

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

**File Ref: F2008075
Decision Ref: D0492008**

Participants:

**Kelvin Clive Pearson and Shelley
Anne Pearson**
Complainants

- and -

**Real Estate and Business Agents
Supervisory Board**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents relating to a complaint made to the agency - scope of the access application - clause 7 - legal professional privilege - clause 3 - personal information - clause 3(6) - public interest

Freedom of Information Act 1992: section 102(3); Schedule 1, clauses 3(1) and 7(1)
Freedom of Information Regulations 1993: regulation 9(1)

Re Birney and Attorney General [2002] WAICmr 22

Esso Australia Resources Ltd v The Commissioner of Taxation (1999) 168 ALR 123 at 132

Commissioner of Australian Federal Police and Another v Propend Finance Pty Ltd and Others [1997] 188 CLR 501

Trade Practices Commission v Sterling (1979) 36 FLR 244

Attorney General (NT) v Kearney (1985) 158 CLR 500

Waterford v Commonwealth (1987) 163 CLR 54

DECISION

The agency's decision to refuse access to certain of the disputed documents is varied.
I find that:

- Documents 9, 12, 14, 16, 17, 19-23, 26, 27, 29, 31-33, 35, 37-46, 48-98, 101-105, 107, 112-114, 118-121, 123, 124, 130, 135, 137-147 and 149 fall outside of the scope of the access application;
- Documents 1-8, 10, 11, 13, 18, 25, 28, 30, 34, 106, and 108-110 are exempt under clause 7(1);
- Documents 100 and 153 are exempt under clause 3(1);
- The information in Documents 36, 47 and 99, as set out in the appendix to these reasons for decision, is exempt under clauses 3(1). Otherwise those documents are not exempt and access is to be given in an edited form.

JOHN LIGHTOWLERS
A/INFORMATION COMMISSIONER

31 October 2008

REASONS FOR DECISION

1. This complaint arises from a decision of the Real Estate and Business Agents Supervisory Board ('the agency') to refuse Mr and Mrs Pearson ('the complainants') access to documents under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. On 9 January 2006, the complainants wrote to the agency about an alleged non-disclosure by a real estate agent of the realignment of a road in the area where they had purchased property in December 2004. From the information before me, I understand that the agency investigated the complainants' complaint, together with a number of other complaints in relation to similar or related issues.
3. On 10 October 2007, the Registrar of the agency wrote to the complainants advising that the agency had concluded its investigation into their complaint and determined that it would not bring any action against the real estate agent the subject of their complaint. In that letter, the Registrar said:

"I am aware that yours is not an isolated complaint. It is one of a series of complaints from landowners ... who are members of the ... Residents Action Group.

...

Thank you for bringing this matter to the Board's attention. ... If you and other members of the ... Residents Action Group would like to meet with me as a group to discuss the outcome of the Board's investigation I would be pleased to do so."

4. On 19 October 2007, the complainants applied to the agency under the FOI Act for access to "... all documentation provided by and received by REBA relating to [their] complaint lodged with REBA dated 9th January 2006 their ref: 190/2006". The complainants added that their application included:

"..memorandums, letters, briefing notes, reports, correspondence including emails and similar, electronic stored information, faxes, Minutes of Meetings, meeting notes, day sheets, diary sheets, maps, notes and other attachments from 6 January 2006 to present between the REBA, New Metro Rail, Public Transport Authority, [named property/development groups], [three named individuals] and other government departments. We also request copies of all documentation of legal counsel to the REBA Board in regard to the recommendation made on the decision in regard to [a named property group]".

5. On 24 October 2007, the agency wrote to the complainants advising that it could not accept their application at that point, since it did not meet the requirements of s.12(1) of the FOI Act. Section 12(1) provides that an access application has to give enough information to enable the requested documents to be identified. The agency asked the complainants to reduce the scope of their application and offered assistance in redefining the ambit of their request.
6. On 1 November 2007, following further communications with the agency to confirm the scope of the access application, the complainants advised the agency by email that the information they sought was contained in the following three categories of document:
 - Transcripts of all interviews with employees of a property company ('the Company') and a development company.
 - All correspondence to and from the employees of those companies.
 - All legal correspondence "*to and from legal counsel and Solicitors advice to the REBA Board.*"
7. At the same time, the complainants advised that they were not seeking access to "*transcripts of residents' interviews or correspondence*". On the same day, the agency wrote to the complainants and confirmed that the scope of their application had been reduced to those three categories of document.
8. Following that, the agency consulted with a number of third parties, including the Company, as it was required to do under sections 32 and 33 of the FOI Act if it was considering releasing personal or business information about those parties. I understand from the agency's FOI file that the Company did not consent to the disclosure of information concerning it to the complainants.
9. On 13 December 2007, the agency advised the complainants of its decision and noted that it had identified 154 documents as falling within the scope of the access application. The agency identified and described those documents in a schedule which it gave to the complainants. The agency's decision was to give the complainants access in full to 22 documents and to give access to edited copies of five documents (deleting personal information under clause 3). The agency also refused access to 127 documents, on the grounds that those documents were either outside the scope of the access application (although it had previously noted that all 154 documents were within the scope) or were exempt under clauses 3, 7 or 8(1) of Schedule 1 to the FOI Act.
10. On 20 December 2007, the complainants applied for internal review of that decision and, on 11 January 2008, the agency varied its original decision by finding that 23 documents to which access had been refused were also exempt in full under either clauses 4(3), 6(1), 7 or 8(1) and that access could be given to edited copies of 22 documents.
11. On 3 March 2008, the complainants applied to me for external review of the agency's decision.

REVIEW BY THE A/INFORMATION COMMISSIONER

12. Following receipt of this complaint, I obtained the disputed documents and the agency's FOI file maintained in respect of the access application. On 18 April 2008, one of my officers met with the complainants to discuss their complaint and to see whether its scope could be reduced further. However, following further correspondence and discussion, the complainants declined to further reduce the scope of their application but sought external review of the agency's decision in respect of all of the documents to which they had been refused access or where access was given in an edited form.
13. Discussions were also held with the agency – particularly in respect of its decision to list documents on its document schedule which were stated to be outside the scope of the complainants' access application and to include other documents on that schedule which also appeared to be outside the agreed scope of the application. In response, the agency advised my office that it had taken "a liberal stand" in relation to identifying documents within the scope of the application.
14. On 30 July 2008, my Legal Officer (Research & Investigations) wrote to the parties and said that, in her opinion, a large number of the documents referred to on the agency's document schedule appeared to be outside the scope of the complainants' application. In addition, she advised that a number of documents were exempt under clauses 7(1) and 3(1), and two documents could be disclosed in edited form. The complainants were invited to withdraw their complaint in respect of those documents considered to be exempt or outside the scope of the application or, alternatively, to provide me with further submissions and/or information relevant to the matters for my determination.

THE DISPUTED DOCUMENTS

15. The agency described 154 documents in the schedule attached to its notice of decision dated 11 January 2008. The agency gave full access to 22 of those documents. Therefore, the complainant sought external review of the decision of the agency in respect of the remaining 132 documents, which the agency claims are exempt – either in full or in edited form – or are outside the scope of the complainants' application. Those 132 documents are listed and described on that schedule as Documents 1-14, 16-23, 25-110, 112-114, 118-121, 123, 124, 130, 135, 137-147, 149 and 153.

SCOPE OF THE ACCESS APPLICATION

16. On 30 July 2008, my officer advised the complainants, in writing, that 65 documents appeared to fall outside the scope of their access application because those documents did not relate "to [their] *complaint lodged with REBA dated 9th January 2006*". Those documents are Documents 14, 16, 19, 20, 27, 29, 31-33, 38- 42, 44, 45, 48-54, 56-65, 68, 71, 74, 78-82, 84-86, 88, 89, 90, 92, 93, 96-98, 101-103, 105, 113, 114, 119-121, 123, 124, 144 and 149.

17. In addition, having regard to the agreement to reduce the scope of the application to the three categories of document referred to in paragraph 6 above, my officer also advised the complainants that a further 36 documents appeared to fall outside of the scope of their application because none of those documents came within those three categories. Those documents are Documents 12, 17, 21-23, 26, 35, 43, 46, 66, 67, 69, 70, 72, 73, 75-77, 83, 87, 91, 94, 95, 99, 130, 135, 137-143 and 145-147.

The complainants' submissions

18. On 4 August 2008, in response to that letter, the complainants made the following submissions, which I have set out in brief, as follows:
- Documents which relate to the road re-alignment prior to December 2004 are relevant to their complaint to the agency because they are linked to their complaint.
 - Documents obtained by the agency from “*the ‘Group’*” (which I understand to be a reference to the Residents Action Group) should be considered within scope because the agency advised the complainants that not all members of that body needed to “*submit copies of the same letters as it applied to all the complaints*”.
 - Other documents such as the Master Plan for the area were not listed on the agency’s document schedule.
 - Documents 37, 38, 42, 47, 49, 52 and 53 - which are letters - should be included within the scope if written on the agency’s letterhead, provided that personal information is removed.
 - Documents 96, 100, 104, 112, 113, 144, 149 and 153 - which are letters from the Company - should also be included within scope and disclosed after removing personal information because they represent the Company and not individuals.

Consideration

19. In *Re Birney and Attorney General* [2002] WAICmr 22, the former Information Commissioner considered her functions in relation to the scope of an application and said, at [38]-[39]:

“Section 76(1) of the FOI Act provides that, in dealing with a complaint the Information Commissioner has, in addition to any other power, power to review any decision that could have been made by an agency in respect of the access application and power to decide any matter in relation to the access application that could, under the FOI Act, have been decided by the agency. That is, the Information Commissioner ‘stands in the shoes’ of the original decision-maker and conducts a merits review of the case. When a request for access to a document is received, preliminary

decisions have to be made about, amongst other things, the extent and manner of searches to be undertaken and the documents covered by the terms of the access application.

*In my view, when I am conducting an external review of a complaint, as I am in this instance, the FOI Act gives me wide powers, including the power to confirm, vary or set aside an agency's decision and to substitute my own... In my opinion, I have the power to determine whether a document is covered by the terms of an access application and, if it is, whether or not that document is exempt and the reasons why. I consider that the expression "decide any matter in relation to the access application" in s.76(1)(b) is very broad and includes a preliminary decision about which documents are included. If that were not the case, the objects and intent of the FOI Act could clearly be frustrated: see *Re Anti-Fluoridation Association of Victoria and Secretary, Department of Health*, 8 ALD 163, at 168."*

I agree with that view.

20. In this case, the complainants applied to the agency under the FOI Act, on 19 September 2007, "*for all documentation provided by and received by REBA relating to our complaint to REBA lodged with REBA dated 9th January 2006 their ref: 190/2006*".
21. The complainant's letter of 9 January 2006 - which contained the relevant complaint - was headed: "*Re: ... Road Realignment at ... Lot 1386 ...*" and said "*We are writing to register our concern with [the Company] re: non-disclosure of the road alignment to us when we purchased lot 1386, which finalized in December 2004*".
22. In light of that, I consider that the documents which come within the scope of the complainants' access application are documents which relate to their complaint to the agency, which concerned the alleged non-disclosure of the road alignment in December 2004, at which date they purchased their property.
23. In my view, documents which refer to complaints made by other people to the agency - whether on the same or similar matters - or the agency's investigation of those other complaints - fall outside the scope of the complainants' application. In addition, on 1 November 2007, the complainants narrowed the scope of their complaint further to three categories of document.
24. I do not consider that, having narrowed the scope of the original access application, it was then consistent for the agency to extend its interpretation of the agreed narrowed scope to cover matters that clearly fell outside the agreed scope because they were matters "linked" to the complainants' complaint of 9 January 2006 to the agency, or that - because the agency had advised members of the Residents Action Group that it was unnecessary for them all to submit the same letters in respect of all their complaints - those documents should be included within the agreed scope of the application. In particular, I consider it to be unhelpful where, as here, the agency then proceeded to refuse access to

most of those documents on the basis that they contain personal information about individuals other than the complainants and, consequently, claimed they are exempt in full (or, in a few cases, in part) under clause 3(1). In my view, there would be occasions where it is appropriate for an agency to interpret the scope of an application generously but this is not such a case. In any event, having examined the relevant additional documents, it appears to me that most of the matter contained in those documents contain exempt matter and, if I was required to make a determination as to whether the agency should give access to those documents, which I am not, I would most likely find that a large part of those documents is exempt from disclosure.

25. With regard to the complainants' submission in the third dot point of paragraph 18, I consider that any document containing a master plan for the area in question would be outside the scope of their access application because such a document is not a transcript of an interview with, or correspondence to and from, the employees of the Company and the development company, nor is it "legal correspondence".
26. I have examined the 132 disputed documents listed in paragraph 15 above and I have carefully considered the terms of the complainants' access application, together with the terms of the agreed reduced scope. In my view, 107 of those documents fall outside the scope of the application because they do not relate to the complaint made by the complainants to the agency on 9 January 2006 or they do not come within the three categories of document, as agreed with the agency on 1 November 2007. (I note that Documents 104 and 112 are duplicates of Document 37). In light of that, I do not intend to deal with those documents further. Those documents are Documents 9, 12, 14, 16, 17, 19-23, 26, 27, 29, 31-33, 35, 37-46, 48-98, 101-105, 107, 112-114, 118-121, 123, 124, 130, 135, 137-147 and 149.
27. As I have found that 107 of the 132 disputed documents are outside the scope of the application, I am required to determine whether the 25 documents remaining in dispute are exempt as claimed by the agency. Those documents are Documents 1-8, 10, 11, 13, 18, 25, 28, 30, 34, 36, 47, 99, 100, 106, 108-110 and 153.

Clause 7 - legal professional privilege

28. The agency claims that Documents 1-8, 10, 11, 13, 18, 25, 28, 30, 34 and 106 are exempt under clause 7(1) of Schedule 1 to the FOI Act on the ground of legal professional privilege.
29. Clause 7(1) provides:

“(1) Matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege.”
30. Legal professional privilege protects from disclosure confidential communications between clients and their legal advisers if made or brought into existence for the dominant purpose of giving or seeking legal advice or for use

in existing or anticipated legal proceedings: *Esso Australia Resources Ltd v The Commissioner of Taxation* (1999) 168 ALR 123 at 132.

31. The privilege is concerned with confidential communications and seeks to promote communication with a legal adviser, not to protect the content of a particular document. In *Commissioner of Australian Federal Police and Another v Propend Finance Pty Ltd and Others* [1997] 188 CLR 501, Toohey J observed, at p.525:

“... privilege does not attach to a piece of paper. It attaches to a communication, written or oral, and it is the communication that is at issue. While it is natural to speak of legal professional privilege in terms of documents, it is the nature of the communication within the document that determines whether or not the privilege attaches.”

The complainants’ submissions

32. In their letter of 4 August 2008, the complainants provided me with excerpts from a report of the 35th Australian Legal Convention held on 23 March 2007 in Sydney in relation to the topic of *“Legal Professional Privilege and Commonwealth Investigatory Bodies”* which noted that views in relation to legal professional privilege are often polarized and listed examples of certain cases where privilege had been raised as an issue, including the James Hardie case *“where the Parliament decided that ‘the public interest in discovering the truth’ should prevail over the privilege”*.
33. I understand from this that the complainants submit that it would be in the public interest, in this case, to abrogate the protection of legal professional privilege for the documents in question.

Consideration

34. Although legal professional privilege is most commonly applied to communications between clients and their legal advisers, it also extends to other classes of documents. For example, in *Trade Practices Commission v Sterling* (1979) 36 FLR 244, Lockhart J of the Federal Court of Australia held that the privilege extends to other categories of documents, including:

- “(a) Any communication between a party and his professional legal adviser if it is confidential and made to or by the professional adviser in his professional capacity and with a view to obtaining or giving legal advice or assistance; notwithstanding that the communication is made through agents of the party and the solicitor or the agent of either of them...;*
- (b) Any document prepared with a view to its being used as a communication of this class, although not in fact so used...;*
- (c) Communications between the various legal advisers of the client, for example between the solicitor and his partner or his*

city agent with a view to the client obtaining legal advice or assistance...;

- (d) *Notes, memoranda, minutes or other documents made by the client or officers of the client or the legal adviser of the client of record of those communications, or relate to information sought by the client's legal adviser to enable him to advise the client or to conduct litigation on his behalf...;*
- (e) *Communications and documents passing between the party's solicitor and a third party if they are made or prepared when litigation is anticipated or commenced, for the purposes of the litigation, with a view to obtaining advice as to it or evidence to be used in it or information which may result in the obtaining of such evidence...;*
- (f) *Communications passing between the party and a third person (who is not the agent of the solicitor to receive the communication from the party) if they are made with reference to litigation either anticipated or commenced, and at the request or suggestion of the party's solicitor; or, even without any such request or suggestion, they are made for the purpose of being put before the solicitor with the object of obtaining his advice or enabling him to prosecute or defend an action...;*
- (g) *Knowledge, information or belief of the client derived from privileged communications made to him by his solicitor or his agent... ”*

- 35. With regard to the complainants' submissions, I do not have the power to abrogate the privilege in respect of any documents which may be exempt under clause 7(1) of the FOI Act. Moreover, that provision is not subject to a public interest 'test'.
- 36. I have examined Documents 1-8, 10, 11, 13, 18, 25, 28, 30, 34 and 106. In my view, Documents 1, 5, 7, 8, 10, 11 and 13 all contain legal advice given to the agency by its legal advisers. Those documents are, *prima facie*, the subject of legal professional privilege. In my opinion, part of Document 7 is outside the scope of the complainants' application as part of that legal advice relates to a different complaint made by persons other than the complainants.
- 37. Further, I consider that Documents 3 and 4 come within category (b) of *Stirling's* case and that Documents 2, 6, 18, 25, 28, 30, 34, 106 and part of Document 1 come within category (d) of *Stirling*.
- 38. Although the agency has claimed that Documents 108, 109 and 110 are all exempt under clause 3(1), in my opinion, those documents are also privileged in that Document 108 contains legal advice sought and obtained by the agency from its legal adviser and Documents 109 and 110 contain information of the kind referred to in category (a) of *Stirling's* case.

39. The High Court of Australia has held that legal professional privilege attaches to confidential communications between government agencies and salaried legal officers in government employment in respect of legal advice, where the advice given is within the professional relationship between the legal officer and the client and is independent in character: *Attorney General (NT) v Kearney* (1985) 158 CLR 500; *Waterford v Commonwealth* (1987) 163 CLR 54. Based on my examination of the published list of certified legal practitioners, I am satisfied that the agency's legal advisers were appropriately qualified and independent, such that legal advice provided by those persons is capable of attracting legal professional privilege in accordance with the legal principles enunciated in *Kearney* and *Waterford*.
40. Consequently, I consider that Documents 1-8, 10, 11, 13, 18, 25, 28, 30, 34, 106 and 108-110 would be privileged from production in legal proceedings on the ground of legal professional privilege and are therefore exempt under clause 7(1) of Schedule 1 to the FOI Act.

Clause 3 – personal information

41. The agency claims that Documents 36, 47, 99, 100, 108-110 and 153 are exempt under clause 3 of Schedule 1 to the FOI Act. However, as I have already found that Documents 108-110 are exempt under clause 7, it is only necessary for me to decide whether the remaining documents (Documents 36, 47, 99, 100 and 153) are exempt under clause 3, as claimed by the agency.

Clause 3 provides as follows:

“3. Personal information

Exemption

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

Limits on exemption

- (2) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal personal information about the applicant.*
- (3) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to-*
- (a) *the person;*
 - (b) *the person's position or functions as an officer; or*
 - (c) *things done by the person in the course of performing functions as an officer.*

- (4) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who performs, or has performed, services for an agency under a contract for services, prescribed details relating to-*
 - (a) *the person;*
 - (b) *the contract; or*
 - (c) *things done by the person in performing services under the contract.*
- (5) *Matter is not exempt matter under subclause (1) if the applicant provides evidence establishing that the individual concerned consents to the disclosure of the matter to the applicant.*
- (6) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.”*

42. 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.”*

43. The definition of ‘personal information’ makes it clear that any information or opinion about a person, from which that person can be identified, is exempt under clause 3(1).

44. In my view, 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 also 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 or in circumstances where there is no demonstrable public interest in doing so.

45. The complainant submits that access could be given to an edited copy of each of documents from the agency and from the named property group, provided that personal information about individuals is removed.

Consideration

46. I note that Document 153 is a duplicate of Document 100. Having examined Documents 36, 47, 99, 100 and 153, each of those documents contains personal information about third parties which is *prima facie* exempt under clause 3(1). That information consists of names, titles, contact details and opinions of both private individuals and government officers. Documents 36 and 47 do not contain any personal information about the complainants. However, Documents 99, 100 and 153 contain a small amount of personal information about the complainants.

Limits on exemption

47. The exemption in clause 3(1) is subject to a number of limits which are set out in clause 3(2)-(6).
48. 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 any access application. The Concise Oxford Dictionary defines "mere" as "...solely or no more or better than what is specified", and "merely" as "unmixed". In my view, the use of the term 'merely' in clause 3(2), according to its ordinary dictionary meaning, means 'solely' or 'no more than', for example, personal information about the applicant.
49. In my view, the limit on exemption in clause 3(2) does not apply in this instance because there is no personal information about the complainants in Documents 36 and 47 and the personal information about the complainants which is recorded in Documents 99, 100 and 153 is not merely personal information about the complainants.
50. Clauses 3(3) and 3(4) provide, among other things, that matter is not exempt matter under clause 3(1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency or a person who is or has performed services for an agency under a contract for services, 'prescribed details' relating to the person, the person's position or functions or things done by the person in the course of performing functions as an officer or things done by the person in performing services under the contract (see regulation 9(1) of the *Freedom of Information Regulations 1993*).
51. In my opinion, on the basis of the information presently before me, the limits on exemption in clauses 3(3) and 3(4) apply to the personal information about the officers of the agency who are identified in Documents 36, 47, 99, 100 and 153, because that information appears to consist of nothing more than prescribed details about those officers and is not exempt under clause 3(1).
52. Clause 3(5) provides that matter is not exempt matter under clause 3(1) if the applicant provides evidence establishing that the third party concerned consents to his or her personal information being disclosed to the applicant.

53. In this matter, there is nothing before me to establish that the complainants provided any evidence to the agency which establishes that any of the third parties identified in the disputed documents have consented to their personal information being disclosed to the complainant. To the contrary, the third parties consulted by the agency advised the agency that they do not consent to their personal information being disclosed to the complainants. Therefore, the limit on exemption in clause 3(5) does not apply in this case.
54. Section 102(3) of the FOI Act provides that, if under a provision of Schedule 1, matter is not exempt matter if its disclosure would, on balance, be in the public interest, the onus is on the access applicant to establish that the disclosure would, on balance be in the public interest.
55. In this case, the onus is on the complainants, as the access applicants, to establish that disclosure of the personal information about people other than them would, on balance, be in the public interest, taking into account the fact that none of those other individuals have consented to their personal information being disclosed to the complainants.
56. In the complainants' letter to me dated 4 August 2008, the complainants made a number of submissions in support of disclosure of the disputed documents. I have summarised those submissions, insofar as they are relevant to my consideration of the public interest, as follows.
- Disclosure of the disputed documents “...*would be beneficial to gain an understanding of why the ‘REBA’ Board made the decision.*”.
 - “...*21 affected families, including children have had to deal with a complete change in lifestyle.*”.
 - “...*it is of concern to the public that a company was negligent in informing purchasers of the road re-alignment.*”
 - The property company “...*continues to sell land to the public and REBA will not hold [the property company] accountable to the contracts they issue to purchasers. It is also of concern when REBA then informs the public that [the property company] has no case to answer.*”
 - The complainants “...*are a party to the complaint that REBA have made a determination on (without providing any detail) as to how this decision was reached. REBA is a public institution and we should have full transparency of what documents/memos/emails etc. were used by this statutory authority for Real Estate compliance under WA regulations, provided it is not put in the public domain.*”
57. The term “public interest” is not defined in the FOI Act. However, in my view the term ‘public interest’ 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 ... 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”.

58. The application of the public interest test in clause 3(6) involves identifying the public interest factors which favour disclosure and the public interest factors which favour non-disclosure, then weighing those factors against each other, in order to determine where the balance lies.
59. In this instance, there are several public interest factors that weigh in favour of the disclosure of Documents 36, 47, 99, 100 and 153 to the complainants. Those public interest factors include the public interest in individuals being able to exercise their right of access under the FOI Act and in individuals being able to access personal information about them which is held by a government agency. That latter public interest is also recognised by section 21 of the FOI Act.
60. I also recognise a public interest in individuals being informed of the reasons for a decision made by an agency, particularly when that decision directly affects the particular person and, more broadly, in ensuring the accountability of State and local government agencies through access to documents. Balanced against those is a public interest in maintaining the privacy of persons about whom personal information is contained in documents held by State and local government agencies.
61. In its submissions, the complainants claim that they have not been given sufficient detailed reasons for the agency’s decision in respect of their complaint to the agency about certain named parties. The complainants are clearly dissatisfied with the decision of the agency not to bring disciplinary proceedings against certain persons in the State Administrative Tribunal.
62. Having examined the information before me, including the disputed documents, I have a contrary view to that of the complainants. Having read the agency’s letter dated 10 October 2007 to the complainants, advising that the Board had determined not to bring disciplinary proceedings in the State Administrative Tribunal against the parties the subject of the complainants’ allegations, in my view, the agency provided the complainants with a detailed explanation of its reasons for its decision and the process it had followed in arriving at its decision.
63. The agency advised the complainants that, in its view, there was insufficient evidence to support the allegations that there had been a breach of the *Real Estate and Business Agents Act 1978*, or the Code of Conduct made under that Act. In this case, I am of the view that the agency has demonstrated that it conducted a full investigation in response to the allegations made by the complainants. The agency described its awareness of the issues in dispute and it described the extent of the investigations it conducted, including the number of

- witnesses interviewed and the number of documents examined relating to the issue. The agency also described how it had sought advice from legal counsel before making its decision. The agency also invited the complainants to meet with the relevant officer of the agency to discuss the outcome of the complaint should they wish to do so. Whether the complainants decided not to accept that invitation to meet, for the reasons they described to me, does not detract from the fact that the agency made such an invitation. In my view, the detailed reasons given to the complainant by the agency largely satisfies the public interest in individuals being informed of an agency's reasons for its decision.
64. Although an access applicant has a right to be given access to documents under the FOI Act, irrespective of the reasons for seeking access, the right of access under the FOI Act is not an unfettered right.
 65. Section 10(1) of the FOI Act provides that a person has a right to be given access to the documents of an agency (other than an exempt agency) subject to and in accordance with the FOI Act. The right created by section 10(1) is subject to a range of exemptions which are designed to protect significant public interests that compete with the public interest in the openness and accountability of the State government and its agencies (see: *Re Rogerson and Department of Education and Training and Anor* [2007] WAI Cmr 1).
 66. Clause 3 of the FOI Act is, as I have said, intended to protect the strong public interest in the protection and maintenance of personal privacy of individuals about whom personal information may be contained in documents held by State and local government agencies, especially in circumstances where one or more of those individuals does not consent to their personal information being disclosed to the access applicant.
 67. As I have also previously stated, although the FOI Act is intended to make the Government, its agencies and their officers more accountable, it is not intended to call to account or unnecessarily intrude upon the privacy of private individuals, in circumstances where there is no demonstrable public interest in doing so.
 68. In this case, I consider that the public interest in the accountability of the agency has been satisfied to a large extent by the information already given to the complainants by the agency. In those circumstances, I do not consider that the public interest in the accountability of the agency requires the general disclosure of the personal information about private individuals which is contained in the disputed documents.
 69. The public interest is not primarily concerned with the personal interests of a particular access applicant, or with public curiosity. Rather, the question is whether disclosure of the information under consideration in a particular matter would be of some benefit to the public generally. That is, whether it would be of benefit to the public for the information sought by the complainant – being personal information about other people – to be disclosed to the complainant or to any other person and whether that public benefit is sufficient to outweigh any public interest in confidentiality being maintained.

70. In weighing that balance, it is necessary to bear in mind that disclosure under the FOI Act is, in effect, disclosure to the whole world, because if a document is found not to be exempt and it is released, no restrictions or limitations may be placed upon what the applicant or another party subsequently does with the released document.
71. Among the public interest factors weighing against disclosure is the strong public interest in maintaining personal privacy. I have previously expressed the view that there is a very strong public interest in maintaining personal privacy which may only be displaced by some other, considerably stronger and more persuasive public interest that requires the disclosure of personal information about one person to another person.
72. In light of the above, I consider that there is insufficient information before me to establish that there is a compelling, stronger and more persuasive public interest that requires the disclosure of personal information about third parties to the complainants.
73. I find therefore that the personal information about third parties contained in Documents 36, 47, 99, 100 and 153 is exempt under clause 3(1).

Editing

74. Although I find that Documents 36, 47, 99, 100 and 153 contain personal information about various third parties that is exempt under clause 3(1) of Schedule 1 to the FOI Act, I have also considered whether it would be practicable to edit those documents to delete the information about third parties which is interwoven with personal information about the complainants and to give access to the remainder, including the 'prescribed details' about officers of agencies.
75. Section 24 of the FOI Act provides, among other things, that access should be given to edited copies of documents if it is "*practicable*" to do so. In *Winterton's* case, Scott J considered the application of s.24 of the FOI Act and said, at p.16:

"It seems to me that the reference in s.24(b) to the word "practicable" is a reference not only to any physical impediment in relation to reproduction but also to the requirement that the editing of the document should be possible in such a way that the document does not lose either its meaning or its context. In that respect, where documents only require editing to the extent that the deletions are of a minor and inconsequential nature and the substance of the documents still makes sense and can be read and comprehended in context, the documents should be disclosed. Where that is not possible, however, in my view, s24 should not be used to provide access to documents which have been so substantially edited as to make them either misleading or unintelligible."

76. I agree with that view and, having examined Documents 36, 47, 99, 100 and 153, I also agree with the agency that it would not be practicable to edit Documents 100 and 153 because to do so would require such extensive deletions as to render their meaning unintelligible. However, in my view, it would be practicable to delete the exempt matter from each of Documents 36, 47 and 99 - as set out in the appendix to this decision - and for the agency to give the complainants access to an edited copy of those three documents. My office also sought the views of a third party about disclosure of Documents 47 and 99 and the third party subsequently gave its consent to disclosure of those documents in an edited form.

APPENDIX**EXEMPT MATTER**

Document Number	Description	Exempt matter
Document 36	Email dated 10 August 2007 from an officer of the agency to a third party	<ul style="list-style-type: none">• The email address in line 4.• The name in line 6.
Document 47	Letter dated 24 October 2007 from a third party to the agency	<ul style="list-style-type: none">• The name, title and signature on page 2.
Document 99	Draft letter dated 22 May 2006 from the agency to a third party	<ul style="list-style-type: none">• The name and title in the address block and the name in the 'salutation' line• The name and title of a third party in the first paragraph of the body of the letter.