

Participants:

'R'
Complainant

- and -

City of Greater Geraldton
First Respondent

-and -

'S'
Second Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – building plans – whether documents subject to copyright – section 27 – clause 3 – whether personal information – clause 3(6) – whether disclosure would, on balance, be in the public interest – clause 5(1)(f) – whether disclosure could reasonably be expected to endanger the security of any property.

Freedom of Information Act 1992: sections 3, 27(1)(a), 27(2)(c), 102(2), 102(3);

Schedule 1, clauses 3(1), 3(6) and 5(1)(f)

Copyright Act 1968 (Cth): s.10(1)

Dividing Fences Act 1961

Re Zurich Bay Holdings Pty Ltd and City of Rockingham and Others [2006]

WAICmr 12

DPP v Smith [1991] 1 VR 63

Commonwealth v John Fairfax and Sons Ltd (1980) 147 CLR 39

Re Villanueva and Queensland Nursing Council and Talbot and Gordon and Another [2000] QICmr 2

DECISION

The agency's decision is set aside. In substitution I find that the disputed documents are not exempt under clauses 3(1) or 5(1)(f) of Schedule 1 to the FOI Act. Further, I find that the disputed documents are subject to copyright and that access should be given by way of inspection only.

Sven Bluemmel
INFORMATION COMMISSIONER

11 September 2012

REASONS FOR DECISION

1. This complaint arises from a decision made by the City of Greater Geraldton ('the agency') to refuse 'R' ('the complainant') access to documents under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. On 3 November 2011, the complainant applied to the agency under the FOI Act for access to documents relating to: "*Plans, elevations & sections of the current building licence*" for a named property ('the Property'). I understand that the complainant's house shares a boundary with the Property and that the complainant has been involved in a long running dispute, including proceedings in the Magistrates Court, with the owner of the Property over certain issues, including an embankment, infill and a dividing fence.
3. The agency provided me with the following background to this matter:
 - The agency granted planning approval for a second storey to be added to the Property on 6 November 2009.
 - In December 2009, the complainant raised concerns over a pool and retaining embankment to the rear of the Property. The agency made inquiries and found that the pool and embankment had been installed without a building licence being sought or granted. The dividing fence also encroached on the complainant's property.
 - In June 2010, the owner of the Property failed to obtain retrospective building approval over the unapproved works and the agency issued a notice to remove or alter the works to remove the cause of objection. Following protracted negotiations, a solution was agreed between the agency and the owner whereby the latter would remove the pool and fill in the area so that it raised the land level to the top of the unapproved embankment. Approval to undertake this work and a building licence was issued on 7 April 2011.
 - The agency has adequately addressed the issue of the unapproved works on the Property. This resolved the issue of the unsafe embankment. Since the rectification of the embankment occurred on the Property below the level of that at the rear of the complainant's property, and in accordance with the Residential Design Codes, the agency determined that consultation with the complainant was not required. There was no retaining wall required on or near the boundary to restore the levels. [The complainant disputes that last statement and says that the agency advised her that the owner of the Property had two years from the issue of the licence to install a half metre of retaining wall and she has since been told that she cannot install boundary fencing until that has been done].
 - The conditions of the planning approval given to the owner included the requirement to consult the complainant concerning the 500mm level

difference between their two properties or to resolve the matter in court. The agency also advised the complainant that the dividing fence matter needed to be resolved under the *Dividing Fences Act 1961*. [The complainant claims that she was unaware of this requirement to consult and was never consulted].

- There was a number of contacts, meetings and approvals relating to this matter “*that demonstrate the extensive steps the City has taken to listen to [the complainant] and act on her concerns when needed and to correctly advise her on the processes that have to be followed*”. The agency met with the complainant and the owner of the Property on numerous occasions in February 2010; met and discussed issues with the complainant on 25-26 July 2011; met the complainant on 12 September 2011, where, among other things, it was discussed that “*the height of the building was measured from natural ground and the proposed development was in accordance with the Residential Design Codes*”; had telephone conversations with the complainant on 21 and 24 October 2011 concerning the height of the building and infill; met with the complainant on 30 November 2011; and wrote to the complainant on 1 and 15 December 2011. Moreover, meetings and discussions have also been held between the complainant and the Mayor and a number of councillors.
4. By notice of decision dated 7 November 2011, the agency identified seven documents within the scope of the complainant’s access application but refused access to all seven under clause 3(1) of Schedule 1 to the FOI Act. The complainant applied for internal review of that decision and, on 5 December 2011, the agency confirmed its initial decision. On 21 December 2011, the complainant applied to me for external review of the agency’s decision.

REVIEW BY THE INFORMATION COMMISSIONER

5. On receipt of this complaint, I obtained the requested documents from the agency, together with the agency’s FOI file maintained in respect of the complainant’s access application. In dealing with this matter, the scope of the complaint was reduced to two plans that detail the levels, profiles and soil infill of the Property, as confirmed by email to the complainant dated 12 April 2012.
6. On 17 July 2012, I provided the parties with a letter setting out my preliminary view of this complaint, which was that the disputed documents are not exempt as the agency claimed. I asked the agency to consult all relevant third parties and invite them to make submissions to me and be joined as parties to this complaint. I also provided a copy of the reasons for my preliminary view to the owner of the Property.
7. By letter of 27 July 2012, the agency advised me that it accepts my preliminary view.

8. On 2 August 2012, the owner of the Property, 'S', ('the third party'), applied to be joined, and was joined, as a party to this complaint. Since the agency has now withdrawn its claim for exemption, the third party bears the onus of establishing that access should not be given to the disputed documents, pursuant to s.102(2) of the FOI Act.

THE DISPUTED DOCUMENTS

9. Document 1 is sheet no.1 of 6 (site plan) and Document 2 is sheet no.3 of 6 (elevations) in relation to works at the Property.

CLAUSE 3 - PERSONAL INFORMATION

10. The third party claims that the disputed documents are exempt under clause 3(1) of Schedule 1 to the FOI Act. Clause 3, insofar as it is relevant, provides:

“3. *Personal information*

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

...

(6) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.”*

11. 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.”

12. That definition makes it clear that 'personal information' is information about an identifiable person. The purpose of clause 3(1) is to protect the privacy of individuals whose personal information may be contained in documents held by State and local government agencies. Personal information is exempt under clause 3(1), subject to the limits placed on the exemption in clauses 3(2)-3(6).

The complainant's submissions

13. By letter of 21 December 2011, the complainant made, in summary, the following submissions:

- She calculated that substantial sand infill, approximately three metres deep and around 600-700 cubic metres, was added to the rear of the Property, which has significantly altered the levels on the Property. That work was deemed necessary to rectify prior unlicensed earthworks which left the complainant's block unsafe and with approximately 30 square metres of her land removed.
 - She has never been consulted about the material used, level of infill or compaction data or shown plans disclosing the overall building height as a result of those changes to block height.
 - It is in the public interest for all ratepayers "*to know that such major earthworks will undergo consultation with neighbouring property owners prior to their approval and that plans for such works will be available to neighbours.*" To that end, the complainant provided me with the signatures of three other neighbours who support her access application in this matter.
14. Following the receipt of my letter of 17 July 2012, the complainant contested certain of the agency's statements outlining the background to this matter, which I have noted in square brackets at paragraph 3, above.

The third party's submissions

15. In response to my letter of 17 July 2012, the third party submits that:
- the complainant's motive in making this application is vexatious and the matter has been on-going for three years. The case before the Magistrates court was eventually dropped;
 - the information sought by the complainant is not public information but relates to the private assets of the owners of the Property, who object to its disclosure. "*[V]ery little of the information sought can be seen from public land or the complainant's property and some only partially visible to selected side neighbours*";
 - the information requested could be used to gain pricing information, to gain an insight into costs and reveal the financial situation of the owner, which is sensitive personal information that is not available by any other means;
 - information regarding the construction, size and strength of parts of the house could be used to gain forced entry. Making such information publicly available will compromise the future security of the house;
 - "*[t]he complainant is unaffected by the building works outside what is normally allowable under the building code of Australia and local government approvals and regulations.*" The role of compliance is for the local government building inspectors not neighbours; and

- although there was no legal requirement to keep her informed on the matters under construction, the complainant has demanded consultation and justification for building work which falls under the jurisdiction of the local government building inspectors and the resulting interruptions have been a constant annoyance to the builder and subcontractors.

Consideration

16. I have examined the disputed documents, which are architectural drawings, being a site plan and elevations for the building on the Property. They contain the name and other identifying information about an identifiable individual. Accordingly, I consider that the disputed documents are *prima facie* exempt under clause 3(1) because, if disclosed, they would reveal personal information about an individual other than the complainant. As noted above, the exemption in clause 3(1) is subject to the limits on exemption in clauses 3(2) to 3(6). In the present case, I consider that clause 3(6) is the only potentially relevant limit.

Clause 3(6) – public interest

17. Clause 3(6) provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. Section 102(3) of the FOI Act provides that the access applicant (in this case, the complainant) bears the onus of persuading me that disclosure would, on balance, be in the public interest.
18. The term ‘public interest’ is not defined in the FOI Act but, in my view, it is best described in the decision in *DPP v Smith* [1991] 1 VR 63 at p.75, where the Supreme Court of Victoria said:

“The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals ...”

19. Determining whether or not disclosure would, on balance, be in the public interest involves identifying the competing public interests – those favouring disclosure and those favouring non-disclosure – weighing them against each other and making a judgment as to where the balance lies in the circumstances of the particular case.
20. In identifying factors that weigh against disclosure, the third party questions the complainant’s motives in seeking access to the disputed documents. Section 10(2) of the FOI Act provides that a person’s right to be given access is not affected by, among other things, the agency’s belief as to what the applicant’s reasons for wishing to obtain access may be.
21. I agree with the third party’s submission that there is a public interest in the maintenance of personal privacy. The protection of an individual’s privacy is a very strong public interest that is recognised and enshrined in the FOI Act by

- clause 3. 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.
22. However, in the particular circumstances of this case, I consider that the personal information that would be revealed by the disclosure of the disputed documents is not information of a particularly private or sensitive nature. It consists of an address; the name of an individual; and the size and certain external features of the building on the Property.
 23. Although the third party refers to the fact that, from an external viewpoint, very little of the information in the disputed documents is visible from public land or the complainant's property, I am not persuaded that householders have, in general, a right to consider the external facades of their homes to be private information. I am not aware that there is anything, in the absence of exceptions such as trespass, to prevent neighbours or the public from taking steps to view a property from outside that property.
 24. In light of the third party's submissions as to pricing information and costs, I examined the disputed documents but could identify no information of that kind. I do not accept the third party's claim that his financial situation could be revealed if those documents were disclosed. On the information before me, I do not accept that disclosure of the disputed documents would involve any real intrusion on the personal privacy of the third party.
 25. I have considered the third party's claim concerning the security of the Property in relation to the exemption in clause 5(1)(f) of Schedule 1 to the FOI Act. For the reasons set out in relation to that exemption claim below, I do not consider that disclosure of the disputed documents in the manner proposed here could reasonably be expected to endanger its security or compromise its future security. As noted below, since the documents are subject to copyright, access should be given by way of inspection only.
 26. Favouring disclosure, I recognise a public interest in persons exercising their rights under the FOI Act to gain access to government held information.
 27. I also recognise a public interest in the accountability of agencies for the manner in which they discharge their functions on behalf of the Western Australian public. In that regard, I consider that their actions and decisions should be as transparent as possible in order that the public may have confidence that they perform those functions properly and effectively. Where, as here, an agency is faced with a long-running dispute between neighbours, I consider it is in the public interest for both parties to be kept fully informed, whether or not the agency is obliged to do so. I do, however, note that the agency went to some lengths to keep the complainant informed.
 28. I accept the complainant's submission that there is a public interest in agencies giving the public access to information to enable it to assess the nature and quality of information forming the basis of decision-making, particularly where, as here, that decision-making has the potential to impact on a person's property.

29. In my opinion, the accountability of government agencies includes informing the public, where possible, of the basis for decision-making and the material considered relevant to that process. I consider that also furthers the objects of the FOI Act set out in s.3 and that “...*disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs*”: *Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39 at 52.
30. From the information before me, it appears that there are still some difference of opinion or recollection in relation to what was said or done at particular times and that disclosure of the disputed documents could assist in clarifying various issues.
31. I also consider that there are public interests in private individuals who have dealings with government agencies maintaining trust in those agencies and being – and being seen to have been – fairly dealt with. Those are interests common to all members of the community and for their benefit. As the Queensland Information Commissioner recognised, it means that a particular applicant’s interest in obtaining access to particular documents is capable of being recognised as a facet of the public interest: *Re Villanueva and Queensland Nursing Council and Talbot and Gordon and Another* [2000] QICmr 2. In my view, the history of the agency’s dealings with the complainant in relation to the Property gives her an interest of that nature.
32. Having considered the submissions of both the third party and the complainant, I am not persuaded that the public interest in the third party’s privacy overrides other public interests in this case. In balancing the competing public interests, I consider that those favouring disclosure outweigh those favouring non-disclosure and that, consequently, the disputed documents are not exempt under clause 3(1) of Schedule 1 to the FOI Act.

CLAUSE 5(1)(f) – ENDANGER THE SECURITY OF ANY PROPERTY

33. The third party claims that the disclosure of the disputed documents could compromise the future security of the Property. As noted above, I have considered that to be a claim for exemption under clause 5(1)(f) of Schedule 1 to the FOI Act, which provides:

“(1) Matter is exempt matter if its disclosure could reasonably be expected to –

...

(f) endanger the security of any property; ...”
34. In support of that claim, the third party submits that information regarding the construction, size and strength of parts of the Property could be used to gain forced entry. This information is not available to the public by any other means and will compromise the future security of the Property.

35. I have examined the disputed documents. I note that the two plans show windows and doors but there is nothing to indicate their strength or material or the internal layout of the Property. In my view, knowing the placement of doors and windows, without more, could not reasonably be expected to endanger the security of the Property.
36. In the circumstances, I am not persuaded that the disclosure of the disputed documents could reasonably be expected to endanger the security of the Property. In my view, the disputed documents are not exempt under clause 5(1)(f) of Schedule 1 to the FOI Act.

COPYRIGHT

37. Having examined the disputed documents, I consider that they are *prima facie* the subject of copyright, pursuant to s.10(1) of the *Copyright Act 1968* (Cth). A copyright owner has the exclusive right to reproduce the relevant work in a material form. Although copyright belonging to a person other than the State is not a ground of exemption under the FOI Act – nor is it a basis upon which access to a document can be refused – it does have an effect on the manner in which access to the document may be given: see *Re Zurich Bay Holdings Pty Ltd and City of Rockingham and Others* [2006] WAICmr 12 at [109].
38. Section 27(2)(c) of the FOI Act provides that, if an applicant has requested that access to a document be given in a particular way, the agency has to comply with the request unless giving access in that way would involve an infringement of copyright belonging to a person other than the State, in which case access may be given in some other way, for example, “*by giving a reasonable opportunity to inspect*” the documents, pursuant to s.27(1)(a) of the FOI Act. In this case, I find that access to the disputed documents should be given by way of inspection only.

CONCLUSION

39. I find that the disputed documents are not exempt under clauses 3(1) or 5(1)(f) of Schedule 1 to the FOI Act. However, I am satisfied that s.27(2)(c) of the FOI Act applies in this instance. As such, I consider that access should be given by way of inspection only.
