

Participants:

**Post Newspapers Pty Ltd**  
Complainant

- and -

**Town of Cambridge**  
Respondent

### **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – request for access to house plans – clause 3(1) – personal information – whether document reveals personal information – clause 5(1)(e) – public safety of any person – clause 5(1)(f) – property security – whether disclosure could reasonably be expected to endanger security of property.

***Freedom of Information Act 1992***: sections 6, 13(1)(b), 27(2)(c), 30(f), 32, 33, 39(3), 69(2), 76(1), 76(4), 102(1), 102(3); Schedule 1, clauses 3(1)-3(6), 4(3), 5(1)(e), 5(1)(f);  
***Copyright Act 1968 (Cth)***;  
***Local Government Act 1995***;  
***Local Government (Administration) Regulations 1996***;  
***Building Regulations 1989***.

***Manly v Ministry of the Premier and Cabinet*** (1995) 14 WAR 550;  
***Herbert and Ministry of Housing*** [2000] WAICmr 41;  
***Hoyts Multiplex Cinemas Pty Ltd and City of Gosnells*** [1997] WAICmr 1;  
***Attorney-General's Department v Cockcroft*** (1986) 10 FCR 180;  
***Searle Australia Pty Ltd v Public Interest Advocacy Centre*** (1992) 108 ALR 163;  
***Re Mineralogy and Department of Resources Development*** [1996] WAICmr 2;  
***Re Birney and Attorney General*** [2002] WAICmr 22.

## DECISION

The decision of the agency to give access to edited copies of the disputed documents by inspection is set aside. In substitution, it is decided that the disputed documents are exempt under clause 3(1) and clause 5(1)(f) of Schedule 1 to the *Freedom of Information Act 1992*.

D A WOOKEY  
A/INFORMATION COMMISSIONER

22 December 2006

## REASONS FOR DECISION

1. This complaint arises from a decision made by the Town of Cambridge ('the agency') to give Post Newspapers Pty Ltd ('the complainant') access, by way of inspection, to an edited copy of a document under the *Freedom of Information Act 1992* ('the FOI Act').

## BACKGROUND

2. By email message sent on 16 November 2005 at about 5:00pm, the complainant wrote to the agency, seeking access to a copy of "...*the plans for Lot 373 Windarra Drive, City Beach as supplied to councillors with their agendas for the Development and Environmental Services Committee*" ("the requested documents"). The complainant asked for its access application to be dealt with by 10:00am the next day. In effect, the complainant requested the agency to deal with its access application and make a decision on access in less than one working day after the access application was lodged with the agency and before the complainant had paid the prescribed application fee of \$30.00 to the agency. The agency did not agree to the complainant's application for a reduction in time but undertook to deal with the complainant's access application as soon as practicable.
3. By letter dated 18 November 2005, the agency consulted with one of the owners of Lot 373 ('the first third party') and the architect who created the requested documents ('the second third party') in accordance with its statutory obligations under ss.32 and 33 of the FOI Act. The agency asked both third parties to advise it whether they considered the requested documents were exempt under clause 3 of Schedule 1 to the FOI Act and to respond by no later than 30 November 2005.
4. By letter dated 28 November 2005, the first third party advised the agency that the first third party did not agree to the agency giving the complainant access to details of the third party's name, address and any other personal particulars that are ascertainable from the requested documents. The first third party also advised the agency that the development of a family home is a private matter that did not warrant the agency providing access to the requested documents and that it was not in the public interest to do so.
5. By letter dated 26 November 2005, which was received by the agency on 28 November 2005, the second third party advised the agency that it was the owner of the copyright in the requested documents. The second third party also advised the agency that, although it had no objection to the release of any personal information about the second third party contained in the requested documents, the second third party strongly objected to the agency giving the complainant a copy of the requested documents and the second third party did not consent to the agency providing the complainant with a copy of the requested documents. The second third party informed the agency that for it to provide the complainant with a copy of the requested documents would be a breach of s.27(2) of the FOI Act and also a breach of s.36(1) of the *Copyright Act 1968 (Cth)* ('the Copyright Act').

6. After considering the information then before him, including the views of the third parties, by letter dated 30 November 2005, the agency's Chief Executive Officer ('the CEO') made the decision on access. The CEO advised the complainant it would not be given access to unedited copies of the requested documents.
7. The CEO further advised the complainant that the second third party owned the copyright in the requested documents and that copying those documents without the permission of the copyright owner (which had been refused) would be an infringement of copyright. However, the CEO advised the complainant that it was granted access to edited copies of the requested documents, by way of inspection, in accordance with the provisions of s.27(2)(c) of the FOI Act. The agency advised that, following consultation with the third parties, certain information would be deleted from the requested documents on the ground that it was exempt under clauses 3, 5(1)(e) and 5(1)(f) of Schedule 1 to the FOI Act.
8. As the CEO of the agency is the 'principal officer' of the agency for the purposes of the FOI Act, internal review of his decision was not available to the complainant, in accordance with the provisions of s.39(3) of the FOI Act. Accordingly, by letter dated 12 December 2005, the complainant applied to the Information Commissioner for external review of the agency's decision on access.
9. The complainant made written submissions to me in support of its complaint. In essence, the complainant submitted that, among other things, the requested documents were not exempt under clauses 3, 5(1)(e) or 5(1)(f) of Schedule 1 to the FOI Act, as claimed by the agency. The complainant claimed that the requested documents were not exempt under the *Local Government Act 1995* ('the Local Government Act'), because s.5.96 of the Local Government Act would allow the complainant to have a copy of information that is available for inspection under the Local Government Act. The complainant said that clause 3(1) could not apply to a building, as it is an inanimate object, not a person and that clauses 5(1)(e) and (f) were not relevant because copies of plans provided for the purpose of planning approval would not contain details of safes or security features and because elevations and floor plans of building are published in real estate newspapers and householders often give their plans to companies that supply quotes for air conditioning or floor coverings.
10. In addition, the complainant submitted that, as the proposed building would be seen by the public after construction, it was not unreasonable for the townspeople to preview what will be part of their landscape for 50 years or more and that there was a strong public interest in providing information that allows electors in the Town of Cambridge to see how, and whether, their elected representatives are applying fairly the standards the electors voted for.

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

11. Following receipt of this complaint, pursuant to my powers under ss.72 and 75 of the FOI Act, I required the agency to produce the requested documents to me

for my examination, together with the FOI file maintained by the agency in respect of the complainant's access application. After examining those documents, I referred the matter to my Senior Investigations Officer to deal with, in accordance with his delegated authority under the FOI Act.

12. My Senior Investigations Officer consulted with the agency and with the complainant, in an endeavour to resolve this complaint by conciliation between the parties. During that part of the external review process, the third parties were also contacted and advised of their respective rights to be joined as a party to these proceedings under s.69(2) of the FOI Act but neither third party applied to be joined. Nonetheless, as I am satisfied that both third parties might be affected by my decision on this complaint, I am empowered by s.69(4) of the FOI Act to take into account submissions from them.
13. In my opinion, the notice of decision given to the complainant by the agency is deficient as it did not give the details required to be provided by section 30(c) of the FOI Act. Section 30(c) provides as follows:
  - “30. *The notice that the agency gives the applicant under section 13(1)(b) has to give details, in relation to each decision, of -*  
...  
*(c) if the decision is that a document is an exempt document and that access is to be given to a copy of the document from which exempt matter has been deleted under section 24 –*
    - (i) the fact that access is to be given to an edited copy; and*
    - (ii) the reasons for classifying the matter as exempt matter and the findings on any material questions of fact underlying those reasons, referring to the material on which those findings were based”.*
14. The material facts are those which are necessary to constitute the exemptions claimed. If an agency fails to give an access applicant the information referred to in section 30(c), the agency has not discharged its obligations under the FOI Act. Simply citing the exemption provisions relied on, as the agency did on this occasion, does not satisfy the requirements of section 30(c). Moreover, the agency's decision did not identify which of the information recorded in the requested documents it claimed to be exempt under clause 3(1) and which information it claimed to be exempt under subclauses 5(1)(e) and (f). Without proper reasons for a decision, as required by the FOI Act, an applicant is not in a position to assess the reasonableness of the decision and to make an informed decision as to whether to accept it or apply for external review.
15. On 13 February 2006, after making initial inquiries into this complaint, my Senior Investigations Officer informed the complainant and the agency of his initial view of this complaint, including his reasons. On the basis of the information then available to him, it appeared to my Senior Investigations Officer that the requested documents may be exempt under clause 5(1)(f) of Schedule 1 to the FOI Act.

16. My Senior Investigations Officer also provided the complainant with copies of two decisions of the former Information Commissioner ('the former Commissioner') relating to matters similar in nature to that under consideration in this complaint. Those decisions were *Re Herbert and Ministry of Housing* [2000] WAICmr 41 and *Re Hoyts Multiplex Cinemas Pty Ltd and City of Gosnells* [1997] WAICmr 1. The complainant was further advised that, in the event the requested documents were found not to contain exempt matter as claimed by the agency, then, in his view, s.27(2)(c) of the FOI Act applied to the requested documents and that the agency's decision to give the complainant access by way of inspection only also appeared to be justified. The complainant was invited to reconsider its complaint and to either withdraw the complaint or provide me with further submissions.
17. By email letter dated 24 February 2006, the complainant advised my office that it maintained its request for access to the requested documents - by way of full, unedited copies - and it made some further submissions to me, in support of its application. The complainant submitted that, in refusing the complainant copies of the requested documents, the Council of the agency had acted outside the Local Government Act, because ss.1.3, 5.94 and 5.95 of the Local Government Act all applied to make the requested documents publicly available. The complainant submitted that the decisions in *Re Herbert* and *Re Hoyts* are not the same situation, but they do support the agency's argument that the suggestion of risk (the agency's suggestion) is exaggerated, because the location of doors and windows are visible from outside a house and the details of security features are not shown on plans submitted for planning applications.
18. The complainant also submitted that, in *Re Herbert*, the matter related to scaled plans for a building that already existed whereas the requested documents in this application were for a proposed building and that plans that are submitted to councillors and subjected to scrutiny are plans that do not conform to the established regulations/laws/standards that the people of the Town of Cambridge would expect to be applied and, accordingly, such applicants are asking for special treatment and concessions. The complainant submitted that those who do not want their plans publicly scrutinised have the choice of submitting plans that conform to the prescribed standards.
19. Finally, the complainant submitted that ss. 41, 42, 43, 65 and 66 of the Copyright Act applied to the requested documents and the complainant. Those provisions render "fair dealings" with works for certain purposes - including the reporting of news in a newspaper - not an infringement of copyright. The complainant also submitted that I should address the fact that the agency had allegedly suddenly stopped what the complainant said was a previously-established practice of supplying plans of the requested kind in this matter to interested members of the public, such as the complainant.
20. Following receipt of that submission, my Senior Investigations Officer made further inquiries with the agency in relation to the complainant's claim that the agency had a previously-established practice of providing members of the public with access to plans of the kind under consideration in this matter. In

response to those inquiries, the agency provided me with detailed information about its administrative procedures relating to members of the public having access to or inspecting the building plans of another ratepayer.

21. Among other things, the agency advised my Senior Investigations Officer that, in circumstances where a counter inquiry is received by the agency from an immediate neighbour who may be affected by a building application, the agency will make arrangements for planning staff to deal with the inquiry and the plans may be shown to that immediate neighbour during such discussions, in accordance with clause 1.5.10 of the Residential Building Codes. However, in those circumstances, the person inspecting plans has no right to copies of the plans or to make drawings or take photographs of the plans.
22. In addition, the agency advised my Senior Investigations Officer that, after a building licence is issued, regulation 12 of the *Building Regulations 1989* provides that only the property owner, his or her authorised agent or a police officer may view such plans. The agency further advised my Senior Investigations Officer that under no circumstances will a person be given access (by inspection or copies) to the plans of another property owner unless the property owner has given the agency written authority for a specified person to view the plans under regulation 12 of the *Building Regulations 1989*.
23. Following that, by letter dated 9 May 2006, my Senior Legal Officer wrote to the complainant and to the agency, advising them of his preliminary view of this complaint, including his reasons. It was my Senior Legal Officer's preliminary view that, having regard to the former Commissioner's decision in *Re Herbert* and having considered all of the evidence then available to him, the requested documents are exempt under clause 5(1)(f) of Schedule 1 to the FOI Act. It was also his preliminary view that a small amount of information recorded in the requested documents was exempt under clause 3(1).
24. My Senior Legal Officer advised the complainant that, in the event that it maintained its claim that the requested documents are publicly available documents under the provisions ss.5.94, 5.95 and 5.96 of the Local Government Act then, in accordance with the provisions of s.6 of the FOI Act, the complainant did not have a right of access to the requested documents under the FOI Act and the Information Commissioner would not have jurisdiction under the FOI Act to deal with its complaint. My Senior Legal Officer also provided the complainant with full details of the information received from the agency in relation to its administrative arrangements/procedures in circumstances where a member of the public (not council staff or councillors) seeks access to building plans of another ratepayer and he invited the complainant to re-consider its complaint in light of his preliminary view.
25. By letter dated 23 May 2006, the complainant advised me that it maintained its request for copies of the requested documents and it made some additional written submissions to me in support of its complaint. As a result, this complaint cannot be resolved by conciliation between the parties.

## THE DISPUTED DOCUMENTS

26. The requested documents consist of eight pages of architectural plans, as described in the complainant's access application. Those plans include site plans, floor plans, elevations and sections for the proposed residence ('the disputed documents').

## PRELIMINARY ISSUE

27. The complainant maintains its claim that ss.1.3, 5.94, 5.95 and 5.96 of the Local Government Act apply to make the requested documents publicly available and that, in refusing the complainant access to copies of them, the agency is acting outside the Local Government Act.
28. As my office advised the complainant, if the complainant's submission concerning ss.5.94, 5.95 and 5.96 of the Local Government Act is correct and the disputed documents are accessible to the complainant, and to other members of the public, under the provisions of Division 7 of Part 5 of the Local Government Act and the regulations relating to public access to information held by local government agencies, then it necessarily follows that the complainant does not have a right of access to the disputed documents under the FOI Act and, further, this matter is not a matter about which a complaint can be made under Part 4 of the FOI Act.
29. Section 6 of the FOI Act provides that the access procedures set out in the FOI Act do not apply to documents that are already available. Section 6 provides as follows:

***“6. Access procedures do not apply to documents that are already available***

*Parts 2 and 4 do not apply to access to documents that are-*

- (a) available for purchase by the public or free distribution to the public;*
  - (b) available for inspection (whether for a fee or charge or not) under Part 5 or another enactment;*
  - (c) State archives to which a person has a right to be given access under Part 6 of the State Records Act 2000;*
  - (d) publicly available library material held by agencies for reference purposes; or*
  - (e) made or acquired by an art gallery, museum or library and preserved for public reference or exhibition purposes.”*
30. If I were to accept the complainant's submission that the disputed documents are accessible by it under the provisions of ss.5.94, 5.95 and 5.96 of the Local Government Act, then it follows that the disputed documents are available to the complainant under the provisions of another enactment, the Local Government Act. As a result, in accordance with the provisions of s.6 (b) of the FOI Act, the complainant would not have a right of access to the disputed documents under the FOI Act and the complainant also would not have the right, under Part 4 of

the FOI Act, to make a complaint to the Information Commissioner against the agency's decision on access.

31. Section 5.94 of the Local Government Act provides as follows:

***“5.94. Public can inspect certain local government information***

*Any person can attend the office of a local government during office hours and free of charge inspect, subject to section 5.95, any of the following in relation to the local government, whether or not current at the time of inspection-*

- (a) code of conduct;*
- (b) register of financial interests;*
- (c) annual report;*
- (d) annual budget;*
- (e) schedule of fees and charges;*
- (f) plan for the future of the district made in accordance with section 5.56;*
- (g) proposed local law of which the local government has given Statewide public notice under section 3.12(3);*
- (h) local law made by the local government in accordance with section 3.12;*
- (i) regulations made by the Governor under section 9.60 that operate as if they were local laws of the local government;*
- (j) text that-*
  - (i) is adopted (whether directly or indirectly) by a local law of the local government or by a regulation that is to operate as if it were a local law of the local government; or*
  - (ii) would be adopted by a proposed local law of which the local government has given Statewide public notice under section 3.12(3);*
- (k) subsidiary legislation made or adopted by the local government under any written law other than under this Act;*
- (l) any written law having a provision in respect of which the local government has a power or duty to enforce;*
- (m) rates record;*
- (n) confirmed minutes of council or committee meetings;*
- (o) minutes of electors' meetings;*
- (p) notice papers and agenda relating to any council or committee meeting and reports and other documents that have been-*
  - (i) tabled at a council or committee meeting; or*
  - (ii) produced by the local government or a committee for presentation at a council or committee meeting and which have been presented at the meeting;*
- (q) report of a review of a local law prepared under section 3.16(3);*
- (r) business plan prepared under section 3.59;*
- (s) register of owners and occupiers under section 4.32(6) and electoral rolls;*
- (t) contract under section 5.39 and variation of such contract;*
- (u) such other information relating to the local government-*

- (i) *required by a provision of this Act to be available for public inspection; or*
- (ii) *as may be prescribed,*

*in the form or medium in which it may for the time being be held by the local government.”*

32. The disputed documents are clearly not documents of a kind described in paragraphs (a) - (o) or paragraphs (q) - (t) of s.5.94. The *Local Government (Administration) Regulations 1996* (‘the Regulations), regulation 29, prescribes “other information” required to be made available under paragraph (u). Regulation 29(1)(d) provides that the following is prescribed for the purposes of s.5.94(u)(ii):

*“(d) notice papers and agenda relating to any council or committee meeting and reports and other documents which-*

- (i) are to be tabled at the meeting; or*
- (ii) have been produced by the local government or a committee for presentation at the meeting,*

*and which have been made available to members of the council or committee for the meeting;...”*

33. I have taken it that the complainant’s submission is essentially that the documents should be available under paragraph (p) or paragraph (u) of s.5.94 of the Local Government Act. It would appear that, if the documents had been tabled at a council or committee meeting or produced by the local government or a committee for presentation at a council or committee meeting and presented at the meeting, they would be available for inspection under s.5.94 of the Local Government Act. If they were to be tabled at a meeting or were produced by the agency or a committee for presentation at a meeting and were made available to members for the meeting, then they would be available for inspection under paragraph (u) of that provision. Section 5.96 of the Local Government Act provides that if information is available for inspection under that division of the Local Government Act then copies are to be made available on request.

34. In order to ascertain whether or not the disputed documents are of the kind described in paragraph (p) or (u), I had inquiries made with the agency as to its usual practice in respect of plans submitted with building applications. I am advised by the agency that, when a building application is received which does not comply with all the prescribed residential design codes, enquiries are made, which may include consultation with affected third parties, and a report is prepared for submission to council, which includes a recommendation in respect of the application. The application and the agency’s recommendation is then considered first by a subcommittee of council. The subcommittee considers the recommendation and decides whether to put that recommendation to the full council for determination or to put forward an alternative recommendation. The full council subsequently meets to determine the matter.

35. Agendas for both committee and full council meetings are sent to all elected members several days before the meeting and are posted on the agency's website the morning after they have been sent to the elected members. Plans are not posted on the website with agenda. The agenda consists of the reports prepared by the agency's administration.
36. The agency advises that a copy of the report is made available to the elected members, together with a photo-reduced copy of the relevant plans, and the report is considered an attachment to the agenda, but the copy plans are not. All plans are stamped with the following advice: "*for Councillor information only, not for public disclosure or reproduction*". They are provided confidentially to the elected members to enable them to consider the application before determining it at the meeting. Only the report is tabled at the meeting. The plans are not tabled. They are provided to the elected members for the limited purpose of assisting them in their deliberations of the agenda item. I am advised that this practice was implemented by the agency at the request of its council approximately five years ago. Prior to that, copy plans were not provided to the elected members.
37. I am advised that the plans are also displayed for public inspection at the agency for a limited period immediately before and during the meeting at which the item is being considered by the council. After the meeting, the plans are removed from display and no copies are provided to the public.
38. I am advised that, in respect of the application to which the disputed documents relate, that process was followed. The report in respect of the application was made public by being posted on the agency's website, but the copy plans were not made public. Although they were provided on a confidential basis, in accordance with the usual practice, to the elected members for the purposes of, initially, the committee meeting and subsequently the council meeting, they were not "tabled" at either meeting. In those circumstances they are not documents of a kind described in paragraph (p)(i) of s.5.94 of the Local Government Act or regulation 29(1)(d)(i) of the Regulations. They are not, in my opinion, documents "produced by the local government or a committee", as they were produced and submitted to the agency by a person engaged by the property-owners for the purpose. They are not, therefore, in my opinion, documents of a kind described in paragraph (p)(ii) of s.5.94 of the Local Government Act or regulation 29(1)(d)(i) of the Regulations.
39. For those reasons, it does not appear to me that the disputed documents are documents that are required to be made available for inspection under s.5.94 of the Local Government Act. Section 5.95 - which provides certain limits on the right of inspection under s.5.94 - and s.5.96 - which requires copies of information available under s.5.94 to be provided on requested - therefore have no application in this matter.
40. As the complainant has not persuaded me that the disputed documents are available for inspection under another enactment, it follows that I am of the view that they are documents for which an access application can be made

under the FOI Act and, therefore, that I have jurisdiction to deal with this complaint. If the complainant remains of the view that the disputed documents are documents required to be made available for inspection under the Local Government Act and considers that it has been wrongly refused access to them on that basis by the agency, then my understanding is that that is a matter about which a complaint could be made to the Parliamentary Commissioner for Administrative Investigations (the Ombudsman).

## THE EXEMPTIONS CLAIMED

41. The agency claims that certain information in the disputed documents is exempt under clauses 3(1), 5(1)(e) and 5(1)(f) of Schedule 1 to the FOI Act.

### (a) Clause 3 – personal information

42. Clause 3 of Schedule 1 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.”*
43. The term “personal information” is defined in the Glossary to the FOI Act to mean:
- “...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.”*
44. The definition of the term “personal information” 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, on the face of it, exempt information under clause 3(1), subject to the application of any of the limits on exemption in clauses 3(2) to 3(6).
45. In a number of my decisions relating to the meaning and interpretation of clause 3, I have expressed the view that 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. I hold the view 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 recognised and enshrined in the FOI Act by clause 3 and the FOI Act is not intended to open the private or professional lives of citizens to public scrutiny in circumstances where there is no demonstrable benefit to the public interest in doing so.
46. I have examined the disputed documents. As I have said, they consist of building plans. They contain details of the names and other specific identifying information about the first and second third parties, including details of their addresses and telephone numbers. That particular information is clearly ‘personal information’ as that term is defined in the FOI Act, about the first and second third parties and it is, *prima facie*, exempt under clause 3(1) of Schedule 1 to the FOI Act.
47. However, I am also of the view that the documents in their entirety would, if disclosed, reveal personal information, as defined, about the property-owners because the complainant requested the plans of the private home to be built at a particular location and is aware of the identities of the property-owners. Their identities are, in any event, ascertainable from the address of the property as I understand them to be the registered owners. The information about them that

would be revealed by disclosure of the disputed documents is that they proposed to build the home the subject of the plans, the size and layout of their proposed home and the features that they had chosen to include in their home. I am inclined to the view, therefore, that the documents in their entirety are *prima facie* exempt under clause 3(1).

48. The exemption in clause 3(1) is subject to the application of the limits on exemption in clauses 3(2) to 3(6) of Schedule 1 to the FOI Act. Accordingly, I have considered whether, in the circumstances of this matter, any of the limits on exemption in clauses 3(2) to 3(6) may apply to the information I consider to be *prima facie* exempt under clause 3(1).

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

49. In my view, the limits on exemption in clauses 3(2) – 3(4) clearly do not apply to the personal information about the third parties in this case, as the information contained in the disputed documents does not relate to the complainant, officers of agencies or persons performing services for agencies under contracts for services. To the extent that the disputed documents would reveal personal information about such a person (one of the property owners, whose identity is reasonably ascertainable from the address and other sources) these limits do not apply because the information that would be revealed is not about that person in his professional capacity and therefore is not prescribed details for the purposes of clause 3(3) or (4).
50. The limit in clause 3(5) is that personal information is not exempt under clause 3(1) if the individual concerned consents to its disclosure. Based on the advice given to the agency by the second third party that the second third party has no objection to any personal information about the second third party being disclosed, the limit on exemption in clause 3(5) does apply to that information and, therefore, that information is not exempt under clause 3(1).
51. However, the first third party did not consent to the disclosure of personal information about the first third party. In fact, the first third party clearly expressed to the agency a strong objection to disclosure of that kind of information. I have been provided with no evidence that the other property-owner consents to disclosure of the documents. Therefore, the limit on exemption in clause 3(5) does not apply to the personal information about the property-owners which would be revealed by disclosure.
52. As none of the other limits on the exemption applies, in my view, it remains only to consider whether the limit in clause 3(6) applies.

### ***Clause 3(6) – public interest***

53. Clause 3(6) provides that matter is not exempt matter under clause 3(1) if its disclosure would, on balance, be in the public interest.

*The complainant's onus*

54. Section 102(3) of the FOI Act provides that, if under a provision of Schedule 1, matter is not exempt matter if its disclosure would, on balance, be in the public interest, the access applicant (in this case, the complainant) bears the onus of establishing that disclosure would, on balance, be in the public interest.

*The complainant's submissions*

55. In a letter dated 12 December 2005, the complainant submitted, among other things, that:
- it is in the public interest to provide access to information that allows electors to see how and if their elected representatives and appointed officers are applying fairly the standards that they have voted for; and
  - its role is to report fairly and accurately decisions of the agency and the reasons for the decisions of the agency to those of the agency's electors who are unable to attend council meetings for one reason or another.
56. In a letter dated 23 May 2006, in response to my Senior Legal Officer's preliminary view of this complaint, the complainant submitted that:
- the disputed documents play a crucial part in the decision-making process, which is why they are supplied to councillors;
  - the disputed documents contain vital, visual information for councillors who are required to consider the scale, bulk and aesthetics of developments and their impact on the land/streetscape and amenity to the neighbourhood;
  - in matters where plans are for a development that does not conform to the rules, the applicants are asking for special treatment, concessions and extraordinary variations of the rules;
  - the public is entitled to know the identity of anyone making application for extraordinary treatment particularly where the applicant may be in a position of significant power and influence;
  - the FOI Act says a matter is not exempt merely because it discloses information about an individual;
  - the agency did not justify its decision or supply the information that should have been supplied to the complainant and to my office;
  - in this case, the agency suddenly stopped what was established practice of supplying plans whereas other councils regularly supply that kind of information;
  - recently the agency included plans of a proposed new surf club in an agenda (re page 3 POST Newspapers 20/5/06); and
  - access to the disputed documents will enable the public to more effectively understand and participate in their local government and will make local government more accountable to the public.

*The first third party's submission*

57. In response to the agency's initial inquiries about the complainant's access application, the first third party submitted that the development of a family home is a private matter that does not warrant disclosure of the disputed documents.

***Consideration***

58. Firstly, the agency provided me with detailed information about its administrative procedures relating to members of the public having access to or inspecting building plans of a ratepayer. A copy of that information was given to the complainant for its consideration before making its final written submissions. In essence, that information contradicts the complainant's claims that documents of the kind under consideration in this matter are accessible by persons other than by an immediate neighbour without the express written authority of the property owner, in accordance with the *Building Regulations 1989*.
59. The complainant was asked to provide me with evidence in support of its claim that the agency, and other councils, had routinely given the complainant access to copies of building plans. However, the complainant did not provide any evidence in support of that claim. In the circumstances, and in view of the process set out in paragraphs 34-38 above, I accept the advice of the agency that it does not routinely give access to building plans to third parties and, therefore, I have not given any weight to the complainant's submission in that regard.
60. I agree with the complainant's submission that it is in the public interest for access to be provided to information that allows electors to see how and if their elected representatives and appointed officers are applying fairly the standards that they have voted for. However, there is nothing recorded in the disputed documents about the decision-making processes of the Council of the agency; nor do those documents contain any information that would give electors of the Council of the agency any insight as to how and why the members of the Council of the agency voted or applied their minds to the decision-making process in relation to the building application submitted to the agency for the proposed residence at Lot 373. Whilst that kind of information may be recorded in other documents of the agency, for example, in the relevant minutes of meetings of the Council of the agency, it is not recorded in the disputed documents.
61. I do not accept the complainant's claim that it is necessary to give access to personal information about third parties to further that particular public interest. There are a number of other means by which the public may have access to sufficient information about planning applications and approvals which satisfy the public interest in the decision-making of the agency being made open and accountable, in my view. Those means include, but are not limited to, the ability of the public to attend meetings of the Council of the agency when such matters are being considered and for people who are directly affected

(neighbours) being notified and having an opportunity to discuss their concerns with relevant agency officers before the matter being considered by Council.

62. Further, I understand that the minutes of meetings at which such matters are discussed are publicly available. The minutes relating to the applications in respect of the property in question contain descriptions of the features of the proposed building and details of the variations sought. The immediate neighbours, who are the directly affected parties, were permitted to view the plans. The identities of the property owners are reasonably ascertainable from the information already publicly available. It seems to me that those processes strike a reasonable balance between serving the public interest in the community being informed of such proposals and the public interest in the protection of personal privacy.
63. In my view, there is a strong public interest in maintaining personal privacy, which is recognised by the inclusion of the exemption in clause 3(1) in the FOI Act. I consider that that public interest will only be displaced by some other significantly stronger countervailing public interest which requires the disclosure of personal information about another person. Further, I consider the personal information in this case to be the kind of private information generally requiring protection from disclosure on the ground of personal privacy. The documents are the plans of a private family home. The considerations are not, as the complainant suggests, the same as they might be for the plans of a club house or public building.
64. Having considered the submissions of the complainant, and given the amount of information otherwise available about the proposal, I am not persuaded that the complainant has established that there is a compelling public interest that requires the personal information about the first third party to be disclosed to the complainant or that any of the public interests in disclosure identified by the complainant overrides the public interest in protecting personal privacy. Therefore, in balancing the competing interests, on the basis of the evidence before me, I do not consider that the public interests in disclosure in this instance outweigh the public interest in protecting the privacy of the first third party.
65. Accordingly, I find that the disputed documents are exempt under clause 3(1) of Schedule 1 to the FOI Act. As the identities of the property-owners are known to the complainant and otherwise ascertainable, there is not, in my view, any way the disputed documents could be edited so as not to disclose personal information about them. There is therefore no obligation on the agency under s.24 to give the complainant access to edited copies of the documents. Even if the disputed documents were not exempt under clause 3(1), for the reasons given below, I am in any event of the view that they are exempt under clause 5(1)(f).

(b) **Clauses 5(1)(e) and 5(1)(f)**

66. The agency claims that the disputed documents are exempt under clauses 5(1)(e) and (f) of Schedule 1 to the FOI Act. Clause 5(1) provides, so far as is relevant:

***“5. Law enforcement, public safety and property security***

***Exemptions***

- (1) *Matter is exempt matter if its disclosure could reasonably be expected to -*
- (a) ...
  - ...
  - (e) *endanger the life or physical safety of any person;*
  - (f) *endanger the security of any property”.*

***Consideration***

67. Matter will be exempt under clause 5(1)(e) or (f) if its disclosure “*could reasonably be expected to*” cause the harm described in those exemption clauses. The phrase “*could reasonably be expected to*” appears in a number of the exemption clauses set out in Schedule 1 to the FOI Act.
68. In *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 at page 190, the Full Federal Court of Australia said that the words “*could reasonably be expected to*” in the Commonwealth FOI Act were intended to receive their ordinary meaning and 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 stated consequences to follow if the documents in question were disclosed.
69. The meaning of the phrase “*could reasonably be expected to*” was also considered by the Full Federal Court in *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 108 ALR 163. In *Searle's* case, it was held that, on an objective view of the evidence, there must be real and substantial grounds for expecting certain consequences to follow from the disclosure of documents.
70. I accept that the decisions in *Cockcroft's* case and in *Searle's* case correctly state the test that is to be applied when considering the application of the exemptions in the FOI Act that contain the phrase “*could reasonably be expected*” in Western Australia. The standard of proof required does not have to amount to proof on the balance of probabilities. However, it must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasonable decision-maker: see the comments of Owen J in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at 573.

***Clause 5(1)(e)***

71. For the exemption in clause 5(1)(e) to apply, the agency must establish that disclosure of the disputed documents could reasonably be expected to endanger the life or physical safety of any person.
72. In this instance, the agency has claimed that the disputed documents are exempt under clause 5(1)(e) by reference to the language of the exemption clauses and nothing more. However, in order to establish a *prima facie* claim for exemption under clause 5(1)(e) the agency must establish that the CEO of the agency had a reasonable basis for the expectation that the disclosure of the disputed documents could endanger the life or physical safety of a person.
73. In the absence of any factual material, information or explanation from the agency as to the reasons why the CEO of the agency reached the conclusion that disclosure of the disputed documents could reasonably be expected to endanger the life or physical safety of any person, on the basis of the evidence before me, I am not satisfied that the agency has discharged the onus its bears under s.102(1) of the FOI Act of establishing that disclosure of the disputed documents could reasonably be expected to endanger the life or physical safety of any person. Accordingly, I find that the disputed documents are not exempt under clause 5(1)(e) of Schedule 1 to the FOI Act.

***Clause 5(1)(f)***

74. Clause 5(1)(f) provides that matter is exempt if its disclosure could reasonably be expected to endanger the security of any property. In this case, as with the claim for exemption under clause 5(1)(e), the agency has provided the complainant with none of the specific details it was required to do by s.30(c) of the FOI Act. In particular, the agency has not provided the complainant with a notice of decision that contains the reasons for the decision on access, the findings on the material questions of fact underlying those reasons, nor reference to the material on which those findings were based.
75. In order to establish a *prima facie* claim for exemption under clause 5(1)(f), the agency must establish that the CEO of the agency had a reasonable basis for the expectation that the disclosure of the disputed documents could endanger the security of any property. On the basis of the evidence before me, as with the claim for exemption under clause 5(1)(e), I am not satisfied that the agency has discharged the onus its bears under s.102(1) of the FOI Act to establish that disclosure of the disputed documents could reasonably be expected to endanger the security of any property.

***Further consideration***

76. Although the agency has not established that its decision on access was justified, as Information Commissioner, I must deal with complaints made to me in accordance with my statutory functions and duties under Part 4 of the FOI Act. In dealing with a complaint made to me under Part 4 of the FOI Act against a decision of an agency, I ‘stand in the shoes’ of the decision-maker

(see: *Re Mineralogy and Department of Resources Development* [1996] WAICmr 2 and *Re Birney and Attorney General* [2002] WAICmr 22).

77. Section 76(1) of the FOI Act provides that, in dealing with a complaint under the FOI Act, I have, in addition to any other power, power to review any decision that has been made by the agency in respect of an access application or an application for amendment and to decide any matter in relation to the access application that could, under the FOI Act, have been decided by the agency. In addition, s.76(4) of the FOI Act provides that, if it is established that a document is an exempt document, I do not have power to make a decision to the effect that access to the document is to be given.

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

78. The complainant submits that clauses 5(1)(e) and 5(1)(f) are not relevant to the disputed documents because:
- the agency has not demonstrated “real and substantial grounds” for the exemption claimed;
  - the agency has exaggerated the risk of plans being made public, and the complainant cited *Re Herbert* in which, it says two qualified crime experts said disclosure would not create danger to the property and the only view that it would create such a danger was from a lay person, the neighbourhood watch representative;
  - the Council of the agency has acted outside the Local Government Act and the Regulations;
  - the decisions in *Re Herbert* and *Re Hoyts* are not the same situation and although those decisions acknowledge the suggestion of risk, in the complainant’s view, the agency’s suggestion of risk is exaggerated;
  - the decision in *Re Herbert* involved scaled plans for a building that already existed, whereas the plans in this application are for a proposed building;
  - section 5.94 and s.5.95 of the Local Government Act apply to make the information publicly available and clearly show the material cannot be classified as exempt, but should be made public under the Local Government Act and, further, that s.5.96 of the Local Government Act would allow the complainant to have a copy of the disputed documents, which it can view;
  - plans provided for the purpose of planning approval would not contain details of positions of safes or security features, as such things would be reserved for the builder’s working drawings;
  - elevations and floor plans of properties are published every week in real estate newspapers and householders often give their plans to companies that supply quotes for air conditioning or floor coverings;
  - the position of windows, doors and balconies, particularly second and third storey windows with a potential to overlook, are relevant information as is the use of the room behind the window, i.e. a frosted bathroom window would have a very different impact to a clear lounge room window which would be different again to a bedroom window;

- the proposed building will eventually be built for the public to see and it is not unreasonable for the townspeople to preview what could be part of their landscape for 50 years or more;
- plans that are submitted to councillors and subjected to scrutiny are plans that do not conform to the established regulations/laws/standards that people of the town would expect to be applied. Applicants are asking for special treatment and concessions and those who do not want their plans publicly scrutinised have the choice to submit plans that conform to the prescribed standards; and, finally
- it is in the public interest to provide information that allows electors to see how and if their elected representatives and appointed officers are applying fairly the standards they have voted for.

### Consideration

79. The complainant's submissions that the agency has acted outside the provisions of the Local Government Act and the Regulations and that ss.5.94, 5.95 and 5.96 of the Local Government Act apply to make the disputed documents publicly available are not relevant to a determination of whether or not the disputed documents are exempt documents under clause 5 of the FOI Act.
80. In this matter, the complainant has applied to the agency for access to documents under the FOI Act. As a result, the question of whether the agency's claims for exemption may be justified or not must be considered and determined in accordance with the provisions of the FOI Act and not otherwise. Accordingly, the complainant's submission that ss.5.94 and 5.95 of the Local Government Act establish that the disputed documents cannot be classified as exempt under the FOI Act is misconceived. The provisions of Division 7 of Part 5 of the Local Government Act relating to public access to information held by local government agencies have no relevance to a determination as to the exempt status or otherwise of a document under the provisions of the FOI Act.
81. Under the FOI Act, an 'exempt document' is a document that contains exempt matter. The term 'exempt matter' is defined in the Glossary to the FOI Act as matter that is exempt under Schedule 1 to the FOI Act.
82. I have examined the disputed documents and I have also obtained a copy of amended plans that were submitted to the agency by the second third party on behalf of the first third party, following the rejection of the initial application for building approval. Having examined both sets of plans, in my opinion, despite several minor amendments to the original plans, both the disputed documents and the amended plans are essentially similar documents.
83. In her decision in *Re Herbert*, the former Commissioner found, for the reasons given in that decision, that a copy of scaled drawings of a rental property owned by the Ministry for Housing, as it then was, was exempt under clause 5(1)(f). In *Re Herbert*, the former Commissioner acknowledged, at paragraph 20 of her reasons for that decision, that the Ministry for Housing had consulted with the Bureau of Crime Prevention of the Community Services Branch of the Police Service and the Neighbourhood Watch program about the likely effects of

disclosure of house plans. In that case, an officer from the Bureau of Crime Prevention expressed the view that disclosure would not endanger the security of a property, since most crimes are based on opportunity. Similarly, an officer from the Community Services Branch expressed the view that burglars are opportunists and would be unlikely to obtain house plans in order to commit a burglary. Nonetheless, that officer also expressed the view that disclosure of house plans could create a security risk.

84. I accept that most property crimes are opportunistic and burglars do not generally seek out house plans in order to commit their crime. However, in my view, publication of such plans - particularly in a local newspaper - creates an opportunity and a risk in respect of that particular property, and particularly in this case given the high public profile of one of the property-owners. In *Re Herbert*, the Neighbourhood Watch representative expressed the view that disclosure of house plans would assist a person to break into a house by revealing the number and kind of entry points and their distance from the ground.
85. I have also considered the complainant's submissions that floor plans of properties are published every week in real estate newspapers; that plans provided for the purpose of planning approval would not contain details of positions of safes or security features, as such things would be reserved for the builder's working drawings; that householders often give their plans to companies that supply quotes for air conditioning or floor coverings; and that the proposed building will eventually be built for the public to see, so that the positions of windows, doors and balconies will be observable to members of the public.
86. I acknowledge that floor plans of properties are published in real estate newspapers and that householders will give copies of their plans to companies that supply quotes for air conditioning or floor coverings. I also acknowledge that features of the proposed residence will be observable from the street by members of the public who may be passing by. However, there is no evidence presently before me that the disputed documents are documents that are in the public domain. Plans published in the newspaper are generally plans of houses that landowners may choose to have built in their land; they are not plans of a particular house at a particular location. To the extent that plans of existing properties at particular locations are published, my perusal of the real estate sections of various newspapers and real estate websites suggests that they are most often apartments being sold "off the plan", rather than an individually-owned house.
87. As to home-owners choosing to give their plans to particular tradespeople for a particular purpose, that is an entirely different matter from having their house plans distributed, over their objection, to the world at large and having no control over their dissemination. Once built, features of a house, including some access points, will be visible from the street. However, not all of the access points will be visible and, for at least some of them, the rooms they open into and the layout of the house behind them will not be apparent.

88. Based upon my consideration of the complainant's submissions, I accept that the complainant's purpose for seeking access to the disputed documents is the reporting of events that the complainant considers are newsworthy and there is nothing to suggest that disclosure of the disputed documents to the complainant could reasonably be expected to pose a risk of endangerment to the security of the first third party's property from the complainant.
89. However, disclosure under the FOI Act generally is considered to be "disclosure to the world at large" (see: *Re Herbert*). That means that if the disputed documents were found not to be exempt under the FOI Act, then no restrictions, limitations or conditions can be attached by the agency to the disclosure of those documents under the FOI Act or to their further dissemination by a successful access applicant.
90. In *Re Herbert*, the former Commissioner accepted that a plan of a house contained information that would be useful if any person were inclined to consider breaking into the property or otherwise causing a mischief to it, because a house plan would indicate relevant access points to the property and the interior rooms served by, or adjacent to, each of those access points. The former Commissioner accepted that that kind of information would assist a potential burglar to determine the best access point to facilitate the quickest and easiest access and egress to the property. I also accept that to be the case.
91. Having regard to the former Commissioner's decision in *Re Herbert* and the reasons for that decision, in my opinion, the security of the first third party's property to which the disputed documents relate could reasonably be expected to be endangered by the disclosure of the disputed documents. Accordingly, I find that the disputed documents are also exempt under clause 5(1)(f).
92. As clause 5(1)(f) is not subject to a "public interest" test limit on exemption, there is no scope for me to consider the complainant's submissions as to the public interest factors which may weigh in favour of disclosure of the disputed documents. In addition, as I have found that the disputed documents are exempt under clause 5(1)(f), it is unnecessary to consider the complainant's submissions relating to the provisions of the *Copyright Act 1968*. By way of comment, however, it appears to me that some of the provisions of that legislation cited by the complainant have no relevance to this matter, and those that may arguably allow the complainant to deal with works in a particular way without breaching copyright do not appear to me to allow the agency to make copies of the documents for public release without breaching copyright.
93. It is unfortunate that the complainant chose not to accept the agency's offer - which I consider to have been a reasonable one - to allow the complainant to inspect copies of the plans with the specific information about the first third party deleted. Allowing the complainant to inspect the plans would not, in my view, have posed the same security risk as would disclosure of copies with no control on their further dissemination. However, the complainant is insistent on being given copies and my role is to determine whether the documents are exempt. If it is established that they are, then I am prohibited by s.76(4) from

making a decision to the effect that access is to be given, in any form. For the reasons I have given, I consider that it is established they are exempt.

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