

Participants:

**'Q'**  
Complainants  
  
- and -  
  
**City of Cockburn**  
First Respondent  
  
and  
  
**'R'**  
Second Respondents

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

FREEDOM OF INFORMATION – refusal of access – documents relating to boundary fence dispute - public interest in access rights under the FOI Act – public interest in protecting personal privacy - clause 3(1) - personal information about third parties.

*Freedom of Information Act 1992*: sections 21, 32, 76(1), 76(2), 76(4); Schedule 1 clauses 3(1), 3(2), 3(3), 3(4), 3(5), 3(6); Schedule 2, Glossary.

*DPP v Smith* [1991] 1 VR 63

*Police Force of Western Australia v Kelly and Another* (1996) 17 WAR 9

## DECISION

The agency's decision is set aside and substituted. The disputed documents are exempt in full under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*.

Sven Bluemmel  
INFORMATION COMMISSIONER

23 September 2009

## REASONS FOR DECISION

1. This complaint arises from a decision made by the City of Cockburn ('the agency') to give access to documents under the *Freedom of Information Act 1992* ('the FOI Act'). Given my obligation under section 74(2) not to include exempt matter in my decision or reasons, I have decided not to identify either the complainants or the access applicants (second respondents).

## BACKGROUND

2. In an access application dated 22 January 2009, the access applicants applied to the agency for access to all documents relating to 2 properties within the local government boundaries of the agency. Specifically, the access applicants sought access to:
  - “1. *Applications for development approval and building licences approval in relation to the land at [an address in] Coogee;*
  2. *Applications for development and building licence approval in respect of [a different address in], Coogee; and*
  3. *Investigations into boundary disputes and the location of dividing fences between the properties at [the two addresses in], Coogee.”*
3. The agency decided to give the access applicants access in full to some documents and edited copies of other documents, and refused access to some of the requested documents. During the course of dealing with the access application, in accordance with its obligations under s.32 of the FOI Act, the agency consulted with the complainants and several other third parties prior to making the decision on access. The complainants objected to the disclosure of the disputed documents in the edited manner proposed by the agency.
4. On 19 May 2009, the agency confirmed its initial decision. On 3 June 2009, the complainants made a complaint to the Information Commissioner seeking review of that decision.

## THE INFORMATION COMMISSIONER'S ROLE ON EXTERNAL REVIEW

5. On external review, the Information Commissioner's role is to “stand in the shoes” of the agency's decision-maker. Under s.76(1) of the FOI Act, the Commissioner has the power to review any decision made by the agency in respect of an access application and the power to make any decision that could, under the FOI Act, have been made by the agency in respect of that application.
6. Under s.76(2) of the FOI Act, the Commissioner has to make a decision, in writing, by confirming the agency's decision; by varying the agency's decision; or by setting aside the agency's decision and making a decision in substitution of that decision.

7. However, s.76(4) of the FOI Act further provides that if it is established that a document is an exempt document, the Commissioner does not have power to make a decision to the effect that access is to be given to the document.
8. Having considered all of the information currently before me, on 22 July 2009 I informed the parties in writing that it is my preliminary view that the disputed documents are exempt in full under clause 3(1) of Schedule 1 to the FOI Act. The access applicants did not accept my preliminary view and made further submissions to me. The agency accepted my preliminary view.

### **THE EXEMPTION**

9. Clause 3(1) provides that matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead). The term 'personal information' is relevantly defined, in the Glossary in Schedule 2 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 ...”*

10. In my view, the purpose of the exemption in clause 3(1) is to protect the privacy of individuals, information about whom may be contained in documents held by State and local government agencies. The definition of 'personal information' in the Glossary makes it clear that any information or opinion about a person, from which that person can be identified, is *prima facie* exempt matter under clause 3(1).

### ***The information in the disputed documents***

11. I have examined the disputed documents. Each of those documents contains the name and other personal information about a number of third parties, including such things as their addresses, their contact telephone numbers, handwriting and other information. In my opinion, the disputed documents would, if disclosed, reveal personal information, as defined in the FOI Act, about several third parties. In my view, that information is, on the face of it, exempt information under clause 3(1). The exemption in clause 3(1) is, however, subject to a number of limits which are set out in subclauses 3(2) – (6), as set out below.

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

12. The limit on exemption in clause 3(2) does not apply to the information recorded in the disputed documents because all of those documents contain some personal information about individuals other than the access applicants. The limits on exemption in clauses 3(3) and 3(4) may apply to a small amount of the information, because some of the information consists of prescribed details about officers of the agency. However, in my opinion, much of that particular information is inextricably intertwined with the personal information

about other third parties who are not officers of an agency and therefore could not be disclosed without revealing personal information about other people.

13. The limit on exemption in clause 3(5) does not apply because there is no evidence before me that any of the third parties identified in the disputed documents has consented to his or her personal information being disclosed to the access applicants. To the contrary, the complainants complained to me because they object to the disclosure of their personal information.
14. As the limits in clause 3(3) and (4) apply only to a small amount of information and the limits in clause 3(2) and 3(5) do not apply, the only limit on exemption that might apply to the disputed documents is the limit on exemption in clause 3(6).
15. Clause 3(6) provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. In the circumstances of this matter, under s.102(3) of the FOI Act, the onus is on the access applicants to persuade me that the disclosure of personal information about third parties would, on balance, be in the public interest.

#### **THE SUBMISSIONS OF THE ACCESS APPLICANTS**

16. The access applicants submit that certain of the information contained in the disputed documents, such as names, addresses and telephone numbers is easily obtained from published sources such as the telephone directory. In addition, the access applicants submit that all of the parties to this complaint are well known to each other.
17. Further, the access applicants submit that:
  1. the parties are in dispute with each other regarding a boundary fence;
  2. the complainants have applied to adversely acquire a portion of the access applicants' land which application is currently subject to requisitions from Landgate;
  3. the information held by the agency "*...may be pivotal to the success or failure of that application...*" and disclosure of the information in the disputed documents is vital in order for justice to be done; and
  4. the complainants made the grievance public and the access applicants have provided me with copies of newspaper articles as evidence to support that claim.

#### **THE PUBLIC INTEREST**

18. The FOI Act does not define 'public interest'. In my view, the term is best described in *DPP v Smith* [1991] 1 VR 63. In that case, the Supreme Court of Victoria said, at p.75:

*“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. The application of the public interest test in clause 3(6) involves identifying the public interest factors for and against disclosure and weighing them against each other to determine where the balance lies. In my view, the exemption in clause 3(1) is intended to protect the privacy of individuals about whom personal information may be contained in documents held by State and local government agencies and the FOI Act is not intended to open the private and professional lives of its citizens to public scrutiny in circumstances where there is no demonstrable benefit to the public interest in doing so. I also recognise that there is a very strong public interest in the maintenance of personal privacy and that the protection of an individual’s privacy is a public interest which is recognised and enshrined in the FOI Act by clause 3.
20. Favouring disclosure of the disputed documents are the public interests in people being able to exercise their rights of access under the FOI Act and being able to access personal information concerning them, which is held by a government agency. The latter public interest is also recognised in s.21 of the FOI Act. However, I consider that that public interest has been satisfied, to some extent, by the provision to the access applicants of certain documents the subject of their access application.
21. Weighing against disclosure in this instance, I consider that there is a strong public interest in protecting personal privacy. Previous decisions of the Information Commissioner have consistently recognised that the public interest in the protection of personal privacy is a particularly strong one, which will generally only be outweighed by some other, significantly stronger, public interest that requires the disclosure of private information about another person: see, for example, *Re West Australian Newspapers Ltd and Department of the Premier and Cabinet* [2006] WAICmr 23.
22. Also weighing against disclosure, I recognise a public interest in the agency maintaining its ability to receive and investigate complaints received from ratepayers without complainants needing to fear retribution to ensure that the needs of all members of the local community are met.
23. I also consider there is a public interest in the agency being held accountable for the enforcement of regulations governing local government matters and the decisions that it makes on behalf of ratepayers. However, in the circumstances of this matter, I do not consider disclosure of the disputed documents will further that public interest, as they do not contain information of that type.
24. Given the circumstances of this matter, I accept the access applicants’ submission that the parties are known to each other. However, the issue of what a party may know as regards the contents of the requested documents from other

sources is not a consideration in overcoming the application of a relevant exemption, and I refer to the decision of the Supreme Court of Western Australia in *Police Force of Western Australia v Kelly and Another* (1996) 17 WAR 9 at 14 which dealt with a similar situation. Although that case dealt with a claim for exemption under clause 5(1)(b) of Schedule 1 to the FOI Act, I consider that the comments relating to the question of what is known by an access applicant are also relevant to this case.

25. In *Kelly*, Anderson J said:

*“In considering the question of whether exemption is lost once the matter has found its way into the hands of the applicant or into public hands, I think it must be remembered that what is under consideration is the right of access to the particular documents of an agency. One would not expect the character of the documents as exempt documents to depend on whether, by some means, the subject matter of the documents, or some of it, had already got out...it would mean that an applicant could overcome a claim of exemption by showing or claiming that he already knew something of the matter from other sources. I do not think it could have been intended that exemption should depend on how much the applicant already knows or claims to know of the matter. Also the Act plainly contemplates that, as regards exempt material, the agency may give access to some documents or parts of documents but refuse access to others dealing with the same subject (see ss.3(3), 23(1)).”*

I agree with those comments.

26. In relation to the access applicants’ submission regarding the adverse possession claim, I understand that the application to adversely acquire a portion of their property has been withdrawn. Therefore, I give no weight to that submission.
27. In relation to the submission of the access applicants regarding the complainants appearing in the local newspapers, I do not consider that submission relevant for the reasons given by Anderson J in *Kelly* as stated above.
28. In weighing the competing public interests for and against disclosure, based on the information before me, I consider that those factors favouring non-disclosure of the disputed documents outweigh those factors favouring disclosure in this instance.

## CONCLUSION

29. Based on the material presently available to me, it appears to me that the public interest in protecting the personal privacy of third parties is not outweighed by the public interests favouring disclosure in this instance. I find that the disputed documents are exempt under clause 3(1) of Schedule 1 to the FOI Act.

\*\*\*\*\*