

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

**File Ref: F2012376  
Decision Ref: D0182016**

Participants:

**Lynette Jennings**  
Complainant

- and -

**City of Nedlands**  
Agency

- and -

**Palmaya Pty Ltd**  
Third Party

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – documents relating to a draft biodiversity local planning policy – scope of the access application – whether the disputed documents come within the scope of the access application – clause 4(3) – adverse effect on business affairs

*Freedom of Information Act 1992 (WA)*: sections 24, 26, 27(2), 30, 33 and 102; Schedule 1, clauses 3(1), 4(3), 4(7) and 7(1)

*Interpretation Act 1984 (WA)*: section 5

*Apache Northwest Pty Ltd v Department of Mines and Petroleum* [2012] WASCA 167

*Attorney-General's Department v Cockcroft* (1986) 10 FCR 180

*Re Hesse and Shire of Mundaring* [1994] WAICmr 7

*Re Oset and Office of Racing and Gaming and Anor* [2000] WAICmr 2

## DECISION

The agency's decision to refuse the complainant access to the disputed documents is set aside. In substitution, I find that:

- The complainant did not agree to exclude all commercial or business information about third parties from the scope of her access application. Rather, the complainant agreed to exclude commercial or business information about third parties only if it is exempt information.
- The commercial or business information about third parties contained in the disputed documents is not exempt under clause 4(3) of Schedule 1 to the FOI Act or for any reason.
- Accordingly, the disputed documents are within the scope of the complainant's access application and the agency should give the complainant access to those documents, in accordance with my decision.

Sven Bluemmel  
INFORMATION COMMISSIONER

21 December 2016

## REASONS FOR DECISION

1. This complaint arises from a decision made by the City of Nedlands (**the agency**) to refuse Lynette Jennings (**the complainant**) access to documents under the *Freedom of Information Act 1992* (WA) (**the FOI Act**). One third party, Palmaya Pty Ltd (**the Third Party**) has been joined as a party to this complaint.

### BACKGROUND

2. The Third Party is the owner of land in Bedbrook Place, Shenton Park (**the Property**). In October 2011 the agency advertised for public comment the draft Bedbrook Place Biodiversity Local Planning Policy (**the draft Policy**). The Property is part of the land area covered by the draft Policy<sup>1</sup>.
3. On 2 May 2012 the complainant applied to the agency under the FOI Act for access to documents consisting of correspondence, or a record of communication, between various named parties – including the Third Party – or their representative, and the agency regarding the draft Policy or the draft Subiaco Waste Water Treatment Plant Odour Buffer – Land Use Restrictions Local Planning Policy.
4. Following receipt of the complainant's access application, the agency and the complainant engaged in numerous communications about the scope of the access application, which I will refer to later. Most significantly for the purpose of this decision, on 4 May 2012 the agency and the complainant engaged in email communications regarding the exclusion of certain information about third parties from the scope of the access application. The question of what was agreed in those communications is a key issue in dispute in this matter.
5. On 11 July 2012, the agency provided the complainant with its notice of decision. The agency identified 138 documents within the scope of the application. The agency decided to give access to edited copies of 108 documents, deleting personal information about third parties under clause 3(1) of Schedule 1 to the FOI Act; refuse access to 16 documents and attachments to documents on the ground they are exempt under clause 7 of Schedule 1 to the FOI Act; give access to three documents by way of inspection in accordance with section 27(2)(c); and refuse access to 11 documents consisting of attachments to some of the requested documents on the basis they are publicly available. In addition, the agency decided to impose charges for dealing with the complainant's access application.
6. On 10 August 2012, the complainant applied for internal review of the agency's decision.
7. In its internal review decision dated 20 September 2012, the agency identified three additional documents within the scope of the access application. The agency varied its original decision and decided to:

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<sup>1</sup> See page 3 of the draft Policy at <http://www.nedlands.wa.gov.au/draft-bedbrook-place-biodiversity-lpp>

- give full access to two documents;
  - refuse access to 13 documents – described as Documents 7, 10, 19, 26, 27, 28, 29, 33, 34, 36, 37, 38 and 46 – on the basis they contain information of the kind described in clause 4(3) of Schedule 1 to the FOI Act, being information of the kind that the complainant advised the agency she did not seek access to;
  - refuse access to five documents and attachments to Documents 61, 83, 102, 103, 125, 127, 128 and 129 on the ground they are exempt under clause 7 of Schedule 1 to the FOI Act;
  - give access by way of inspection in accordance with section 27(2)(c) of the FOI Act to complete copies of three documents;
  - refuse access to the attachments to several of the requested documents because the attachments are publicly available documents; and
  - give access to edited copies of 111 documents deleting information on the ground it is exempt under clause 3(1) of Schedule 1 to the FOI Act.
8. On 20 November 2012, the complainant applied to me for external review of the agency's decision. At that stage, the complainant sought external review of the aspects of the agency's decision as described at the second, third and fifth bullet points above, as well as the agency's decision to in effect refuse access to further documents under section 26 of the FOI Act and to impose charges for dealing with her access application.

## **REVIEW BY THE INFORMATION COMMISSIONER**

9. On receipt of this complaint, I required the agency to produce to me its FOI file maintained for the purposes of the complainant's access application and the documents to which access was refused.
10. During the course of this external review, my office has held various discussions with the agency and the complainant and has spent considerable time attempting to resolve this matter without requiring my formal determination. However, those efforts have not resulted in the resolution of all of the issues in dispute and, therefore, it now requires my formal determination.
11. As a result of my office's numerous and lengthy negotiations with the complainant between July 2013 and October 2015, all but one aspect of the initial complaint to my office has been resolved. The number of documents now in dispute has been reduced from 136 to 15. 13 of those documents are Documents 7, 10, 19, 26, 27, 28, 29, 33, 34, 36, 37, 38 and 46, referred to in the second bullet point of [7] of this decision. Two of the 15 documents are the attachments to Documents 61 and 83 which the agency claimed in its internal review decision were exempt under clause 7(1). By letter dated 19 September 2013, the agency withdrew that exemption claim and instead claimed that those attachments are 'documents of a court' and are therefore not accessible under the FOI Act.

12. On 15 January 2016, I provided the agency and the complainant with my preliminary view in respect of the documents remaining in dispute (**preliminary view letter**). In that letter I noted that, having examined the agency's FOI file, it was apparent from the wording of the agency's request to the complainant on 4 May 2012 to reduce the scope of her access application that the complainant only agreed to the exclusion of exempt business information about third parties; and that, as such, this requires a determination to be made as to whether that business information is exempt. I advised that it was my preliminary view that the agency's decision to refuse access to Documents 7, 10, 19, 26, 27, 28, 29, 33, 34, 36, 37, 38 and 46 on the ground they are exempt under clause 4(3) was not justified and that the agency's decision to refuse access to the attachments to Documents 61 and 83 on the basis that those documents are 'documents of a court' was also not justified.
13. In response to my preliminary view letter the agency advised, by letter dated 28 January 2016, that it has never claimed that Documents 7, 10, 19, 26, 27, 28, 29, 33, 34, 36, 37, 38 and 46 are exempt under clause 4(3). Rather, the agency claims that it refused the complainant access to those 13 documents on the basis that the complainant agreed to exclude all commercial or business information about third parties from the scope of her access application, not just commercial or business information about third parties that is exempt (my emphasis); and, as a result, the agency considered those 13 documents to be outside the agreed scope of the complainant's access application. The agency provided submissions in support of its position.
14. In the above letter the agency advised that it accepted my preliminary view that the attachments to Documents 61 and 83 are not 'documents of a court' and are therefore, potentially, accessible under the FOI Act. However, in substitution, the agency claimed that those two documents contain commercial or business information about third parties and are therefore outside the agreed scope of the complainant's access application for the same reasons as Documents 7, 10, 19, 26, 27, 28, 29, 33, 34, 36, 37, 38 and 46.
15. For a considerable portion of this external review my office proceeded on the understanding that the agency claimed that Documents 7, 10, 19, 26, 27, 28, 29, 33, 34, 36, 37, 38 and 46 are exempt under clause 4(3). My office confirmed this understanding to the agency on multiple occasions and this was not corrected by the agency. Since receipt of my preliminary view letter, the agency has expressed the view that the complainant agreed to exclude *all* commercial or business information about third parties from the scope of her access application, not just *exempt* commercial or business information, and that this is the basis for its decision to refuse the complainant access to the disputed documents. Consequently, the agency maintains that it was and is unnecessary for it to claim or establish that the commercial or business information about third parties in those documents is exempt.
16. By letter dated 5 February 2016, I advised the agency that I considered that the ambiguous wording of the correspondence between the parties could be interpreted as supporting both the agency's and the complainant's interpretations of the agreed reduced scope of the access application. I also advised the agency that, in light of that and in keeping with the objects of the FOI Act, I had decided to proceed in accordance with the complainant's interpretation of the wording of the agreed reduced scope; that is, that the complainant agreed to exclude only exempt commercial or business

information about third parties. Consequently, the agency was invited to make any submissions on the exempt status of the documents remaining in dispute, being Documents 7, 10, 19, 26, 27, 28, 29, 33, 34, 36, 37, 38, 46 and attachments to Documents 61 and 83 (**the disputed documents**).

17. By letter dated 18 February 2016 the agency advised me that it rejected my view that there is any ambiguity in the wording of the agreed reduced scope. The agency did not make submissions to me about the exempt status of the disputed documents. By letter dated 26 February 2016 I advised the agency that, after again considering all of the information before me, I remained of the view previously advised.
18. My office subsequently identified the various third parties whose commercial or business information is contained in the disputed documents with a view to contacting them to seek their views on disclosure of that matter and whether that matter is exempt under either or both clauses 3 or 4 of Schedule 1 to the FOI Act.
19. As a result of the third party consultation process undertaken by my office, one third party – the Third Party – was joined as a party to this complaint. The Third Party advised that it did not consent to disclosure but did not make any submissions at that stage claiming that the relevant documents are exempt. One third party gave consent to disclosure of its business information in the documents; two third parties contacted my office and advised they had no concerns about disclosure of the information; and six of the third parties did not respond.
20. Eleven of the 15 documents – Documents 7, 10, 26, 28, 29, 33, 34, 36, 37, 38 and the attachment to Document 61 – contain information concerning the business affairs of the Third Party (**the Third Party documents**). The remaining four documents – Documents 19, 27, 46 and the attachment to Document 83 – do not contain information concerning the business affairs of the Third Party but contain information concerning the business affairs of other third parties. However, those third parties either gave consent to disclosure, did not object to disclosure or did not respond to the consultation process conducted by my officers.
21. On 17 June 2016, I provided the Third Party with a letter setting out the reasons for my preliminary view that the Third Party documents are not exempt under clause 4(3). The Third Party was invited to make submissions relevant to the matter for my determination. A copy of my letter was provided to both the agency and the complainant but neither was required to respond or provide any further submissions.
22. By letter dated 28 June 2016, the agency advised my office that, although it maintained its position with respect to its interpretation of the agreed reduced scope, if the complainant had only agreed to exclude exempt business information, the agency would ‘without hesitation’ have accepted my preliminary view that the documents are not exempt under clause 4(3).
23. On 3 July 2016 the Third Party provided my office with submissions claiming that the Third Party documents are exempt under clause 4(3).

## THE DISPUTED DOCUMENTS

24. The disputed documents consist of Documents 7, 10, 19, 26, 27, 28, 29, 33, 34, 36, 37, 38, 46 and attachments to Documents 61 and 83. Those documents are described in the Appendix attached to this decision. The majority of the documents consists of correspondence between the agency and the Third Party's legal representatives in 2011 regarding the draft Policy.
25. As already noted, Documents 19, 27, 46 and the attachment to Document 83 do not contain information concerning the business affairs of the Third Party. The documents that contain information concerning the business affairs of the Third Party – the Third Party documents – are Documents 7, 10, 26, 28, 29, 33, 34, 36, 37, 38 and some information in the attachment to Document 61.

### Onus of proof

26. Section 102(1) of the FOI Act provides that, except where subsection (2) or (3) applies, in any proceedings concerning a decision made under this Act by an agency, the onus is on the agency to establish that its decision is justified or that a decision adverse to another party should be made. Therefore, I consider that the agency bears the onus of establishing that its decision to refuse the complainant access to the disputed documents is justified.

## THE ISSUES FOR MY DETERMINATION

27. As noted at [50] below, the agency submits by its letter dated 28 January 2016 as follows:

*In the view of the City, the issue for you to determine in relation to [the disputed documents] is not whether the City's claim for exemption is justified - as the City has never claimed exemption for those documents under clause 4(3) or at all - but, rather, whether or not the complainant agreed to exclude those documents from the scope of her FOI application.*

28. I consider that the first issue that I must decide is whether the complainant agreed to exclude all commercial or business information about third parties from the scope of her access application or whether the complainant agreed to exclude commercial or business information about third parties from the scope of her access application only if it is exempt under clause 4 of Schedule 1 to the FOI Act. The complainant submits that she agreed to the latter whereas the agency submits that the complainant agreed to the former.
29. In the event that I find that the complainant agreed to exclude commercial or business information about third parties only if it is exempt information, it is then necessary for me to determine whether the disputed documents are exempt from disclosure under the FOI Act. If they are exempt documents then they are outside the scope of the complainant's access application and the agency is entitled to refuse the complainant access to them on that basis. However, if the disputed documents are not exempt then the agency's decision to refuse access to them on the basis they are outside the scope of

the access application is not justified and the complainant should be given access to those documents.

## THE SCOPE OF THE ACCESS APPLICATION

30. In determining the extent of information that the complainant agreed to exclude from her access application, I have considered all of the material before me including the documents on the agency's FOI file and the submissions made by the agency and by the complainant.
31. The documents on the agency's FOI file show that following receipt of the complainant's access application on 2 May 2012, the agency's FOI Officer contacted the complainant by email dated 4 May 2012 in the following terms:

...

### *Preliminary matters relating to your FOI application*

#### *(a) Sections 32 and 33 of the FOI Act*

*The requested documents, as described in your FOI application will, in my opinion, almost certainly contain some "personal information", as that term is defined in [the] FOI Act, about individuals other than you, as well as some information about the business, professional, commercial or financial affairs of community organisations and associations. Individuals other than you and organisations and associations that are not State or local Government agencies are referred to as "third parties" in sections 32 and 33 of the FOI Act.*

*Please note that [the] City is expressly prohibited, by section 32(2) of the FOI Act, from giving you access to complete and unedited copies of any documents that contain any personal information about individuals other than you unless the City has taken such steps as are reasonably practicable to obtain the views of any third parties as to whether any information recorded in the requested documents consists of matter that is exempt matter under clause 3 - personal information - of Schedule 1 to the FOI Act.*

*In addition, the City is also expressly prohibited, by section 33(2) of the FOI Act, from giving you access to complete and unedited copies of any documents containing information about the business, professional, commercial or financial affairs of non-government organisations and associations, unless the City has taken such steps as are reasonably practicable to obtain the views of any third parties as to whether one or more of the requested documents contains any information that is exempt matter under clause 4 - commercial or business information - of Schedule 1 to the FOI Act.*

*However, sections 32(2) and 33(2) of the FOI Act do not apply if access is given to an edited copy of a requested document from which any third party personal information and/or third party commercial or business information has been deleted by the City, in accordance with the provisions of section 24 of the FOI Act [agency emphasis].*

*Section 24 of the FOI Act provides that if you, as the FOI applicant, seek access to documents containing third party personal information and/or third party commercial or business information that is exempt from disclosure under clause 3 or clause 4 of Schedule 1 to the FOI Act and it is practicable for the City to give you access to edited copies of the requested documents, redacted by the City to delete any exempt third party personal information and/or third party commercial or business information from the requested documents, the City must give you access to edited copies of the requested documents, if it is 'practicable' for the City to do so [agency emphasis].*

*Would you please advise me, in writing, as soon as possible, whether or not you are prepared to accept access to edited copies of the documents described in your FOI application, once any exempt third party personal information and/or the commercial or business information has been redacted from the documents by the City. **Your urgent advice on this aspect of your FOI application would be appreciated** [agency emphasis].*

*If you are prepared to accept access to edited copies of the documents described in your FOI application, that would mean, amongst other things, the City will not have to consult with any third parties and it may be practicable for the City edit the requested documents and give you access to edited copies in an expeditious manner.*

*Once the City receives your further advice as to whether you are prepared to accept access to edited copies of the requested documents, I will then be in a position to provide you with the documents that you have requested.*

*Finally, please also note, this letter is not a decision on access in response to your FOI application but, rather, an initial attempt by me, in my capacity as the City's FOI Officer to take reasonable steps to seek further advice and assistance from you, in order to reduce the amount of potential charges that may be imposed for processing your FOI application and to assist the City to process your FOI application as expeditiously as possible, taking into account its statutory responsibilities and duties under the FOI Act.*

...

32. The complainant responded by email dated 4 May 2016 advising, among other things, 'I consent to edited versions of the information being provided to me as per your email below'.
33. By email dated 7 May 2012, the agency's FOI Officer advised 'I will proceed with your application as stated. Edited versions of the information will be provided as per your email below'. The complainant responded by email dated 8 May 2016 by merely saying 'Thank you'. Later that day, the agency's FOI Officer again contacted the complainant by email 'to seek [her] assistance to narrow the scope of [her] access application...by reference to...a specific date range or time period... [or] a specific person or position'. The complainant's consent on 4 May 2012 to being given edited copies of the requested documents was not referred to.

34. By email dated 11 May 2012, the complainant advised that she agreed to reduce the date range of the requested documents to those that were ‘dated or...sent or received between 1 January 2011 and 30 April 2012’ and, in relation to part of her access application, specified the officers of the agency ‘to whom the correspondence would have been sent to or by’. The complainant also asked the agency to provide her with a ‘cost estimate for providing the documents.’
35. Following receipt of a further email from the complainant on 12 May 2012, the agency sent an email to the complainant on 15 May 2012 outlining the agency’s understanding of the four groups of documents to which the complainant sought access. At the end of that email the agency’s FOI Officer stated:

*In order to assist the City to deal with your amended FOI application in accordance with the FOI Act and to ensure that we do not [misinterpret] or misunderstand the scope of your amended FOI application, would you please confirm, by return email, that I have correctly understood the nature of the documents requested and the scope of your amended FOI application, as soon as practicable.*

*In the alternative, if I have misunderstood any aspect of your amended FOI application, would you please so advise, again as soon as practicable, in order that I may amend my records to accurately reflect the scope of your amended FOI application.*

36. The complainant’s consent on 4 May 2012 to being given edited copies of the requested documents was not referred to in that email.
37. In her email response dated 17 May 2012, the complainant relevantly stated in the final paragraph:

*I ... notice that there is no mention of the agreement to redact third party information as per prior correspondence...My comments above are made on the basis that [that agreement is] still in place. Please advise if my understanding is not correct.*

38. By email to the complainant dated 21 May 2012 the agency’s FOI Officer stated, among other things:

*[Y]ou have asked about the previous agreement to redact third party information as per prior correspondence...I confirm your advice as per prior correspondence to redact third party information...Please advise via email regarding the above if my understanding is not correct.*

39. The complainant responded by email dated 27 May 2012 regarding the scope of her application generally but did not refer to the above issue.
40. By letter dated 11 June 2012 the agency provided the complainant with an estimate of charges for dealing with her access application. The agency referred to my predecessor’s decision in *Re Hesse and Shire of Mundaring* [1994] WAICmr 7 and noted that the activities that an agency can impose charges for included ‘... Consulting

with third parties (but only if consultation is required) (*consulting is not [required] in this case*)'. The agency advised on page 2 of that letter:

*I estimate that the charges that you might have to pay [include] examining the requested documents, identifying any third party information recorded in the documents; redacting the third party information identified, in accordance with your advice of 4 May 2012...*

41. When the agency issued its notice of decision dated 11 July 2012 to the complainant it referred to their communications regarding the scope of the access application but did not expressly refer to the complainant's consent or agreement to exclude either third party commercial or business information or exempt third party commercial or business information as per the email exchange on 4 May 2012.
42. Following receipt of the agency's initial decision and the documents as released by the agency, the complainant applied for internal review. In her internal review request dated 10 August 2012, the complainant stated, among other things, at page 5 as follows:

...

***3. Editing of personal information of third parties who are not individuals/natural persons***

*The Decision states that third party personal information has been edited from the copies of documents provided by the City. I presume this is the case with the documents to which access has been granted by way of inspection.*

*Only the third party personal information of individuals/natural persons may be edited on the basis of the personal information exemption under the FOI Act. I only agreed to exempt personal information being edited.*

*It appears that the names of companies and firms may have been edited from the documents provided to me, incorrectly on the basis of it being personal information.*

*I request a review of this aspect of the Decision and that names of companies and firms have not been incorrectly edited as personal information.*

...

43. The complainant then stated at page 6 of her internal review request:

...

***5. Commercial and Business Information***

*I request a review of the decision to apparently edit from the documents "non-exempt" commercial and business information. This includes all documents in respect of which the Decision was to grant access.*

*It appears that information has been edited from the copies of documents provided to me on the basis of it being commercial or business information.*

*The Decision does not state that this is the basis of the editing of information in the documents and therefore should not have been edited.*

*Although I previously agreed to the editing of this information, it was I thought on the basis that it was exempt information that would be edited.*

*I consider in the context of the documents provided it is likely that any commercial or business information that has apparently been edited from the documents is not exempt due to such information either being in the public interest that it be provided and/or it does not satisfy the test in sub-clause 4(3)(b) of Schedule 1 of the FOI Act (or indeed fall within any other exemption in clause 4 of Schedule 1),*

*Additionally by the operation of section 24 and sub-section 33(4) of the FOI Act, only exempt commercial or business information may be edited from the documents and provided this has been done, then documents containing non-exempt commercial or business information must be provided pursuant to s24. [Section] 24 refers to only exempt information being edited from documents and ss33(4) states s33 does not apply (including the necessity to consult with third parties about whether commercial or business information should be disclosed) if the “exempt” information has been deleted under s24.*

44. Following receipt of the complainant’s application for internal review, the then Acting Chief Executive Officer of the agency (**Acting CEO**) wrote to the complainant by letter dated 5 September 2012 and advised:

*While we are processing your request for an internal review, I wanted to respond to the concerns you have raised as follows:*

...

***(h) editing of third party information***

*You state, at page 5 of your letter, that “[I] only agreed to exempt personal information being deleted.” With respect, it is very difficult for the City to understand that assertion.*

*I enclose a copy of an email dated 4 May 2012 which you sent to [the agency’s FOI Officer], in response to an email which she sent to you on the same date. In her email, among other things, [the agency’s FOI Officer] sought your urgent advice as to:*

*“...whether you would be prepared to accept access to edited copies of the documents described in your FOI application, once any exempt third party personal information and/or third party commercial or business information has been redacted from the documents by the City.”*

*At paragraph 1 of your email response to [the agency’s FOI Officer] request, you advised...that “[I] consent to edited versions of the information be provided to me as per your email below” [agency emphasis].*

45. The Acting CEO's above letter did not refer to the complainant's submission made at page 6 of her internal review request. Nor was that submission specifically referred to or addressed when the Acting CEO issued his internal review decision on 20 September 2012. The internal review decision relevantly stated on page 2 as follows:

***My Decision on Internal Review***

*In my capacity as the City's FOI decision-maker for the purpose of dealing with your FOI application for internal review, I have decided to:*

- ...
2. *refuse you access to 13 of the requested documents (Documents 7, 10, 19, 26-29, 33, 34 36-38 and 46) because those documents contain information of the kind described in clause 4(3) of Schedule 1 to the [FOI Act] (business and commercial information about third parties) being information of the kind which you advised the City you did not seek access to (see: your email to [the agency's FOI Officer] on 4 May 2012...*
- ....

46. The Acting CEO then stated on page 4 of the internal review decision:

***3. Access Refused to 13 of the Requested Documents***

*I have decided to refuse you access to thirteen (13) of the requested documents because they contain business and commercial information about third parties, which is information of the kind described in clause 4(3) of Schedule 1 to the FOI Act. As noted above, you have advised the City you did not seek access to information of that kind and accordingly, the City has decided to refuse you access to those documents.*

**The complainant's submissions**

47. In her application for external review to my office dated 19 November 2012 the complainant submitted as follows:

*... The Agency in making this part of its decision of 20 September 2012 (the Decision) [as set out at [45] of my Reasons for Decision] has failed to comply with sub-section 30 (f) of the Act to give findings on any material questions of fact underlying the reasons, by referring to the material on which those findings were based.*

*... The Agency's stated grounds for refusing to provide access to documents of the kind described in clause 4(3) of Schedule 1 are that I had previously advised (by email of 4 May 2012) that I did not seek access to the information in the documents if that information was exempt.*

*... By the 4 May 2012 email I consented to edited versions of the documents being provided that deleted exempt third party commercial or business information.*

*... There is no explanation in the Decision (see under heading Reasons for Decision - 3. Access Refused to 13 of the Requested Documents) as to why any exempt information could not be edited from the documents. Such consideration should have been given and if it was this should have been advised in the decision.*

48. By letter to my office dated 19 August 2015 the complainant, insofar as is relevant, submits that:

*I note that the Agency has not justified as required by section 30(f) of the Act the basis for refusing access and its only explanation for refusing access on the basis of the applicable exemption was that I had previously agreed to edited versions of documents being provided that redacted third party business etc information. My agreement was to edited versions that deleted exempt information.*

*The relevant correspondence between me and the Agency in this regard was:*

*The Agency's email ([FOI Officer] 4 May 2012) to me: "Would you please advise me, in writing, as soon as possible, whether or not you are prepared to accept access to edited copies of the documents described in your FOI application, once any exempt third party personal information and/or the commercial or business information has been redacted from the documents by the City. **Your urgent advice on this aspect of your FOI application would be appreciated.**"*

*My email response of 4 May 2012 stated: "I consent to edited versions of the information being provided as per your email below."*

*I was agreeing to EXEMPT information being redacted. Not to all business information being redacted or documents that contain nothing but business etc information not being provided at all.*

49. On 22 October 2015 my office provided the agency with a copy of the complainant's submissions as set out above.

### **The agency's submissions**

50. By letter to my office dated 28 January 2016, the agency submits as follows, among other things:

*Nothing in either of [the] Notices of Decision [given to the complainant] states that the City claimed exemption under clause 4(3) of Schedule 1 to the FOI Act for one or more of [the disputed documents] because the complainant had previously advised the City - in an email dated 4 May 2012 - that she did not seek access to documents containing information of the kind described in clause 4(3)(a) of the FOI Act.*

*...*

*Following receipt of the complainant's FOI application, a number of emails were exchanged between the complainant and the City's FOI Officer at the time, [the FOI Officer], in an endeavour on the part of the City to reduce, narrow and clarify the scope of the complainant's FOI application. In an email to the*

*complainant dated 4 May 2012 (copy of email attached) [the FOI Officer] asked the complainant whether or not she was “...prepared to accept access to edited copies of the documents described in your FOI application, once any exempt third party personal information and/or the commercial or business information has been redacted from the documents by the City.”... [Agency emphasis].*

*On the same date, 4 May 2012, the complainant responded to [the FOI Officer]...and advised her that “I consent to edited versions of the information being provided to me as per your email below”.*

...

*With respect, the City does not accept your interpretation of the scope of the complainant's access application nor does the City accept your interpretation of what the complainant “claims” she agreed to.*

*During the exchange of emails that took place between the complainant and [the FOI Officer] - in early May 2012 and before the initial decision on access was made, the complainant was very particular and very precise in stating what documents she was seeking access to. ...*

*The City submits that the complainant knew precisely what she was agreeing to during her consultations with [the FOI Officer] about the scope of her FOI application [agency emphasis]. The City says that [the FOI Officer's] email of 4 May 2012 is both clear and unambiguous and that it is not, in any sense, open to “misinterpretation” or claim that it was ambiguous. [The FOI Officer's] email to the complainant clearly referred to “...exempt personal information and/or the commercial or business information”. Had [the FOI Officer] **meant** to ask the complainant to exclude from the scope of her FOI application only the **exempt** personal information and the **exempt** commercial or business information, [the FOI Officer] would clearly have said so [agency emphasis].*

*In the view of the City, the complainant's November 2012 submission to the Information Commissioner in support of her application for external review is nothing more than a selective interpretation of the scope of her FOI application. The complainant's submission that she “...consented to edited versions of the documents being provided that deleted exempt third party commercial or business information” is disingenuous, self-serving and at clearly odds with the true facts of this matter.*

*In the view of the City, the issue for you to determine in relation to [the disputed documents] is not whether the City's claim for exemption is justified - as the City has never claimed exemption for those documents under clause 4(3) or at all - but, rather, whether or not the complainant agreed to exclude those documents from the scope of her FOI application.*

*The City maintains its view that the complainant excluded those documents from the scope of her FOI application.*

*As the City has never made a claim for exemption under clause 4(3) of Schedule 1 to the FOI Act in relation to [the disputed documents], in the view of the City [it] is presently unnecessary for the City to demonstrate that one or more of those*

*documents are exempt under clause 4(3) of Schedule 1 of the FOI Act [agency emphasis].*

51. In its letter to my office dated 28 June 2016 the agency submits as follows, among other things:

...

*In the course of dealing with the complainant's access application - given the broad and complex scope of that application - the City's officers who dealt with and processed the application undertook a significant amount of careful preliminary consultations with the complainant in order to ensure that the City clearly and unambiguously understood the exact scope of the complainant's access application before making the decision on access [agency emphasis].*

...

*The City notes that during those preliminary consultations, the complainant reduced the scope of her access application on 4 May 2012.*

*The City's former FOI officer asked the complainant - by email - whether or not she was "...prepared to accept access to edited copies of the documents described in your FOI application, once any exempt third party personal information and/or **the** [agency emphasis] commercial or business information has been redacted from the documents by the City." The complainant responded to the City's former FOI officer advising her that "[I] consent to edited versions of the information being provided to me as per your email below".*

*In the same email, the complainant also sought to add another document to the scope of her access application and, thereafter, the complainant:*

- *further clarified the scope of her access application on 11 May 2012;*
- *further clarified the scope of her access application on 17 May 2012 - in order to correct an error in the description of the names of one of the third parties whose documents she sought access to;*
- *clarified and again expanded the scope of her access application on 25 May 2012; and*
- *when seeking internal review of the City's initial decision on access on 10 August 2012, again attempted to expand the scope of her access application to include documents sent to and from the City to a [particular] entity described by the complainant...*

*The City's officers took considerable care to satisfy themselves that they did not misinterpret or misunderstand the scope of the complainant's access application before making the decision on access. As the City is concerned, there never was nor is there now any dispute between the City and the complainant as to the scope of her access application. The complainant agreed to accept access to edited copies of the requested once any exempt third party personal information and/or the commercial or business information had been redacted from the documents by the City.*

*In the City's view, it is self-evident from an examination of the complainant's application for internal review of 10 August 2012 that she understood what the*

*City's former FOI officer had asked of her on 4 May 2012. In that application for internal review, the complainant said that:*

*“it appears that information has been edited from the documents provided to me on the basis of it being commercial or business information. The decision does not state that this is the basis of the editing of information in the documents and therefore should not have been edited. Although I had previously agreed... [agency emphasis] to the editing of this information, it was I thought on the basis that it was exempt information that would be edited”.*

*Finally, the City again notes that the complainant agreed to “...accept access to edited copies of the documents described in your FOI application, once any exempt third party personal information and/or **the commercial or business information** has been redacted from the documents by the City [agency emphasis].*

*...*

*In the event that your understanding of what was purportedly agreed between the complainant and the City was correct (and it is not correct) the City would, without hesitation, have accepted your preliminary view. However, what you understand the complainant agreed to and what was actually agreed between the complainant and the City are, with respect, not the same thing [agency emphasis].*

*The City dealt with the complainant's access application on the basis of her written advice to the City that she would accept access to “...edited copies of the documents described in [her] FOI application, once any exempt third party personal information and/or the commercial or business information has been redacted from the documents by the City” [agency emphasis].*

## **Consideration**

52. It is not in dispute that the disputed documents contain information that can be categorised as commercial or business information about third parties. The agency claims that the complainant agreed to exclude all commercial or business information about third parties from the scope of her access application. If that is in fact what the complainant agreed to, the disputed documents will therefore fall outside the scope of the complainant's access application. In contrast, the complainant claims that she agreed to exclude commercial or business information about third parties from the scope of her access application only if it is exempt. If that is in fact what the complainant agreed to, the disputed documents will only be outside the scope of the access application if they are exempt.
53. Although I was of the view earlier in these proceedings that both interpretations of what was agreed were arguably open on the facts, after undertaking a further review of all of the material before me, I am now of the view, for the reasons set out below, that the material before me establishes that the complainant did not agree to exclude all commercial or business information about third parties; rather she agreed to exclude commercial or business information about third parties only if it is exempt information.
54. While I accept that the agency may have intended by its email dated 4 May 2012 to ask the complainant to exclude all third party commercial or business information from the

scope of her access application, I find that the proposal made by the agency in that email was open to a different interpretation. In my view, the references in that email to the deletion of exempt information in accordance with section 24 of the FOI Act suggested that it was exempt information that would be deleted both in the case of personal information and commercial or business information. In a grammatical sense, the issue comes down to whether the adjective ‘exempt’ was intended only to apply to the object ‘personal information’ or also to the subsequent object ‘commercial or business information’. On balance, I consider it is reasonable to interpret the contents of that email as a request from the agency to ask the complainant to exclude exempt third party commercial or business information (my emphasis).

55. While the agency maintains that it dealt with the complainant's access application on the basis of her written advice to the agency on 4 May 2012 that she would accept access to “...edited copies of the documents described in [her] FOI application, once any exempt third party personal information and/or the commercial or business information has been redacted from the documents by the City”, that was the language used by the agency in its email to the complainant dated 4 May 2012, not by the complainant in her email of 4 May 2012. Although the complainant advised the agency in that email that she ‘consent[ed] to edited versions of the information being provided to her as per [the agency’s email]’, in my view, the precise terms of what the agency was asking the complainant to agree to by its email of 4 May 2012 was unclear.
56. Regrettably, neither party clarified the precise terms of what the complainant agreed to on 4 May 2012 before the agency issued its initial decision on 11 July 2012. I accept that the language used by the agency in the estimate of charges issued to the complainant on 11 June 2012 suggested that the agency’s understanding was that the complainant had agreed to exclude all third party information, not just exempt third party information, from the scope of her access application.
57. However, following receipt of the agency’s initial decision and the documents disclosed to her, I consider that the complainant made it clear to the agency in her application for internal review that it was her understanding that the agency had asked her to delete exempt commercial or business information only, not all commercial or business information, and that this is what she understood she had agreed to or consented to by her email response of 4 May 2012.
58. Consequently, I do not accept the agency’s claim that it is self-evident from an examination of the complainant’s application for internal review that she understood that the agency asked her on 4 May 2012 to exclude all third party commercial or business information from the scope of her access application. Nor do I accept, on the material before me, the agency’s suggestion that the complainant knows that she agreed to exclude all third party commercial or business information from the scope of her application or that her ‘submission that she “...consented to edited versions of the documents being provided that deleted exempt third party commercial or business information” is disingenuous, self-serving and at...odds with the true facts of this matter’.
59. Further, although the agency may have indirectly sought in its letter of 5 September 2012 to clarify its view of what the complainant agreed to, it merely cited the language used by both parties in the email exchange on 4 May 2012 and did not address the

complainant's advice at page 6 of her internal review that she thought she had agreed to commercial or business information being deleted only if it is exempt. Nor did the Acting CEO address this issue in his internal review decision. Rather, he advised that access was refused to the disputed documents because they contain information of the kind described in clause 4(3), which is information of the kind the complainant advised the agency by her email of 4 May 2012 that she did not seek access to. I find that the facts do not support the agency's contention that the complainant advised the agency by email dated 4 May 2012 that she did not seek access to documents containing information of the kind described in clause 4(3)(a) or clause 4(3). Neither the agency nor the complainant specifically referred to clause 4(3) in their emails dated 4 May 2012.

60. I also note that by its email to the complainant dated 15 May 2012, in which the agency confirmed its understanding of the four groups of documents that the complainant sought access to, one of those groups of documents included correspondence between the agency and a representative of the Third Party. As noted at [24], the majority of the disputed documents consist of correspondence of that kind. In my view, the agency's claim that the complainant agreed to exclude the disputed documents from the scope of her access application is inconsistent with the agency's understanding as described in its email of 15 May 2012.
61. While the agency maintains that it has dealt with the complainant's access application in accordance with the terms agreed by her, I consider that a disproportionate amount of time and effort has been spent by both my office and the agency dealing with this issue, particularly in light of the fact that there is nothing to prevent the complainant from making another access application to the agency seeking access to the disputed documents and the agency does not claim that the disputed documents are exempt in any event.
62. On the information before me I am not persuaded that the complainant agreed to exclude all commercial or business information about third parties from the scope of her access application. I find as a fact that the complainant agreed to exclude commercial or business information about third parties from the scope of her access application only if it is exempt information. Consequently, it is necessary for me to determine whether the disputed documents are exempt from disclosure under the FOI Act.
63. As already noted, if the disputed documents are exempt documents then they are outside the scope of the complainant's access application and the agency is entitled to refuse the complainant access to them on that basis. However, if the documents are not exempt then the agency's decision to refuse access to them on the basis they are outside the scope of the access application is not justified and the complainant should be given access to those documents.

## **ARE THE DISPUTED DOCUMENTS EXEMPT?**

### ***Documents 19, 27, 46 and the attachment to Document 83***

64. The agency does not claim that Documents 19, 27, 46 or the attachment to Document 83 are exempt. No other party has claimed that those documents are exempt. On the

contrary, when the relevant third parties were invited to give their views on whether those documents are exempt, none of those third parties provided any submissions claiming those documents are exempt.

65. On the material before me, including my examination of Documents 19, 27, 46 and the attachment to Document 83, I find that Documents 19, 27, 46 and the attachment to Document 83 are not exempt under any of the exemptions in clause 4 of Schedule 1 to the FOI Act or for any other reason.

### ***The Third Party documents***

66. The remainder of the disputed documents are the Third Party documents which consist of Documents 7, 10, 26, 28, 29, 33, 34, 36, 37, 38 and some information in the attachment to Document 61. The agency does not claim that the Third Party documents are exempt. However, the Third Party claims that those documents are exempt under clause 4(3) of Schedule 1 to the FOI Act.

### **CLAUSE 4 – COMMERCIAL AND BUSINESS INFORMATION**

67. Clause 4 provides, so far as is relevant:

- (3) *Matter is exempt matter if its disclosure —*
  - (a) *would reveal information (other than trade secrets or information referred to in subclause (2)) about the business, professional, commercial or financial affairs of a person; and*
  - (b) *could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.*
- (4) *Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of an agency.*
- (5) *Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of the applicant.*
- (6) *Matter is not exempt matter under subclause (1), (2) or (3) if the applicant provides evidence establishing that the person concerned consents to the disclosure of the matter to the applicant.*
- (7) *Matter is not exempt matter under subclause (3) if its disclosure would, on balance, be in the public interest.*

### **Onus of proof**

68. Section 102(2) of the FOI Act provides that if a third party initiates or brings proceedings opposing the giving of access to a document, the onus is on the third party

to establish that access should not be given or that a decision adverse to the access applicant should be made. As the agency does not claim that the Third Party documents are exempt under any of the exemption provisions in the FOI Act and the third party opposes access being given to those documents on the grounds they are exempt under clause 4(3), I consider that the onus is on the third party to establish the Third Party documents are exempt.

### **The Third Party's submissions**

69. The Third Party's submissions are set out in its letter to me dated 1 July 2016. The Third Party submits as follows:

*[Disclosure of the Third Party documents] would have a substantial adverse effect on [the Third Party's] business interests.*

*[The Third Party] is in negotiation for the subdivision of the [Property] at present and there is a substantial risk of damage to the negotiations by the disclosure of old information from the failed subdivision.*

*Disclosure now could have [a] substantial adverse effect on the current negotiations and...should be delayed for at least 6-12 months.*

### **The complainant's submissions**

70. The complainant has made submissions in support of her position that the disputed documents are not exempt under clause 4(3) and why disclosure of the disputed documents would, on balance, be in the public interest. The complainant's submissions are set out in her request for internal review dated 10 August 2012, her application for external review dated 19 November 2012 and her letter to my office dated 19 August 2015. In relation to whether the Third Party documents are prima facie exempt under clause 4(3), the complainant submits, in summary, that:

- The information in the documents relate to matters that are no longer live business dealings or affairs of the Third Party. As such, it is unlikely that disclosure would have any adverse effect on the Third Party's present or future business affairs.
- The complainant does not consider that the Third Party has acted improperly or inappropriately. It is legitimate that the Third Party may have pursued its commercial interests when a local policy of the agency may have negatively impacted on its business affairs. There are no adverse reflections that can properly or reasonably be made against the Third Party and therefore it is not reasonable to expect that there will be any adverse effect on its business affairs from disclosure of the documents.
- If the documents contain threats of legal action and negotiations, the disclosure of such information will not stop the supply of similar information in the future as third parties will still pursue legal action against local government if they think it appropriate or necessary to do so.

## Consideration

71. To establish a claim for exemption under clause 4(3), the Third Party must demonstrate that the Third Party documents contain information about the business, professional, commercial or financial affairs of a person (which, under section 5 of the *Interpretation Act 1984* (WA), includes a company), and also that the disclosure of that information could reasonably be expected to have an adverse effect on those affairs or, in the alternative, to prejudice the future supply of information of that kind to the Government or to an agency. Finally, if the requirements of both paragraphs (a) and (b) of clause 4(3) are satisfied, the limits on exemption set out in clauses 4(4) to 4(7) must also be considered.
72. From my examination of the Third Party documents, I am satisfied that they contain information concerning the business, professional, commercial or financial affairs of the Third Party. Therefore, I accept that the information contained in the Third Party documents satisfies the requirements of paragraph (a) of clause 4(3). However, in order to establish a prima facie claim for exemption under clause 4(3) it is necessary to satisfy both paragraphs (a) and (b) of that clause.
73. In *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 the Full Federal Court of Australia said, at 190, that the words 'could reasonably be expected to' in the Commonwealth FOI Act were intended to receive their ordinary meaning. That is, they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect the relevant outcome. That approach was accepted as the correct approach by the Court of Appeal (WA) in *Apache Northwest Pty Ltd v Department of Mines and Petroleum* [2012] WASCA 167.
74. I agree with the view of the former Information Commissioner expressed in *Re Oset and Office of Racing and Gaming and Anor* [2000] WAICmr 2 that the meaning of the term 'adverse effect' will depend on the context in which it is used and that the adverse effect will most likely be pecuniary in nature but not necessarily so.
75. I have examined the Third Party documents and considered the submissions made by the Third Party. Other than asserting that disclosure of the Third Party documents could reasonably be expected to have an adverse effect on its business interests, the Third Party has provided little of substance in support of that assertion.
76. The disputed documents refer, in part, to a development application in respect of the Property that has lapsed and has not proceeded. The Third Party advised my office in July 2016 that it was then in negotiations for the subdivision of the Property and submits that there is a substantial risk of damage to the negotiations by 'disclosure of old information from the failed subdivision'. The Third Party submits that disclosure now could have a substantial adverse effect on the current negotiations and that disclosure should be delayed for at least 6-12 months. However, the Third Party has not explained how or why disclosure of the documents could damage or adversely affect any current negotiations. Having considered the submissions made by the Third Party and based on my examination of the Third Party documents, I am not persuaded that disclosure of the Third Party documents could reasonably be expected to either

damage or adversely affect any current negotiations for the subdivision of the Property or have an adverse effect on the Third Party's business interests or affairs.

77. The Third Party has not claimed, in the alternative, that disclosure of the Third Party documents could reasonably be expected to prejudice the future supply of information of the kind in those documents to the Government or to an agency and, on the material before me, I am not persuaded that disclosure of the Third Party documents could reasonably be expected to have that effect.
78. The Third Party's submissions have not persuaded me that disclosure of the Third Party documents could reasonably be expected to have an adverse effect on the affairs of the Third Party or another party or to prejudice the future supply of information of that kind to the Government or to an agency. Consequently, on the material before me, I am not persuaded that the requirements of clause 4(3)(b) have been met. Accordingly, I find that the Third Party documents are not exempt under clause 4(3) of Schedule 1 to the FOI Act.
79. In light of that finding, it is not necessary for me to consider whether any of the limits on the exemption in clauses 4(4) to 4(7) apply, including whether disclosure of the Third Party documents would, on balance, be in the public interest pursuant to clause 4(7). As a result, I have not set out or considered in my decision the public interest submissions made by the complainant in this regard.
80. Finally, it is not disputed between the parties that the complainant has agreed to exempt personal information being deleted from the disputed documents. In light of that, I consider that the agency is entitled to delete personal information that is exempt under clause 3(1) of Schedule 1 to the FOI Act from the copy of the disputed documents it gives to the complainant. I find that the signatures and direct contact details of all individuals and the names of individuals who are not officers of an agency contained in the disputed documents consists of personal information which is exempt under clause 3(1) and the agency is entitled to delete that information wherever it appears in the disputed documents.

## CONCLUSION

81. For the reasons given in this decision, the agency's decision to refuse the complainant access to the disputed documents is set aside. In substitution, I find that:
  - The complainant did not agree to exclude all commercial or business information about third parties from the scope of her access application. Rather, the complainant agreed to exclude commercial or business information about third parties only if it is exempt information.
  - The commercial or business information about third parties contained in the disputed documents is not exempt under clause 4(3) of Schedule 1 to the FOI Act or for any reason.
  - Accordingly, the disputed documents are within the scope of the complainant's access application and the agency should give the complainant access to those documents, in accordance with my decision.

## APPENDIX

## The disputed documents

Document No.	Date	Description
7	3 February 2011	Letter from the Third Party's legal representatives to the agency regarding the Draft Bedbrook Place Biodiversity Local Planning Policy ( <b>draft Policy</b> )
10	7 February 2011	Letter from the Third Party's legal representatives to the agency regarding the draft Policy
19	19 October 2011	Cover letter from representative of a third party to the agency regarding a proposed development application, with attached copy documents
26	31 October 2011	Letter from representative of a third party to the agency regarding the draft Policy
27	31 October 2011	Letter from a third party to the agency regarding the draft Policy
28	31 October 2011	Letter with attached map from the Third Party's legal representatives to the agency regarding the draft Policy
29	31 October 2011	Letter from the Third Party's legal representatives to the agency regarding the draft Policy
33	3 November 2011	Letter from the Third Party's legal representatives to the agency regarding the draft Policy
34	3 November 2011	Unsigned copy letter from the Chief Executive Officer ( <b>CEO</b> ) of the agency to the Third Party's legal representatives regarding the draft Policy
36	8 November 2011	Unsigned copy letter from the CEO of the agency to the Third Party's legal representatives regarding the draft Policy
37	8 November 2011	Letter from the Third Party's legal representatives to the agency regarding the draft Policy
38	8 November 2011	Letter from the Third Party's legal representatives to the agency regarding the draft Policy
46	7 December 2011	Letter from a third party to the agency regarding activities of the third party
Attachment to Document 61	22 December 2011	Copy cover letter from a third party to the State Administrative Tribunal ( <b>SAT</b> ) regarding an application for review and the subsequent application. Includes attached supporting copy documents
Attachment to Document 83	23 December 2011	Letter from the SAT to the agency regarding an application made by a third party