

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

**File Ref: F2010268  
Decision Ref: D0322010**

Participants:

**Australia First Party (NSW) Inc.**  
Complainant

- and -

**Department of Commerce**  
Respondent

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – membership application forms of a defunct association and political party – documents of an agency – third party consultation – clause 3(1) – personal information – clause 3(5) – evidence of consent by third parties – clause 3(6) – whether disclosure would, on balance, be in the public interest – whether disclosure to the world at large.

***Freedom of Information Act 1992***: sections 3, 10(1), 32(2), 32(6), 102(3); Schedule 1, clauses 3(1), 3(5), 3(6); Schedule 2, Glossary, clause 1, clause 4

***Associations Incorporation Act 1987***: sections 35, 36 and 39C

***Commonwealth Electoral Act 1918 (Cth)***

***Freedom of Information Act 1982 (Vic)***: section 33(1)

***Minister for Transport v Edwards*** [2000] WASCA 349

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

***McGowan and Shire of Murray*** [2010] WAICmr 29

***Victoria Police v Marke*** [2008] VSCA 218

***DPP v Smith*** [1991] 1 VR 63

## DECISION

The agency's decision is confirmed. I find that the disputed documents are exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*.

SVEN BLUEMMEL  
INFORMATION COMMISSIONER

13 December 2010

## REASONS FOR DECISION

1. This complaint arises from a decision made by the Department of Commerce ('the agency') to refuse Australia First Party (NSW) Inc. ('the complainant') access to documents under the *Freedom of Information Act 1992* ('the FOI Act').

### BACKGROUND

2. By letter dated 25 May 2009, the complainant wrote to the agency requesting the Commissioner for Consumer Protection to make orders that the property of Australia First Party Incorporated ('AFP Inc'), a formerly incorporated association, be vested in the complainant. The Consumer Protection Division is a division of the agency. The AFP Inc became defunct on 20 February 2006 when its incorporation was cancelled pursuant to s.35 of the *Associations Incorporation Act 1987* ('the AI Act'). By letter dated 29 March 2010, the Executive Officer, Associations and Charities at the agency, wrote to the complainant about surplus property and the proposed distribution of the property of AFP Inc. In particular, the agency advised the complainant that certain surplus property would be distributed to it. However, the agency decided that other property, including the membership documents, would not be distributed.
3. On 8 April 2010, the complainant wrote to the Manager, Associations and Charities Section of the agency and submitted that the agency should "*vest in us the custody of all membership records of the former Australia First Party Incorporated (AFP Inc).*"
4. On 27 April 2010, the Commissioner for Consumer Protection advised the complainant that she confirmed the decision not to give it the membership records of AFP Inc.
5. By letter dated 29 May 2010, the complainant applied to the agency under the FOI Act for access to:

*"...the membership forms held by the Department in respect of a defunct incorporation – Australia First Party Incorporated. I note here that I do not seek access to any document that notes bank account details."*
6. The complainant paid the \$30.00 application fee payable under the FOI Act for applications for non-personal information.
7. On 7 July 2010, the agency refused the complainant access to the requested documents and claimed that all of the documents identified as coming within the scope of its request contained personal information about third parties, which is exempt matter under clause 3(1) of Schedule 1 to the FOI Act.

8. The complainant applied for internal review of that decision and, on 5 August 2010, the agency confirmed its original decision.
9. On 26 August 2010, the complainant applied to me for external review of the agency's decision.

### **REVIEW BY INFORMATION COMMISSIONER**

10. Following the receipt of this complaint, the agency produced to me all of the requested documents and its FOI file maintained in respect of the complainant's access application.
11. On 29 October 2010, after considering the information then before me, including the requested documents, the agency's FOI file and information provided by the complainant, I wrote to the parties setting out my preliminary view of the complaint. It was my preliminary view that the requested documents were exempt under clause 3(1) of Schedule 1 to the FOI Act as claimed by the agency.
12. In light of my preliminary view, I invited the complainant to withdraw its complaint or alternatively to provide me with further submissions relevant to the matter for my determination.
13. The complainant maintained its complaint and provided me with additional submissions by facsimile dated 16 November 2010.

### **DISPUTED DOCUMENTS**

14. The documents in dispute consist of approximately two thousand completed membership forms titled 'Australia First Party - Membership Application' ('the disputed documents').

### **PRELIMINARY ISSUES**

#### **Documents of an agency**

15. In brief, the complainant submits that although the disputed documents are in the agency's custody, the agency is not the owner of those documents. The ownership of, or the proprietary interest in, the disputed documents belongs to the complainant. Accordingly, the complainant submits that "*the information [contained in the disputed documents] cannot be considered to be State or government information per se simply because of the effect of a statute on defunct associations.*"
16. The complainant, as I perceive it, does not contest the fact that the disputed documents are in the possession or under the control of the agency. Moreover, the complainant states at page 4 of its correspondence to me dated 16 November 2010: "*Certainly, an agency holds the information, but it is put that it is held in effect in a sort of trust role only – if we can prove our bona fides to receive it*". Further at page 10 of that correspondence, the complainant states that the

disputed documents are “*only in the custody of the agency, but its ownership lies elsewhere.*”

17. Section 36(1) of the AI Act provides that where the incorporation of an association is cancelled under s.35 of the AI Act, the property of the association vests with the Commissioner for Consumer Protection and, subject to s.33 of the AI Act, the Commissioner may give such direction as he or she thinks with respect to, among other things, the distribution of that property. It was in these circumstances that the agency came to hold the disputed documents and other property of the AFP Inc.
18. Under the FOI Act, the right of access to documents is created by s.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 under the FOI Act is not whether the disputed documents are owned by, or are the property of the agency. Rather, the question is whether the disputed documents are “*documents of an agency*”.
19. The term “*documents of an agency*” is defined in clause 4(1) of the Glossary in Schedule 2 to the FOI Act which provides, insofar as it is relevant, that:

*“...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.”*
20. Therefore, whether a document is a document of an agency for the purposes of the FOI Act depends on whether it is:
  - in the possession or under the control of the agency;
  - a document that the agency is entitled to access; or
  - in the possession or under the control of an officer of the agency in his or her capacity as such an officer.
21. In *Minister for Transport v Edwards* [2000] WASCA 349 at [53] Hasluck J, in considering the term “*documents of an agency*” noted that the FOI Act is not concerned with ownership or authorship of a document, nor with the entitlement to exclusive possession. The definition of ‘documents of an agency’ was also 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 [13] noted that section 3 of the FOI Act sets out the objects of the Act and provides that they are to be achieved, amongst other things, by “*providing means to ensure that personal information held by State and Local Governments is accurate...(emphasis supplied)*”; the inference being that the term ‘held’ is synonymous with the documents being “*documents of*” government agencies or authorities. Wheeler J said at [20]: “*...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.*”

22. From the material before me, I am satisfied that the disputed documents are in the possession of, and are under the control of, the agency. I am also satisfied that the agency is entitled to access the disputed documents. Accordingly, I am satisfied that the disputed documents are 'documents of an agency' as defined in the Glossary and, thus, are potentially accessible under the FOI Act, subject to its provisions.

### **Third party consultation**

23. In its correspondence to me dated 16 November 2010, the complainant claimed that my preliminary view of this matter, as set out in my letter to the parties dated 29 October 2010, is a subjective one, as neither I nor the agency obtained the views of the third parties named in the disputed documents as to whether they wished to have their personal information disclosed. The complainant submits that "[t]he Associations Incorporation Act should not be used, nor should the Freedom of Information Act be employed, to deny natural justice to those who have not been consulted in the present case. You do not know what the members of the defunct association would want done with their data anymore than we do." However, elsewhere in its submissions to me and its letters to the agency, the complainant acknowledges that "*contacting each member is inappropriate*" as it would be a "*time consuming and expensive process*" and that "*the whole matter should be considered generically and in a common sense fashion. It is really only a matter of giving the party [the complainant] back its membership records.*"
24. In the present case, the AI Act is not relevant in determining whether consultation with a third party is required in dealing with an access application made under the FOI Act. The only applicable legislation in determining this issue is the FOI Act.
25. Section 32 of the FOI Act governs consultation with third parties in relation to the personal information of third parties. Section 32(2) provides that an agency is not to give access to a document which contains personal information about individuals other than the applicant unless the agency has taken such steps as are reasonably practicable to obtain the views of those third parties as to whether the documents contain matter that is exempt under clause 3(1) of Schedule 1 to the FOI Act.
26. An agency is only required to obtain the views of third parties if it is intending to give access to personal information about those third parties. If - as in the present case - an agency does not intend to give the applicant access to that information, the agency is not obliged to consult with those third parties: s.32(6). Consultation with third parties in the latter case can unnecessarily increase the time it takes for an applicant to receive an agency's notice of decision. Further, in my experience, consultation in those circumstances often raises unnecessary concerns and is more likely to hinder rather than assist in the process of dealing with the application: see *McGowan and Shire of Murray* [2010] WAICmr 29.

27. It is apparent from the agency's notices of decision that it decided not to give access to the disputed documents on the basis that they contained personal information about third parties that is claimed to be exempt under clause 3(1). Therefore, the agency was not required to consult those third parties under s.32 of the FOI Act.

### **CLAUSE 3 – PERSONAL INFORMATION**

28. Insofar as it is relevant, clause 3 of Schedule 1 to the FOI Act provides:

**“3. *Personal information***

- (1) *Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).*
- (2) ...
- (3) ...
- (4) ...
- (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.”*

### **Definition of ‘personal information’**

29. In the Glossary to the FOI Act the term ‘personal information’ is defined 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.”*

30. The definition of ‘personal information’ in the Glossary makes it clear that ‘personal information’ is information about an identifiable person. Information of that kind is exempt under clause 3(1), subject to the application of any of the limits on exemption in clauses 3(2) - 3(6).

31. 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.

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

32. The complainant advises me that it does not seek access to any resignation forms, forms relating to deceased persons or bank account details of any former members of the AFP Inc that may be contained in the disputed documents. In its letters to the agency; its letter to me seeking external review; and its correspondence to me dated 16 November 2010, the complainant made detailed submissions which I have summarised, as follows:

- The complainant submits that its interest in accessing the disputed documents is a public rather than a private interest *“because it affirms in the circumstances of this case, a democratic principle.”* Although its access to the disputed documents would advance its immediate organisational interest there is a *“clear public interest in Australian citizens participating in democratic organisations and processes. This extends to the free creation of political parties and their operation in a way free of unnecessary regulation or interference”* by the FOI Act.

### ***Public interest considerations arising from the the history behind the disputed documents***

- The disputed documents *“...are essentially – [the complainant's] records”* as the complainant is a political organisation that carries on the objectives of the AFP Inc and *“...is the continuation of the former [AFP Inc] in terms of some membership, general policy and some of the leadership.”* There is also a new entity using the name AFP Inc, which is a specialised section of the complainant and is the complainant's Western Australian incorporated co-entity. The agency may be the custodian of the disputed documents but the true owner of the disputed documents is the complainant by virtue of some of its members who held membership in the AFP Inc. Those proprietary rights have not been extinguished merely because the AFP Inc is defunct. Therefore, the disputed documents are the collective property of the complainant's members who were former members of the AFP Inc. *“There is no public interest in extinguishing the ownership rights in the information [contained in the disputed documents] when it was these members who created it and who used it.”*
- The complainant submits that refusing it access to what should be considered as its own membership data base *“would be conceived of by a reasonable person as an artificial restriction of democratic liberty.”* The complainant is a registered Federal political party that is essentially the same party as the AFP Inc, which was also registered as a Federal political party until August 2004. Therefore, the public interest should also take into account the fact that the complainant is also a political party.

- The complainant submits that it was as a result of the complainant's original complaint to the agency to intervene in the affairs of the AFP Inc that the disputed documents were ultimately passed to the agency's care. The agency's responsibility in this matter as defined in the AI Act is to pass on the surplus property of the AFP Inc to a new possible owner or retain the property if no new association of a like mind and purpose can be located. The agency exercised those responsibilities by transferring to the complainant some of the property of the AFP Inc. This confirmed the complainant as legitimate to lay claim to the disputed documents. Nevertheless, the agency regards the complainant as a new legal entity, regardless of the continuing nature of some of the complainant's membership and officers from the AFP Inc. The agency concluded that privacy rights would be violated by passing the disputed documents to a new association. The agency's decision to refuse access to the disputed documents is inconsistent with the agency's decision to transfer the other physical property and money of the AFP Inc to the complainant. Nonetheless, the complainant concedes that different responsibilities are involved in the consideration of distributing third parties' details and other physical property and money.
- The complainant "*would meet all reasonable objective tests to be a suitable applicant to receive the information [contained in the disputed documents] via any legal means. An appreciation of the history involved in the case allows the balance between a public interest favouring disclosure against the privacy of the former members, to take immediate effect.*"

#### ***Consent and intent of third parties***

- The complainant regards the former members of the AFP Inc as "*de facto members*" of the complainant. Therefore the complainant seeks access to the disputed documents in order "*to confer with our members in order to clarify their status. We say that the members have given a de facto consent to us having the [the disputed documents] by the very nature of a membership taken in a political party. The former members of the AFP Inc joined that party "in an implied contract with all other members, including the officers. They expected a service (the public exposition of a political programme) and to participate in furthering the delivery of this service to other Australians."* That intention is not extinguished by the defunct status of the AFP Inc and "*is a public interest consideration, since only the Freedom [of Information Act allows the restoration of their rights and such a thing would be considered reasonable by the average citizen and gives effect to associations' law – given it affirms the principle of good-governance for incorporated bodies.*" The purpose of the complainant's access application is to "*give effect to every [former] member's original intent*" in joining the AFP Inc.
- There is no public interest in using the law under the FOI Act to affirm privacy when the third parties "*under notice gave up privacy (in a certain way – to their elected officers) when they joined a political party.*"

- Those members of the AFP Inc whom the complainant could contact provided their personal information to the leadership of the complainant and this confirms “*the original intent of at least part of the membership of the former association [the AFP Inc] to participate in democratic politics.*” The complainant recognises that “*some [former members of the AFP Inc] may no longer want contact or have altered their political disposition, but it is equally certain many may wish to re-affiliate. It is also likely that those who want no further membership would not necessarily resent the contact or feel that their privacy was violated. It is really quite simple to ignore our communication.*” There is no public interest in denying the third parties in this matter an opportunity to affiliate to a political party, being the complainant, when it is reasonable to conclude that they would probably do so if provided with membership material. In view of the uncertainty, the balance should come down on the complainant’s side. The privacy concern is outweighed by a public interest in having the proper administration of associations confirmed and people free to choose a political movement in a legal framework which suits them.

#### ***Other public interests in favour of disclosure***

- The complainant submits that many of the members of the AFP Inc were not aware that it was deregistered in 2006. If they had been aware, they “*would have acted in the former association to secure our rights.*” Certain internal divisions within the AFP Inc prevented that action from being taken. This led to the members of the AFP Inc losing their rights and interests as members. There “*is no public interest in allowing the maladministration of incorporated associations to be rewarded.*” It is in the public interest to “*affirm that the sensibilities of the individuals who were members of the AFP Inc are preserved and not further violated.*”
- Clause 3 deals with the privacy of the third parties named in the disputed documents who were former members of the AFP Inc. However, the abuse of their rights by the AFP Inc “*is a matter to be considered in any decision involving the public interest.*”
- The AFP Inc had rights under Federal law that cannot be lost because of malfeasance in that former association and these rights overrule the AI Act and the FOI Act.
- The complainant does not consider that disclosure of the disputed documents to the complainant would “*open the private lives of citizens to public scrutiny*” because disclosure is only to the complainant. In support of that proposition, the complainant cited the decision of *Victoria Police v Marke* [2008] VSCA 218. The complainant submits that “*no misuse of the information [will occur] if it is handed over to us. Quite the contrary: passing over information is proper and reasonable and lawful and is in accordance with democratic principle.*” Further, the complainant states that “*great care would be exercised in relation to the data, given the*

*comity existing between the defunct and the new associations and the purposes of the present association.”*

### **The agency’s submissions**

33. In its various letters to the complainant, the agency submits as follows:

- An incorporated association is a separate legal entity and there is no evidence to indicate that the members of the AFP Inc have given consent, de facto or otherwise, to their personal details being handed to another association.
- The decision to refuse access to the disputed documents does not restrict the complainant’s activities nor prevents the former members of the AFP Inc from joining another incorporated association.
- It would be impractical to contact and consult the former members of the AFP Inc because:
  - there are a large number of membership application documents in dispute;
  - it would be difficult to do when the last known address of the members could be over 10 years old;
  - some of the application documents note that the members are deceased or have resigned from the association; and
  - there is no certainty that the former members still hold the same beliefs or views or political persuasions and may not welcome the contact.
- The agency disagrees with the complainant’s view that there is no harm in releasing third parties’ personal information.
- The complainant seeks access to the disputed documents in order to progress its own interests. The agency is not convinced that the interest of the complainant equates to the public interest.
- There is a central issue related to protecting the privacy of individuals who disclosed personal information in their dealing with an association. There is considerable public interest in ensuring that information about individuals held by incorporated associations is treated with respect and handled with care.
- The information currently in the possession of the agency is being held on behalf of the Commissioner for Consumer Protection in the exercise of her powers under the AI Act. Section 39C of the AI Act specifically provides for information about the affairs of a person officially obtained to be confidential. The AI Act also provides substantial penalties for misuse of that information by, amongst other things, disclosure to another person.

The agency submits that those provisions in the AI Act would have been drafted to reflect the public interest in relation to information held by the agency and Commissioner in fulfilling their responsibilities when administering the AI Act.

### Consideration

34. Since the complainant does not seek access to any resignation forms of third parties, bank account details or information relating to deceased persons contained in the disputed documents, that information is not in dispute.
35. I have examined the disputed documents. There are a number of versions of those membership forms, but essentially each document requests the same type of information to be completed by those wishing to become a member of the AFP Inc. The information includes the full name, signature, date of birth, residential address, occupation, telephone numbers and email address of the various individuals. Clearly, the identity of each person would be disclosed from that information. In my view, all of the personal information contained in the disputed documents would be *prima facie* exempt under clause 3(1) because its disclosure would reveal personal information, as that term is defined in the FOI Act, about individuals other than the complainant.
36. I note that there is a small amount of non-personal information contained in those documents. However, in my opinion, it would not be practicable to provide edited copies of the disputed documents nor is it likely that the complainant would want copies edited to delete the information that it is seeking to access.
37. The exemption in clause 3(1) is, however, subject to a number of limits which are set out in clauses 3(2) - 3(6) of Schedule 1 to the FOI Act. There is nothing presently before me to suggest that clauses 3(2)-3(4) are relevant to this matter. I consider that the only relevant limits that may be applicable are clauses 3(5) and 3(6).

### *Clause 3(5) – consent from third parties*

38. Clause 3(5) provides that matter is not exempt matter under clause 3(1) if the applicant provides evidence establishing that the individual concerned consents to the disclosure of the matter to the applicant.
39. I do not accept, as the complainant submits, that the third parties' provision of their personal information to the AFP Inc for the purpose of joining that party equates to their consent, de facto or otherwise, to provide their personal information to the complainant. In my view, the third parties provided personal information to the AFP Inc in order to become a member of that association and party. I do not accept that the provision of that information implies or is evidence that the particular individual consented to his or her personal information being given to another association or related party, such as the complainant. There is no evidence before me to establish that claim. The

complainant's assertion alone, without more, is not sufficient evidence of consent by the relevant third parties.

40. I agree with the agency that the complainant is a separate legal entity to AFP Inc. I understand the AFP Inc was registered by the Australian Electoral Commission ('AEC') as a Federal party on 13 September 1996 and was deregistered on 13 August 2004 under the provisions of the *Commonwealth Electoral Act 1918* ('Electoral Act'). I also understand that the AFP Inc was incorporated under the AI Act and its incorporation was cancelled in 2006 under that Act. The complainant applied under the Electoral Act to the AEC for registration as a new Federal political party on 2 October 2009. The complainant was registered by the AEC on 16 June 2010. The complainant is also an incorporated entity. Although the complainant submits that the objectives and part of the membership and leadership of the AFP Inc are continued by the complainant, it is clear that the AFP Inc and the complainant are separate associations and are recognised as separate parties under the Electoral Act. Therefore I do not accept the complainant's claims that the third parties have consented to the disclosure of their personal information, merely by their membership of the AFP Inc or that the complainant is a continuation of the AFP Inc simply because it has the same or similar objectives, members or leaders.
41. The complainant submits that because some former members of the AFP Inc have provided their personal information to the complainant this confirms the original intention of at least some former members of the AFP Inc to continue to participate in active membership of a political party. I do not accept that proposition which, in my view, is merely speculative.
42. On the material before me there is nothing to establish that any relevant third party has consented to the disclosure of his or her personal information contained in the disputed documents to the complainant. Accordingly, the limit on exemption in clause 3(5) does not apply.

***Clause 3(6) – public interest***

43. Clause 3(6) provides that matter will not be exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. Under s.102(3) of the FOI Act, the complainant bears the onus of establishing that it would, on balance, be in the public interest for the agency to disclose personal information about other people to it.
44. The public interest is not defined in the FOI Act. In my opinion, the term is best described in the decision by the Supreme Court of Victoria in *DPP v Smith* [1991] 1 VR 63 at page 65, 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 ... There are ... several and different features and facets of interest which form the public interest. On the other hand, in the daily affairs of the community, events occur which attract public attention. Such events of interest to the public may or may not be ones which are for the benefit of the public; it follows that such form of interest per se is not a facet of the public interest.”*

45. The public interest is not primarily concerned with the particular interests of the complainant or with public curiosity. Rather, the question is whether disclosure of personal information about third parties would be of some benefit to the public generally and whether that public benefit is sufficient to outweigh any public interest in maintaining the privacy of those third parties.
46. Determining whether 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 judgment as to where the balance lies in the circumstances of the particular case.
47. In favour of disclosure, I recognise that there is a public interest in applicants being able to exercise their right of access under the FOI Act. However that right is not an absolute right but is expressed in s.10(1) to be subject to and in accordance with the FOI Act which includes a range of exemptions designed to protect other particular public interests.
48. The complainant submits that its interest in accessing the disputed documents is of a public rather than a private nature. Although it acknowledges that its access to the disputed documents would advance its own interests, it submits that there is an overarching public interest in allowing a political party to promote its programme. The complainant submits that there is no public interest in denying the third parties in this matter an opportunity to affiliate to a political party, being the complainant, when it is reasonable to conclude that they would probably do so.
49. I acknowledge that there is a public interest in people being able to participate in democratic processes as the complainant submits. However, I do not agree that a refusal of access to the disputed documents under the FOI Act would interfere with such participation in this case. I agree with the agency that its decision to refuse access to the disputed documents does not restrict the complainant's activities nor prevent the former members of the AFP Inc or any other third party from joining another incorporated association or party such as the complainant. The choice to distribute membership material remains available to the complainant. The choice to join another incorporated association and political party remains available to the third parties regardless of whether or not the disputed documents are disclosed to the complainant.
50. I do not accept the complainant's submissions that giving the complainant access to the disputed documents would restore the rights held by third parties who were former members of the AFP Inc. Any membership rights held in the

AFP Inc are rights held by virtue of being a member of that association. Should any third parties now become a member of the complainant, they obtain 'new' membership rights in the complainant by virtue of being a member of the complainant; they are not restored old rights in AFP Inc, which is a defunct association.

51. The complainant also submits that its rights under Federal law cannot be lost because of malfeasance in the AFP Inc and those rights overrule the AI Act and the FOI Act. With respect to that submission, it is not clear to which Federal legislation the complainant refers. In any event, there is nothing before me – other than the complainant's assertion – to establish any 'malfeasance' by former members of AFP Inc. My jurisdiction under the FOI Act is to consider whether access should be given according to the provisions of the FOI Act. The FOI Act was not created to obstruct access to documents which are available through other legislation. There are other avenues that may be available to the complainant to obtain access to the disputed documents such as subpoena or through the court discovery process. I note that the complainant is not prevented from pursuing those other avenues in conjunction with the FOI process.
52. The complainant's submission that many third parties may wish to become members of the complainant is merely an assertion and, in the absence of any evidence of consent given by the relevant third parties, I do not accord it much weight.
53. The complainant also submits that the matters of ownership of the disputed documents and the history relating to how the disputed documents came into the possession of the agency are relevant considerations in weighing the public interests for and against disclosure. In particular, the complainant submits that there is no public interest in extinguishing its ownership rights in the disputed documents. The question of ownership is not a matter within my jurisdiction to determine. As set out in paragraphs 15 to 22 above, there is no requirement under the FOI Act that the person seeking access have a proprietary or any other interest in the documents or the information contained in them. Whatever the rights of ownership may be, the operation of the FOI Act does not extinguish any ownership rights that may exist in the disputed documents. As stated, the disputed documents are "*documents of an agency*" and thus are potentially accessible under the FOI Act, subject to its provisions.
54. I understand the complainant to submit that despite the AFP Inc's being defunct and the complainant's being a separate legal entity to AFP Inc, the disputed documents are its records. The complainant made a number of detailed submissions in that regard, including that the third parties joined the AFP Inc "*in an implied contract*" with other members and officers of that organisation and, consequently, with the complainant. The complainant further submits that there is no public interest in using the law under the FOI Act to affirm privacy when the third parties "*under notice gave up privacy (in a certain way – to their elected officers) when they joined a political party.*"

55. I do not accept those submissions. I am not persuaded that any implied contract exists, as the complainant asserts or that the former members of the AFP Inc are 'de facto' members of the complainant. Nor do I accept that the third parties gave up their privacy in any way. There is nothing other than the complainant's assertions to support those views.
56. In the alternative, the complainant submits that disclosure of the disputed documents to the complainant would not "*open the private lives of citizens to public scrutiny*", because disclosure is only to one association, being the complainant. The complainant cited the Court of Appeal decision of the Victorian Supreme Court in *Victoria Police v Marke* [2008] VSCA 218 as relevant to that issue. The complainant has also provided its assurance that it would not misuse the information contained in the disputed documents and great care would be exercised in that regard.
57. In *Marke*, the Court of Appeal considered s.33(1) of the *Freedom of Information Act 1982* (Vic) ('Vic FOI Act'), which is the equivalent of clause 3(1) of Schedule 1 to the FOI Act. Section 33(1) of the Vic FOI Act provides that a document is an exempt document if "*... its disclosure under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person.*" Importantly, the words of s.33(1) are very different from the words of clause 3(1) of Schedule 1 to the FOI Act. The issue before the Court of Appeal was whether the decision-maker had to, or could, consider the likelihood that Mr Marke would publish the document or information to any other person, in determining whether disclosure would be "*unreasonable.*" That is not a matter for my determination under clause 3(1) in this case because of the different wording of the exemption and I consider that *Marke* is distinguishable on its facts.
58. The FOI Act is not intended to open the private lives of its citizens to public scrutiny in circumstances where there is no demonstrable public benefit in doing so. The FOI Act is intended to make government, its agencies and officers more accountable, not to unnecessarily intrude upon the privacy of individuals. Under the FOI Act, disclosure to an access applicant is considered to be, in effect, disclosure to the world at large because no restrictions can be placed on the use that may be made of a document to which access is given, so that the fact that disclosure is only to the complainant is not relevant.
59. In favour of non-disclosure, I recognise that there is a very strong public interest in maintaining personal privacy and that the protection of an individual's privacy is a public interest that is recognised in the FOI Act by clause 3.
60. In balancing the competing public interests, I am not persuaded that the public interest favouring disclosure of the disputed documents to the complainant is sufficient to outweigh the public interest in the protection of personal privacy of the individuals to whom the information relates.

**CONCLUSION**

61. I find that the disputed documents are exempt under clause 3(1) of Schedule 1 to the FOI Act, as the agency claims.

\*\*\*\*\*