of the minutes of site meetings held on 18 July 2000, 1 August 2000 and 15 August 2000. On internal review, the amount of information the agency deleted from those three documents was less than that deleted by the agency when it made the initial decision on access. The agency claimed exemption for some of the information deleted from those three documents under clause 3(1).
28. Thirteen of the edited documents released to the complainants on internal review were copies of the minutes of site meetings held on 4 July 2000; 29 August 2000; 12 September 2000; 26 September 2000; 13 October 2000; 24

October 2000; 10 November 2000; 5 December 2000; 30 January 2001; 13 February 2001; 28 February 2001; 22 March 2001 and 10 April 2001. The agency claimed exemption for some of the information deleted from those thirteen documents under clause 3(1).

29. Prior to making its decision on internal review, the FOI Coordinator consulted with the third party, in accordance with the requirements of ss.32 and 33 of the FOI Act. By letter dated 4 March 2004, the third party claimed that certain information (which it identified to the agency) was exempt under clause 4 of Schedule 1 to the FOI Act. As a result, the agency claimed exemption under clause 4(3) of Schedule 1 to the FOI Act for certain information it deleted from the minutes of site meetings of 26 September 2000; 28 February 2001; 22 March 2001 and 10 April 2001 and all of the information recorded in a table entitled "*Morley 26L/5B - Schedule of Work*". A copy of that table was attached to the minutes of site meetings held on 4 July 2000; 1 August 2000; 15 August 2000; 29 August 2000; 26 September 2000; 13 October 2000; 24 October 2000; 10 November 2000; 5 December 2000; 30 January 2001 and 13 February 2001.
30. Four of the edited documents released to the complainants on internal review were documents of the kind described in paragraph 16 above, that is, records of responses received by the agency from the owners of properties located in Morley 26L in response to the Notice of Proposal letter. The agency claimed exemption for the information deleted from those four documents under clause 3(1) of Schedule 1 to the FOI Act.
31. One of the edited documents released to the complainants on internal review was a memorandum from an officer of the agency to the third party, dated 17 May 2000, under cover of which mailing lists for Morley 5B and Morley 26L had been sent to the third party. That memorandum was released to the complainants with minor editing. The agency claimed that the information deleted from that memorandum was exempt under clause 3(1).
32. The two remaining documents released to the complainants on internal review were edited copies of the two mailing lists described in paragraphs 17 and 18 above. Both of those documents were among the documents identified by the agency when it made the initial decision on access.
33. The first of those edited documents was the document described in paragraph 17 above. The agency advised the complainants that that mailing list had been attached to the memorandum referred to in paragraph 31 above. On internal review, the agency identified that document by the numbers 7 and 23 and it described the document in the schedule attached to the decision on internal review as a 'Computer Listing – Notice of Entry'. Notwithstanding the fact that the agency identified that mailing list by the number 1, when it made the initial decision on access and by the numbers 7 and 23 when it made the decision on internal review, it is the same document in each case. Accordingly, for the purposes of these reasons for decision, I have referred to that document as Document 23 only.

34. A single edited page from Document 23 was released to the complainants by the agency when it made the initial decision on access. That page contained the complainants' names and address and some information about the block. On internal review, the agency released to the complainants a copy of the whole of Document 23, with substantial editing. The agency deleted details of the account numbers, lot numbers, customers' names, house numbers, unit numbers and street addresses of people other than the complainants from Document 23 and claimed exemption for the deleted information under clause 3(1).
35. The second of the edited mailing lists released to the complainants on internal review was the mailing list described in paragraph 18 above. The agency initially refused the complainants access to that document and identified it by the number 3. On internal review, that same mailing list was identified by the agency in the schedule attached to the decision on internal review by the number 24. For the purposes of these reasons for decision, I have referred to that document as Document 24 only. It was also described in the agency's schedule as a 'Computer Listing – Notice of Proposal'. Prior to releasing an edited copy of Document 24 to the complainants on internal review, the agency deleted the details of the account numbers, lot numbers, customer's names, the house number and street addresses from that mailing list and claimed exemption for the deleted information under clause 3(1).
36. Finally, the agency advised the complainants that some of the documents described in their application for internal review, such as property re-instatement releases, records of on-site property visits made by employees of the third party and letters of complaint which the complainants said they sent to the third party in or about July 2000, in relation to the block, were not held by the agency. Accordingly, the agency refused them access to those kinds of documents in accordance with s.26 of the FOI Act.

### **Correspondence re scope of second application**

37. By letter dated 17 March 2004, the agency's FOI Coordinator wrote to the complainants, asking them to re-define the scope of the second and third paragraphs of the second application, as the work involved in dealing with that application appeared to be significant and would possibly divert significant resources away from the agency's other operations. By letter dated 21 March 2004, the complainants refused the agency's request to re-define the scope of the second application. They advised the FOI Coordinator that the second application was a request for access to documents supporting several statements made to them by the Manager in his letter dated 22 January 2004.
38. The complainants took the view that it was not unreasonable for them to seek access to documents of the kind described in the second and third paragraphs of the second application, as the Manager had made certain statements to them, purportedly based upon his thirty years of experience with the agency. In the view of the complainants, the Manager should have been in a position to provide the FOI Coordinator with sufficient information to locate the requested documents. The complainants also noted that the second and third paragraphs

of the second application were limited to a defined “*class of documents*” which, in their view, should have been readily identifiable by the agency.

### **Correspondence re additional documents relating to first application**

39. On 23 March 2004, the complainants sent an email to the FOI Coordinator, confirming their understanding of certain matters discussed between one of the complainants and the FOI Coordinator by telephone, on 19 March 2004. That email bears the heading “*Re 1. Our conversation on March 19, 2004. 2. Third FOI Application – event histories of other vacant blocks in Morley 26L*”.
40. In that email, the complainants asked the FOI Coordinator to provide them with access to additional documents relating to their internal review application in relation to the first application, including a request for a document that they described as the “event history” for the block. They also asked the FOI Coordinator to provide them with a copy of the agency’s Operating Licence and a complete printout of the undated computer mailing list for the Notice of Proposal letter, Document 24, in the schedule attached to the agency’s notice of decision on internal review of 8 March 2004.
41. The complainants advised the FOI Coordinator that, in their view, there were significant disparities between the edited copies of the two mailing lists, Documents 23 and 24, which had been released to them by the agency on internal review including, among other things, different row totals; different totals of non-Dianella post codes; no vacant blocks in the mailing list for the Notice of Proposal letter as compared with five in the mailing list for the Notice of Entry letter; and several post code inconsistencies on both mailing lists. The complainants asked the FOI Coordinator to provide them with further information, in order to make sense of the disparities they described, including “*...the list properties, criteria and/or formulas used to generate each mailing list and an explanation for each discrepancy, with particular reference to the treatment of each and every vacant block, including our own*”.
42. The final paragraph of the complainants’ email of 23 March 2004 dealt with a request one of the complainants made to the FOI Coordinator, during the telephone conversation on 19 March 2004, to be provided with the “event histories” of the other vacant blocks identified in Document 23. The final paragraph noted that the FOI Coordinator had advised the complainants that she would be unable to provide them with the “event history” documents of those other vacant blocks, with or without editing to protect the privacy of the owners of the other blocks, without the complainants making a further FOI request to the agency. The complainants advised the FOI Coordinator that they wished to consider that aspect of the matter further, as they did not see why those documents were not covered by their original request. They observed that, while not directly relating to the block, in their view, the additional “event histories” would relate to their situation indirectly because they would provide information about the treatment of vacant blocks.
43. On 19 April 2004, the FOI Coordinator responded to the complainants’ email of 23 March 2004, advising them that the agency had identified twenty two (22)

documents of the kind described in their email. Those twenty two documents were in addition to the documents that had been identified by the agency when it made the initial decision on access on 19 January 2004 and the decision on internal review on 8 March 2004.

44. The agency gave the complainants full access to twenty of those additional documents and access to edited copies of the two remaining documents. The first of the edited documents was a letter dated 9 July 1998 from the agency to Ove Arup. The agency claimed the information deleted from that letter was exempt under clause 4(3) of Schedule 1 to the FOI Act. The second of the edited documents was a section copied from the agency's Work Instructions relating to the creation of Notice of Entry letters and Notice of Proposal letters. That document contains certain information about agency customers, including their house and lot numbers and street addresses, from an infill sewerage area other than Morley 26L. The agency claimed that the information deleted from that document was exempt under clause 3(1) of Schedule 1 to the FOI Act.
45. The FOI Coordinator also advised the complainants that the agency did not hold any documents of the kind described in their email of 23 March 2004 as "*route walking plans*" because those plans were destroyed approximately 12 months after the project was completed and that the agency did not hold any documents of the kind that the complainants had described as "[e]ach stage of the design [drawings] and accompanying letter signed by the Design Engineer" because there were no interim plans required. The FOI Coordinator advised the complainants that the only documents of that kind were among the twenty documents then released to the complainants by the agency. Accordingly, they were refused access to the route walking plans and the design drawings in accordance with s.26 of the FOI Act. Finally, the FOI Coordinator also advised the complainants that, in her view, the "event histories" of the other vacant blocks located in Morley 26L were outside the scope of the first application and refused them access to those "event history" documents on that basis.

#### **Initial decision re second application**

46. On the same date, 19 April 2004, the FOI Coordinator made the initial decision on access in respect of the second application. The agency:
  - granted the complainants full access to the documents described in the first paragraph of the second application;
  - advised the complainants that no specific cases of the kind described in the second and third paragraphs of the second application were known to the Manager and deferred giving them access to those kinds of documents whilst the FOI Coordinator continued to search 55 files, which were the files most likely to contain the documents of the kind described in the second and third paragraphs of the second application;
  - refused the complainants access to the documents described in the fourth paragraph of the second application, under s.26 of the FOI



Act, on the ground that the agency did not hold any documents of that kind;

- gave the complainants access to an edited copy of a mailing list, which was referred to in the schedule attached to the agency's notice of decision in respect of the second application by the number 5.1 (and which, for the purposes of these reasons for decision, I have also referred to as Document 5.1);
- refused the complainants access to any other computer listings of the kind described in the fifth paragraph of the second application, under s.26 of the FOI Act, on the ground that the agency did not hold any other computer listings of the kind requested; and
- refused the complainants access to the documents described in the sixth paragraph of the second application, under s.26 of the FOI Act, on the ground that the agency did not hold any documents of that kind.

47. The agency deleted the details of the names, addresses and account numbers of a substantial number of individuals other than the complainants from Document 5.1. The agency claimed that the deleted information was exempt under clause 3(1). The agency identified that document as the mailing list for the Notice of Entry Letter. The agency explained that there had been some confusion and that the document identified in the decision in respect of the first application as the mailing list for the Notice of Entry Letter (Document 23) was, rather, the mailing list given to the third party under cover of the memorandum dated 17 May 2000 referred to in paragraph 31 above, to enable it to send the Contractor's letter.
48. The FOI Coordinator also advised the complainants that she was then undertaking a detailed search of approximately 55 files that had been identified by the agency as the files most likely to contain the documents of the kind described in the second and third paragraphs of the second application and that they would receive further advice from the agency about the outcome of those searches, by no later than 30 April 2004. In the event, the complainants did not receive that further advice from the agency by that date.

### **Complaints to Information Commissioner**

49. On 3 May 2004, the complainants applied to the Information Commissioner for external review of the agency's decision on access in respect of the first application ('the first complaint'). In that application, which they described as their "appeal document", the complainants stated that their appeal to the Information Commissioner related to the first application, which had been the subject of internal review by the agency, and that it also related to the second application which had not been subject to internal review by the agency ('the second complaint').

50. On 7 May 2004, my office advised the complainants that, as they had not then applied to the agency for internal review of the agency's decision on access in respect of their second application, their application for external review of the initial decision on access was, in effect, an application under s.66(6) of the FOI Act, seeking approval to lodge a complaint with the Information Commissioner without first having applied to the agency for internal review. They were invited to make written submissions to me in support of that s.66(6) application and their submissions were received at my office on 12 May 2004.
51. On 19 May 2004, my Senior Legal Officer met with the complainants, in order to discuss both applications with them. Following that meeting and, after consulting with the agency and considering the complainants' submissions in support of their s.66(6) application, my Senior Legal Officer exercised his delegated authority and allowed the second complaint to be lodged.

### **PRELIMINARY ISSUE**

52. On 21 May 2004, the complainants wrote to my Senior Legal Officer, in response to the matters discussed at the meeting on 19 May 2004. In that letter, the complainants claimed that they had made only one access application to the agency, not two. They further claimed that their letter of 4 March 2004 to the agency was not a second access application but, rather, that it was an extension of the first application that they had made to the agency on 2 December 2003. They claimed that their letter of 4 March 2004 merely identified specific matters covered by the more generally described matters referred to in the first application.
53. In my letter to the complainants, informing them of my preliminary view of the first and second complaints, I advised them that I did not accept their claim that they had made only one access application to the agency, and I gave my reasons for that view. The complainants have not withdrawn their claim on this issue. However, they made no further submissions to me in support of their claim. Accordingly, as the issue remains unresolved, I propose deal to with it first, before considering the two complaints against the decisions of the agency.

### **Consideration**

54. I do not accept the complainants' claim that they made only one access application to the agency.
55. I have examined their letters of 2 December 2003 and 4 March 2004 to the agency. The letter of 4 March 2004 is entitled "*Re: FOI Application No.2*" and it is, on its face, a request for access to documents supporting various statements made to the complainants by the Manager, in his letter of 22 January 2004. On both occasions, the complainants paid the prescribed \$30.00 application fee to the agency. I note also that the fourth paragraph of the first page of their "appeal document" clearly states that the appeal to the Information Commissioner related primarily to their first FOI application, which had been subject to internal review by the agency but that their appeal to the Information Commissioner also related to their second FOI application, which had not.

56. In my view, the complainants' letter of 4 March 2004 was, clearly, a second access application to the agency. They expressed it to be so and the agency reasonably, in my view, understood it to be so. The complainants specified, in the first application, that they sought access only to the kinds of documents described in points 1- 4 of the first application which relate to the block and that they also sought access only to documents of the kind described in point 5 of the first application which related to the Morley 26L infill sewerage program. The letter of 4 March 2004 also referred to the complainants' previous application to the agency.
57. In their second application, the complainants requested access to documents which, although they may arguably be of a kind described in points 1-3 of the first application, relate to properties other than the block, as well as documents relating to all cases where a sewer has been located on vacant land and the landowner has objected to the agency and/or the Minister, not just those located within Morley 26L. In my view, therefore, at least some of the documents requested in the second application would fall outside the scope of the first application, as the second application was not geographically limited in the manner of the first application. Further, I do not accept that an access application dated 2 December 2003 could reasonably be interpreted as being a request for access to supporting statements made in a letter dated 22 January 2004, that is, documents supporting statements that had not yet been made when the access application was lodged.
58. Although I am satisfied that the complainants made two separate access applications to the agency, resulting in two separate complaints to the Information Commissioner, as the complainants and the agency are the only parties to both complaints and as both complaints closely relate to each other, I have decided to deal with the two complaints in the one decision.

## **REVIEW BY THE A/INFORMATION COMMISSIONER**

### **Review of the first complaint**

59. The first complaint arises from the decisions made by the agency in respect of the first application on 19 January, 8 March and 19 April 2004 to give the complainants access to edited copies of documents and to refuse them access to other documents under s.26 of the FOI Act. When the first complaint was made to me on 3 May 2004, the agency had already given the complainants access to complete copies of seventy six documents, as well as access to edited copies of thirty nine documents. However, the agency had refused them access to some of the requested documents described in the first application, in their application for internal review dated 11 February 2004 and their email to the FOI Coordinator, dated 23 March 2004, in accordance with s.26 of the FOI Act, on the ground that the agency did not hold some of the documents described in that correspondence. The agency also refused access to some documents requested in the email of 23 March 2004 on the basis that they were outside the scope of the first application.

60. After receiving the first complaint, I required the agency to produce to me, for my examination, the FOI file relating to the first application together with the unedited originals of all of the documents that had previously been released to the complainants in edited form by the agency, in response to the first application. After examining that material, my Senior Legal Officer met with officers of the agency to make further inquiries into the first complaint, in an effort to resolve it by conciliation between the parties. He also attended at the offices of the agency for the purpose of inspecting the originals of the files held by the agency relating to the Morley 26L infill sewerage program.
61. The agency was directed to undertake further searches for documents of the kind described in the first application and to provide me with detailed information about the initial searches conducted by the agency to locate and identify the documents the subject of the first application. As a result of those further searches, the agency located several additional documents and released copies of those documents to the complainants in full or with minor editing.
62. Three additional documents were released to the complainants with editing. The first of those was a letter dated 16 March 1998 from Ove Arup to the agency and the second was a letter dated 18 March 1998 from the agency to Ove Arup. The agency claimed exemption under clause 4(3) for the information deleted from those two letters. The third document was a file index copied from an agency file entitled "*Preliminaries to Works. General Works – Infill Sewerage*" ('the Preliminaries to Works file'). The agency released an edited copy of the file index to the complainants, after deleting the names, street numbers, lot numbers and contact telephone numbers of a number of residents/landowners who had contacted the agency in response to the Notice of Proposal letter dated 2 July 1999. The agency claimed exemption under clause 3(1) for the information deleted from the file index.
63. In late July 2004, my Senior Legal Officer provided the complainants with full written details of the searches conducted by the agency in order to identify the documents the subject of the first application. He advised them that, at that stage of proceedings, he did not propose to direct the agency to undertake further broad searches of its records for additional documents. However, he also advised them that, in the event they were able to provide him with further information which indicated that the agency should hold more documents of the kind requested in the first application, then he would require the agency to make further searches for any such documents.
64. On 9 August 2004, my Senior Legal Officer advised the agency and the third party that there was insufficient information in the notices of decision given to the complainants by the agency to discharge the agency's onus, under s.102(1) of the FOI Act, of establishing that its claim for exemption under clause 4(3) was justified. The agency and the third party were invited to reconsider their respective positions in relation to the agency's claim for exemption under clause 4(3). The agency was also asked to consult with Ove Arup in order to seek its views as to whether the three letters dated 16 March 1998, 18 March 1998 and 9 July 1998 could be released to the complainants by the agency without editing.

65. After receiving further advice from Ove Arup, the agency withdrew its claim for exemption under clause 4(3) for the three letters referred to in paragraph 62 and gave the complainants full access to them. The agency also withdrew its claim for exemption under clause 4(3) for the information relating to the business, professional, commercial or financial affairs of the third party which the agency had previously deleted from the documents described in paragraph 29 above.
66. On 23 August 2004, the third party's legal adviser informed me that the third party maintained its objections to the disclosure of the table entitled "*Morley 26L/5B - Schedule of Work*" attached to the minutes of the site meetings held on 4 July 2000, 1 August 2000, 15 August 2000, 29 August 2000, 26 September 2000, 13 October 2000, 24 October 2000, 10 November 2000, 5 December 2000, 30 January 2001 and 13 February 2001. He also confirmed that the third party claimed exemption for some information that the agency had deleted from the minutes of site meetings held on 26 September 2000, 28 February 2001, 22 March 2001 and 10 April 2001 under clause 4 of Schedule 1 to the FOI Act. Finally, the legal adviser informed me that the third party did not wish to make any further submissions to me in support of its claim for exemption and that it relied on the submissions made to the agency on 4 March 2004.
67. In its letter of 4 March 2004 to the agency, the third party did not identify whether it claimed exemption under clause 4(1), clause 4(2) or clause 4(3) of Schedule 1 to the FOI Act. However, it appeared to me from my examination of the information set out in that letter, that the third party claimed exemption for the table entitled "*Morley 26L/5B - Schedule of Work*" and for the information deleted from the minutes of the site meetings referred to in paragraph 66 above on the ground that it was exempt under clause 4(3) of Schedule 1 to the FOI Act. The third party's legal adviser subsequently confirmed that to be the case. Although notified of its rights under s.69(2) of the FOI Act, the third party did not seek to be joined as a party to this complaint.
68. During the external review process, the complainants raised some further queries with my office about the adequacy of the agency's searches to locate all of the requested documents described in the first application and they provided further information to my office in support of those queries. On each such occasion, my Senior Legal Officer made further inquiries with the agency. As a result, some additional documents relevant to the first application were identified by the agency and released to the complainants. In addition, arrangements were made with the former Managing Director of the firm AAM Surveys so that the complainants could attend at the offices of AAM Surveys for the purpose of inspecting survey documents held by AAM Surveys relating to Morley 26L. The complainants have inspected those documents.

### **Review of the second complaint**

69. After accepting the second complaint against the agency's decision on access in respect of the second application, I also required the agency to produce to me, for my examination, the FOI file relating to the second access application,

together with copies of other documents relevant to the second complaint, including the original of Document 5.1, as described in the schedule attached to the agency's notice of decision in respect of the second application, an edited copy of which had been released to the complainants with substantial editing.

70. After examining that material, my Senior Legal Officer also made further inquiries with the agency in relation to the issues of concern to the complainants in respect of the second complaint. Among other things, he required the FOI Coordinator to complete the file review process described in paragraph 48 above, whereby the FOI Coordinator had been undertaking searches of more than fifty of the agency's files in an endeavour to identify the requested documents described in the second application.
71. Subsequently, my Senior Legal Officer advised the complainants, in detail, of the outcome of his inquiries into that aspect of the second complaint and of the results of the further searches carried out by the FOI Coordinator in order to locate any additional documents held by the agency that fell within the scope of paragraphs two and three of the second application.
72. The FOI Coordinator advised me that she had personally examined fifty eight files in order to locate any documents potentially within the scope of the complainants' second application. She has also advised me that she was unable to identify any documents (other than those previously released to the complainants in response to the second application) of the kind described in the second application. The FOI Coordinator advised me that it took her approximately 5 days to examine those files and that she had also conducted a search of the agency's electronic file system, using the key search words "infill", "vacant" and "Minister". As a result of that search of the agency's electronic file system, the FOI Coordinator identified several files that might possibly have contained documents of the kind described in the second access application. However, following physical searches of those files, no further documents of the kind requested by the complainants in the second application were identified.
73. My Senior Legal Officer also required the Manager and the Principal Engineer to provide me with further information and documents relevant to the complainants' second application. The Manager was required to provide me with information about successful and unsuccessful objections to the Minister, of the kind described in his letter to the complainants dated 22 January 2004. The Manager was also required to provide me with information and documents about cases where he knew that sewers have been installed on vacant land, to achieve an overall optimum system design, in circumstances where the landowners had lodged an unsuccessful objection with the Minister, and also where the landowners had lodged successful objections with the Minister. The Manager was also required to provide me copies of any documents held by the agency relating to such cases.
74. In response to that requirement to give information and produce documents, the Manager advised me that, despite extensive searches of the agency's electronic and paper records dating back to 1994, he was unable to produce to me any

documents of the kind described in paragraphs 2 and 3 of the second application. The Manager also advised that he could not recall an occasion on which the Minister has directed the agency to construct a more expensive sewer on a developed lot, when a less expensive sewer on an adjacent vacant lot could adequately satisfy the design requirements.

75. My Senior Legal Officer also required the Principal Engineer to provide me with information and documents about the investigation he carried out in November 2003, as referred to in the Manager's letter of 22 January 2004. The Principal Engineer subsequently advised me, in writing, that he did not create any documents as a result of that investigation, because the investigation consisted of nothing more than his examining the mailing lists for the Notice of Entry and the Notice of Proposal letters, together with the plans for the Notice of Entry and the Notice of Proposal, in order to determine the extent of the problem identified by the complainants in relation to the agency's failure to send them the Notice of Proposal letter. The Principal Engineer advised me that those documents were the only documents he examined during his investigation.
76. The complainants were also advised, in writing, about the additional information provided to me by the Manager and the Principal Engineer.
77. On 11 September 2004, the complainants drew to my Senior Legal Officer's attention an answer that the then Minister for Government Enterprises ('the Minister') had given to Hon. G Cash, MLC, in response to a question raised in a Legislative Council Estimates Committee hearing in relation to the Infill Sewerage Program. The complainants noted that the Minister had advised Mr Cash that there were three occasions when the Minister of the day had been requested, under s.95(2) of the *Water Agencies (Powers) Act 1984*, to overrule objections to infill sewerage programs and authorise the necessary works. The three infill sewerage projects which were submitted to the Minister for authorisation related to infill sewerage projects known York 1A; Busselton 2L and 8L; and Boyanup 1A.
78. The complainants asserted that they were entitled to be given access to all of the documents relating to the objections described in paragraph 77 above, particularly if they related to vacant land and, further, because the Infill Sewerage Branch of the agency was the apparent source of the information that the Minister provided to Parliament about the objections, that they were also entitled to any works authorization data held by the Infill Sewerage Branch as it relates to the infill sewerage program for Morley 26L.
79. By letter dated 14 October 2004, my Senior Legal Officer informed the complainants that he had considered their claim but that, in his view, any documents about the objections relating to the York 1A, Busselton 2L and 8L and Boyanup 1A infill sewerage projects were documents that fell outside the scope of their access application. However, the complainants did not accept his advice in relation to that aspect of the second complaint.

### **My preliminary view of the complaints**

80. On 28 February 2005, after considering all of the information and evidence then before me, I informed the agency, the third party and the complainants of my preliminary view of the first complaint and the second complaint, including my reasons for those views.
81. As regards the first complaint, it was my preliminary view that:
- (a) the information that the agency had deleted from the edited documents that had been released to the complainants, on the ground that it was exempt under clause 3(1), was exempt as claimed;
  - (b) the information that the third party claimed was exempt under clause 4(3), was not exempt as claimed;
  - (c) the agency's decision to refuse the complainants access to some of the documents described in the first application, in accordance with s.26 of the FOI Act, on the ground that all reasonable steps have been taken to locate them but those documents either do not exist or cannot be found, was justified; and
  - (d) the "event history" documents for the other vacant blocks located in Morley 26L, as described points 22-24 in the complainants' appeal document, fell outside the scope of the first application.
82. As regards the second complaint, it was my preliminary view that:
- the information that the agency had deleted from Document 5.1, on the ground that it was exempt under clause 3(1), was exempt as claimed;
  - the agency's decision to refuse the complainants access to some of the requested documents described in the second application, in accordance with s.26 of the FOI Act, on the ground that all reasonable steps have been taken to locate them but those documents either do not exist or cannot be found, was justified; and
  - the documents relating to the infill sewerage projects known as York 1A; Busselton 2L and 8L; and Boyanup 1A, were outside the scope of the second application.
83. I invited the complainants, the agency and the third party to reconsider their respective positions in relation to the first and second complaints. I invited the third party to provide me with written submissions in support of its claim for exemption under clause 4(3) and I invited the complainants to provide me with further information and submissions in support of their request for access to the information which, in my preliminary view, was exempt under clause 3(1) and I also asked them to identify to me the reasons why they claimed that it would, on balance, be in the public interest to disclose personal information about other people to them. I also invited the complainants to provide me with written



submissions as to the reasons why they considered that the agency had not then taken all reasonable steps to locate the documents described in the first and second applications, in accordance with its obligations under s.26 of the FOI Act.

84. The third party did not reply to my preliminary view. The agency advised me that it did not wish to make any further submissions to me. The agency had previously withdrawn its claim for exemption under clause 4(3) for the information deleted from the minutes of site meetings held on 26 September 2000, 28 February 2001, 22 March 2001 and 10 April 2001, and for the table entitled "*Morley 26L/5B - Schedule of Work*" attached to the minutes of site meetings referred to in paragraph 66 above and the third party has not sought to be joined as a party to this complaint. Therefore, the relevant information and the table is no longer in dispute between the parties and was then able to be released to the complainants.
85. The complainants did not accept my preliminary view and declined to withdraw either complaint. They made a twelve-page written submission to me, in response to my preliminary view, in support of the first and second complaints. In relation to the first complaint, the complainants submitted that:
- a number of additional documents which were not described in my preliminary view remained in dispute between the parties, including the minutes of the site meeting of 16 May 2000, the "event history" documents relating to the block and some other documents, which they described as the other "objections" described in the agency's document schedule dated 12 July 2004, in relation to the file index described in paragraph 62 above;
  - the scope of the first application was "broader" than the manner in which I had interpreted it in my preliminary view, particularly as it related to:
    - (i) the "event history" documents for the two properties adjacent to the rear of the block;
    - (ii) the "event history" documents for the other vacant blocks in Morley 26L; and
    - (iii) the "event history" documents for any other blocks in Morley 26L which had been deleted from the agency's mailing lists so only one letter was sent to a property or to an owner;
  - the agency's decision to refuse them access to some of the documents described in the first application, under s.26 of the FOI Act, on the ground that the agency does not hold any documents of the kind requested was not justified; and
  - they are entitled to be given access to all of the information deleted from the documents released to them by the agency which, in my

preliminary view, was exempt under clause 3(1), because: the objects of the FOI Act are intended to enable the public to participate more effectively in governing the State and to make persons and bodies that are responsible for State and local government more accountable; the documents previously released to them by the agency strongly suggested, in the complainants' view, systematic as well as individual failures on the part of the agency to comply with its own policies, practices and legal standards; and, further, in the complainants' view, there is an obvious public interest in the public knowing whether the agency had complied with its processes and legislated standards in relation to the infill sewerage program.

86. In relation to the second complaint, the complainants submitted that:
- they are entitled to be given access to all of the information deleted from Document 5.1 which, in my preliminary view, was exempt under clause 3(1), for the same reasons as those set out in the last dot point of paragraph 85 above;
  - the documents relating to the infill sewerage projects known as York 1A, Busselton 2L and 8L and Boyanup 1A fell within the scope of the second application; and
  - the agency's decision to refuse them access to some of the documents described in the second application, under s.26 of the FOI Act, on the ground that the agency does not hold any documents of the kind described, was also not justified.
87. The complainants also submitted that there was an unresolved issue relating to the mailing list that the agency had identified as the mailing list for the Notice of Entry letter, because of conflicting advice that had been given to them by the agency about that document. The complainants said that, in January 2004, the agency gave them access to an edited document which it claimed to be the mailing list for the Notice of Entry letter but that, in April 2004, when the agency made the decision on access in respect of the second application, it then gave them access to an edited copy of an entirely different document which the agency then claimed to be the mailing list for the Notice of Entry letter.
88. In light of the conflicting advice given to them by the agency and the clear differences between the two mailing lists, the complainants expressed concern about the reliability and accuracy of all of the mailing lists identified by the agency as the mailing lists for the Notice of Entry letter, the Notice of Proposal letter and the Contractor's letter in relation to the first and second applications. Their concerns in that regard raised as an FOI issue the question of whether the agency had identified and given them access to edited copies of the correct mailing lists for the three letters.

## **Further inquiries by my office**

### ***The event history for the block and the meeting minutes***

89. In light of the complainants' claim that they had not been given access to the "event history" documents for the block and the minutes of the site meeting of 16 May 2000, I directed that further inquiries be made into those claims. As a result, arrangements were made with the agency for the complainants to attend at the agency's Balcatta offices, where they inspected the "event history" documents for the block, and another copy of the minutes of the site meeting of 16 May 2000 was released to the complainants by the agency. By letter dated 12 September 2005, the complainants advised me that they were then satisfied they had been given access to the "event history" documents for the block and to the minutes of the site meeting of 16 May 2000. Accordingly, those documents are no longer in dispute between the parties.

### ***The mailing lists – issue and inquiries***

90. In light of the complainants' concerns about the mailing lists identified by the agency (see paragraphs 41, 87 and 88 above), I also directed that further inquiries be made into that aspect of both complaints.
91. The complainants said that the agency's editing of Documents 23, 24 and 5.1 had resulted in significant inconsistencies from one mailing list to the next and that there were inconsistencies in relation to the common elements in those documents. For example, certain columns that appeared in Document 23 did not appear in Documents 24 and 5.1. The complainants submitted that Documents 24 and 5.1 bore little or no resemblance to the agency's template for mailing lists (a copy of which had been released to them by the agency) and that the explanations given to them by the agency about the inconsistencies and differences between Documents 23, 24 and 5.1 were not consistent with the agency's template and with the use of a single administrative method for creating such mailing lists.
92. The complainants claimed that the mailing list identified by the agency on 19 April 2004 as the mailing list for the Notice of Entry letter, Document 5.1, could not be the mailing list for that letter because, when they first asked for a copy of that mailing list, the agency gave them access to an edited copy of a very differently formatted, single page document on 19 January 2004. The complainants said that when they requested a complete copy of that single page document, as part of their application for internal review on 11 February 2004, the agency effectively confirmed that Document 23 was the correct mailing list for the Notice of Entry letter because it then gave them access to a fuller edited copy of Document 23 (10 pages) on 8 March 2004.
93. The complainants say that, on 19 April 2004, three months after the agency gave them access to the single page document described in paragraph 17 above and a month after it released a fuller copy of the same document to them (Document 23) the agency responded to the second application by giving them

access to an edited copy of a different document, Document 5.1, which the agency then claimed was the mailing list for the Notice of Entry letter.

94. The complainants said that, in giving them that advice on 19 April 2004, the agency had effectively resiled from its original advice about Document 23 by then claiming that Document 23 was, in fact, the mailing list provided to the third party on 17 May 2000 (the Contractor's list) and by claiming that a mistake had been made by the agency in identifying which mailing list was the correct mailing list for the Notice of Entry letter and the Contractor's letter, due to some confusion in the processing of the first application.
95. The complainants submitted that, because the agency had previously advised them that it did not hold an electronic copy of the mailing list for the Notice of Entry letter, it had to mean that the only copy of that mailing list that was available to the agency when the first application was lodged by the complainants would have been a paper document. The complainants submitted that the paper copy of the Notice of Entry letter mailing list would have been placed on the agency's file on or about March 1998, whereas the Contractor's list (with which the mailing list for the Notice of Entry letter was apparently confused by the agency) would have been created and placed on the agency's file almost two years later.
96. The complainants said that they believed that the Contractor's list would probably not have been placed on the same file as the mailing list for the Notice of Entry letter, because the latter was a step taken as part of the very formal Preliminary to Works process, for which the agency appeared to have had a separate file, whereas the Contractor's list would have related to the construction of gravity sewers for the reticulation areas Morley 5B and 26L, for which the agency appeared to have a different file.
97. The complainants submitted that the alleged confusion referred to in paragraph 94 above did not come to light when the Principal Engineer conducted an investigation in response to their first face-to-face meeting with officers of the agency on 4 November 2003, which meeting they claim focused on the contents of the mailing lists, including the mailing list relating to the Notice of Entry letter. The complainants say that they were told by the Principal Engineer, and by other senior officers of the agency, that the agency had very formal processes and procedures for keeping property owners informed of infill sewerage programs in their areas and that the alleged confusion over the mailing lists also did not come to light when the agency went to some trouble to locate and identify the mailing lists for FOI purposes.
98. The complainants noted that Document 5.1 was the only mailing list to contain a mixture of handwriting (for some of the generic column headings) and typed information, but that it did not contain any of the columns that the agency's Work Instruction Manual said that it should. They also noted that the Manager had informed them, in his letter dated 1 December 2003 that "...the same data was used on each occasion to prepare the mailing lists." However, the complainants submit that Document 5.1 does not contain the same data as the

two other mailing lists identified by the agency as the mailing lists for the Notice of Proposal letter and for the Contractor's letter.

***The mailing lists - consideration***

99. My Senior Legal Officer made further inquiries into the complainants' concerns about the mailing lists. He required the agency to produce to him, for his examination, the agency's "House file" on which the Notice of Entry letter and the mailing list relating to that letter are retained. He also re-examined the Preliminaries to Works file, which contains the Notice of Proposal letter and the mailing list relating to that letter.
100. When he examined the "House File", my Senior Legal Officer observed that two white A4 size envelopes were stapled to the inside back cover of that file. The first of those envelopes contains what appears to be the "merge letter" for the Notice of Entry letter and a copy of the mailing list for that letter. That mailing list is Document 5.1 and not the document originally identified by the agency as the mailing list for the Notice of Entry letter, Document 23. The second envelope contains what appears to be the "merge letter" for the Notice of Proposal letter as well as a copy of Document 24. My Senior Legal Officer also required the agency to provide him with copies of the Notice of Entry and the Notice of Proposal letters which the agency sent to the residents in the Morley 5B, Morley 2A, Morley 3A and Morley 26A infill sewerage areas in 1996, 1997 and 1998, together with the relevant mailing lists for each of those letters, for the purpose of comparing those documents with the disputed mailing lists.
101. Inquiries were also made with the Infrastructure Design Branch of the agency, in an endeavour to identify the exact date on which Document 23 was created by the agency. The agency subsequently advised my office that Document 23 was created on 23 May 2000. As the agency had previously produced an electronic copy of Document 23 to me, my Senior Legal Officer examined the electronic 'properties' log of the electronic version of Document 23. That examination of the electronic properties log confirmed the agency's advice that Document 23 was created by the agency on 23 May 2000.
102. My Senior Legal Officer also contacted the third party's legal adviser and asked the third party to undertake a thorough search of its records, in an endeavour to locate the mailing lists with the names and addresses for residents in the Morley 5B and 26L Infill Sewerage Areas which were sent to the third party's Project Manager by an officer of the agency under cover of the memorandum dated 17 May 2000, as described in paragraph 31 above. My office took that step because the agency had not retained, on file, a copy of either of the mailing lists that were attached to the memorandum sent to the third party's Project Manager.
103. The third party located the memorandum and the attached mailing lists in its archived records and produced those documents to me. It was apparent from an examination of those documents that the mailing list of the names and addresses of the owners of properties in Morley 26L which was sent to the third party on 17 May 2000 was identical to Document 24. As the agency had also produced an electronic copy of Document 24 to me, my Senior Legal Officer examined

the electronic 'properties' log of the electronic version of Document 24. That examination established that Document 24 was created by the Infrastructure Design Branch on 30 June 1999 and printed on 2 July 1999, the date on which the Notice of Proposal letter in relation to Morley 26L was sent out by the agency.

104. By letters dated 28 October 2005 and 8 November 2005, my Senior Legal Officer advised the complainants of the outcome of his further inquiries into this issue. He advised them that, on the basis of his inquiries, he was satisfied that Document 5.1 was the correct mailing list for the Notice of Entry letter and that Document 24 was the correct mailing list for the Notice of Proposal letter. He also advised the complainants that, in light of the advice and documents received from the third party's legal adviser, he was satisfied that Document 24 was also the Morley 26L mailing list that had been sent to the third party by the agency on 17 May 2000. Finally, he also advised the complainants that, in his view, it was not possible for the agency to have sent a copy of Document 23 to the third party with the memorandum of 17 May 2000 as Document 23 was not created by the Infrastructure Design Branch until 23 May 2000, a week after Document 24 was sent to the third party by the agency.
105. By letter dated 14 November 2005, the complainants advised me that, as a result of those further inquiries, they are reasonably confident that Document 5.1 is the mailing list for the Notice of Entry letter and that Document 24 is the mailing list for the Notice of Proposal letter. However, they advised me that they still had doubts that Document 24 was one of the two mailing lists sent to the third party by the agency on 17 May 2000. The complainants held those doubts because of the agency's statement that it is its usual practice to generate mailing lists using data that represents the latest available information, because in their view, it was very unlikely that an officer of the agency would have sent an out-of-date mailing list to the third party and, finally, because they had received a letter from the third party, despite the fact that their names and address are not recorded in Document 24.
106. Further information was sought from the agency about the origins of Document 23. However, in spite of those inquiries, no one from the Infrastructure Design Branch has been able to advise me why Document 23 was created or what that document was intended to be used for. I was advised by the Manager that Document 23 was created by the Infrastructure Design Branch after it received a request from the Project Management Branch of the agency and that staff of the Infrastructure Design Branch assumed that it was to be sent to the third party to enable it to create its own Notice of Entry documentation.
107. I was also advised by the Manager that the officer of the agency who asked for Document 23 to be created cannot now remember why he asked for it to be prepared but that that officer assumes that he did so at the request of the Project Manager. The agency has also advised me that the request to create Document 23 was not put in writing. Finally, despite further inquiries with the Infrastructure Design Branch, no one from that Branch has been able to explain to me why Document 23 was initially identified as the mailing list for the

Notice of Entry letter when that document is clearly different from all of the other mailing lists that were produced to me by the agency for my examination.

108. I accept that the complainants received a letter from the third party in late May 2000. They have produced a copy of that letter to me for my consideration. The complainants recall that they received the letter by post but they cannot be certain that was the case and there is no independent evidence before me as to how that letter came to be delivered to the complainants because neither their names nor their address are recorded in Document 24, the mailing list that was sent to the third party by the agency on 17 May 2000. The letter is a 'form' letter dated 24 May 2000 and it is printed on the third party's letterhead. However, it is not addressed to the complainants either by name or by address but, rather, it is addressed to "*The Owner/Occupier of Property in the Morley 5B & 26L Subject to Sewerage Reticulation*" and, although inquiries were made with the agency in relation to this matter, the agency was unable to establish how the third party delivered the Contractor's letter to the owners of properties in Morley 26L, whether by post or by hand-delivery.
109. In my view, given the conflicting advice provided to the complainants by the agency about the Notice of Entry mailing list, the inability of the agency to provide me with a copy of either of the mailing lists sent to the third party on 17 May 2000 by an officer of the agency and the inability of the agency to provide me with a satisfactory explanation as to why Document 23 was created and why that document was identified as the mailing list for the Notice of Entry letter instead of the correct mailing list, Document 5.1, the complainants' doubts that the agency had given them access to the correct mailing lists is understandable.
110. Given the facts that:
- Document 23 was created on 23 May 2000, the day before the date of the Contractor's letter sent by the third party;
  - the complainants received the Contractor's letter and their names and addresses are not on Document 24 but are on Document 23; and
  - the agency's most recent list until then - probably sent with the memorandum of 17 May 2000 - had been created for the Notice of Entry letter almost a year earlier (Document 24),
- it seems to me that the recollections of the Manager and the supposition of the officer who requested that Document 23 be created (set out in paragraphs 106 and 107 above) are probably correct. I consider it very likely in view of those facts that Document 23 was created for, and sent to, the third party as a result of a verbal request for an updated list. However, in the absence of a "paper trail" of documentary evidence, or the firm recollections of anyone involved, I cannot conclusively find that to be the case.
111. The difficulties experienced by the agency in identifying the correct mailing list for the Notice of Entry letter and its inability to provide relevant information to the complainant and to me relating to the mailing lists highlight the importance of accurate record-keeping and reflects poorly on the standard of record-keeping in the agency at the time. It also reflects poorly on the level of assistance provided to the FOI Coordinator by officers of the Infrastructure Design Branch and on the thoroughness with which searches were conducted within the agency

itself, by officers of the Infrastructure Design Branch, in order to identify the documents falling within the scope of the complainants' first and second applications.

112. My view on this aspect of both complaints was confirmed when, during his last examination of the agency's "House File" file, my Senior Legal Officer identified what appeared to be a second version of Document 5.1 on that file. That second mailing list is very similar to Document 5.1. It is in the same type face and format and it contains almost the same information as Document 5.1. However, that second document also contains an additional column, with lot numbers, and the order in which the columns are set out in the second document differs from the order in Document 5.1, with the address appearing in the first column and the names of the addressees appearing in the fourth column. In addition, the two-letter code at the end of the account numbers in Document 5.1 does not appear in the second document. When further inquiries were made with the agency in relation to that mailing list, I was informed by the agency that the second document may have been used by officers of the agency as a reference document if the agency received any calls from the owners of properties in Morley 26L in response to the Notice of Entry letter.
113. Given that the second mailing list so closely resembles Document 5.1, it is perhaps not surprising that the FOI Coordinator did not identify it as a separate and distinct mailing list. However, that does not explain why, despite the fact that the FOI Coordinator sought assistance from several senior officers of the Infrastructure Design Branch whilst she was dealing with the complainants' first and second applications, no one from that Branch identified that mailing list as a document that fell within the scope of either the first or second applications. In my view, that document is, clearly, a document that falls within the scope of the first application and for the purposes of this decision I have referred to it as Document 5.2. I have considered whether the information about the names, addresses, lot and account numbers recorded in Document 5.2 is exempt under clause 3(1) of Schedule 1 to the FOI Act below.
114. Finally, notwithstanding the complainants' understandable doubts that an officer of the agency would have sent an 'out-of-date' mailing list of the names and addresses of the residents in Morley 26L to the third party, the evidence before me arising from the inquiries carried out by my Senior Legal Officer suggests to me that Document 24 is likely to have been the mailing list initially sent to the third party. In that regard, I note that at the bottom of page 3 of the minutes of the "Kick Off" meeting held on 16 May 2000, it is recorded that that the third party asked for the names and addresses of residents and owners in the infill area for sending notices. Those minutes also indicate which officer of the agency was to provide that information to the third party. That officer sent the mailing lists to the third party under cover of the memorandum referred to in paragraph 31 above, the next day, 17 May 2000.
115. The memorandum produced to me by the third party's legal adviser, following the request from my office, is identical to the copy of that memorandum which the agency has already released to the complainants. The mailing list of the names and addresses of the residents in Morley 26L which was attached to the



memorandum (which was also produced to me by the third party's legal adviser) is identical to Document 24 in every respect. In addition – although it seems likely, for the reasons given in paragraph 110 above, that Document 23 was created for and sent to the third party – there is no evidence in any of the documents before me to indicate that a further request for additional information about the names and addresses of the residents and owners in the Morley 26L infill sewerage area was received by the agency from the third party and that, as a result, a copy of Document 23 was sent to the third party by an officer of the agency, after that document was created by the Infrastructure Design Branch.

116. In considering this matter, unlike the complainants, I have had the advantage of examining unedited copies of Documents 23, 24 and 5.1 and my Senior Legal Officer has also examined the electronic copies of Documents 23 and 24. I have also had the advantage of examining the mailing list identified by my Senior Legal Officer during his examination of the agency's "House File" file, Document 5.2. I accept that there are significant differences between the agency's mailing lists. That is evident from an examination of those mailing lists. I also accept that the agency's editing of the mailing lists released to the complainants produced inconsistencies between the three lists.

#### ***The mailing lists – conclusion***

117. However, having examined Documents 23, 24 and 5.1 as produced to me by the agency and having considered all of the evidence before me, I am satisfied that Document 24 is the mailing list for the Notice of Proposal letter and that Document 5.1 is the mailing list for the Notice of Entry letter. Moreover, it is also clear to me that the mailing list that the agency originally identified as the mailing list for the Notice of Entry letter (Document 23) and released to the complainants with editing cannot be the mailing list for that letter. The evidence before me establishes that Document 23 was not created by the agency until late May 2000, more than two years after the agency sent the Notice of Entry letter to the residents in Morley 26L in March 1998. I am satisfied that a copy of Document 24 was sent to the third party with the agency's memorandum of 17 May 2000 for the purposes of the Contractor's letter. I also consider it likely that Document 23 was sent to the third party, as an updated list on 23 May 2000 but, in the absence of documentary evidence, by way of proper records, to establish that, I cannot find it to be the case.

#### **The scope of the access applications**

118. Finally, before considering the agency's claims for exemption under clause 3(1) and its decisions to refuse the complainants access to some of the requested documents described in the first and second applications, pursuant to s.26 of the FOI Act, it is necessary to consider the complainants' submissions about the scope of the first and second applications and their submission that the documents relating to the other "objections", as referred to in the first dot point of paragraph 85, are also in dispute between the parties in relation to the first complaint.

## The scope of the first application

119. I do not accept the complainants' submissions about the "broad" scope of the first application. In the first dot point of the last paragraph on page 1 of that application, the complainants advised the agency, in relation to the documents described in paragraphs 1- 4 of the first application, that "...we are *NOT* asking at this stage for ALL paperwork and electronic transactions relating to the sewerage infill project in our area (which we understand is Morley 26L): we are asking *ONLY* for those relating to the block." Clearly, in my view, the complainants expressly limited the scope of the first application to documents relating to the block.
120. The complainants say that my interpretation of the scope of the first application is both narrow and restrictive and not in accordance with their intentions. They say that a reasonable interpretation of the phrase "...at this stage", as used in the first application, makes it clear, in their view, that the phrase imposed only a temporary limitation on the scope of the first application. They contend that the phrase "...at this stage" was intended to reserve their right to reconsider their position after receiving the agency's response to the first application.
121. The complainants submit that their subsequent communications with the agency clearly provided express notice to the agency that they had "...changed their minds" and that the temporary limitation referred to above no longer applied to the first application. The complainants say that they sent an email to the agency's FOI Coordinator, on 22 March 2004, confirming their position in this regard.
122. The complainants also claim that the agency has provided them with information consistent with the "broader" terms of the first application. They say the agency released edited documents to them on 6 September 2004 and again on 15 October 2004, which is evidence that supports their claims on this point. The complainants also claim that a regular FOI user ( whom they did not identify) has advised them that he has used the phrase "...at this stage" in the same way they did in the first application and that no one has ever suggested that the phrase has the meaning indicated in my preliminary view. It was my preliminary view that, having regard to the language of the first application, the complainants had expressly limited that application to a request for access to documents relating to the block.
123. The complainants also contend that, if the phrase "...at this stage" amounts to a permanent limitation on the scope of the first application, then the "event history" documents, described in subparagraphs (i), (ii) and (iii) of the second dot point of paragraph 85 above, nonetheless fall within the scope of the first application because:

*"The first mentioned "event history" documents for the period during which the planning, decision-making, consultation process and work undertaken resulting in the sewer pipe being laid on our block, necessarily are "documents relating to (our) block" because the agency provided these two properties, and only these two properties, with access*

*to infill sewerage via the sewer line it installed on our block. (Requested in No 2 of our letter dated December 2, 2003);*

*The second mentioned “event history” documents are also “documents relating to (our) block”, for the period during the planning, decision-making, consultation process and work undertaken in relation to those blocks, because our block was also a vacant block. The agency has admitted, and documents released in response to No.4 of our “first application” suggest, the fact that our block was vacant was a critical factor in the planning, decision-making, consultation process and work undertaken that resulted in a sewer pipe being laid on our block to service the two [rear] properties (Requested in No 2 of our letter dated December 2, 2003);*

*The third mentioned event history documents were “documents relating to (our) block” for the period during the planning, decision-making, consultation process and work undertaken resulting in a connection point being provided to service those two blocks. This is because the documents relate to compliance with the agency’s relevant policies and procedures (requested in No 4 of our letter dated December 2, 2003) in particular the Work Instruction referred to above which defines the circumstances when properties can be removed from the computer lists for mailing out the required notices. In so far as the property owners did not receive a separate Notice of Proposal for some at least of their properties in Morley 26L they were in the category as we were.”*

124. I have not been able to identify the email the complainants say they sent to the agency’s FOI Coordinator on 22 March 2004 from the documents retained on the agency’s FOI file for the first application. The FOI Coordinator does not recall receiving an email from the complainants on that specific date. Having examined all of the documents before me, it seems to me that the complainants are referring to the email they sent to the agency’s FOI Coordinator on 23 March 2004, following the telephone discussion that took place between one of the complainants and the FOI Coordinator on 19 March 2004.
125. The complainants’ email of 23 March 2004 is headed “*Re 1. Our conversation on March 19, 2004. 2. Third FOI Application – event histories of other vacant blocks in Morley 26L.*” In my view, the heading of that email indicates that, prior to the telephone discussion on 19 March 2004, the complainants understood that they had not applied to the agency for access to “event history” documents for any vacant blocks other than their own located in Morley 26L. There is no reference in any of their correspondence to the agency in relation to the first application, prior to 23 March 2004, to a request for access to the “event history” documents of any kind, or a specific request for the event history documents for the block.
126. The complainants’ email of 23 March 2004 specified a range of documents to which they sought access, most of which were not within the scope of the first application in my view because they related to the Morley 26L infill project but they did not relate to the block. Given the express limitation of the scope of the

first application, in my opinion, the conclusion reached by the agency's FOI Coordinator, that none of the "event history" documents relating to the other vacant properties located in Morley 26L - as described in paragraphs (i), (ii) and (iii) of the second dot point in paragraph 85 above - were within the scope of the first application was reasonable. I do not accept the complainants' argument that, in essence, the term "relating to the block" should have been understood as to include all vacant blocks in Morley 26L and the two properties to the rear of the block. Had they intended their application to include documents of the kind requested in relation to all vacant blocks in Morley 26L they should have said so in their application. I do not consider it reasonable to expect the agency to interpret "relating to the block" to mean "relating to every vacant block in Morley 26L" and I do consider it reasonable for the agency to have interpreted the limitation as it did - as meaning relating specifically to the block.

127. Therefore, the email of 23 March 2004 was, in my view, a request for access to documents additional to the documents described in the first access application. That request was made to the agency two weeks after the complainant received the agency's notice of decision on internal review in respect of the first application. At that point, further internal review of the decision on access was not available (see: s.39(3)(b) of the FOI Act) and the only avenue of review then available to the complainants was external review by the Information Commissioner. Accordingly, the agency should have treated the request for the additional documents described in the complainants' email of 23 March 2004 as a new access application and it should have assisted the complainants to change that application so that it complied with s.12 of the FOI Act.
128. I also do not accept the complainants' claim that the fact that the agency has provided them with access to documents consistent with the "broader" terms of the first application amounts to confirmation by the agency that it understood the first application to be in those broader terms. Some additional documents were released to the complainants by the agency in September and October 2004. However, those additional documents were released to them by the agency at the request of my office, as part of the efforts made by my office to resolve the first complaint by conciliation between the parties. In the event, those efforts have proven to be fruitless.
129. The documents released to the complainants on 6 September 2004 relate to representations made to the former Minister for Water Resources by the former Member for Nollamara, on behalf of the owner of a property located in Morley 26L. The former Member for Nollamara asked that the agency provide the owner with an additional sewerage connection point to that owner's property. My Senior Legal Officer took the view that those documents were, possibly, documents of the kind described in the fifth paragraph of the first application and, at his request, the agency released edited copies of those documents to the complainants.
130. The documents released on 15 October 2004 concern a formal objection made to the former Minister in August 1997, against the proposed installation of sewerage works in the area known as East Cannington 11B. None of those documents has any connection with the proposed installation of sewerage works

in Morley 26L. However, they were an example of a case where an objection against a proposal to install sewerage works was referred to the Minister for determination.

131. Given that the above-mentioned documents appeared to be an example of documents of the kind described in paragraph 5 of the first application, albeit not within the scope of that application because they were unrelated to Morley 26L or the block, my Senior Legal Officer also asked the agency to release edited copies of those documents to the complainants, even though they were outside the scope of the first application. As before, the agency agreed to that request and released edited copies of those documents to the complainants.
132. Finally, the proposition put by the complainants that the phrase “*at this stage*” as it is used in the first application, imposed only a temporary limitation on the scope of the first application is, in effect, a submission that an access applicant is entitled, under the FOI Act, to reconsider or revise the scope of his or her access application, after receiving an agency’s initial decision on access, particularly in circumstances where he or she is not satisfied with the initial decision. I do not accept that proposition.
133. In my opinion, including the words “*at this stage*” can only flag an applicant’s intention to perhaps make a subsequent access application; it cannot be used to create an ability for the applicant to expand the scope of the application once the agency has commenced or finished dealing with it. The FOI Act requires that an access application must, among other things, give enough information to enable the requested documents to be identified (s.12(1)(b)). If it does not, the agency must take reasonable steps to assist the applicant to change it so that it does (s.11(3)). The agency is required to follow the process for dealing with the application and, ultimately, if it is clear to the agency which documents are sought, to either give access or provide a notice of decision explaining why it refuses to give access. If, as a result of the information gathered by the applicant from the documents released in response to the access application, or from the notice of decision, the applicant decides that access to further documents is needed or desired, he or she must make a new application for those.
134. There is no scope, under the FOI Act, for an applicant to attempt to expand the scope of his or her access application once a decision on access has been made by the relevant agency. An applicant may seek internal review of the initial decision on access and, in so doing, query whether the agency has identified all of the requested documents. However, the right to seek internal review of a decision on access does not entitle the applicant to then expand the scope of his or her request to include a request for access to some additional documents that he or she may have overlooked or forgotten to apply for in the first instance, or have been subsequently alerted to by information in documents released in response to the access application or in the notice of decision. A request for additional documents requires a fresh application to be made to the agency. Accordingly, in my view, the “event history” documents described in the second dot point of paragraph 85 above do not fall within the scope of the first application and I so find.

*The documents relating to the other “objections”*

135. I have considered the complainants’ claim (referred to in the first dot point of paragraph 85 above) that the documents held on the Preliminaries to Works file which purportedly relate to the other “objections” referred to in the agency’s schedule dated 12 July 2004 also fall within the scope of the first application.
136. In order to assist me to deal with this aspect of the first complaint, I required the agency to produce to me, for my examination, the original of the Preliminaries to Works file. That file contains a number of documents including letters the agency received from Telstra; Alinta Gas; the Department of Environment; Western Power Corporation; the Aboriginal Affairs Department and the City of Stirling, in response to the agency’s Notice of Proposal letter dated 2 July 1999. None of those letters is an objection to the agency’s proposal to install infill sewerage in Morley 26L.
137. The Preliminaries to Works file also contains the originals of the documents described in one of the schedules attached to the agency’s initial decision on access and in the schedule attached to the agency’s decision on internal review as ‘Query/Objection – Position of Sewerage Line’. Those documents contain information received by officers of the agency as a result of telephone calls made to the agency and/or correspondence sent to the agency by fifty four private individuals who contacted or wrote to the agency in response to the Notice of Proposal letter. The agency has previously given the complainants access to edited copies of thirteen documents from that file, on the basis that those thirteen documents were considered to be documents relating to “objections” made to the agency in response to the Notice of Proposal letter.
138. I have examined the originals of the thirteen “objections” documents previously released to the complainants by the agency. In my opinion, four of those documents are not objections to the proposal to install infill sewerage in Morley 26L but, rather, are inquiries received by the agency from a particular property owner about the proposed location of sewerage lines; requests to the agency for sewerage connection points to be re-located to another part of the relevant property; or queries about the possible adverse effects that the sewerage installation process may have had on a particular property owner’s garden or outbuildings, such as sheds or pools. In my view, those four documents fell outside the scope of the first application.
139. The other nine edited documents released to the complainants by the agency do contain an objection from a property owner to the proposal to install infill sewerage in Morley 26L. As those documents clearly fell within the scope of paragraph 5 of the first application, they were released to the complainants, in edited form. I have considered the agency’s claims for exemption under clause 3(1) for the information deleted from those documents at paragraphs 148 to 196 below.
140. In addition, I have examined the remaining forty one “query/objection” documents held on the Preliminaries to Works file and I am satisfied that none

of those documents consists of an objection to the agency in relation to the proposal to install infill sewerage in Morley 26L. Therefore, in my view, none of them is a document that falls within the scope of the first application and I so find.

### **The scope of the second application**

141. The complainants maintain their claim that the documents relating to the infill sewerage projects referred to in the second dot point of paragraph 86 above fall within the scope of the second application. They assert that the agency has already resolved this question in their favour because the agency has released, expressly in response to their application for external review, certain documents purportedly relating to a Ministerial appeal by the owner of a duplex in Morley 26L, being the documents described in paragraph 129 above.
142. I do not accept the complainants' claims on this point, for several reasons. Firstly, the documents relating to the representations made to the former Minister by the former Member for Nollamara are not documents relating to a matter of the kind described by the Manager in his letter to the complainants. They are not documents about a landowner's objection to the installation of a sewer on vacant land and they do not relate to a case where the Minister of the day overruled an "objection" to the installation of infill sewerage on vacant land. Secondly, as noted above, those documents were released to the complainants at the request of my office, not as a result of the agency resolving the question in their favour.
143. Thirdly, I have read the Minister's response to Mr Cash. In his response, the Minister advised Mr Cash that the objection relating to the York 1A infill sewerage program related to the proposed location of a pumping station and its visual impact on the area and that the objections in relation to the Busselton 2L and 8L infill sewerage program concerned objections made by property owners about the location of a sewer main along the side boundary of their respective properties, because it would have the potential to restrict future development. After reviewing the situation and taking into account the severe flooding that periodically occurs in low lying areas surrounding Busselton, the Minister concluded the project was for the benefit of the whole community and overruled the objection.
144. Finally, the objection made to the Minister in relation to the Boyanup 1A infill sewerage program was an objection about a proposed sewer pressure main route, because of its perceived effect on vegetation re-growth, the potential to damage existing public utility services and the need for the proposed sewer to pass through wetlands and creeks. The Minister overruled that objection.
145. The objections that the Minister overruled in relation to those three infill sewerage programs did not relate to a landowner's objection to the Minister about a proposal to install a sewer line on a piece of vacant land owned by the landowner who made the objection. In the second and third paragraphs of the second application, the complainants specified that they were seeking access to "*...documents relating to cases ... where sewers are [or have been] located on*

*vacant land...*” and where the landowners’ had objected. None of the objections referred to the Minister, as described above, related to sewers or sewer mains intended to be installed on vacant land owned by the objector.

146. In addition, at the first dot point of page 3 of their second application, the complainants advised the agency that “...*All documents requested in this application relate directly or indirectly to the manner in which the Water Corporation, its employee or contractors and sub-contractors, treated our block (specifically, or by virtue of its status as a vacant block) in the course of providing infill sewerage in Reticulation Area Morley 26L.*”
147. In light of their advice to the agency in that regard, in my opinion, any documents held by the agency relating to the infill sewerage projects known as York 1A, Busselton 2L and 8L and Boyanup 1A clearly fall outside the scope of the second application and I so find.

## **THE DISPUTED DOCUMENTS**

148. At the conclusion of the external review process 35 documents remain in dispute between the parties in relation to the first and second complaints (‘the disputed documents’). The disputed documents include the minutes of site meetings; the “objections” documents; the four mailing lists; the file index and the extract copied from the agency’s Works Manual. I have identified and described the disputed documents in the schedule attached to these reasons for decision. With the exception of the four mailing lists, to which I have already referred as Documents 23, 24, 5.1 and 5.2, I have used a capital letter to identify the 31 other disputed documents. At this point, with the exception of Document 5.2, edited copies of all of the disputed documents have been released to the complainants by the agency.

## **THE EXEMPTION**

### **Clause 3 - personal information**

149. The agency claims that the information deleted from the disputed documents is exempt under clause 3 of Schedule 1 to the FOI Act. I have also considered whether Document 5.2 is exempt under clause 3. Clause 3 provides as follows:

#### ***“3. Personal information***

##### ***Exemption***

- (1) *Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).*

##### ***Limits on exemption***

- (2) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal personal information about the applicant.*



- (3) *Matter is not exempt matter under subclause (1) 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;*
  - (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.*
- (4) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who performs, or has performed, services for an agency under a contract for services, prescribed details relating to-*
- (a) *the person;*
  - (b) *the contract; or*
  - (c) *things done by the person in performing services under the contract.*
- (5) *Matter is not exempt matter under subclause (1) if the applicant provides evidence establishing that the individual concerned consents to the disclosure of the matter to the applicant.*
- (6) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.”*

***Definition of “personal information”***

150. The term “*personal information*” is defined in the Glossary to the FOI Act as meaning:

*“...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; or*
- (b) *who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample.”*

151. The definition of ‘personal information’ in the Glossary to the FOI Act makes it clear that any information or opinion about a person whose identity is apparent, or whose identity can reasonably be ascertained from the information or opinion is personal information for the purposes of the FOI Act, and matter that, if

disclosed, would reveal information of that kind is exempt under clause 3(1), subject to the application of any of the limits on exemption in clause 3(2) - 3(6).

***The complainants' submissions re "personal information"***

152. The complainants submit that they are entitled to be given access to all of the information that the agency deleted from the disputed documents on the ground that it is exempt under clause 3(1). The complainants submit that 'mere' street addresses and lot numbers alone (i.e. either or both of those elements without any names) are not personal information, as that term is defined in the FOI Act. The complainants submit that the identity of an individual is not apparent from disclosure of mere street addresses and lot numbers.
153. The complainants contend that their views in this regard have been recognised by the agency, because the agency routinely publishes and provides street addresses and lot numbers, as part of its normal practices relating to general works, including infill sewerage projects. In support of that claim, the complainants referred me to the indicative map attached to the Notice of Proposal letter, a copy of which was released to them by the agency on 19 January 2004. The complainants contend that the release of that document is evidence of the fact that the agency routinely publishes and provides street addresses and lot numbers as part of its normal practices.
154. The complainants also submit that I referred to no evidence in my preliminary view as to how an individual's identity can reasonably be ascertained from the release of mere street addresses and lot numbers.

***Consideration***

155. I have examined the disputed documents. The disputed documents contain, among other things, details of the names; street addresses; house numbers; lot numbers; account numbers; and home and mobile telephone numbers of a substantial number of individuals other than the complainants.
156. That information is, in my view, personal information, as defined in the FOI Act, because the identities of individuals are reasonably ascertainable from it. I acknowledge that the disclosure of a document containing information such as a lot number or a street address, without the name of the owner, does not directly disclose the identity of an individual. The owner's identity can, however, be reasonably ascertained from that information, for example, by way of a title search.
157. Further, the information deleted from Documents A to ZE and Documents 5.1, 23 and 24, which the agency claims is exempt under clause 3(1), does not merely consist of lot numbers and street addresses. The relevant information in the documents consists of, among other things, a combination of details of the names; street addresses; house numbers; lot numbers; account numbers; and the home and mobile telephone numbers of a substantial number of individuals other than the complainants and would, if disclosed, reveal other information about those people and their dealings with the agency. It also reveals the

addresses of individuals who own particular properties within the area but who do not live in them.

158. Documents 5.1, 5.2, 23 and 24 - the mailing lists - appear to be of particular concern to the complainants. Document 5.1 contains names, addresses and account numbers only. Document 5.2 contains names, addresses, account numbers and lot numbers (but not the street name for each lot number). Document 23 contains names, addresses, account numbers, lot numbers (but not street names), the property types, letter references and what appears to be an indication of whether or not the owner lives in the property. Document 24 contains names, addresses, account numbers, lot numbers (but not street names) and the property types.
159. There is some information deleted from Documents 23 and 24 and in Document 5.2 which, in isolation, may not be personal information as defined. That information is the letter references in Document 23 and the lot numbers in Documents 5.2, 23 and 24. In the context in which it appears I consider that its disclosure would reveal personal information about third parties. However, as - out of context - it does not appear to me to be personal information, I have considered at paragraphs 234-241 below whether it would be practicable to give access to re-edited copies of Documents 23 and 24 without that information deleted and an edited copy of Document 5.2 disclosing only that information.
160. Therefore, with the one qualification referred to in the preceding paragraph, in my opinion, the disputed documents would, if disclosed to the complainants with less editing, reveal personal information, as that term is defined in the FOI Act, about each of those third parties. That information is *prima facie* exempt under clause 3(1). However, the clause 3(1) exemption is subject to the limits set out in subclauses 3(2) to 3(6) (reproduced in paragraph 149 above).

### ***The limits on exemption***

161. The limit on exemption in clause 3(2) does not apply to the information deleted from the disputed documents, because none of that information consists of personal information about either of the complainants. The agency has already given the complainants access to all of the personal information about them where information of that kind is recorded in the disputed documents.
162. Similarly, the limits on exemption in clauses 3(3) and 3(4) also do not apply, because none of the information deleted from the disputed documents consists of prescribed details about officers of an agency or prescribed details about one or more of an agency's contractors and/or agents and the limit on exemption in clause 3(5) also does not apply to any of that information because no evidence has been put before me by either of the complainants that any of the individuals about whom personal information is recorded in the disputed documents has consented to their personal information being disclosed to the complainants.
163. As the limits in subclauses 3(2) - 3(5) do not apply in this case, the only limit on exemption that might apply to the information deleted from the disputed documents is the limit on exemption in clause 3(6). Clause 3(6) provides that

matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. Pursuant to s.102(3) of the FOI Act, the onus is on the complainants to persuade me that the disclosure of the personal information about third parties which the agency has deleted from the disputed documents would, on balance, be in the public interest.

***The complainants' submissions re the public interest***

164. The complainants submit that, if mere street addresses and lot numbers are *prima facie* "personal information" then that information is not in the same category as an individual's name for the purposes of determining if disclosure would, on balance, be in the public interest.
165. The complainants submit that I also gave no evidence in my preliminary view as to how the release of street addresses and lot numbers would compromise privacy or have any other adverse effect. The complainants say that if such evidence consists of claims that the information could be used to facilitate land titles searches at the Department of Land Administration (DOLA) which would, in turn, identify the owners and others with interests in the land then that evidence cannot be accepted as sufficient because Parliament considers the ability to conduct such searches is in the public interest as indicated in the *Transfer of Land Act 1893*.
166. The complainants submit that there is a very strong public interest in allowing them fullest possible access to all information about the planning and decision-making processes relating to the installation of the reticulated infill sewerage scheme in Morley 26L, particularly as that planning and decision-making process has adversely affected their property.
167. The complainants submit that their efforts to obtain access to documents of the agency have exposed numerous instances which strongly suggest both systematic and individual failure on the part of the agency to comply with its policies, practices and legal standards and further that, despite initial assurances of good faith on the part of the agency, it has engaged in a pattern of "dribbling" disclosure of documents, contrary to the object, spirit and intent of the FOI Act, which is intended to enable the public to participate more effectively in governing the State and in making State and local government agencies more accountable to the public. The complainants submit that there is an obvious public interest in knowing whether the agency has complied with its own process and legislative standards.
168. The complainants further submit that, if the agency were genuinely interested in efficiently and effectively responding to their reasonable requests for information, it would have responded in full in the first place, thereby saving all of the parties the time and effort required to deal with their applications and subsequent complaints to me. The complainants claim that there is evidence the agency has a conscious policy or practice of discriminating against a well-defined group of property owners (the owners of vacant blocks of land) in relation to the infill sewerage program and that those property owners have not been kept "fully informed" by the agency, as required by law.

169. The complainants claim that they have presented evidence supporting their view that there has been a failure by the agency in their case - and possibly in relation to a whole category of land owners - to comply with the strict legal requirements in the *Water Agencies (Powers) Act 1984*, the agency's Operating Licence and its published practices and procedures. The complainants submit that the effect of the agency's failure to comply with its obligations and duties has been to deny them natural justice and, in the event of a systemic failure on the part of the agency, also to deny natural justice to a whole category of land owners (the owners of vacant blocks of land) and to expose the complainants and those other landowners to greater financial and market risk than all other property owners.
170. The complainants claim that, in seeking information about street addresses, lot numbers and the other deleted information, they are not seeking to harm others but, rather, they are seeking to help anyone who may have been "kept in the dark" by the agency like they were, by providing assurance that the agency has complied with its legal and other obligations and thereby make the agency more accountable to the public.
171. The complainants submit that they have discharged their onus of proof in relation to street addresses, lot numbers, land descriptions and letter reference numbers because the agency routinely releases information of that kind in the designs attached to its template Notice of Proposal letter. The complainants say that they: have provided me with a letter in which the agency admitted they were not provided with due process; have shown that this was a breach of the agency's public statements regarding due process in relation to the infill sewerage program, as well as a breach of its obligations and duties under the law; and have provided evidence of the real financial and market risk to which they have been exposed as a result of the agency's actions. They submit that the agency's claim that there was only one occasion on which they were denied natural justice is contradicted by the fact that they did not receive either a Notice of Commencement letter or a separate Notice of Entry notice from the third party in May 2000.
172. The complainants submit that the information claimed to be exempt under clause 3(1) is directly related to determining if the other owners of vacant blocks have been exposed to greater financial and market risk than all other property owners. They submit that, therefore, they have established that the release of all of the information which the agency claims is exempt under clause 3(1) will serve the public interest by providing assurance about whether their case was an exception, as claimed by the agency, or evidence of a systemic failure on the part of the agency which resulted in other land owners being "kept in the dark" by the agency like they were.
173. The complainants submit that, in the face of this evidence - and in the absence of any evidence that privacy would, in fact, be prejudiced - it is wrong both in law and in fact to conclude that the public interest in protecting the privacy of third parties outweighs the public interest in disclosure. They submit that the agency has provided no evidence of how privacy could or would be

compromised by the release of street addresses, lot numbers, land descriptions and letter reference numbers, or would result in any other adverse effect.

174. The complainants acknowledge that, while it may be possible to argue that names in general are different from the other categories of deleted information, this is rebutted by the evidence set out in their submissions (particularly the agency's claimed routine release of street addresses and lot numbers) and certainly less than the public interest in their receiving assurances regarding the propriety of the agency's practices and procedures. The complainants also submit that they have discharged the onus of proof they bear in relation to the names of the owners of other vacant blocks located in Morley 26L and the owners of the two properties located at the rear of the block.

### *The public interest test*

175. 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 and the FOI Act is not intended to open the private and professional lives of individuals to public scrutiny in circumstances where there is no significant demonstrable benefit to the public interest in doing so. I recognise that there is a very strong public interest in the maintenance of personal privacy. The protection of an individual's privacy is a public interest which is recognised and enshrined in the FOI Act by clause 3.
176. The term 'public interest' is not defined in the FOI Act, nor is it a term that is easily defined. However, it is not merely something that may be of interest to the public; rather, it is something which is of serious concern or benefit to the public. In *DPP v Smith* [1991] 1 VR 63, at 65, the Victorian Supreme Court said:

*"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 for the well being of its members ... There are ... several and different features and facets of interest which form the public interest. On the other hand, in the daily affairs of the community events occur which attract public attention. Such events of interest to the public may or may not be ones which are for the benefit of the public; it follows that such form of interest per se is not a facet of the public interest."*

177. In relation to the process of determining where the public interest lies in a particular case, the majority of the High Court of Australia (Mason CJ, Wilson and Dawson JJ) said, in *Re Queensland Electricity Commission; Ex Parte Electrical Trades Union of Australia* (1987) 61 ALJR 393 at 395:

*"Ascertainment in any particular case of where the public interest lies will often depend on a balancing of interests, including competing public interests, and be very much a question of fact and degree."*

178. Tamberlin J in the Federal Court decision in *McKinnon v Secretary, Department of Treasury* [2005] at paragraph 12 explained the process of determining where the public interest lies as follows:

*“The public interest is not one homogeneous undivided concept. It will often be multi-faceted and the decision-maker will have to consider and evaluate the relative weight of these facets before reaching a final conclusion as to where the public interest resides. This ultimate evaluation of the public interest will involve a determination of what are the relevant facets of the public interest that are competing and the comparative importance that ought to be given to them so that the public interest can be ascertained and served. In some circumstances, one or more considerations will be of such overbearing significance that they will prevail over all others. In some circumstances, the competing considerations will be more finely balanced so that the outcome is not so clearly predictable.”*

179. I have considered the complainants’ submissions. I understand that they have a personal interest in the disclosure of full copies of the disputed documents to them. However, the public interest is not primarily concerned with the personal interests of the particular access applicant, nor with public curiosity. Rather, the question is whether disclosure of the information would be of some benefit to the public generally, that is, whether it would be of benefit to the public for the information the complainants seek – being personal information about a substantial number of third parties – to be disclosed to any other person and whether that public benefit is sufficient to outweigh the strong public interest in maintaining the privacy of those third parties.
180. The exemption in clause 3(1) is intended to protect the privacy of third parties and, as I have said, I consider that there is a strong public interest in maintaining personal privacy and that that public interest may only be displaced by some other significantly stronger and more persuasive public interest that requires the disclosure of personal information about one person. I agree with the complainants’ submission that the FOI Act is intended to make government, its agencies and officers more accountable. However, the FOI Act is not intended to call to account or unnecessarily intrude upon the privacy of private individuals.
181. I do not doubt, in seeking information about the street address, lot numbers and other information deleted from the documents, the complainants are not seeking to harm others. However, disclosure under the FOI Act is considered to be disclosure to the world at large, rather than merely to the particular access applicants. That is because an agency cannot attach conditions to the use - including further dissemination - of documents disclosed under the FOI Act. Therefore, although the particular access applicants may have no improper motive in seeking access to information about third parties, consideration of the effects of disclosure must be in the context of disclosure to the whole world, including potential disclosure to those who might consider putting that information to some other use than that stated to be the intention of the complainants. For example, some people on the lists might not consider disclosure of the information in question solely for the purpose of the

complainants ascertaining from that information whether or not the complainants were the only owners of a vacant block in Morley 26L not notified; however, those same people may consider the disclosure of that information to a marketing company, without their consent, an invasion of their privacy. They may also consider it an invasion of their privacy if the complainants were to use it to contact them.

182. I also accept the complainants' submission that people are entitled, at law, to conduct land title searches at DOLA and to inspect and obtain copies of documents containing information that identifies the owners and others with interests in land. However, in this matter, so far as I am aware, none of the disputed documents the subject of the first complaint is publicly available for purchase or inspection from DOLA or from the agency, and their disclosure would reveal more about the third parties than merely their identities and their ownership of particular properties.
183. I recognise that the agency, as a public institution, operates to serve the community as a whole in the provision of water and sewerage services and that its activities in providing such services to the community are funded by significant amounts of public monies. I also accept that, as a consequence of the Government's decision to undertake the infill sewerage program, the agency is responsible for making a significant number of decisions relating to the planning and installation of reticulated sewerage in the metropolitan area and in the country, and that those decisions directly affect a number of private citizens.
184. Favouring disclosure, I recognize that there is a public interest in people being able to exercise their rights of access to documents under the FOI Act. I recognise that there is a public interest in the accountability of the agency in relation to how it expends public monies and for the decisions it has made in relation to the installation of the infill sewerage program. I also agree with the complainants' submission that there is a public interest in ensuring that the agency has complied with its own processes and legislative standards in respect of the infill sewerage program and a public interest in the accountability of State and local government agencies for the decisions that they make and for the manner in which those agencies discharge their public functions.
185. In my opinion, there is also a public interest in the community, as a whole, being informed of how and why the agency makes decisions in relation to the infill sewerage program and there is also a need for transparency and accountability about that decision-making process. I also agree that there is a public interest in people such as the complainants, who have been directly personally affected by the installation of a sewerage line on their property by the agency, being as fully informed as possible about the processes by which the agency made the decisions that affected their property and the reasons for those decisions.
186. However, in my view, those public interests have been satisfied, to a large extent, by the agency having disclosed to the complainants the documents that it has already disclosed. The only parts of those documents which have not been



disclosed are those that would reveal personal information about people other than the complainants.

187. In respect of the mailing lists, if there is any public interest in the complainants determining whether the other owners of vacant blocks in Morley 26L have been similarly disadvantaged in the way that the complainants consider they have been, I am not persuaded that disclosure of the disputed information would further that public interest in any way. It is clear from the edited copy of Document 24 which has been released to the complainants by the agency that no vacant blocks of land were included on that list. It is similarly clear from the edited copy of Document 23 released to the complainants by the agency that five vacant blocks were included on that list. The information deleted from the other mailing lists does not include identification of whether or not the particular lots of land were developed or vacant.
188. Further, it does not appear to me to be directly ascertainable from the lists themselves that the owners of all the properties within Morley 26L were included on each list as the names and addresses of the owners are listed, rather than the names of the owners and the addresses of the properties in Morley 26L which they own. Were the mailing lists lists of the properties in Morley 26L, the owners of which were to be notified, my view about the effect of disclosure may be different. However, they are not. They are lists of the names and addresses of the owners of properties in Morley 26L and it does not appear to me - in respect of a number of people on the lists - to be possible on the face of those documents to ascertain from the information in those lists which property or properties in Morley 26L they own. Therefore, it seems to me that any public interest in the complainants being able to determine whether all the properties in Morley 26L - in particular, all the vacant blocks - were the subject of notification would not be furthered by disclosure of the disputed information, as that information is not ascertainable from those lists.
189. Further, inclusion on the lists does not establish that the particular owner was notified; it merely establishes that the owner was on the mailing list for notification. In respect of Document 5.2 there is no evidence before me to suggest that that document was actually used as a mailing list or anything other than an internal reference document. In those circumstances, it does not seem to me that disclosing that document would go any way to assisting the complainants to determine whether or not the owners of all those properties were notified or, in particular, whether the owners of developed properties were notified and the owners of vacant blocks were not. Therefore, it seems to me that its disclosure would not go any way towards furthering any public interest there may be in determining whether or not the agency's failure to notify the complainants was an isolated instance.
190. Further, if – as they claim they do – the complainants consider that there is evidence that the agency has a conscious policy or practice of discriminating against the owners of vacant blocks of land in relation to the infill sewerage program, or that there has been a systemic failure on the part of the agency to give natural justice to the owners of vacant blocks of land and that it has deliberately exposed the complainants and all of those other owners of vacant

blocks of land to greater financial and market risk than all of the other owners of property located in Morley 26L, then I would have thought that would be a matter that could be the subject of complaint to the Parliamentary Commissioner for Administrative Investigations ('the Ombudsman'). The Ombudsman has the power to require an agency to produce to her documents and information for the purpose of investigating a complaint about the administrative actions or omissions of a government agency. It therefore appears to me that there exists an avenue by which the agency could be called to account for its actions which does not require the disclosure to the complainants - and potentially the world - of personal information about private individuals.

191. I acknowledge that the complainants did not receive the Notice of Proposal letter from the agency and that, as a result, they were denied the opportunity to object, if necessary, to the proposal to install a sewerage connection on the block and the sewerage line through the block to service the two properties at the rear of the block. That has already been acknowledged by the Manager in his correspondence to the complainants.
192. However, I do not agree with the complainants' claim that the fact that they did not receive due notification is evidence of a conscious policy of discrimination on the part of the agency against the owners of vacant land, in circumstances where the agency was or is installing infill sewerage in metropolitan Perth or elsewhere. In my view, there is no objective evidence before me to support the claim that the agency has a conscious policy or practice of discriminating against the owners of vacant blocks of land, as claimed by the complainants.
193. I accept that, when the agency sent a Notice of Entry letter or a Notice of Proposal letter to the owners of properties located in the infill sewerage areas of the Perth metropolitan area, it attached to those letters small, indicative maps illustrating the area within which the infill sewerage program was to be extended and that those indicative maps included street names, lot numbers and/or street numbers. However, those indicative maps do not contain any of the specific combinations of information deleted from Documents A to ZE and Documents 5.1, 23 and 24 by the agency, including details of the names, addresses, telephone numbers, account numbers and other information about a substantial number of individuals other than the complainants. As I have said, those documents if disclosed, would reveal more personal information, as defined, about the owners of the properties than just their identities and the fact they own the properties.
194. Nor does any of the disputed information, or Document 5.2, contain any information about the decision-making processes of the agency or any specific information about who made the decision to install the sewerage connection on the block and the sewerage line through the block or when or why that decision was made, as would give the complainants or any other person an insight into the decision-making processes of the agency or provide an explanation as to why the complainants' names and address were not on the mailing list for the Notice of Proposal letter (Document 24).

195. The complainants' two access applications, and all of their subsequent correspondence to the agency and to my office since their complaints were accepted, have been directed toward obtaining a satisfactory explanation from the agency as to why they did not receive the Notice of Proposal letter from the agency in July 1999 and to their concerns about the potential financial disadvantage to which they believe they have been exposed, as a result of the agency's failure to send them the Notice of Proposal letter. Clearly, they remain dissatisfied with the responses and explanations they have received from senior officers of the agency.
196. The complainants have argued that the agency has not provided any evidence of how privacy could or would be compromised by the release of details of street addresses, lot numbers, land descriptions and letter reference numbers or that such disclosure would result in any other adverse effect. However, the agency is not required to produce evidence that the disclosure of the information deleted from the disputed documents would compromise or otherwise adversely affect privacy before the agency may be said to have established a valid claim for exemption under clause 3(1). In order to establish a claim for exemption under clause 3(1), the agency bears the onus under s.102(1) of the FOI Act, of establishing that the disputed documents contain information of the kind described in clause 3(1). In my opinion, for the reasons I have given, it is evident from an examination of the information deleted from Documents A to ZE and Documents 5.1, 23 and 24 and the information recorded in Document 5.2 that it is information of the kind described in clause 3(1).
197. That being the case, under s.102(3) of the FOI Act, the burden of proof shifts and the onus falls upon the complainants to establish that the disclosure of personal, private information about other people would, on balance, be in the public interest. In this case, as I have said, I consider that the public interest factors that weigh in favour of disclosure of the requested documents have already been satisfied to a substantial extent, as the agency has already given the complainants access, either in full or in part, to all of the documents the agency has identified as falling within the scope of the first application. The only information deleted from the documents released to the complainants consists of information about other people.
198. I have examined all of the information the agency claims is exempt under clause 3(1) and I have examined Document 5.2. In my view, none of the personal information about the individuals other than the complainants will cast any light on, or give the complainants any further insight into, the agency's planning and decision-making processes relating to the installation of the infill sewerage scheme in Morley 26L and, in particular, to the decision to install a sewerage connection point on the block and a sewerage line on the block to service the two properties at the rear of the block.
199. I am not persuaded that disclosure of the private, personal information about the people other than the complainants, without their consent, would have the effect of improving the accountability of the agency for the decisions it made in relation to the sewerage infill program in Morley 26L. Nor am I persuaded that that information would, if disclosed, reveal any information about the manner in

which the agency discharged its public functions and duties in deciding to proceed with the installation of the infill sewerage scheme in Morley 26L, or serve any of the other identified public interests favouring disclosure to any significant degree or at all.

### ***Findings***

200. For those reasons, in balancing the competing interests, I consider that, in this instance, the complainants have not established that the public interest in protecting the privacy of the third parties is outweighed by any other stronger countervailing public interest which would tilt the balance in favour of disclosure. I am satisfied that all of the information that the agency has deleted from Documents A to ZE and Documents 5.1, 23 and 24, on the ground that it is exempt information under clause 3(1), is exempt as claimed and I so find. I am also satisfied that the personal information about people other than the complainants which is recorded in Document 5.2 is also exempt under clause 3(1) and I so find.

### **Documents that do not exist or cannot be found**

201. Section 26(1) of the FOI Act deals with the obligations of an agency when the agency is unable to locate the documents sought by an access applicant or when those documents do not exist. In this instance, the agency has refused the complainants access to some of the documents described in the first and second applications, on the ground that they do not exist or cannot be found.

202. The former Commissioner discussed the requirements of s.26 in a number of her decisions relating to documents that cannot be found (see: *Re Oset and Ministry of the Premier and Cabinet* [1994] WAICmr 14; *Re Doohan and Police Force of Western Australia* [1994] WAICmr 13; and *Re Uren and Minister for Planning* [1995] WAICmr 21). I have also considered the requirements of s.26 in *Re Williamson and Department of Health* [2004] WAICmr 21.

203. Section 26 of the FOI Act provides as follows:

“26. (1) *The agency may advise the applicant, by written notice, that it is not possible to give access to a document if –*

(a) *all reasonable steps have been taken to find the document;*  
*and*

(b) *the agency is satisfied that the document –*

(i) *is in the agency’s possession but cannot be found; or*  
(ii) *does not exist.*

(2) *For the purposes of this Act the sending of a notice under subsection (1) in relation to a document is to be regarded as a decision to refuse access to the document, and on a review or*

*appeal under Part 4 the agency may be required to conduct further searches for the document.”*

204. I do not consider that it is my function, under the FOI Act, to physically search for documents on behalf of a complainant. I take the view that, provided I am satisfied that the requested documents exist, or should exist, then it is my responsibility to inquire into the adequacy of the searches conducted by the relevant agency and to require that agency to conduct further searches, if necessary.
205. When dealing with a decision to refuse access to documents pursuant to s.26 of the FOI Act, there are two questions that must be answered. The first question is whether there are reasonable grounds to believe that the requested documents exist or should exist and are, or should be, held by the agency. Where the first question is answered in the affirmative, the second question to be answered is whether the agency has taken all reasonable steps to find those documents.

### **The searches conducted by the agency**

206. After the first complaint was received and the agency's FOI files and associated documents were first examined, my Senior Legal Officer formed the view that the complainants had reasonable grounds for believing that additional documents of the kind described in their first application may have been held by the agency. Accordingly, he required the agency to undertake further searches, and to provide me with information about the nature, extent and results of those searches. Some additional documents were identified by the agency as a result of those searches and they were released to the complainants, either in full or in edited form.
207. After receiving the agency's response, my Senior Legal Officer wrote to the complainants describing to them, in detail, the nature and extent of the searches conducted by the agency. When the first application was received, the FOI Coordinator, the Manager, the Principal Engineer, the Project Manager and other staff searched records and files for any relevant documents within the Infrastructure Design Branch. Searches were also carried out by the FOI Coordinator using the agency's electronic filing system and all relevant files relating to the Morley 26L infill sewerage program were searched.
208. The agency estimates that the officers involved in those searches spent approximately 5 to 6 hours searching for the requested documents on relevant files. The agency's FOI Coordinator estimates that it took her another 4 hours to physically search relevant files for any documents that may have fallen within the scope of the first application. On internal review, further searches were conducted by officers of the agency in order to identify any additional documents. Staff of the Infrastructure Design Branch conducted further searches and the FOI Coordinator carried out a further search of the agency's electronic filing system. She recalled and searched all files that she considered might contain any relevant documents. I am advised by the agency that those additional searches, on internal review, took approximately 3 days to complete.

209. The FOI Coordinator also wrote to the third party, inquiring whether that company held any documents of the kind requested by the complainants. In response, the third party advised the agency that it did not hold any documents of the kind requested. After receiving the complainants' email on 23 March 2004, the FOI Coordinator conducted further searches of the agency's records for documents of the kind described in that email. In addition, the Principal Engineer contacted Ove Arup and subsequently attended that firm's offices and searched its files, in order to ascertain whether Ove Arup may have held any documents of the kind requested by the complainants.
210. In the period since I received the first complaint, following the receipt of further information from the complainants, several additional searches have been conducted by the agency at the request of my office, in an endeavour to identify and locate any additional documents of the kind requested. Some additional documents were identified by the agency as a result of those further searches and copies released to the complainants. As noted previously, arrangements were made by the agency, with the firm AAM Surveys, for the complainants to attend at the offices of that firm for the purpose of inspecting survey documents relating to the Morley 26L sewerage infill project which were held by AAM Surveys. The complainants have inspected those survey documents.
211. Similarly, when the second complaint was received and my Senior Legal Officer examined a copy of the Manager's letter to the complainants dated 22 January 2004, he formed the view that the complainants had reasonable grounds for believing that the statements made to them by the Manager would reasonably have been based upon information contained in documents of the agency of the kind described in paragraphs 2 and 3 of the second application.
212. Accordingly, my Senior Legal Officer required the FOI Coordinator of the agency to continue and complete the searches of the agency's files that were then being undertaken by the agency to identify documents of the kind requested in the second application. My Senior Legal Officer also required the Manager and the Principal Engineer to provide me with further information, in writing, in relation to the second complaint. The nature and extent of the searches conducted by the FOI Coordinator to locate documents of the kind described in the second and third paragraphs of the second application, and the information subsequently provided to me by the Manager and the Principal Engineer in response to the requirement to give information and produce documents to me are described in paragraphs 71 to 75 above.

### *The complainants' submissions*

213. In their 'appeal' document, and in their subsequent submissions to me, the complainants have expressed concern about the adequacy of the searches conducted by the agency to identify and locate the documents falling within the scope of the first and second applications.
214. In response to my preliminary view about this aspect of the first complaint, the complainants submitted that I cannot make a final determination as to whether or not any additional documents of the kind requested exist or should exist and

are, or should be, held by the agency or that the agency has taken all reasonable steps to locate the requested documents. The complainants say that is so because I had observed in my preliminary view that:

- the agency's inability to readily identify documents of the kind described in their first application in relation to Morley 26L reflected poorly on the agency's record-keeping practices;
- the fact that the agency identified a significant number of additional documents that fell within the scope of the first application, after the agency received their application for internal review, clearly indicated that the agency's initial searches for documents were not adequate; and
- several aspects of the manner in which the agency processed the complainants' first application and the manner in which the agency dealt with their application for internal review could have been better handled by the agency.

215. In relation to this aspect of the second complaint, the complainants initially submitted that the agency's claim that it did not hold any documents of the kind described in the second and third paragraphs of the second application was illogical and inconsistent, given the nature of the statements made to them by the Manager, in his letter dated 22 January 2004. The complainants submitted that a reasonable person, reading the Manager's letter, would have been entitled to interpret that letter as having been based upon documents and/or information in the possession of the agency or its contractors, before the Manager wrote that letter to them in January 2004.

216. The complainants submit that I should personally investigate the statements made by the Manager and satisfy myself that there are no documents in the possession or control of the agency which support those statements. They further submit that I should not place any reliance placed upon any information provided to me or my officers by the Manager, or by any other officer of the agency, in relation to this aspect of the second complaint because the response provided to me by the Manager is not consistent, in their view, with the statements he made to them in his letter dated 22 January 2004. The complainants submit that the Manager's response to the requirement to give information and produce documents obviates the need for the agency to produce any documents of the kind requested in the second and third paragraphs of the second application.

217. The complainants submit that the integrity and reliability of any statements made by officers of the agency in relation to the searches that the agency has carried out in order to identify the requested documents, particularly those described in the second and third paragraphs of the second application, is also questionable.

### *Consideration*

218. As I have said, in cases where an agency refuses an applicant access to documents pursuant to s.26 of the FOI Act, the FOI issue I am required to consider is whether, in the circumstances, the agency has taken all reasonable steps to find the requested documents. It is my responsibility to inquire into the adequacy of the searches conducted by the agency and, if necessary, to require the agency to conduct further searches.
219. In my letter advising the complainants of my preliminary view, I explained that, as a number of additional searches had been carried out by the agency in the period since I accepted the first and second complaints, I was then satisfied that the agency had taken all reasonable steps to locate the documents the subject of the first and second applications and that there was no evidence then before me to indicate that any further documents of the kind requested in either the first or second application existed or should exist at the agency. I invited the complainants to provide me with submissions as to the reasons why they believed that the agency had not then taken all reasonable steps to locate the requested documents the subject of both applications, in accordance with its obligations under s.26 of the FOI Act.
220. In their submissions in response to my preliminary view, the complainants have not provided me with any additional information or evidence which dissuades me from my preliminary view that the agency has now taken all reasonable steps to locate the requested documents the subject of both applications.
221. The complainants clearly do not accept the agency's claim that, despite extensive searches of its records, it has been unable to identify any additional documents of the kind requested in the first application. Nor do they accept that the agency is unable to identify any documents of the kind described in the second and third paragraphs of the second application which would provide documentary support for the statements made to them by the Manager. It is also clear that they do not accept the agency's claim that it has conducted extensive searches of its files in an endeavour to identify documents of the kind described in the first and second applications. Notwithstanding the complainants' scepticism, there is no evidence before me relating to the first or second complaint which establishes that the agency holds any additional documents of the kind requested.
222. In relation to the second complaint, as I have said, the fact that the Manager advised the complainants that he knew, based on his thirty years of practical experience in the industry, that a landowner's objection to the Minister is not considered sufficient grounds to change a proposed sewer route where sewers are located on vacant land to achieve the overall optimum design of the system might make it reasonable to expect that the agency would hold some documents evidencing that statement by way of exemption. However, it does not establish that the agency does hold any documents that support the Manager's statements. What has been established in relation to that issue is that, despite a thorough physical and electronic searches of the agency's records, which I am advised included a physical search of fifty eight different agency files by the agency's



FOI Coordinator, no documents of the kind described in paragraphs 2 and 3 of the second application have been located by the agency. That is, extensive searches have not revealed any documentary evidence held by the agency which supports the Manager's statements.

223. The question I am required to consider in relation to this aspect of the complaints is whether, in the circumstances, the agency has taken all reasonable steps to locate documents of the kind requested. Having considered the nature and extent of the searches undertaken by the agency, I am satisfied that it has now taken all reasonable steps to identify documents of the kind requested in the first application and of the kind described in the second and third paragraphs of the second application. On the basis of the evidence before me, I am also satisfied that documents of those kinds either cannot be found by the agency or they do not exist. Therefore, I find that the agency has taken all reasonable steps to locate those documents but they either cannot be found or do not exist.
224. Accordingly, I confirm the agency's decision to refuse the complainants access to certain of the requested documents described in the first and second applications in accordance with s.26 of the FOI Act.

#### **OTHER MATTERS RELATING TO THE COMPLAINANTS' ACCESS APPLICATIONS**

225. In making both complaints to me, and in their submissions in response to my preliminary view in relation to both complainants, the complainants drew to my attention a number of procedural and administrative issues of concern to them about the manner in which the agency dealt with the first and second applications. In particular, they drew my attention to the following:
- the agency's alleged failure to voluntarily provide them with documents, before they made the first application, as had been promised to them by certain officers of the agency, and the agency's failure to respond to a written reminder regarding the promise to voluntarily provide those documents;
  - the agency's continuing failure to voluntarily release documents relating to all known Ministerial appeals, including York 1A, Busselton 2L and 8L and Boyanup 1A arising from infill sewerage projects (in the complainants' view, the agency has acknowledged that access can and should be given to documents relating to some Ministerial appeals, because it released documents relating to an appeal to the Minister regarding a vacant block in East Cannington 11B and to an unrelated appeal to the Minister regarding a developed block in Morley 26L);
  - the agency's alleged failure to have regard to the provisions of s.3(3) of the FOI Act;

- the agency’s decision on internal review in relation to the first application was made by the same officer who made the initial decision on access;
  - the agency’s alleged repeated “back-flips” in relation to key statements and documents;
  - the agency’s claim of confusion by an experienced FOI officer in relation to the identification of the correct mailing lists;
  - the agency’s allegedly excessive use of exemptions; and
  - the agency’s allegedly generally unco-operative approach to their requests for information.
226. The complainants submit that the FOI Act was never intended to be the only means of obtaining documents from an agency but that the approach of the agency suggests that is exactly how the agency regards it. The complainants submit that agencies should not be allowed to use FOI to “...*fight a war of attrition with citizens trying to exercise their rights to information*” particularly where those citizens have been maltreated by the agency. The complainants contend that the agency has been doing just that, with little or no demonstrable benefit to anyone except the agency.
227. I have considered the complainants’ submissions on these issues. I agree that the FOI Act is not intended to be the only means of accessing government-held documents. In fact, s.3(3) of the FOI Act expressly states that “[n]othing in this Act is intended to prevent or discourage the publication of information, or the giving of access to documents (including documents containing exempt matter), ... otherwise than under this Act if that can properly be done or is permitted or required by law to be done”. However, it is a matter of policy for agencies to determine which of its documents are to be made routinely available, on request or otherwise, and which will require an application under the FOI Act. I have no power to direct agencies in that regard. The complainants’ allegations relating to the agency’s not having voluntarily given them documents before they made their first application despite allegedly having undertaken to do so are not matters that I can investigate or on which I can comment, as those alleged matters fall outside the processes of the FOI Act.
228. In some instances, I consider that the complainants have reasonable cause to be dissatisfied with the manner in which the agency dealt with their two applications. For example, the agency failed to deal with the first application within the permitted period and it also failed to identify all relevant documents within the scope of the access application in a timely manner. In addition, the decision on internal review in respect of the first application was, as the complainants note, made by the same officer who made the initial decision on access. That decision was made in contravention of the provisions of s.41 of the FOI Act, which clearly states that an application for review of a decision is not to be dealt with by the person who made that decision or by a person

subordinate to that person. My officers have already discussed this matter with the agency and I consider that to be sufficient action in this case.

229. I also accept that there is some justification for the complainants' claim that, in the first instance, the agency's editing of the requested documents was "heavy-handed" and that some information could not be exempt matter, such as column headings, was edited from some of the requested documents. However, I do not accept the complainants' submission that the agency's use of the exemption in clause 3 was excessive, in all the circumstances. In its initial decision, the agency's editing may have been a little excessive, in my opinion. However, given the complainants' advice to the agency, when they lodged the first application with the agency that, at stage, they were prepared to accept access to edited copies of the requested documents with 'personal information' deleted, it is not surprising that the agency edited the requested documents in the manner in which it did in the first instance.
230. In addition, once the complainants applied to the agency for internal review of the initial decision on access in respect of the first application and drew their concerns to the attention of the agency, the agency thereafter abandoned almost all of its initial claims for exemption and limited the editing of information from the requested documents to deleting only personal information about persons other than the complainants and a small amount of information the third party had claimed was exempt matter under clause 4 of Schedule 1 to the FOI Act.
231. I also do not accept the complainants' claim that the agency's failure to voluntarily release to them the documents relating to all known Ministerial appeals, including those relating to the York 1A, Busselton 2L and 8L and Boyanup 1A infill sewerage programs should be a matter for criticism. The question of whether or not those particular documents fell within the scope of their second application was first raised with my office by the complainants in mid-October 2004. For the reasons given in paragraphs 141-147 above, I do not consider that those documents were within the scope of that application. They were clearly not within the scope of the first application either. As documents of that kind were not requested in either of the complainants' two access applications, I do not accept that the agency's failure to voluntarily release to them documents relating to all known Ministerial appeals can be a matter of criticism. In my view, the agency could not have been expected to give access to documents, voluntarily or otherwise, in circumstances where such documents were not requested in the first place and were not identified by the complainants until 6 months after the agency made its decision on access.
232. It is clear that the complainants are unhappy with the manner in which the agency has dealt with their access applications with, as I have said, some justification. However, I am also mindful that both of the complainants' access applications were directed to obtaining access to documents relating to the agency's planning, consultation and decision-making processes which led to the installation of a sewerage connection point on the block and the installation of a sewerage line to service the two properties at the rear of the block.

233. As I have said, none of the information deleted from the requested documents is information about the complainants or the block. Rather, it is only personal information about people other than the complainants and none of that information gives any indication as to the reasons why the complainants' names and address are not included in the agency's mailing list for the Notice of Proposal letter.

## **SECTION 24 OF THE FOI ACT - EDITING**

234. When they lodged these complaints with me, the complainants also claimed that the agency had failed to adequately consider its obligations under s.24 of the FOI Act to provide them with access to more of the information recorded in the requested documents and, in particular, the mailing lists.

235. In my preliminary view, I informed the complainants that, having regard to the decision of the Supreme Court of Western Australia in *Police Force of Western Australia v Winterton* (unreported; Supreme Court of Western Australia; Library No. 960227; 27 November 1997), the editing required to delete all of the personal information from the mailing lists identified by the agency was, in my opinion, so substantial as to render the remainder of those lists unintelligible. Accordingly, it was my preliminary view that the agency was not required to give them access to edited copies of the mailing lists.

236. In response to my preliminary view, the complainants asserted that my views on this question are dependent on what is "personal information" properly so called, as well as a proper application of the public interest limit on the exemption. They submit that a determination regarding intelligibility is one involving context and depends on the facts in each case. In their view, the edited computer lists were sufficiently intelligible as to cast doubt on the adequacy of the agency's searches, as well as to cast doubt on whether Document 5.1 was the mailing list for the Notice of Entry letter or not.

237. The complainants submit that, if my view on the interpretation of s.24 is sound, then it is difficult to imagine a situation where any list that includes names, addresses, lot numbers, property descriptions and letter reference numbers, either alone or in combination, could ever be edited so as to be sufficiently intelligible to be released. As indicated in paragraph 159 above, I have considered further whether it would be practicable to disclose re-edited copies of Documents 23 and 24 and an edited copy of Document 5.2

238. Section 24 of the FOI Act provides as follows:

***"24. Deletion of exempt matter***

*If —*

*(a) the access application requests access to a document containing exempt matter; and*

*(b) it is practicable for the agency to give access to a copy of the document from which the exempt matter has been deleted; and*

(c) *the agency considers (either from the terms of the application or after consultation with the applicant) that the applicant would wish to be given access to an edited copy,*

*the agency has to give access to an edited copy even if the document is the subject of an exemption certificate.”*

239. The Supreme Court of Western Australia has made it clear that the obligation to give access to edited copies of documents under s.24 of the FOI Act only arises if it is practicable for an agency to delete exempt information from the requested documents and that “practicable” does not only mean physically practicable. In *Winterton’s* case Scott J said, at p.16:

*“...the reference in s24(b) to the word ‘practicable’ is a reference not only to any physical impediment in relation to reproduction but also to the requirement that the editing of the document should be possible in such a way that the document does not lose either its meaning or its context. In that respect, where documents only require editing to the extent that the deletions are of a minor and inconsequential nature and the substance of the document still makes sense and can be read and comprehended in context, the documents should be disclosed. Where that is not possible, however, in my opinion, s24 should not be used to provide access to documents which have been so substantially edited as to make them either misleading or unintelligible.”*

240. In this instance, I am satisfied that the editing required to delete all of the personal information from Documents 5.1, 23, 24 and 5.2 would be so substantial as to render the remainder of those mailing lists meaningless, even in the context of this matter. I do not consider that it would be practicable to disclose re-edited copies of Documents 23 and 24 and an edited copy of Document 5.2 without the letter references or lot numbers deleted. The letter references appear to me to be meaningless to anyone outside the agency. The lot numbers, without street names, are meaningless. I have also examined each of the edited mailing lists that have been released to the complainants by the agency. In my opinion, those edited documents are unintelligible and, having regard to the decision in *Re Winterton*, I do not consider that the agency was required to give the complainants access to edited copies of those three mailing lists.

241. The information that the agency has deleted from those mailing lists consists of personal information about several hundred people other than the complainants and there is no evidence before me to establish that any one of those individuals consents to their information being disclosed to the complainants. In addition, I am not persuaded that the complainants have established that there are any compelling public interest factors that would tilt the balance in favour of disclosure. Accordingly, I remain of the view that the agency was not, and is not, required to give the complainants access to edited copies of the mailing lists.

\*\*\*\*\*

| <b>Doc No.</b> | <b>Date</b> | <b>Description</b>  | <b>Exempt matter</b>  |
|----------------|-------------|---|---|
| <b>A</b>       | 04/07/00    | Minutes. Meeting No. 2. Morley 5B and 26L. Contract No. MW-00-10020. Project No. C-S00331.  | Clause 3(1) - Page 2, Item 2.1 - all deleted matter; Page 3, Item 4.2 - all deleted matter; page 5, Items 7.3, 9.0 and 10.0 - all deleted matter.   |
| <b>B</b>       | 18/07/00    | Minutes. Meeting No. 3. Morley 5B and 26L. Contract No. MW-00-10020. Project No. C-S00331.  | Clause 3(1) - Page 2, Item 2.2 - all deleted matter; page 4, Item 4.2, - all deleted matter; page 5, Item 9, - all deleted matter   |
| <b>C</b>       | 01/08/00    | Minutes. Meeting No. 4. Morley 5B and 26L. Contract No. MW-00-10020. Project No. C-S00331.  | Clause 3(1) - Page 2, Item 2.2 - all deleted matter; page 5, Item 7.2 - all deleted matter  |
| <b>D</b>       | 15/08/00    | Minutes. Meeting No. 5 Morley 5B and 26L. Contract No. MW-00-10020. Project No. C-S00331.   | Clause 3(1) - Page 2, Items 2.1 and 2.2 - all deleted matter, page 3, Item 4.2 - all deleted matter, page 5, Items 8 and 10 - all deleted matter.   |
| <b>E</b>       | 29/08/00    | Minutes. Meeting No. 6. Morley 5B and 26L. Contract No. MW-00-10020. Project No. C-S00331.  | Clause 3(1) - Page 1, Item 1.1 - all deleted matter; page 2, Item 2.2 - all deleted matter; page 3, Item 4.2 - all deleted matter.  |
| <b>F</b>       | 12/09/00    | Minutes. Meeting No. 7. Morley 5B and 26L. Contract No. MW-00-10020. Project No. C-S00331.  | Clause 3(1) - Page 1, Item 1.1 - all deleted matter; page 2, Item 2.2 - all deleted matter, page 3, Item 4.2 - all deleted matter; page 3, Item 4.2 - all deleted matter; Property Restoration Release form, all deleted matter |
| <b>G</b>       | 26/09/00    | Minutes. Meeting No. 8. Morley 5B and 26L. Contract No. MW-00-10020. Project No. C-S00331.  | Clause 3(1) - Page 1, Item 1.1, - all deleted matter; Page 2, Item 2.4 - all deleted matter; page 3, Item 4.2 - all deleted matter.   |
| <b>H</b>       | 13/10/00    | Minutes. Meeting No. 9. Morley 5B and 26L. Contract No. MW-00-10020. Project No. C-S00331.  | Clause 3(1) - Page 1, Item 1.1, - all deleted matter; page 2, Item 2.4 - all deleted matter; page 3, Item 3.2 - all deleted matter.   |
| <b>I</b>       | 24/10/00    | Minutes. Meeting No. 10. Morley 5B and 26L. Contract No. MW-00-10020. Project No. C-S00331. | Clause 3(1) - Page 2, Item 2.4 - all deleted matter; page 6, Item 8.0 - all deleted matter.   |
| <b>J</b>       | 10/11/00    | Minutes. Meeting No. 11. Morley 5B and 26L. Contract No. MW-00-10020. Project No. C-S00331. | Clause 3(1) - Page 1, Item 1.1, - all deleted matter; page 2, Item 2.4 - all deleted matter; page 5 Item 7.1 - all deleted matter; page 6, Item 9.0 - all deleted matter.   |
| <b>K</b>       | 05/12/00    | Minutes. Meeting No. 12. Morley 5B and 26L. Contract No. MW-00-10020. Project No. C-S00331. | Clause 3(1) - Page 2, Item 2.4 - all deleted matter; page 3, Item 4.2 - all deleted matter; page 5, Item 9.0 - all deleted matter.  |
| <b>L</b>       | 30/01/01    | Minutes. Meeting No.13 Morley 5B and 26L. Contract No. MW-00-10020. Project No. C-S00331.   | Clause 3(1)- Page 1, Item 1.1 - all deleted matter; page 2, Items 2.1 and 2.4 - all deleted matter; pages 3 and 4, Item 4.2 - all deleted matter.   |
| <b>M</b>       | 13/02/01    | Minutes. Meeting No. 14. Morley 5B and 26L. Contract No. MW-00-10020. Project No. C-S00331. | Clause 3(1) - Page 1, Item 1.1 - all deleted matter; page 2, Item 2.4 - all deleted matter; pages 3 and 4, Item 4.2 - all deleted matter.   |
| <b>N</b>       | 28/02/01    | Minutes. Meeting No. 15. Morley 5B and 26L. Contract No. MW-                                | Clause 3(1) - Page 2, Item 2.4 - all deleted matter; pages 3 and 4, Item  |

|            |          |  |  |
|------------|----------|--|--|
|            |          | 00-10020. Project No. C-S00331.  | 4.2 - all deleted matter.  |
| <b>O</b>   | 22/03/01 | Minutes. Meeting No. 16. Morley 5B and 26L. Contract No. MW-00-10020. Project No. C-S00331.                  | Clause 3(1) - Page 1, Item 1.1 - all deleted matter; page 2, Item 2.4 - all deleted matter; page 3, Item 4.2 - all deleted matter. |
| <b>P</b>   | 10/04/01 | Minutes. Meeting No. 17. Morley 5B and 26L. Contract No. MW-00-10020. Project No. C-S00331.                  | Clause 3(1) - Page 1, Item 1.1 - all deleted matter; page 2, Item 2.4 - all deleted matter; page 3, Item 4.2 - all deleted matter. |
| <b>Q</b>   | 07/07/99 | Query from third party re position of sewerage line  | Clause 3(1) - all deleted matter   |
| <b>R</b>   | 07/07/99 | Query from third party re installation of sewerage line  | Clause 3(1) - all deleted matter   |
| <b>S</b>   | 08/07/99 | Query from third party whether property could be connected from rear onto sewerage line                      | Clause 3(1) - all deleted matter   |
| <b>T</b>   | 08/07/99 | Objection from third party re alignment of sewerage pipe   | Clause 3(1) - all deleted matter   |
| <b>U</b>   | 09/07/99 | Objection from third party re location of sewerage pipe  | Clause 3(1) - all deleted matter.  |
| <b>V</b>   | 16/07/99 | Objection from third party re installation of sewerage   | Clause 3(1) - all deleted matter.  |
| <b>W</b>   | 19/07/99 | Objection from third party re installation of sewerage pipe, potential damage to pool                        | Clause 3(1) – all deleted matter.  |
| <b>X</b>   | 26/07/99 | Query from third party re installation of sewerage pipe  | Clause 3(1) – all deleted matter.  |
| <b>Y</b>   | 30/07/99 | Objection from third party re installation of sewerage pipe  | Clause 3(1) – all deleted matter.  |
| <b>Z</b>   | Undated  | Query from third party re location of sewerage connection point  | Clause 3(1) – all deleted matter.  |
| <b>ZA</b>  | Undated  | Query from third party re location of sewerage chamber   | Clause 3(1) – all deleted matter.  |
| <b>ZB</b>  | Undated  | Query from third party re relocation of sewerage pipe  | Clause 3(1) – all deleted matter.  |
| <b>ZC</b>  | Undated  | Query from third party re relocation of sewerage pipe  | Clause 3(1) – all deleted matter.  |
| <b>ZD</b>  |          | File Index - Preliminaries to Works - General Works – Infill Sewerage Project Morley 26L File No 10 D 362101 | Clause 3(1) - all deleted matter   |
| <b>ZE</b>  | 30/09/03 | Infrastructure Design Branch – Notice of Entry and Proposal Letters Work Instruction                         | Clause 3(1) page 7 – all deleted matter.   |
| <b>5.1</b> |          | Mailing List – Notice of Entry letter - Morley 26L (Agency Document No. 5.1)                                 | Clause 3(1) - all deleted matter.  |
| <b>5.2</b> |          | Alternate Mailing List – Notice of Entry letter - Morley 26L   | Clause 3(1) – all  |
| <b>24</b>  |          | Mailing List – Notice of Proposal letter (Agency Document Nos 3 and 24)                                      | Clause 3(1) - all deleted matter   |
| <b>23</b>  |          | Mailing List. METRO\MORL5B26L\MORLEY 26L (Agency Document Nos. 1, 7 and 23)                                  | Clause 3(1) - all deleted matter   |