

Participants:

George Ninan and Molly George
Complainants

- and -

Department of Commerce
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – definition of ‘document of an agency’ – documents not in physical possession of the agency – whether documents that may be accessible using an agency’s coercive statutory powers are documents of the agency and accessible under the FOI Act

Freedom of Information Act 1992: sections 3, 10, 23(1)(b) and 24; Schedule 1, clauses 3(1), 3(2), 3(3), 3(6) and 4; Glossary, clause 4(1)

Freedom of Information Regulations 1993: regulation 9(1)

Acts Amendment (Fair Trading) Act 2010

Fair Trading Act 2010: sections 56, 69

Real Estate and Business Agents Act 1978

Land Valuers Licensing Act 1978

Freedom of Information Act 1982 (Vic): section 3

Freedom of Information Act 1992 (Qld)(repealed): section 7

Interpretation Act 1984: section 18

Information Commissioner for Western Australia v Ministry of Justice
[2001] WASC 3

Victorian Public Service Board v Wright (1986) 64 ALR 206

Re Price and Nominal Defendant [1999] QICmr 3; (1999) 5 QAR 80

Re Inglis and Curtin University of Technology [2001] WAICmr 27

Re Price and Nominal Defendant [1999] QICmr 19

Re Miller and Racing and Wagering Western Australia [2012] WAICmr 19

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

Re Weygers and Department of Education and Training [2007] WAICmr 16

DPP v Smith [1991] 1 VR 63

Re Schatz and Department of Treasury and Finance [2005] WAICmr 8

Re Post Newspapers Ltd and Town of Cambridge [2006] WAICmr25

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

DECISION

The respondent's decision is confirmed. I find that:

- the requested valuations and reports, being items 2, 3 and 4 of the complainants' amended access application, are not 'documents of the agency' under the FOI Act and, accordingly, the agency's decision to refuse access to those documents under s.23(1)(b) of the FOI Act is justified;
- the information deleted from Documents 1 and 2 is exempt under clause 3(1) of Schedule 1 to the FOI Act; and
- Document 3 is exempt under clause 3(1) of Schedule 1 to the FOI Act.

Sven Bluemmel
INFORMATION COMMISSIONER

30 November 2012

REASONS FOR DECISION

1. This complaint arises from a decision made by the Department of Commerce ('the agency') to refuse Mr George Ninan and Ms Molly George ('the complainants') access to documents and to give access to an edited copy of documents under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. In January 2011, the complainants complained to the Land Valuers Licensing Board ('the Board') about a valuer who, they believed, had conducted a "grossly inflated" valuation of a particular property. At that time the Board was responsible for licensing individuals who conduct valuations of land in Western Australia. From 1 July 2011 the Board was abolished and, pursuant to the *Acts Amendment (Fair Trading) Act 2010* ('the AA(FT) Act'), the responsibilities of the Board were transferred to the Consumer Protection Division of the agency.
3. The agency investigated that complaint ('the valuation complaint') and, on 20 September 2011, advised the complainants of the results of the completed investigation.
4. On 25 September 2011, the complainants applied to the agency under the FOI Act for access to four categories of documents. On 26 September 2011, the complainants paid the \$30.00 fee payable under the FOI Act for applications for non-personal information. The complainants sought to amend the scope of the application on two occasions: first, on 29 September 2011, to include a particular letter, and second, on 5 October 2011, to include an additional twelve categories of documents.
5. In its notice of decision of 2 November 2011, the agency described the amended scope of the complainants' application as follows:
 1. *Copy of a request for land valuation of [a specified property] sent by [a named bank] to [a named third party] sometime in June-July 2006;*
 2. *Copies of any and all land valuations/reports done by [a named third party] or his firm, or [a named third party], including [named third parties] from 1 January 2005 to 1 August 2006 on behalf of [a named bank] and/or [a named third party];*
 3. *Copies of any and all valuations/reports done by [a named third party] or his firm, or [a named third party], on [a specified property] from 1 January 2002 to 1 August 2006 on behalf of any client;*
 4. *Copy of the ledger of [a named third party] firm showing the land valuations conducted by firm from year Jan 2002 – Aug 2006;*
 5. *Copy of administrative warning letter issued to [a named third party]; and*
 6. *Copy of administrative warning letter issued to [a named third party]."*
6. The agency gave the complainants access in edited form to two documents within item 1 of the amended application as described above, claiming that the deleted matter was exempt under clauses 3(1) and 4 of Schedule 1 to the FOI Act.

7. The agency identified one document falling within item 5 of the amended application, to which it refused access under clause 3(1) of Schedule 1 to the FOI Act. The agency advised the complainants that documents falling within items 2, 3, 4, and 6 of the amended application did not exist.
8. On 27 November 2011, the complainants sought internal review of the agency's decision. The complainants claimed that further documents within the scope of the amended application did exist because the Glossary to the FOI Act provides that "*agency documents*" include documents that the agency is entitled to access and the agency has the power to access documents under the *Real Estate and Business Agents Act 1978* ('the REBA Act') and the *Land Valuers Licensing Act 1978* ('the LVL Act'). The complainants submitted that none of the information within the scope of the amended application is exempt and that the agency failed to consider the twelve categories of documents requested in their email of 5 October 2011.
9. On 13 December 2011, the agency confirmed its original decision. The agency advised that the documents described in items 2, 3, and 4 of the complainants' amended application were not "*agency documents*" because the agency is not in possession or control of them nor is it entitled to access them for the purpose of the complainants' amended access application. It further advised that the complainants' application for the twelve categories of documents described in their email of 5 October 2011 would be dealt with as a separate access application.
10. On 14 December 2011, the complainants applied to me for external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

11. After receiving this complaint, I required the agency to produce to me the disputed documents and its FOI file maintained in respect of the complainants' access application.
12. In the course of dealing with this matter, my office obtained additional information from the agency regarding the types of documents that it holds and the searches it had conducted for documents within the scope of the complainants' amended application. In addition, the complainants advised that they accepted that documents within item 6 of the amended application do not exist and, on 20 August 2012, confirmed that they do not seek a copy of a particular valuation attached to the valuation complaint. The complainants also accepted that the agency does not physically hold the documents described at items 2, 3 and 4 of the amended application.
13. On 26 October 2012, I provided the parties with a letter setting out my preliminary view of this complaint, based on the information before me. I considered that the complainants' complaint consisted of two parts. The first part is the agency's decision to, in effect, refuse access to certain documents under section 23(1)(b) of the FOI Act on the ground that those documents are not documents of the agency. The second part is the agency's decision to refuse the complainants access to one document in full (Document 3) and to give

access to an edited copy of two documents (Documents 1 and 2) under the exemption clauses claimed. In brief, my preliminary view was that the agency was justified in refusing access to documents under section 23(1)(b) of the FOI Act and that, with the exception of a small amount of information that was business information but was not exempt information under clause 4 of Schedule 1 to the FOI Act, the agency's decision that certain matter in the disputed documents was exempt under clause 3(1) of Schedule 1 to the FOI Act was justified.

14. In light of my preliminary view, the complainants were invited to withdraw their complaint or provide me with further submissions relevant to the matter for my determination by 9 November 2012. On 30 October 2012, the complainants provided me with further submissions.
15. The agency accepted my preliminary view. On 9 November 2012, it gave the complainants access to an edited copy of Documents 1 and 2, which included the information the agency had previously deleted as exempt matter under clause 4 of Schedule 1 to the FOI Act.

‘DOCUMENTS OF AN AGENCY’ – CLAUSE 4(1) OF THE GLOSSARY TO THE FOI ACT

16. The agency submits that the documents described at items 2, 3, and 4 of the complainants' amended application ('the requested valuations and reports') are not "*agency documents*" because the agency is not in possession or control of those documents nor is it entitled to access them for the purpose of the complainants' amended application.
17. As the FOI Act refers to 'documents of an agency', rather than "*agency documents*", I will refer to that term throughout this decision. The term 'documents of an agency' is defined in clause 4(1) of the Glossary to the FOI Act. It provides, insofar as it is relevant, as follows:

“a reference to a document of an agency is a reference to a document in the possession or under the control of the agency including a document to which the agency is entitled to access and a document that is in the possession or under the control of an officer of the agency in his or her capacity as such an officer.”

18. Under the FOI Act, the right of access to documents is created by section 10 of the Act and is a right of access to "*documents of an agency (other than an exempt agency)*" subject to and in accordance with the provisions of the FOI Act. Accordingly, the question for my determination in this matter is whether the requested valuations and reports are 'documents of an agency' as defined in the FOI Act.
19. Pursuant to section 23(1)(b) of the FOI Act, an agency may refuse access to a document if it is not a document of the agency. That is, in effect, what the agency has done on this occasion.

The complainants' submissions

20. The complainants' submissions are set out in their letter to the agency of 27 November 2011, the application for external review dated 14 December 2011 and in their letter of 30 October 2012 in response to my preliminary view of this matter.
21. In their submissions to the agency, the complainants asserted that the agency was entitled to access the requested valuations and reports using its powers of investigation contained in the REBA Act and the LVL Act. The sections within those Acts to which the complainants referred were deleted by the AA(FT)Act. Both the REBA Act and the LVL Act currently refer to the powers of investigation of the Commissioner for Consumer Protection ('the CP Commissioner) under the *Fair Trading Act 2010* ('the FT Act'). The complainants now submit that the requested valuations and reports are documents that the agency is entitled to access under section 69 of the FT Act and therefore, on a "*plain reading*" of the definition of 'document of an agency' in the FOI Act, they are accessible under the FOI Act. Section 69 of the FT Act provides:
- "69. Investigations and inquiries, powers for*
- (1) For the purposes of carrying out any investigation or inquiry in the course of carrying out the [CP Commissioner's] functions under this Act or any other Act, an authorised person may —*
- (a) require any person —*
- (i) to give whatever information the authorised person requires in relation to any matter the subject of an investigation or inquiry; and*
- (ii) to answer any question put to the person in relation to any matter the subject of an investigation or inquiry;*
- and*
- (b) require any person to produce any document or thing relating to an investigation or inquiry; and*
- (c) enter at all reasonable times and search any premises or motor vehicle named in a warrant obtained in accordance with this Division and exercise the powers set out in the warrant; and*
- (d) make a copy or abstract of any document produced or inspected under this section, or of any entry made in the document."*
22. The complainants submit that from this "*it is plain that the agency has the ability to access any document and obtain any affidavit they choose*" and that section 69 of the FT Act gives the agency the ability to obtain documents for the purposes of carrying out an investigation or inquiry in the course of carrying out the functions of the CP Commissioner under the FT Act. The complainants refer to section 56(1)(g) of the FT Act, which states that the functions of the CP Commissioner include performing:

“any functions that are conferred or imposed on the Commissioner by this Act or any other Act.”

23. The complainants submit that the reference in the FT Act to “*any other Act*” includes the FOI Act and therefore, “[i]t is the function of the CP Commissioner to provide access to documents under the FOI Act.” As the agency may procure documents under an investigation or inquiry, it is obliged to procure those documents under the FOI Act. The complainants assert that the agency cannot choose whether or not to procure the documents if they are requested under the FOI Act and that procuring the documents is a normal function assigned to the agency.
24. The complainants consider that the agency’s internal review decision implies that the agency can access the documents but that it has chosen not to in dealing with the access application. They submit that the FOI Act does not distinguish between the different processes under which the agency is entitled to access documents and, if the agency is entitled to access documents under any legislative power, it is, therefore, required to access the documents under the FOI Act.
25. The complainants claim that the reason the agency does not have physical possession of the documents is the agency’s own “*deficiency*” and “*negligence*”. They submit that if the investigator had investigated the valuation complaint properly and in good faith, the agency would have procured the requested valuations and reports and, accordingly, the agency should not be encouraged to take any further “*advantage*” of its “*negligence*”.
26. The complainants submit that the intent of the FOI Act is to allow the complainants “*to participate in the functions of an agency and ensure that officers act as intended per the Act*”. They consider that “*the FOI Act is made to empower [them] to get the information to ensure that the [agency] as well as the licencees act in good faith.*” They submit that the disclosure of the documents would have only good effects for the agency and third parties and both the agency and third parties would be able to defend any allegations that may result from disclosure.
27. The complainants refer to the Supreme Court’s decision in *Information Commissioner for Western Australia v Ministry of Justice* [2001] WASC 3 where Justice Wheeler states at [16]:

“the [FOI] Act is not concerned with ownership or authorship of a document, or with the entitlement to exclusive possession.”

28. In support of their interpretation of ‘document of an agency’ the complainants rely on *Victorian Public Service Board v Wright* (1986) 64 ALR 206, in which the High Court considered section 3 of the *Freedom of Information Act 1982* (Vic) (‘the Victorian FOI Act’) – which defines the objects of the Act – and stated at page 212 that in light of this and other sections of the Victorian FOI Act, it was proper to give the relevant provisions of the Act “*a construction which would further, rather than hinder, free access to information*”.

29. The complainants submit that the FOI Act does not require the agency to have legal ownership or possession of the documents nor does it require a legal entitlement to control the use or physical possession for it to be a 'document of an agency'. They suggest that to interpret the definition of 'document of an agency' in this way is "*re-writing*" the FOI Act rather than interpreting it.
30. The complainants submit that *Re Price and Nominal Defendant* [1999] QICmr 19 can be distinguished from this complaint because the requested valuations and reports are held by third parties and the agency has a right to access those documents, which means legal ownership or possession is not relevant. They submit that what is relevant is that the CP Commissioner is entitled to access the documents under the FT Act.

The agency's submissions

31. In its internal review decision of 13 December 2011, the agency advised the complainants that the requested valuations and reports are "*not in the possession or under the control of [the agency] nor is it entitled to access them for the purpose of [their] FOI application.*" On that basis the agency took the view that the requested valuations and reports are not documents of the agency.

Consideration

32. The question for my consideration is whether the requested valuations and reports, which the agency may be entitled to access under the FT Act, are 'documents of the agency' and, consequently, accessible under the FOI Act.
33. The complainants accept that the agency does not have physical possession of the requested valuations and reports. In effect, they are arguing that if an access applicant applies to the agency for valuations and reports that are held not by the agency but by private individuals or organisations, then the agency should obtain those documents pursuant to its powers under section 69 of the FT Act and give access to them pursuant to the FOI Act.
34. The definition of 'documents of an agency' was considered by the Supreme Court of Western Australia in *Information Commissioner for Western Australia v Ministry of Justice* [2001] WASC 3. In that case, Wheeler J at [12] noted that the expressions "*in the possession*" or "*under the control*" in the definition of "*documents of an agency*" are used disjunctively and "*while there may be a degree of overlap, one would not normally expect the expressions to have the same meaning ... agencies might seek to argue that documents were not relevantly their documents simply by divesting themselves of physical possession. It may be that the use of the expression 'control' was in part an attempt to ensure that no argument of this kind was open.*" Wheeler J said at [20] that "*the better view is that an agency is in possession of documents, so as to make them documents of the agency, when the agency actually physically holds those documents.*"
35. In *Re Inglis and Curtin University of Technology* [2001] WAICmr 27 at [16], the former Information Commissioner considered the above decision and noted that, accordingly, there must be 'possession' in the sense of either actual holding

of the requested documents, or some degree of control that is able to be exercised over the documents.

36. In *Re Price and Nominal Defendant* [1999] QICmr 3; (1999) 5 QAR 80 ('the first Price decision'), the Queensland Information Commissioner considered the meaning of "document of an agency" as defined in section 7 of the *Freedom of Information Act 1992* (Qld)(repealed), which is similar in wording to the definition in the FOI Act. The Queensland Information Commissioner considered, in particular, the concept of documents being 'under the control' of an agency and said, at [18]:

"The ruling test imposed by the definition of 'document of an agency' is comprised in the words 'in the possession or under the control of an agency' The remaining words of the definition illustrate, rather than extend, the ruling test... A document not in the physical possession of the agency will nevertheless be a 'document of the agency' for the purposes of the FOI Act, if it is under the control of the agency (or under the control of an officer of the agency in the officer's official capacity). Included in the concept of documents which are under the control of an agency are documents to which the agency is entitled to access. This concept is apt to cover a document in respect of which an agency has legal ownership, and hence a right to obtain possession, even though the document is not in the physical possession of the agency. The words 'under the control' convey the concept of a present legal entitlement to control the use or physical possession of a document, as exists in the case of documents held on behalf of a principal by the principal's agent, or documents held by a bailee on behalf of the owner of the documents. In the context of the obligations placed on an agency, by the FOI Act, in respect of 'documents of the agency' ... I consider that, for a document to be one which is under the control of an agency (or one in respect of which an agency is entitled to access), the agency must have a present legal entitlement to take physical possession of the document (at least for so long as necessary to discharge all of the agency's obligations under the FOI Act in respect of the document)."

37. I agree with that view. Accordingly, I consider that the requested valuations and reports can only be under the control of the agency (and therefore 'documents of an agency') if the agency has a present legal entitlement to control the use or physical possession of those documents.
38. I accept that section 69 of the FT Act gives, for the purposes of an investigation or inquiry, an authorised person within the agency the power to require any person to produce any document relevant to an investigation or inquiry. Therefore, the question before me is whether the power in section 69 of the FT Act gives the agency a present legal entitlement to control the use or physical possession of those documents for the purposes of the FOI Act.
39. In the *first Price decision*, the Queensland Information Commissioner said, at [27]:

“I accept that it was the legislature's intention that an agency should take steps to bring into its physical possession, for the purpose of dealing with a valid FOI access application, any requested document in respect of which the agency has a present legal entitlement to possession. However, I do not accept that it was the legislature's intention that an agency should have to take some additional step in order to put itself into a position where it has a legal entitlement to take possession of a document, in order to respond to an FOI access application for that document. For example, many agencies possess coercive statutory powers to compel the production of documents for certain administrative or regulatory purposes. I do not accept, however, that an agency would be required to take the formal step of exercising its coercive powers to obtain access to a document, merely because that document had been requested in an FOI access application received by the agency.”

40. I accept that is correct: see *Re Miller and Racing and Wagering Western Australia* [2012] WAICmr 19.
41. In my view, the power to require the production of documents under section 69 of the FT Act does not give the agency a present legal entitlement to obtain possession of those documents for the purposes of the FOI Act. If the agency has not taken possession of the documents for the purposes of an investigation or inquiry under section 69, the FOI Act cannot be used to require the agency to take the step of carrying out an investigation or inquiry in order to obtain the documents.
42. In my view, the process by which an agency can or may obtain documents is relevant to whether or not those documents are accessible under the FOI Act. The FOI Act cannot be used to compel an agency to take an additional step to use its powers under separate legislation in order to create a right of access under the FOI Act.
43. The complainants submit that any construction of clause 4(1) of the Glossary to the FOI Act must give the widest interpretation towards giving access and refer to *Victorian Public Service Board v Wright* (1986) 64 ALR 206. The question of interpretation in this case may be guided by section 18 of the *Interpretation Act 1984*, which provides:

“In the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object.”

44. I do not accept the complainants' submission that the intent of the FOI Act is to give them access to the requested valuations and reports. The objects and intent of the FOI Act are expressed in section 3 of the FOI Act. The objects of the FOI Act are to enable the public to participate more effectively in governing the State and to make the persons and bodies that are responsible for State and local government more accountable to the public. Section 3(2) provides:

“The objects of this Act are to be achieved by –

- (a) creating a general right of access to State and local government documents;*
- (b) providing means to ensure that personal information held by State and local governments is accurate, complete, up to date and not misleading; and*
- (c) requiring that certain documents concerning State and local government operations be made available to the public.”*

45. In my view, the objects of the FOI Act do not extend to creating a general right of access to documents of private individuals or organisations where those documents can only be accessed by an agency when or if it chooses to exercise coercive powers, for specific, limited purposes under legislation other than the FOI Act.
46. I understand that the complainants believe the agency did not appropriately or thoroughly investigate the valuation complaint. However, my role as the Information Commissioner is not to undertake a review of the CP Commissioner’s response to complaints made under the FT Act. The complainants’ submissions in relation to perceived deficiencies in the agency’s investigation of the valuation complaint are not relevant to the question that I must determine, which is whether the requested valuations and reports are ‘documents of an agency’.
47. In my view, the requested valuations and reports are not documents of the agency within the meaning of clause 4(1) of the Glossary to the FOI Act. Accordingly, the agency’s decision to refuse access to those documents under s.23(1)(b) of the FOI Act is justified.
48. I now turn to the second aspect of the complainants’ complaint.

THE DISPUTED DOCUMENTS

49. The disputed documents in this matter are the three documents that the agency has identified within the scope of the amended application, being:
- Valuation Processing System document dated 31 July 2006 (‘Document 1’);
 - Valuation Processing System document dated 1 August 2006 (‘Document 2’); and
 - Administrative Warning letter sent to a named third party dated 20 September 2011 (‘Document 3’).
50. The agency has now given the complainants access to edited copies of Documents 1 and 2, after deleting information that it claims is exempt under clause 3(1) of Schedule 1 to the FOI Act. The agency has refused access in full to Document 3, claiming it is exempt under clause 3(1).

CLAUSE 3 – PERSONAL INFORMATION

51. The agency claims that Document 3 and the information deleted from Documents 1 and 2 are exempt under clause 3(1) of Schedule 1 to the FOI Act.

52. Clause 3, insofar as it is relevant, provides:

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

(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.

...

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

53. 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.”

54. That definition makes it clear that ‘personal information’ is information about an identifiable person.

55. The purpose of the exemption in clause 3(1) is to protect the privacy of individuals about whom information may be contained in documents held by State and local government agencies. I consider that clause 3 is a recognition by Parliament that State and local government agencies collect and hold sensitive and private information about individuals and that the FOI Act is not intended to

open the private and professional lives of its citizens to public scrutiny without the consent of the individuals concerned where there is no demonstrable benefit to the public interest in doing so.

56. Personal information is exempt under clause 3(1), subject to the application of the limits on exemption in clauses 3(2)-3(6).

The complainants' submissions

57. The complainants submit that Documents 1 and 2 are property valuations that are generally available to the public so they do not contain personal information. The complainants submit that:

“The agency had concluded an investigation on [a named third party], a licenced valuer and the agency wrote to [the complainants] that a warning letter was sent to [the third party]. So [the third party’s] name ... licence number and ... company address are not ‘personal information’. They are public information and [the complainants are] in possession of them.”

58. The complainants submit that the agency publishes information about offences committed under the FT Act, including the names of people who have been convicted, on its website so the information in the disputed documents should be made public.

The agency’s submissions

59. The agency claims that the information deleted from Documents 1 and 2 consists of personal information that is exempt under clause 3(1) of Schedule 1 to the FOI Act. The agency submits that Document 3 contains personal information about individuals other than the complainants and is, therefore, prima facie exempt under clause 3(1).

Consideration

60. In the amended application to the agency the complainants requested access to documents relating to two named third parties. It is evident from the circumstances of this matter that the complainants are likely to be aware of the identities of some or all of the third parties whose personal information is contained in the disputed documents. However, the right of access under the FOI Act to a document does not depend on how much of the information in the document is already known by an access applicant. In *Police Force of Western Australia v Kelly and Smith* (1996) 17 WAR 9, Anderson J of the Supreme Court of Western Australia – in relation to a claim for exemption under clause 5(1)(b) of the FOI Act – said at page 14:

“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.”

61. I agree with that view, although the question of what the complainants may know may be relevant to the operation of clause 3(6) which relates to the public interest: *se Re Weygers and Department of Education and Training* [2007] WAICmr 16 at [22]-[23].
62. The information deleted from Documents 1 and 2 consists of the name and contact details of an individual or individuals, as well as information concerning a “*valuers code*”. Document 3 contains information about a number of identifiable individuals, including the complainants, officers of the agency and other people. Accordingly, I am satisfied that the information deleted from Documents 1 and 2 and the whole of Document 3 (together ‘the disputed matter’) consists of personal information as defined in the FOI Act which is *prima facie* exempt under clause 3(1).
63. The exemption in clause 3(1) is subject to the application of the limits on the exemption in clauses 3(2)-3(6). In the present case, I consider that the only limits that may apply are clauses 3(2), 3(3) and 3(6).

Clause 3(2) – personal information about the applicants

64. Clause 3(2) provides that information is not exempt under clause 3(1) merely because its disclosure would reveal personal information about the applicant (in this case, the complainants). In my opinion, the use of the term ‘merely’ in clause 3(2), according to its ordinary dictionary meaning, means ‘solely’ or ‘no more than’.
65. Document 3 contains some personal information about the complainants. However, I consider that the personal information about the complainants is so closely intertwined with personal information about third parties that disclosure of that information would not *merely* reveal personal information about the complainants but would also reveal personal information about other people.
66. As the deleted information in Documents 1 and 2 does not contain any personal information about the complainants, clause 3(2) does not apply to that information.

Clause 3(3) – prescribed details

67. Clause 3(3) provides that certain information about officers or former officers of agencies that relates to the work performed by them – which is referred to as ‘prescribed details’ – is not exempt personal information under clause 3(1). Those prescribed details are listed in regulation 9 of the *Freedom of Information Regulations 1993* (‘the FOI Regulations’).

68. Having examined Document 3, it is my opinion that most of the personal information about officers of the agency is ‘prescribed details’ as defined in regulation 9(1) of the FOI Regulations; for example, their names, job titles and things done by them in the course of performing their functions as officers. I consider that those prescribed details are not exempt under clause 3(1) by virtue of clause 3(3). However, for the reasons given in paragraphs 82-84 of this decision, I consider that it is not practicable to give the complainant access to that information pursuant to section 24 of the FOI Act.
69. Since the information deleted from Documents 1 and 2 does not contain any prescribed details (or personal information) about officers of an agency, clause 3(3) has no application to that information.

Clause 3(6) – the public interest

70. Clause 3(6) provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. Under section 102(3) of the FOI Act, the onus is on the complainants as the access applicants to establish that the disclosure of personal information about other people would, on balance, be in the public interest.
71. The term ‘public interest’ is not defined in the FOI Act. In my view, it is best described in the decision by the Supreme Court of Victoria in *DPP v Smith* [1991] 1 VR 63, at page 75, where the Court said:

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

72. Determining whether or not disclosure would, on balance, be in the public interest involves identifying the relevant competing public interests – those favouring disclosure and those favouring non-disclosure – weighing them against each other and making a judgement as to where the balance lies in the circumstances of the particular case.

The complainants’ submissions

73. The complainants made no specific submissions about the public interests in favour of disclosure of the disputed matter.

The agency’s submissions

74. In its internal review decision, the agency submits that the public interest in maintaining an individual’s right to privacy outweighs any interests in favour of disclosure to the complainants in the circumstances of this matter.

Consideration

75. I understand that the complainants have a personal interest in the disclosure of the disputed matter to them. However, consideration of the public interest under the FOI Act is not primarily concerned with the personal interests of the particular access applicant or with public curiosity. The public interest is a matter in which the public at large has an interest as distinct from the interest of a particular individual or individuals.
76. Favours disclosure, I recognise a public interest in access applicants being able to exercise their rights of access to documents under the FOI Act and, in particular, a public interest in persons being able to access information concerning themselves which is held by government agencies. I also recognise a public interest in individuals knowing that an agency has dealt appropriately with a complaint made by them.
77. In regard to those particular public interests, I understand that the agency has given the complainants information about the outcome of the valuation complaint. By letter dated 20 September 2011, the agency advised the complainants that it had closed the file on that complaint; gave a description of the information considered by the agency in dealing with the complaint; an analysis of that information; and the outcome of the investigation. In light of that, I consider that those particular public interests are largely satisfied.
78. I accept that there is a public interest in the accountability of government agencies for their actions in dealing with complaints made to them. However, I do not consider that the disclosure of the disputed matter would add significantly to the complainants' knowledge or the public's knowledge of the actions taken by the agency or the way it conducted investigations in response to the valuation complaint.
79. Favours non-disclosure in this case, I recognise that there is a strong public interest in maintaining the personal privacy of third parties, none of whom has consented to the disclosure of their personal information to the complainants. The significance of that particular public interest is recognised by the inclusion in the legislation of the clause 3 exemption and that interest may only be displaced by some other stronger and more persuasive public interest that requires the disclosure of personal information about one person to another person. As the former A/Information Commissioner noted in *Re Schatz and Department of Treasury and Finance* [2005] WAICmr 8 at [30]:
- “[t]he FOI Act is intended to make governments, its agencies and officers more accountable, not to call to account or unnecessarily intrude upon the privacy of private individuals.”*
80. In cases such as this, where parties have made allegations to government agencies and the ensuing investigations have not resulted in formal findings against the subject of the complaint, I consider that there is a strong public interest in protecting the privacy of those persons the subject of the complaint.

81. Having weighed the competing public interests, I do not consider that those favouring disclosure outweigh the very strong public interest in the protection of the personal privacy of third parties. Consequently, I consider that the limit on exemption in clause 3(6) does not apply in this case.

Editing

82. I have considered whether it is possible for the agency to provide the complainants with access to an edited copy of Document 3. In my opinion, when applicants apply for information about named individuals, there is generally no way in which the requested documents can be edited so as not to disclose personal information about those individuals. In those circumstances, there is no obligation on the agency under section 24 of the FOI Act to give an applicant access to an edited copy of the documents: see *Post Newspapers Ltd and Town of Cambridge* [2006] WAICmr 25 at [65].
83. In addition, in my opinion it is not practicable for the agency to give the complainants an edited copy of Document 3, disclosing only the prescribed details of officers that I consider is not exempt, because the extent of editing required would render the document meaningless: see *Police Force of Western Australia v Winterton* (1997) WASC 504.
84. Accordingly, I do not consider that the agency is obliged under section 24 of the FOI Act to give the complainants access to an edited copy of Document 3.

CONCLUSION

85. I find that:
- the requested valuations and reports, being items 2, 3 and 4 of the complainants' amended access application, are not 'documents of the agency' under the FOI Act and, accordingly, the agency's decision to refuse access to those documents under s.23(1)(b) of the FOI Act is justified;
 - the information deleted from Documents 1 and 2 is exempt under clause 3(1) of Schedule 1 to the FOI Act; and
 - Document 3 is exempt under clause 3(1) of Schedule 1 to the FOI Act.
