OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	File Ref: F2008266 Decision Ref: D0502008

Participants:

Ross William Leighton
Complainant

- and -

Department of Local Government and Regional Development
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – letter to the agency in response to complaint lodged – clause 3(1) – personal information – definition of personal information – the application of the limits on the exemption in clauses 3(3) and 3(6) – whether disclosure would, on balance, be in the public interest. Section 84 – application for costs – exceptionable and unreasonable conduct.

Freedom of Information Act 1992: ss. 24, 30, 39(1), 42, 43, 74(1), 74(2), 76(1), 76(5), 84, 102(3); Clauses 3, 8(2); Schedule 1.
Freedom of Information Regulations 1993

Re Manly v Ministry of Premier and Cabinet (1995) 14 WAR 550
Re Van De Klashorst and City of Melville [2004] WAICmr 14
Ministry for Planning v Collins
Health Department of Western Australia v Australian Medical Association Ltd [1999] WASCA 269 (unreported)
Re National Tertiary Education Union (Murdoch Branch) and Murdoch University and Ors [2001] WAICmr 1
DPP v Smith [1991] 1 VR 63
Wills and Department of the Premier and Cabinet [2005] WAICmr 12
Channel 31 Community Educational Television v Inglis [2001] WASCA (unreported)
BGC (Australia) Pty Ltd v Fremantle Port Authority and Anor [2003] WASCA 250, (unreported)
Police Force of Western Australia v Winterton (1997) WASC 504 (unreported)
Re Hesse and Shire of Mundaring [1994] WAICmr 7
Re Humphrey and Humphrey and Public Advocate [1997] WAICmr 23
Re Schatz and Department of Treasury and Finance [2005] WAICmr 8
Re Askew and City of Gosnells [2003] WAICmr 19.

DECISION

The decision of the agency to refuse access under clause 8(2) of Schedule 1 to the *Freedom of Information Act 1992* is set aside. In substitution, I find the disputed document is exempt under clause 3(1) of Schedule 1 to the FOI Act.

JOHN LIGHTOWLERS
A/INFORMATION COMMISSIONER

31 October 2008

REASONS FOR DECISION

1. This complaint arises out of a decision by the Department of Local Government and Regional Development ('the agency') to refuse Mr Ross Leighton ('the complainant') access to a document under clause 8(2) of Schedule 1 to the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. In an access application dated 5 May 2008, on behalf of the complainant, solicitors for the complainant, Messrs Jackson MacDonald applied to the agency for access to various documents including *"…the letter from* [a named individual] *dated 17 July 2007 referred to in the Department's letter of 24 July 2007…"*. The letter dated 17 July 2007 is the disputed document in this matter.

3. On 16 June 2008, the agency refused the complainant access to the disputed document. The agency indicated that it had consulted with a third party who did not consent to the disclosure of the disputed document. By implication, the agency's reason for refusing access to the disputed document relates to the third party's refusal to consent to disclosure. The complainant's submissions indicate that the agency confirmed this to Jackson MacDonald in subsequent telephone discussions. In a letter dated 2 July 2008, Jackson MacDonald applied, upon behalf of the complainant, for internal review of the agency's decision to refuse the complainant access to the disputed document.

4. In a notice of decision dated 19 August 2008, the agency's internal review decision-maker refused the complainant access to the disputed document under clause 8(2) (confidential communications) of Schedule 1 to the FOI Act. Thereafter, on 21 August 2008, the complainant applied to the A/Information Commissioner for external review of the agency's decision. The complainant also applied to the A/Information Commissioner for the awarding of costs pursuant to section 84 of the FOI Act.

REVIEW BY THE A/INFORMATION COMMISSIONER

5. Following receipt of this complaint, the agency produced to me the original of the disputed document and its FOI file maintained in respect of the complainant's access application. I have examined that file and the disputed document. I have also considered the submissions made to me by Jackson MacDonald, on behalf of the complainant.

Role of the Information Commissioner on external review

6. Under section 76(1) of the FOI Act, the Information Commissioner has, in addition to any other power, power to review any decision that has been made by the agency in respect of the access application or application for amendment

and to decide any matter in relation to the access application or application for amendment that could, under the FOI Act, have been decided by the agency.

Non-disclosure of exempt matter

7. Section 76(5) of the FOI Act provides that, in dealing with a complaint, the Information Commissioner has to include in the decision the reasons for the decision and the findings on material questions of fact underlying those reasons, referring to the material on which those findings were based.

8. However, section 74(1) of the FOI Act requires me to, among other things, ensure that exempt matter is not disclosed during the course of my dealing with a complaint and section 74(2) places a further obligation upon me not to include, among other things, exempt matter in a decision on a complaint or in reasons given for a decision.

9. Having regard to the provisions of sections 74 and 76, I consider that I am constrained, in the circumstances of this case, from describing the disputed document, other than in general terms, because to describe it in detail would disclose matter that is claimed to be exempt. For the same reasons, I am also constrained from providing the complainant with my findings on some of the material questions of fact underlying the reasons why I have reached my decision and from referring, other than in general terms, to the material upon which those particular findings are based and the evidence before me which supports those reasons. In this instance, I do not consider that I can do so without revealing exempt matter and thereby breaching my statutory obligations under section 74(2) of the FOI Act.

10. I acknowledge that, in some instances, a complainant may be at a disadvantage in endeavouring to make submissions to the Information Commissioner on some of the contested issues. However, in this instance, Jackson McDonald has provided detailed and helpful submissions to me, on behalf of the complainant, in relation to the issues I am required to determine in this complaint.

11. The difficulties faced by complainants and the constraints placed upon me by section 74 of the FOI Act, and on the Supreme Court of Western Australia by section 90, were recognised by Owen J in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550. At pages 556-557 of that decision, Owen J said:

> *"If it is established that a document is an exempt document the court does not have the power to make a decision to the effect that access is to be given to the document: s 87(3). In other words, once a decision is reached that a document is exempt, there is no discretion concerning the end relief. In this respect the court is in the same position as the Commissioner.*
>
> *One provision with which I had some difficulty during the hearing is s 90, which is in these terms:*
>
> *"(1) In hearing and determining review proceedings the Court has to avoid disclosure of –*
> *(a) exempt matter; or*
> *(b) …*

> *(2) If in the opinion of the Supreme Court it is necessary to do so in order to prevent disclosure of exempt matter … the Supreme Court may receive evidence and hear argument in the absence of the public and any party or representative of a party.*
> *(3) The Supreme Court is not to include exempt matter, … in its decision in review proceedings or in reasons given for the decision.*
> *(4) …"*
>
> *At the commencement of the hearing I was given a copy of Document 1 and Document 2. I think counsel for the respondent had seen those documents. Obviously, the appellant had not seen them, but nor had his counsel and solicitors. A question which arose immediately was whether the appellate process could be disposed of fairly in those circumstances. As will appear later this is a point of some significance because in some respects the fate of the appeal turns on the contents of the documents themselves. This places counsel in a position of considerable disadvantage in making submissions on a contested issue. It also places the court in a position where it is acting without the advantage of considered submissions from one of the parties. The question is whether the court is at liberty to make the contested material available to counsel (not, of course, to the party seeking access) for the purposes of the appeal.*
>
> *It is apparent from the Minister's second reading speech when introducing the Freedom of Information Bills in 1991 and 1992 that the legislature had in mind the freedom of information regimes in other jurisdictions. Section 63(1) of the* Freedom of Information Act 1982 (Cth) *refers to "the necessity of avoiding disclosure [of exempt matter] to* the applicant*". The legislative prohibition is therefore limited to the applicant rather than his or her legal advisers. The Victorian legislation (s 56(3)) specifically empowers the court to make information available to a qualified legal practitioner under certain conditions. The* Freedom of Information Act 1991 (SA) *directs the court, where application is made by a Minister or the agency concerned, "to receive and hear argument in the absence of the public and, where in the opinion of the [court] it is necessary to do so in order to prevent the disclosure of any exempt matter, the appellant's representative". This deals separately with the absence of the public and the applicant on the one hand and of the applicant's legal advisers on the other and is thus different to s 90(2) of the Act. It seems to contemplate situations in which the appellant's legal advisers could be given access to the exempt matter for the purposes of the application. Section 55(6) of the* Freedom of Information Act 1989 (NSW) *is, relevantly, in similar terms to s 90(2) of the Act. The Tasmanian and Queensland statutes do not contain equivalent provisions.*
>
> *This comparison of the statutory regimes suggests to me that s 90 ought to be construed strictly according to its tenor. The court has no discretion and, whether during the hearing or in its reasons for decision the court must not disclose exempt information to* any *person including a qualified legal practitioner."*

12. Since, in *Manly*'s case, Owen J took the view that section 90 - and by implication section 74 of the FOI Act - should be construed strictly according to its tenor, I consider that on the same principle I should adhere strictly to the obligations imposed upon me by sections 74(1) and (2) of the FOI Act.

THE EXEMPTION

13. In accordance with my power under section 76(1) of the FOI Act, I have considered whether the disputed document is an exempt document under clause 3(1) of Schedule 1 to the FOI Act.

14. Clause 3 of Schedule 1 to the FOI Act 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 it 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 persona 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 –

(d) the person;
(e) the contract;
(f) 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."

15. 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."

16. I have examined the disputed document. Having examined that document, I am satisfied that it contains a substantial amount of "personal information", as that term is defined in the FOI Act, about a number of individuals other than the complainant ('the third parties'). In my view, that information is *prima facie* exempt matter under clause 3(1) of Schedule 1 to the FOI Act and, unless one or more of the limits on the exemption set out in clauses 3(2) to 3(6) inclusive applies to that matter, the disputed document will be exempt from disclosure under clause 3(1) of Schedule 1 to the FOI Act. The disputed document also contains a small amount of other information; however, it would not be practicable to edit the document to release any other information that is not personal information about third parties in any meaningful way, for the reasons that are discussed later in this decision.

The complainant's submissions

17. In response to my preliminary view, Jackson McDonald submitted, on behalf of the complainant, that:

"…10. If the personal information of third parties is information of Councillors, or former Councillors, of the Shire of Kalamunda then this information cannot be and is not exempt under Clause 3 of Schedule 1 to the Act.

11. The requested document was a response from a Councillor of the Shire of Kalamunda to a complaint which had been made about that Councillor, by the Applicant, in her capacity as a Councillor. Based on the Information Commissioner's comments at paragraphs 4, 5 and 6 on page 4 of the Preliminary View, the personal information referred to in the Preliminary View may be information about Shire Councillors.

12. The Information Commissioner has taken a narrow view of the construction of both item [sic] *3(3) of Schedule 1 to the Act and Regulation 9 of the* Freedom of Information Regulations 1993. *The Preliminary View relies heavily on the use of the word* "merely" *in Clause 3(3) of Schedule 1 to the Act in arriving at the conclusion that the information about Shire Councillors in the disputed document is personal information. This narrow view is contrary to the objects of the Freedom of Information Act and cannot be justified. The public interest in documents being disclosed under the Freedom of Information Act is an overriding consideration. Adopting a narrow meaning having the effect of frustrating the public interest considerations, when (at least) an equally valid construction is available which meets the objects of the Freedom of Information Act, is an inappropriate and invalid approach to adopt.*

13. Regulation 9(1)(e) is broad in its construction. The effect of regulation 9(1)(e) is that details of ***anything*** *done by the person in the course of performing or purporting to perform the person's functions or duties as an officer is not subject to the exemption contained in item 3 of Schedule 1 to the Act the word* "anything" *is clear, broad and consistent with the object of the Freedom of Information Act.*

14. The Applicant's complaint to the Department of Local Government related to certain activities of [a named individual] *in the performance of her duties as a Shire Councillor. We expect that the disputed document contains information about:*

(a) The activities of [the named individual] *in the performance or purported performance of her duties as a Shire Councillor; and*
(b) The activities of other Shire Councillors (past and present) in the performance or purported performance of their duties as Shire Councillors.

The information about the activities of [the named individual] *and other Shire Councillors (past and present) in the performance and purported performance of their duties as Shire Councillors amounts to prescribed details under Regulation 9.*

15. In support of the contention in the above paragraph we note that the role of a Councillor is set out in s.2.10 of the Local Government Act 1995 *in the following broad terms:*

2.10 The role of Councillors

A councillor –

(a) represents the interests of electors, ratepayers and residents of the district;
(b) provides leadership and guidance to the community in the district;
(c) facilitates communication between the community and the council;
(d) participates in the local government's decision-making processes at council and committee meetings; and
(e) performs such other functions as are given to a councillor by the Act or any other written law.

16. We do not consider that the disputed document would contain information about a Shire Councillor that does not fall within the broad ambit of Regulation 9(1)(e).

17. We submit that information in the disputed document about anything done by a Shire Councillor in the performance or purported performance of their role under s.2.10 of the Local Government [sic] 1995 *constitutes prescribed details and is therefore not subject to the exemption in Clause 3(1) of Schedule 1 to the Act.*

18. If any of the personal information referred to in the Preliminary View is prescribed details under Regulation 9 then the Information Commissioner must reconsider whether or not it is practicable to edit the disputed document."

18. Jackson McDonald also submitted that:

- If there is information about the complainant recorded in the disputed document then that information cannot be exempt by virtue of the operation of the limit on exemption in clause 3(2);

- I must consider whether it is practicable to give access to an edited copy of the disputed document, releasing the personal information about the complainant;

- Clause 3(5) operates to limit the exemption for the personal information about four named individuals whose personal information the complainant claims may be contained in the disputed document;

- The disputed document cannot contain exempt personal information about a Councillor, or former Councillor, as that information would be prescribed details in accordance with Regulation 9 of the *Freedom of Information Regulations 1993* ('the regulations');

- I have taken a narrow view of the use of the word "merely" which view is contrary to the objects of the FOI Act; and

- The disputed document is a response to the agency from a Councillor to a complaint to the agency made against that Councillor by the complainant. Therefore the disputed document must contain information which relates to duties performed by that person as a Councillor.

Consideration

19. I have considered the submissions made to me by Jackson McDonald, on behalf of the complainant, and I have examined the disputed document. As I have said previously, I am constrained somewhat by what information I can disclose about the contents of the disputed document by the provisions of s.74 of the FOI Act.

Limits on exemption – clauses 3(2) to 3(6)

Clause 3(2)

20. There is a small amount of personal information, as that term is defined in the FOI act, about the complainant in the disputed document which, by virtue of the application of limit on exemption in clause 3(2) cannot be exempt matter under clause 3(1), However, in my opinion, that information is inextricably intertwined with the personal information about the third parties and, in my view, it is not possible for the personal information about the complainant to be disclosed to him without also disclosing the personal information about the third parties. Therefore, I find that the limit on exemption in clause 3(2) does not operate in this instance.

Clause 3(3)

21. Clause 3(3) provides that information is not exempt as matter under clause 3(1) merely because its disclosure would reveal prescribed details about a person who is, or has been, an officer of an agency. The former Information Commissioner and the former A/Information Commissioner have expressed the view, in their decisions, that the use of the term 'merely' in clause 3(3), according to its ordinary dictionary meaning, means 'solely' or 'no more than' prescribed details about an officer (see: *Re Van De Klashorst and City of Melville* [2004] WAICmr 14, at paragraphs 32 to 35.

22. The prescribed details are set out in regulation 9(1) of the *Freedom of Information Regulations 1993* ('the regulations') as follows:

> *"In relation to a person who is or has been an officer of an agency, details of -*

> *(a) the person's name;*
> *(b) any qualifications held by the person relevant to the person's position in the agency;*
> *(c) the position held by the person in the agency;*
> *(d) the functions and duties of the person, as described in any job description document for the position held by the person; or*
> *(e) anything done by the person in the course of performing or purporting to perform the person's functions or duties as an officer as described in any job description document for the position held by the person".*

23. Regulation 9(1) relates to individuals who are or have been officers of 'an' agency. That is, it is not restricted to the prescribed details that relate to an officer or officers of the agency to which the access application was made but may also extend to prescribed details relevant to officers of other government agencies.

24. In this matter, the disputed document includes personal information about a person who is or has been an officer of an agency. However, having examined the disputed document, I consider that most of that information is not information of the kind prescribed in regulation 9(1) as being details that are prescribed for the purpose of clause 3(3) of Schedule 1 to the FOI Act.

25. The evidence before me establishes that the disputed document was created in response to correspondence from the Jackson McDonald to the agency, in relation the Shire of Kalamunda's consideration of a planning application for a scheme amendment made by the complainant to the Shire of Kalamunda.

26. In my view, the bulk of the information recorded in the disputed document is not 'merely' prescribed details and goes beyond the kind of information set out in regulation 9(1) of the regulations. On the contrary, that information consists of information and opinions about third parties that goes well beyond the kind of information that relates to the duties performed by those persons who are or were officers of an agency as defined in the FOI Act. Therefore, for the reasons given here, I consider that the limit on the exemption in clause 3(3) does not apply to the information recorded in the disputed document.

Clause 3(4)

27. There is no information of the kind referred to in clause 3(4) of Schedule 1 to the FOI Act contained in the disputed document. Therefore, the limit on exemption in clause 3(4) does not apply.

Clause 3(5)

28. Clause 3(5) provides that matter is not exempt matter under clause 3(1) if the applicant (in this case the complainant) provides evidence establishing that the individual concerned consents to the disclosure of the matter to the applicant. Clause 3(5) would, therefore, operate in this instance if the complainant

provided me with evidence establishing that one or more of the individuals whose personal information is recorded in the disputed document consented to their personal information being disclosed to the complainant.

29. Jackson McDonald on behalf of the complainant has provided me with the names of four third parties whom the complainant submits consent to their personal information which may be contained in the disputed document being disclosed to the complainant. Although I have received no objective evidence from the complainant in support of that claim, such as letters or written statements from the individuals concerned, attesting to the fact that they so consent, I accept on face value the complainant's submission that he has the consent of those four named individuals as required by clause 3(5). Accordingly, for the reasons set out above, I find that the limit on exemption in clause 3(5) does apply to some of the information recorded in the disputed document. Given that some of the matter is not exempt because it falls within the limit on exemption in clause 3(5). I have considered elsewhere whether it is practicable to provide the complainant with an edited copy of the disputed document deleting all of the personal information about individuals other than him and the other individual who has consented to the disclosure of their personal information to the complainant: see paragraphs 56 to 58 below. Accordingly, in this instance, it remains for me to consider whether the limit on exemption in clause 3(6) applies to the disputed document.

Clause 3(6) - Public interest

30. Clause 3(6) provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. Pursuant to section 102(3) of the FOI Act, the onus is on the complainant to persuade me that the disclosure of the disputed document would, on balance, be in the public interest.

31. In *Ministry for Planning v Collins* (1996) LGERA 69, Templeman J of the Supreme Court of Western Australia observed that:

> *"…the* [FOI] *Act does not itself contain any "public interest test". There is no definition of the term "public interest" in the glossary to the Act. In cases such as the present, the Commissioner is required to decide whether access should be given to documents which have been withheld by the relevant agency. In so doing, the Commissioner will be required frequently, as she has been in this case, to decide whether the matter is exempt because it falls within one of the categories of Schedule 1 to the Act. Many of the exemptions set out in Schedule 1 are limited by provisions in the following terms: "Matter is not exempt matter under subclause ... if its disclosure would, on balance, be in "the public interest." In relation to those provisions, s102(3) of the Act imposes on the "access applicant" the onus of establishing that disclosure would, on balance, be in the public interest. ….In reaching a decision on the public interest question, the Commissioner must make a judgment and unless it is shown that the Commissioner has erred in law in so doing, that judgment will stand even though the court hearing an appeal from the Commissioner pursuant to s85(1) of the Act might have reached a different conclusion.*

32. Templeman J's observations in *Ministry for Planning v Collins*, as set out above, were approved and agreed with by McKechnie J in his decision in *Health*

Department of Western Australia -v- Australian Medical Association Ltd [1999] WASCA 269 (unreported).

33. Determining whether or not disclosure would, on balance, be in the public interest involves identifying the public interests for and against disclosure, weighing them against each other and then deciding where the balance lies. In this matter, that requires consideration of whether, on balance, it would be in the public interest to disclose the personal information about third parties that is recorded in the disputed document to the complainant, more particularly where there is evidence before me that at least one third party clearly does not consent thereto.

The complainant's submissions

34. Jackson McDonald submits, on behalf of the complainant, that:

> *"19.We submit that the Information Commissioner has, with respect, misapplied the public interest test contained in clause 3(6) of Schedule 1 to the Act.*
>
> *20. At paragraph 1 on page 6 of the Preliminary View, the Information Commissioner states:* "I understand that the complainant's submissions, as quoted above, to be arguing this public interest. However, the particular interest is subject to the operation of the exemptions contained in the FOI Act. The exemption in clause 3(1) clearly provides that matter is exempt if its disclosure would reveal personal information, as that term is defined, about an individual."
>
> *21. The above extract from the Preliminary View reveals that the Information Commissioner has placed the* "cart before the horse". *The* ***public interest test*** *in clause 3(6) of Schedule 1 to the Act* ***is not subject to the personal information exemption*** *in clause 3(1). Rather, the personal information exemption in clause 3(1) is subject to the public interest test. The Information Commissioner needs to bear in mind that the public interest in disclosure of agency documents lies at the core of the Freedom of Information Act. That is,* ***notwithstanding that the Information Commissioner may form the view that the information is personal information;*** *the information is not exempt from release if,* ***on balance,*** *the public interest favours release.*
>
> *22. In other words, the Information Commissioner formed a preliminary view that the document contains personal information and made his preliminary decision based on that assessment only. That is to wholly misconceive, with respect, the relevant statutory framework. Any exemption still must, as a matter of proper statutory construction, be weighed against the overriding public interest favouring release of the document.*
>
> *23. Even if the Information Commissioner takes the view that certain matter in the disputed document is personal information then we consider that it is in the public interest for this information to be released.*
>
> *24. The Information Commissioner states, at the last paragraph on page 5 of the Preliminary View, that* "There is a strong public interest in maintaining personal privacy and that public interest may only be displaced by some other stronger and more persuasive public interest that requires the disclosure of information about one person to another person." *With respect, this is to confuse the clear*

private interest of a person in maintaining the privacy of their personal information and the public interest that this should be respected, against the clear public interest in the disclosure of the document on the grounds of open and accountable government. In most cases the public interest in disclosure will outweigh the private interest in privacy or if not, then the personal information can be edited permitting disclosure of the balance of the document."

Personal Information of the Applicant

25. As referred to above, if the disputed document contains personal information of the Applicant then s.21 of the Act requires the Information Commissioner to consider this as one factor when considering whether, on balance, the public interest favours nonetheless the release of the document.

Open and Accountable Government

26. The information sought may be information about Shire Councillors, who are paid public officers. In this instance, the strong persuasive public interest referred to above is the public interest in open and accountable government. The Information Commissioner should be in no doubt that the public interest in open and accountable government far outweighs the public (or private) interest in the privacy of public officers.

27. If the Information Commissioner retains any doubt as to the relative merits of these two competing public interests, the Information Commissioner should review the extent to which the Corruption and Crime Commission was willing to expose personal information of a public officer to ensure that open and accountable government in its Report on the Investigation of Alleged Misconduct concerning Dr Neale Fong, Director General of the Department of Health – 25 January 2008.

Right to Know

28. The disputed document was a response to a complaint lodged by the Applicant in respect of the decision making of the Shire of Kalamunda on his proposal for the rezoning of his property at….There is a clear public interest in the Applicant's right to know about matters affecting the Applicant. We refer to the following extract from paragraph 2.3.77 of The Laws of Australia:

"The courts have held that, in the application of a public interest test, it is relevant to take account of the interest of an applicant. As a matter of general principle, the courts have recognised that "the public interest necessarily comprehends an element of justice to the individual." *In Re Kamminga and Australian National University (1992) 26 ALD 585; 15 AAR 297, it was said that:*

> "Deciding whether disclosure is contrary to the public interest requires a balancing of competing interest including the public interest in the

applicant's right to know (*Re Peters and Department of Prime Minister & Cabinet* [No 2] (1984) 5 ALN N306*; Re Burns and Australian National University* (1984) 6 ALD 193; 1 AAR 456), which is a different thing to the applicant's personal interest in knowing."

29. *There is a strong public interest in a person having the right to know about the circumstances surrounding a decision by a public authority which has a substantial effect on the rights and entitlements of that person. There is a strong public interest in the Applicant knowing what Councillors knew and discussed when deciding on his application for rezoning. This is particularly the case as the Applicant has complained to the agency about the manner in which his application was dealt with. The Applicant's right to know is necessary for justice to be done. There is a strong public interest in justice being done and this is a strong public interest in favour of disclosure.*

30. *Reflecting on the matter, the Applicant, based on reasonable grounds, made a complaint about a Councillor that she had misconducted* [sic] *herself in her capacity as a Councillor. The Applicant exercised his right to complain about that misconduct to the Department of Local Government. The Councillor was informed of the Applicant's allegations of misconduct and exercised her right in turn to defend herself. She did this by writing a letter to the Department of Local Government making certain claims and statements. Absent, the alleged existence of* "personal information"*, the right of the Applicant to be given a copy of that letter in order that he might correct any inaccuracies or falsehoods is beyond unquestionable. The rules of natural justice dictate that a copy be made available for this purpose. When notwithstanding, access is denied, an application is made under the Freedom of Information Act for disclosure of the document. The public interest in securing justice for the Applicant (in accordance with the well know principle that* "justice must not only be done, it must be seen to be done"*) is frankly compelling. Further, the public interest in open and accountable government being seen to be practiced is also, frankly, compelling. A democratic society such as Australia places enormous store in* "transparency of process" *and* "freedom of speech" *both of which fundamental democratic principles are in page in this matter. For the Information Commissioner to assess on the preliminary basis that the fact that the document contains* "personal information" *ought to be sufficient, without more, to outweigh the public interest in disclosure is with respect to misconceive the provisions of the Freedom of Information Act and in our respectful opinion strikes at the core of the principles underlying the Freedom of Information Act.*

Embarrassment to Government

31. *The fact that disclosure might be contrary to the interest of government does not necessarily mean that its disclosure will be contrary to public interest. (See* Re Bartlett and Department of the Prime Minister and Cabinet *(1987) 12 ALD 659: 7 AAT 355). The Information Commissioner must take care not to mistake the protection of the privacy of an individual*

with the protection of the government or a public officer from embarrassment. There is a public interest in the public being aware of governmental wrong doing (or that of a particular officer) which is a public interest in favour of disclosure. There is not public interest in public officers being hidden from public embarrassment. Again, the Neale Fong case is a prime example of this.

Frank Disclosure

32. *The Information Commissioner, in the final paragraph on page 5 of the Preliminary View states that the public interest* "in the agency maintaining its ability to obtain frank responses to allegations made against individuals in order to carry out effective investigations and inquiries into allegations is also recognised."

33. *We note the decision of the Information Commissioner in* Re Askew and City of Gosnells *[2003] WAICmr 19. Whilst this decision was in relation to a different test under a different exemption clause, the Information Commissioner made the following comments about the ability of the Department of Local Government to obtain information (at paragraph 22):*

"22. Under Part 8 of the *Local Government Act 1995*, the Minister and the Executive Director of the Department have the power to require a local government agency to provide information and, in addition, persons authorized to conduct inquiries under that Act have the power, among other things, to access documents, enter property and to interrogate individuals…"

34. *In light of these powers, there is no public interest in the agency* "maintaining its ability" *to obtain frank responses when the agency has coercive powers to require frank responses. Further, even absent these powers (which cannot be ignored) any statement made in the circumstances clearly attracts qualified privilege and so long as it is not made with* "malice"*, cannot be attached by the Applicant or any other persona under the laws of defamation.*

35. *The suggestion that the ability to obtain frank responses should preclude public access runs contrary to the notion of open and accountable government. The Information Commissioner suggests that public officials are more likely to be frank when they know that their responses will not be subject to public scrutiny. With respect, this suggestion runs counter to the objects of the Act and any sensible notions* [sic] *of good governance and accountability. If public officers know that their responses are not going to be subject to public scrutiny then there is infact* [sic] *less incentive for them to be frank. Once again, the Corruption and Crime Commission's* Report on the Investigation of Alleged Misconduct concerning Dr Neal Fong, Director General of the Department of Health – 25 January 2008 *is a case in point.*

36. The public interest in frank responses is a strong public interest factor in favour of disclosure as an officer responding to a request from a different agency is more likely to be frank and honest if the first mentioned officer knows that the response may or will be subject to possible public scrutiny.

37. Finally, the "frank responses" *argument sounds remarkably similar to the* "candour and frankness" *argument which relies on the decision in* Howard and the Treasurer of the Commonwealth of Australia [1985] 7 ALD 626. *This decision has been roundly criticised by numerous bodies, including the Information Commissioner. We refer you to the following comments of the Information Commissioner at paragraph 41 of the decision in* Re Mahony and City of Melville [2005] WAICmr 4

In Re Rindos and University of Western Australia [1995] WAICmr 20 *the former Commissioner said, at paragraph 37:*

"That argument has been consistently rejected by the Commonwealth Administrative Appeals Tribunal and I have also rejected it…In *Re Murtagh and Commissioner of Taxation* (1984) 54 ALR 313, 326, the Commonwealth Tribunal said:

'The candour and frankness argument is not new. It achieved preeminence at one time but now has been largely limited to high level decision-making and to policy-making…No cogent evidence has been given to this Tribunal either in this review or, so far as we are aware, in any other, that the enactment of the FOI Act 1982 has led to an inappropriate lack of candour between officers of a department or to a deterioration in the quality of the work performed by officers. Indeed, the presently perceived view is that the new administrative law, of which the FOI Act 1982 forms a part, has led to an improvement in primary decision-making."'

This conclusion supports or contention that the public interest in frank discussions between officers of different agencies is a public interest factor ***in favour of disclosure.***

Balancing the Public Interest

38. As discussed above, we consider that there is a strong public interest in the public being able to obtain access to documents held by Government agencies. We consider this strong public interest exists in circumstances where the information sought is correspondence between an officer of one agency to an officer of a different agency. We consider that the exemption in Regulation 9 strengthens this presumption. Where officers are performing their duties and corresponding with each other, it is important for the public to be able to obtain access to that information. If seems inappropriate for an agency to claim that the information contained in such a letter should be exempt on the grounds of personal information when the officer is recording aspects of the performance of their role, or the performance of the role of other officers of that same agency which are the subject of a bona fide complaint.

> *39. We do not concur with the conclusion that the information being sought is personal information. If we are wrong, and we do not believe that we are, we consider that, on balance, the public interest strongly favours disclosure of the disputed documents* [sic]*."*

Consideration

35. I have considered the complainant's detailed and helpful submissions.

36. The term "public interest" is not defined in the FOI Act. I agree with the views expressed by the former Commissioner in *Re National Tertiary Education Union (Murdoch Branch) and Murdoch University and Ors* [2001 WAICmr 1, that 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".*

37. I consider, as have both the former Commissioner and the former A/Commissioner, that the exemption in clause 3(1) is designed to protect the privacy of third parties (see, for example: *Re National Tertiary Education Union* and *Wills and Department of the Premier and Cabinet* [2005] WAICmr 12). The exemption in clause 3(1) is intended to protect the privacy of individuals. I consider 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. The FOI Act is intended to make the Government, its agencies and their officers more accountable. The FOI Act 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.

38. I agree with the complainant's submission that the provisions of section 21 of the FOI Act must be considered and taken into account when, as in this case, the complainant has requested access to a document containing some personal information about him and the fact that where matter is personal information about the applicant it must be considered as a factor in favour of disclosure for the purpose of making a decision as to whether it is in the public interest for the matter to be disclosed. However, as I have said above, there is only a small amount of personal information about the complainant recorded in the disputed document and, having examined that document, I am satisfied it contains a substantial amount of personal information about another individual who has

not consented to their personal information being disclosed. As a result, I have accorded little weight to that public interest factor.

39. I also agree with the complainant that there is a public interest in accountability among public officers and that there is also a public interest in the openness and accountability of State and local governments. I also accept that there is a public interest in individuals, such as the complainant, being as fully informed, as is possible, of the basis for any decisions made which have a direct impact on those individuals. I also accept that there is a public interest in individuals such as the complainant being able to exercise their rights of access under the FOI Act. However, that particular interest is subject to the operation of the exemptions contained in the FOI Act

40. The exemption in clause 3(1) is clear and unambiguous. Clause 3(1) states that matter is exempt matter if its disclosure under the FOI Act would reveal personal information about an individual (whether living or dead). Accordingly, I do not accept the implication in the complainant's submissions that once a person has put themselves forward for public office, they significantly dilute their right to privacy. I consider that the public interest in ensuring that a Councillor, as the holder of an elected public office, is accountable does not require the publication of the disputed document. This public interest is served through other means available to the community the councillor represents or represented, namely, the right of access to minutes of meetings of the Council of the Shire of Kalamunda and the Committees of the Council; the right of members of the public, including the complainant, to attend meetings of the Council and Committees of the Council; and the right of individuals such as the complainant to ask questions of their elected officials at such meetings. In other words the privacy of individuals can be maintained while still according due regard to the public interest in the accountability of public officers.

41. The complainant asserts that the disputed document is a response to a complaint that he made to the agency in respect of the decision making of the Shire of Kalamunda in response to his proposal for the rezoning of his property and that there is a "clear public interest" in his right to know about matters affecting him. I accept that the complainant has a right to know about matters affecting him. However, in this matter, the complainant complained to the agency about the alleged "misconduct" of a Councillor of the Shire of Kalamunda and the information before me indicates that the Councillor was advised of that complaint by the agency and invited to respond to the complainant's allegations. That being the case, the Councillor's response to the complainant's allegations is not so much about the complainant, personally, but rather, information about the person the subject of the complainant's allegations to the agency.

42. Moreover, in this matter, the complainant has not put evidence before me, to the required probative standard, to establish that there is any general public interest either in relation to his grievances about the manner in which the Council of the Shire of Kalamunda considered and decided not to agree to his application for rezoning of his property or in his complaint to the agency about the alleged "misconduct" of a Councillor of the Shire of Kalamunda. In my view, based upon the material put before me by the complainant, there is no persuasive

evidence or material before me which indicates that there is any general public debate or interest in this particular matter. The primary interest in this case is the complainant's personal interest in pursuing his grievances against the Shire of Kalamunda and councillors of the Shire. In my view, the complainant's interests are private interests and they are not an aspect of the public interest relevant for my consideration of where the balance of the public interest lies.

43. The stated 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 (see: section.3). The purpose of the FOI Act is not to call to account private individuals or to open their private affairs to public scrutiny, other than in circumstances where much stronger public interests than the public interest in the protection of personal privacy may require that to occur. Section 102(3) of the FOI Act places the onus of establishing that disclosure of the disputed document would, on balance, be in the public interest, upon the complainant.

44. I understand that the complainant would have a personal interest in the disclosure of full copies of the disputed document to him. However, the public interest is not primarily concerned with the personal interests of the particular access applicant, or with public curiosity. Rather, the question is whether disclosure of the information would be of some benefit to the public generally; that is, whether it would be of benefit to the public for the information the complainant seeks – being personal information about a number of third parties – to be disclosed to any other person and whether that public benefit is sufficient to outweigh the strong public interest in maintaining the privacy of those third parties.

45. I am not persuaded that disclosure of the private, personal information about the third parties, without their consent, would necessarily or probably have the effect of contributing to improving the accountability of the Shire of Kalamunda for the decision it made in relation to the complainant's application to rezone his property. Having had the benefit of inspecting the disputed document, I am also not persuaded that that information would, if disclosed, reveal any information about the manner in which the Shire of Kalamunda discharged its public functions and duties in deciding to not proceed with the amendment of the relevant Town Planning Scheme or serve any of the other identified public interests favouring disclosure to any significant degree or at all.

46. Finally, section 10 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** (my emphasis). In other words, a person's right (including the complainant) to be given access to documents of an agency, under the FOI Act is not an unfettered right. It is subject to any valid claims for exemption which may apply to the documents sought, a point made by Hasluck J of the Supreme Court of Western Australia in *Channel 31 Community Educational Television v Inglis* [2001] WASCA unreported, where His Honour said, at paragraph 19, that:

> "*…a consideration of the provisions of the Freedom of Information Act to this point suggests that the Act can be characterised as remedial legislation, the aim of which is to provide access to governmental documents which would not otherwise be exposed to public view, but under strictly controlled conditions and subject to various significant exceptions. The objects of the Act indicate that the Act is essentially concerned with the effective and efficient government of the State having regard to well-settled democratic traditions.*"

47. And by Heenan J of the Supreme Court of Western Australia in *BGC (Australia) Pty Ltd v Fremantle Port Authority and Anor* [2003] WASCA 250, unreported) where His Honour said, at paragraph 32 of that case:

> "*In my view, the starting point, for dealing with these submissions, is to identify the nature of the right of access to documents held by agencies which the Freedom of Information Act of Western Australia establishes. Section 10(1) provides that the right of access is subject to, and in accordance with, the Act. While the legislation and the obvious policy of access to government documents is undoubtedly a guide to the interpretation of the legislation, it is equally plain that the Parliament expressly provided that certain documents or classes of documents were to be exempt from public access.*"

48. In the exemption in clause 3(1), the overriding public interest contained in clause 3(1) is the protection of the privacy of the third parties. That privacy will only be displaced with some stronger countervailing public interest. The complainant claims that the balance of the public interest, in this case, lies in the disclosure of the disputed document and his submissions also imply, in my view, that in the absence of any evidence that the privacy of the third parties identified in the disputed document would be prejudiced - it would be wrong, in law and in fact, for me to conclude that the public interest in protecting the privacy of third parties outweighs the public interest in disclosure.

49. The complainant bears the onus of establishing that disclosure would, on balance, be in the public interest. The complainant's submissions are directed to supporting the complainant's view that he is "entitled' to be given access to the personal information about individuals other than him that is recorded in the disputed document, contrary to the wishes of at least one of those third parties. I do not find those submissions persuasive given the strong public interest in maintaining the privacy of individuals reflected in Part 3 and clause 3(1) of Schedule 1 to the FOI Act.

50. In freedom of information legislation, where the balance of the public interest lies is, as I have said, determined by identifying the public interest factors for and against disclosure and then weighing those interests against each other and in order to determine where that balance lies. Determining where the balance of the public interest lies is a matter for determination by the Information Commissioner (see: *Ministry for Planning v Collins* and *Health Department of Western Australia -v- Australian Medical Association Ltd*).

51. I reject the complainant's submissions that I have *"misapplied the public interest test."* In *Manly v Ministry of Premier and Cabinet,* [1995] 14 WAR 550 at 51, Owen J stated:

> *"It is a question of balance that is akin to the exercise of a discretionary judgment. Views may differ on how the decision should have fallen. I am not prepared to say that the discretion was wrongly exercised."*
>
> *"What is this rather nebulous and elastic concept called "the public interest"? At the outset it must be distinguished from what is "of interest to the public": see* Director of Public Prosecutions v Smith (1991) 1 VR 63 *at 75. This is a distinction that is often overlooked. The public interest presents itself in a myriad of guises, many of which are conflicting. Almost inevitably, questions of balance and degree will arise. The public's right to know does not arise simply because something is likely to catch the eye or to satisfy curiosity. No hard and fast rules can be promulgated. Each case which involves a determination of the public interest must be decided on its own facts. There is no doubt that personal privacy is a significant factor within the freedom of information regime. In fact it is a central issue because compulsory disclosure of information is, by its very nature, an inroad into the sanctity of personal privacy."*

52. In his second reading speech on the introduction of the *Freedom of Information* Bill in 1991, the then Minister for Justice stated:

> *"Without information about the processes that govern them, members of the community cannot fully participate in government and exercise their rights as citizens. Freedom of information strengthens democracy, promotes open discussion of public affairs, ensure that the community is kept informed of the operations of government, and opens Government performance to informed and rational debate….*
>
> *Although the public has an interest in access to information, they also have an interest in the proper functioning of government and <u>in protecting the privacy of individuals</u>* (my emphasis) *and the commercial interests of business organisations. The Bill is intended to strike a proper balance between competing interests…In addition, most exemptions incorporate a public interest test which specifically requires a consideration of the public interest in disclosure."*

53. The complainant's submission regarding the Corruption and Crime Commission report and the principles applied by the Corruption and Crime Commission is misconceived as the processes and procedures followed by that body are not determinant as to where the balance of the public interest may lie in matters of the kind before me. The determination is for me to make, in accordance with terms and exemptions provisions in the FOI Act.

54. Therefore, after considering and balancing the public interest factors for and against disclosure of the disputed document, I am not satisfied that the complainant has discharged the onus he bears under section 102(3) of the FOI to persuade me that the disclosure of the personal information about the third parties that is recorded in the disputed document would, on balance, be in the public interest. I find that it is not in the public interest for the personal information about the third parties which is recorded in the disputed document to be disclosed to the complainant.

55. Accordingly, I find that the disputed document is exempt under clause 3(1) of Schedule 1 to the FOI Act.

Section 24

56. I have considered the complainant's submission that it would be practicable for the agency to delete the exempt matter from the disputed document and then provide the complainant with an edited copy of the disputed document. Section 24 of the FOI Act states as follows:

> ***"****If -*
>
> *(a) the access application requests access to a document containing exempt matter; and*
>
> *(b) it is practicable for the agency to give access to a copy of the document from which the exempt matter has been deleted; and*
>
> *(c) the agency considers (either from the terms of the application or after consultation with the applicant) that the applicant would wish to be given access to an edited copy,*
>
> *the agency has to give access to an edited copy even if the document is the subject of an exemption certificate."*

57. The application of section 24, and particularly the qualification contained in section 24(b) was discussed by Scott J, at page 16, in Police Force of Western Australia v Winterton (1997) WASC 504 (unreported) as follows:

> *"It seems to me that the reference 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 document still makes sense and can be read and comprehended in context, the documents should be disclosed. Where that is not possible, however, in my opinion, s24 should not be used to provide access to documents which have been so substantially altered as to make them either misleading or unintelligible."*

58. In my view, it would not be practicable for the agency to give the complainant access to an edited copy of the disputed document. This is because there is such a small amount of personal information about the complainant and another individual who, *prima facie*, consents to the disclosure of their personal to the complainant in the disputed document that to delete all of the remaining personal information about the third parties other than the complainant and that other individual and to only disclose the personal information about the complainant and that other individual to him would mean the bulk of the information recorded in the disputed document would be deleted. I consider that the editing which would be required to avoid disclosure of the personal information about the third parties to the complainant (other than those who have consented to disclosure) would be so substantial as to render the disputed document misleading or unintelligible and could be described in similar terms to

those used by Scott J as "*making little or no sense*". I therefore find that it is not practicable for the agency to edit the disputed document.

Costs of parties to a complaint

59. The complainant also submits in his application for external review that he should be awarded costs against the agency pursuant to s.84 of the FOI Act. It was my preliminary view that the complainant had not established the requirements of s.84 of the FOI Act.

60. In his application for external review to me, the complainant claims, amongst other things, that:

61. The agency was advised verbally of the former Commissioner's decision in *Re Askew* and *"…invited* [the agency] *to reconsider* [its] *Internal Review Decision."*

62. In addition, the complainant submits that:

"…the issue of whether the information was confidential was not in dispute in Askew. *Mr Blanchard told Mr Earnshaw that the decision in* Askew *was that the release of these confidential communications would not prejudice the future supply of that information and that accordingly clause 8(2)(b) of Schedule 1 to the Act could not be satisfied in respect of the disputed document. Mr Earnshaw stated that he thought that the information was confidential. He did not respond to the contention that clause 8(2)(b) could not be satisfied. Mr Blanchard stated to Mr Earnshaw that it was irrelevant how confidential the information was because the Information Commissioner had decided in* Askew *that clause 8(2)(b) could not be satisfied….*

> *19. The Information Commissioner has previously decided that a response to investigations conducted by the Department is not exempt material under clause 8(2) of the Schedule 1 to the Act. In our submission the Department has erred in contending otherwise and their decision should be set aside. Given the decision in* Askew, *there appears little need (in the interests of saving costs) for detailed submissions in relation to clause 8(2) of Schedule 1 to the Act and in particular the public interest factors weighing in favour of disclosure. However, if required, we can provide detailed submissions on this point."*

63. In response to my preliminary view, the complainant included the following submissions, among others, regarding costs.

> *" 1) …*
> *2) The agency failed to identify a ground of exemption under the Act. On this basis, the agency failed to comply with s.30(f) of the Act.*
> *3) Save as to one day's disagreement as to the amount of time it took to respond to internal review, agreed.*

4) *The Information Commissioner has stated that* "the agency's initial decision was to refuse access to the disputed document under clause 3(1) of Schedule 1 to the FOI Act which was subsequently explained to the complainant, and is apparent by inference on the face of the reasons for the initial decision." *We do not consider that the Information Commissioner should accept agencies publishing a decision and expecting applicant's to either contact the agency for reasons (which we did in this instance) or try and draw inferences as to the reasons for refusal. S.30(f) of the Act places a clear duty on the agency which it breached.*
5) *The objects of the Act include an object* "to **require** that certain documents concerning State and local government operations be made available to the public". *We do not see how this object can be achieved if agencies are permitted to ignore the published decisions of the Information Commissioner. Agencies must be held accountable for the costs of raising untenable exemption clauses where the Information Commissioner has previously published decision in substantially similar circumstances. For the agency to claim the exemption in clause 8(2) in light of the Information Commissioner's decision in* Re Askew *was unreasonable and exceptionable in the circumstances. It should be met with a sanction going some way to addressing the costs incurred by the Applicant for no good reason.*
6) *…*
7) *The Information Commissioner contends that the Applicant should have raised the decision in* Re Askew *in our application for Internal Review. We do not consider this was possible. **The agency failed to provide reasons** for its decision at the first instance. This made the process of applying for internal review more complex (and expensive) for the Applicant. More fundamentally the agency had not previously raised the exemption in clause 8(2) in its decision at the first instance which begs the question as to how the Applicant was meant to be able to deduce that he should refer to* Re Askew *in the first place. Perhaps the Information Commissioner is suggesting that we should have* "inferred" *that the decision in the first instance was to refuse access to the disputed document on the basis of the exemption in clause 8(2) and we should have based our submissions on this inference. Alternatively, is the Information Commissioner suggesting that we should have canvassed in detail all possible exemption clauses in case they were raised at Internal Review? In either case, the suggestion that we should have raised* Re Askew *in our application for internal review is clearly unreasonable and not tenable.*

> *8) The agency in breach of the Freedom of Information Act failed to comply with the requirements of section 30(h) of the Act in its notice of decision at internal review.*

41. The Information Commissioner suggests that the following is reasonable and unexceptionable:

(a) An agency publishing a notice of decision without reasons contrary to s.30(f) of the Act.
(b) An applicant having to rely on poorly though out oral reasons for refusal of access when applying for internal review.
(c) An applicant being required to "infer" *reasons from a notice of decision published without express reasons;*
(d) An agency delaying a notice of decision for 49 or 50 days, when a notice of decision is required within 5 days [sic].
(e) An agency failing to abide by the published decisions of the Information Commissioner in circumstances which are "on all fours" *with those published decisions resulting in the Applicant having to address exemption clauses which are untenable and being obliged to unnecessarily incur further costs for no good reason.*
(f) An applicant being required to canvas all possible exemption clauses in an application for internal review due to the failure of the agency to provide reasons in its notice of decision.
(g) An agency failing to comply with the requirements of s.30(h) of the Act.

42. We consider that the actions of the agency in this instance were unreasonable and exceptionable in the context of the requirements of the Act. In fact, we consider that this set of circumstances is precisely that was contemplated by s.84 of the Act. We request that the Information Commissioner reconsiders the Information Commissioner's preliminary view that the agency has not acted in an exceptionable and unreasonable manner. A failure to do so sends clear message to agencies that the Information Commissioner considers the requirements of the Act to be an "optional extra" *and the principles underlying the Freedom of Information Act entirely expendable, at the option of the agency concerned."*

Section 84 Costs of parties to complaints

64. Section 84 of the FOI Act provides:

> *"The costs incurred by a party to a complaint are payable by that party except that the Commissioner may order a party to pay any costs of another party that the Commissioner considers to be attributable to exceptionable or unreasonable conduct of the first party."*

Consideration

65. Section 84 of the FOI Act is located in Part 4 Division 4, which is headed "*General provisions as to the Information Commissioner and staff*".

66. The external review process is generally a cost-free procedure where each party bears its own costs. The intent of s.84 is that it is only in exceptionable cases or where a party is shown to have acted so unreasonably that no reasonable party would have acted that way, where costs may be appropriately ordered. Such cases will be rare. I have considered the complainant's submissions and, for the reasons set out below, I do not believe that in all the circumstances the conduct of the agency was so exceptionable or unreasonable that costs should be payable to the complainant.

67. With regard to the complainant's submissions in (a)-(c), (f) and (g), I agree with the complainant's submission that the agency's notice of decision dated 16 June 2008, does not comply with the requirements of s.30 of the FOI Act. It informs the complainant that two of the documents identified as coming within the scope of his access application have been released in full and given the reason that as a result of consultation with a third party, the third document (the disputed document in this matter) will not be released. It did not state the particular exemption relied on.

68. The notice of decision on internal review, whilst stating the particular exemption clause claimed by the agency to apply to the disputed document, again does not comply with the provisions of s.30 of the FOI Act. In particular, it does not give the findings on any material questions of fact underlying the agency's reasons for refusal of access, together with a reference to the sources of information on which those findings were based, as required by section 30(f).

69. It is a fundamental requirement of administrative law that, in order to understand and if appropriate challenge government decisions, individuals need to be provided with full reasons for decisions affecting them. In the FOI Act, these specific requirements are contained in section 30. The obligation to provide an applicant with a notice of decision which complies fully with all of the statutory requirements of section 30 is intended to ensure that the true basis of a decision is clearly and intelligibly explained to the applicant.

70. In his application for internal review, the complainant's solicitors inferred that the agency was refusing the complainant access to the disputed document under clause 3(1) of Schedule 1 to the FOI Act and made submissions to the agency on that basis. On internal review, the agency decided that the disputed document is exempt under clause 8(2) of Schedule 1 to the FOI Act. Whilst, as I have said, the notice of decision does not fully comply with s.30 of the FOI Act, it does provide the complainant with some explanation as to why the agency considers the disputed document is an exempt document under clause 8(2) and also provides the complainant with his external review rights. In this case, I consider that the agency has also disregarded its obligations under the FOI Act by failing to provide the complainant with an internal review decision within the prescribed time limit or negotiating with the complainant for an extension of time.

71. Notwithstanding the above deficiencies which I find are mainly procedural defects, I do not consider the agency's failure to comply with s.30 to be so unreasonable and exceptionable behaviour on the part of the agency, as to

warrant an order for costs. Some more contumelious behaviour would be needed before costs would be properly ordered in this jurisdiction which is clearly intended to be cheap, informed and not generally subject to awards of costs.

72. The complainant's submission in relation to s.30(h) of the FOI Act is also rejected. Both the initial and internal notices of decision clearly provide the complainant with his review rights.

73. The complainant persists in maintaining the agency should have referred to the decision in *Re Askew* on internal review, because the complainant expressly brought that decision to the attention of the agency in his application for internal review. The complainant did not refer at any stage in his written application for internal review to the decision in *Re Askew.* Although as I understand it, the complainant did raise that decision with the agency in a telephone conversation with the internal review decision maker.

74. Division 5 of Part 2 of the FOI Act deals with applications for internal review. Section 39(1) provides that if a person is aggrieved by the decision on an access application made by agency, that person has a right to have the decision reviewed by the agency. Section 41 provides that an application for review is not to be dealt with by the person who made the initial decision, or by a person who is subordinate to that person. Further, s.42 of the FOI Act states that:

> *"An application for review has to be dealt with as if it were an access application and the provisions of Divisions 2, 3 and 4 apply accordingly."*

75. Finally, s.43 provides that:

> ***"43. Determination can be confirmed, varied or reversed***
>
> *(1) On application for review the agency may decide to confirm, vary or reverse the decision under review.*
> *(2) If the agency fails to give notice of its decision on the application for review within 15 days after it is lodged, or such longer period as is agreed between the agency and the access applicant, the agency is to be taken to have decided to confirm the decision under review."*

76. Despite the complainant's repeated submissions that the agency had no right to refuse access to the disputed document under clause 8(2) on internal review, the FOI Act clearly gives the agency the right to make any decision on internal review it chooses to make. Based on its own assessment of the relevant issues. The complainant's submission that the agency's claim for exemption under clause 8(2), in light of the decision in *Re Askew,* should be met with a sanction, is not accepted.

Determination

77. Agencies are expected to abide by previous relevant decisions made by the former Information Commissioner and the former A/Commissioner unless one of those decisions has, on appeal, been set aside by the Supreme Court of Western Australia. The Supreme Court's decision in Winterton's case is a case in point where the Supreme Court set aside the former Commissioner's decision. This helps to make the administration and application of the FOI Act predictable and understandable.

78. In submitting that the agency should have relied on the decision in Re Askew, the complainant initially asserted that I had previously found the disputed document to be not exempt. I reject that claim. I have not previously dealt with and made a decision as to the exempt status or otherwise of the disputed document, either in this matter or in any other complaint made to me under Part 4 of the FOI Act. Each complaint that comes before the Information Commissioner is required to be considered on its merits and its unique facts.

79. Nothing in the FOI Act requires a State or local government to distinguish previous decisions of the former Commissioner or former A/Commissioner when dealing with access applications particularly when these are not relevant or are based on different facts or unique circumstances. In my view, it would be prudent for agencies to take account of and have regard to relevant decisions, when those decisions contain determinations by the Information Commissioner as to the manner in which agencies should deal with access applications or commentary and observations as to the rights and entitlements of access applicants and/or the statutory obligations of agencies under the FOI Act that are considered by the agency to be applicable to the particular complaint before it (see, for example, *Re Hesse and Shire of Mundaring* [1994] WAICmr 7; *Re Humphrey and Humphrey and Public Advocate* [1997] WAICmr 23 and *Re Schatz and Department of Treasury and Finance* [2005] WAICmr 8.

80. The complainant refers to the former Commissioner's decision in *Re Askew* and the agency's apparent failure to consider that decision when it was considering his application for internal review. In my view, the decision in *Re Askew* is distinguishable on its facts. That decision deals with a different disputed document; different circumstances; and different exemption claims.

81. I do not accept that the complainant's assertions that the agency's actions, in dealing with his access application and application for internal review as outlined above, amount to unreasonable to exceptionable conduct to the extent that costs should be awarded to the complainant. Accordingly, I do not consider the provisions of section 84 to be satisfied in this instance.

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