

Participants:

**Bold Park Parent Advisory  
Council (Inc)**  
Complainant

- and -

**Department of Education Services**  
Respondent

- and -

**Andrew Fatin**  
Second Respondent

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

FREEDOM OF INFORMATION – refusal of access – documents relating to registration of a non-government school – decision to give access – complaint by third party – clause 4(3) – whether information about business, professional, commercial or financial affairs – whether disclosure could reasonably be expected to have an adverse effect or prejudice the future supply of information.

*Freedom of Information Act 1992*: ss. 32, 33, 102(2) and 102(3);  
Schedule 1, clause 4(3).

*School Education Act 1999*

*Re WA Newspapers Ltd and Civil Service Association of WA Inc and Salaries and Allowances Tribunal and Anor* [2007] WAICmr 20

*Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550

*Police Force of Western Australia v Winterton* (unreported; Supreme Court of Western Australia; Library Number 970646; 27 November 1997)

*Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft* (1986) 10 FCR 180 at 190

## **DECISION**

The decision of the agency to give the access applicant access to the disputed documents is confirmed.

I find that Documents 1, 2, 3, 4, 5 and 6 are not exempt under clause 4(3).

JOHN LIGHTOWLERS  
A/INFORMATION COMMISSIONER

12 November 2008

## REASONS FOR DECISION

### BACKGROUND

1. This is an application for external review by the Information Commissioner which arises from a decision made by the Department of Education Services ('the agency') under the *Freedom of Information Act 1992* ('the FOI Act') to give Mr Andrew Fatin ('the access applicant'), access to certain documents. Bold Park Parents Advisory Council (Inc) ('the complainant') is a third party – as that term is defined in the FOI Act – and the complainant in this matter which opposes the agency giving the access applicant access to the requested documents. The access applicant has been joined as a party to these proceedings.
2. The complainant is the governing body of the Bold Park Community School ('BPCS'). BPCS is a non-government school. The agency's functions include advising the Minister for Education in relation to the registration and re-registration of non-government schools under the *School Education Act 1999* and on a variety of general and specific educational issues related to non-government education.
3. The agency's website states that one of its functions is to establish:

*“... policies and procedures for registering non- government schools in accordance with the requirements of the School Education Act 1999 and School Education Regulations 2000. Registration provides assurance that the schools meet minimum acceptable education standards across important areas such as the curriculum, qualifications of teaching staff, buildings and facilities, enrolment and attendance procedures, and duty of care for students. The Directorate also manages State government funding to non-government schools.”*
4. By letter dated 7 February 2008, the access applicant applied to the agency for access under the FOI Act to copies of certain documents relating to the financial affairs of the BPCS and the report of the registration of the BPCS by the agency. Due to the broad nature of the access application and the potential need to consult with a number of third parties, the final scope of the access application was not agreed between these parties until 4 April 2008. In the circumstances, the access applicant allowed the agency additional time to deal with the application, in particular, to complete the process of consultation with various third parties.
5. Under sections 32 and 33 of the FOI Act, the agency is obliged to consult with third parties before giving access to documents containing personal information or business information about them. All of the relevant third parties, except the BPCS, gave their consent to disclosure by the agency of the information about those parties. In all, 58 documents were identified by the agency to be within the scope of the access application. The agency referred 49 documents to the complainant and, in its response, the complainant, on behalf of the BPCS, consented to disclosure in full of the 33 documents and disclosure in an edited form to 3 documents referred to it by the agency. However, the complainant

objected to the release of 13 documents, on the ground that those documents are exempt under clauses 4(2) and 4(3) of Schedule 1 to the FOI Act.

6. On 15 May 2008, the agency provided the complainant with its notice of decision which said:

*“The Department of Education Services notes your views that the requested documents are exempt under clause 4 of Schedule 1 of the Freedom of Information Act, 1992. However, on 14 May 2008 it was decided by Mr Mark Brown, Manager of the Non-Government Schools section that the applicant should be given access to the documents listed below for the reasons shown.*

*...No supporting factual material was provided to substantiate the views of the third party.*

*Assertions about possible inappropriate use of information by the applicant that may occur in the future and result in some form of detriment are insufficient grounds for an exemption under the Act. If the applicant does use the information inappropriately then civil action may be taken by the third party against the applicant if, or when, this occurs.”*

7. On 23 June 2008, the complainant advised the agency that it no longer claimed exemption in respect of 7 documents and it no longer claimed exemption under clause 4(2). However, the complainant maintained its exemption claim under clause 4(3) in respect of 6 documents (‘the disputed documents’) and sought internal review of the agency’s decision in respect of those documents. The complainant provided additional information in support of its claims for exemption for the disputed documents.
8. By letter dated 9 July 2008, the agency advised the complainant of its findings of fact and that the exemption claimed under clause 4(3) had not been established by the complainant for the reasons detailed in that letter and, therefore, the agency confirmed its decision to give access to all of the disputed documents. The agency also advised the access applicant of its decision and informed both the complainant and the access applicant of the review rights available to them.
9. On 14 August 2008, the complainant applied to the Information Commissioner for external review of the agency’s decision.

#### **REVIEW BY THE A/INFORMATION COMMISSIONER**

10. Following receipt of this complaint, I required the agency to produce to me the originals of the disputed documents and its FOI file maintained in respect of the access application. Having examined the material provided to me, my Senior Legal Officer met with representatives of the complainant on 8 September 2008 and advised them that the onus is on the complainant to establish that the disputed documents are exempt as claimed. My officer also advised that, based on the information then available to him, the complainant did not appear to have

satisfied that onus. The complainant was invited to provide additional submissions to me or withdraw its complaint.

11. Section 102(2) of the FOI Act provides that where a third party – in this case, the complainant – opposes the giving of access to a document, the onus lies with that person to establish that access should not be given, or that a decision adverse to the access applicant should be made.
12. Consequently, it is up to the complainant to establish that the disputed documents are exempt under one or other of the exemption provisions in Schedule 1 to the FOI Act and, in order to do that, the complainant must provide probative material to support its claim or claims for exemption.
13. On 12 September 2008, the complainant confirmed that it wished to pursue its complaint and provided additional material and submissions in support of its claim that the disputed documents are exempt under clause 4(3).
14. On 17 October 2008, having considered all of the information available to him, my Senior Investigations Officer wrote to the complainant and advised that, in his opinion, the disputed documents were not exempt documents under clause 4(3), as claimed, because the complainant had not provided sufficient evidence to establish the exemption claim and, therefore, it did not appear to have satisfied the onus that it bears under s.102(2) of the FOI Act.
15. In light of that advice, my Senior Investigations Officer invited the complainant to reconsider its complaint or provide further probative material in support of its exemption claim for my consideration.
16. The complainant advised my office that it was “*very disappointed*” with my officer’s advice and that it would write again prior to the expiration of the period allowed for receipt of final submissions. However, while the complainant has not withdrawn its complaint, the complainant made no further submissions to me in support of the claim that the disputed documents are exempt. It is therefore necessary for me to review the decision of the agency and decide on the access application on the basis of the information and evidence now before me.

## **THE DISPUTED DOCUMENTS**

17. The disputed documents are briefly described as follows:

Document 1    Email message – Sent on Friday, 7 September 2007 (3:42PM)  
From: Manager, Non-Government Schools Branch, Department  
of Education Services  
To: Third party

Document 2    Email message – Sent on Friday, 7 September 2007 (8:09PM)  
From: Third party  
To: Manager, Non-Government Schools Branch, Department of  
Education Services

- Document 3 Email message – Sent on Friday, 26 October 2007 (2:54PM)  
From: Third party  
To: A/Executive Director, Corporate Governance and Non-Government Schools, Department of Education Services
- Document 4 Email message – Sent on Friday, 26 October 2007 (3:00PM)  
From: A/Executive Director, Corporate Governance and Non-Government Schools, Department of Education Services  
To: Third party
- Document 5 Email message – Sent on Tuesday, 20 November 2007 (9:52AM)  
From: Manager, Non-Government Schools Branch, Department of Education Services  
To: Third party
- Document 6 Email message – Sent on Tuesday, 20 November 2007 (10:00AM)  
From: Third party  
To: Manager, Non-Government Schools Branch, Department of Education Services

## THE EXEMPTIONS

### Clause 4 – Commercial or business information

18. The complainant claims that the disputed documents contain information that is exempt under clause 4(3) of Schedule 1 to the FOI Act. Clause 4, so far as is relevant, provides:

**“4. Commercial or business information**

**Exemptions**

- (1) ...
- (2) ...
- (3) *Matter is exempt matter if its disclosure –*
- (a) *would reveal information (other than trade secrets or information referred to in subclause (2)) about the business, professional, commercial or financial affairs of a person; and*
- (b) *could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.*

### Limits on exemptions

- (4) ...
- (5) ...
- (6) ...
- (7) *Matter is not exempt matter under subclause (3) if its disclosure would, on balance, be in the public interest.*

#### Clause 4(3)

- 19. The exemption in clause 4(3) deals with information (other than trade secrets or information of the kind referred to in clause 4(2)) about the business, professional, commercial or financial affairs of a person, in circumstances where disclosure could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.
- 20. This exemption recognises that the business of government (state or local) is frequently mixed with that of the private sector and that such business dealings should not be adversely affected by the operation of the FOI Act.
- 21. Clause 4(3) comprises two parts and both paragraphs (a) and (b) of clause 4(3) must be satisfied before a *prima facie* claim for exemption is established. If the requirements of paragraphs (a) and (b) are satisfied, the application of the limit on exemption in clause 4(7) must also be considered; that is, matter is not exempt under clause 4(3) if its disclosure would, on balance, be in the public interest.

#### The complainant's submissions

- 22. The complainant has made a number of submissions to the agency and to this office in which it argues that the disputed documents should not be released to the access applicant. A significant part of those submissions included background material on the history of a dispute between various members of the BPCS community in 2007 about a number of issues. I understand that those issues include, but are not necessarily limited to, the suspension of the school principal by the former members of the BPCS Advisory Council; the financial viability of the BPCS; and different views as to the direction of the BPCS that were held by the former members of the Advisory Council of the BPCS and the current members of the Advisory Council of the BPCS.
- 23. Having carefully examined the complainant's submissions, I find that most of the complainant's arguments against release of the disputed documents centre on the fact that the complainant believes that the access applicant will use the information contained in the disputed documents in a negative way, resulting in unwanted and adverse publicity which could adversely impact on the enrolment numbers of the BPCS.

24. The complainant claims that the disputed documents contain certain statements that are unbalanced, inaccurate and misleading. The complainant disputes many of the conclusions contained in those documents and comments on inferences which the complainant claims are made by the person who conducted an initial review of the school's affairs; the officers of the agency responsible for overseeing the registration of the BPCS; and a financial consultant engaged by the agency.

**Clause 4(3)(a)**

25. The first question for my determination is whether the disputed documents contain information about the business, professional, commercial or financial affairs of a person.
26. The disputed documents record communications between officers of the agency and two parties. They concern information sought in relation to the then state of affairs of the BPCS in the context of the agency's role in assessing the status of the registration of BPCS and, thus, the ability of the BPCS to continue to operate in 2008.
27. From my examination of the disputed documents, I accept the complainant's claim that the information in those disputed documents broadly comprises information concerning the business or financial affairs of the BPCS and that the requirements of paragraph (a) of clause 4(3) are satisfied in this case.

**Clause 4(3)(b)**

28. The next question for my determination is whether disclosure could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the BPCS or any other person, or prejudice the future supply of information of the kind in question to the Government or to an agency.
29. The correct approach to the interpretation of the phrase "*could reasonably be expected to*" in clause 4 is that the words should be given their ordinary and natural meaning. They require a judgment to be made as to whether something is reasonable, as distinct from something that is irrational, absurd or ridiculous: see *Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft* (1986) 10 FCR 180 at 190.
30. The complainant makes a number of claims as to the expected outcome from disclosure of the disputed documents and that such an outcome would, in its submission, necessarily or probably have an adverse effect on the business or commercial affairs of the BPCS. In particular, the complainant submits that the BPCS is recovering from disruption and ill feeling caused by a so-called "splinter group" associated with former members of the Advisory Council, and the BPCS does not now wish to have disclosed and circulated any negative information to people who remain dissatisfied about the operations of the BPCS.



31. I understand the complainant to submit that disclosure of the disputed documents to the access applicant will result in sensational and false stories about the BPCS being circulated, even though the circumstances of the BPCS have changed significantly since the time the documents were created. If that happens – and the complainant believes that it will – the complainant claims that the publicity would be damaging to the reputation of the BPCS. Moreover, the complainant submits that parents of some existing students may withdraw their children from the BPCS and/or parents of prospective students would not enrol their children at the BPCS. I understand that the complainant claims that a decrease in the level of enrolments would directly affect the BPCS's funding capabilities both from fees and from government grants.
32. Although it is possible that disclosure of the disputed documents may result in publicity, and possibly negative publicity, on the financial affairs of the BPCS, in my opinion, the complainant has not provided probative evidence to support that assertion. It is therefore necessary for me to have regard to the contents of the documents, and to the complainant's submissions, to draw the conclusion that is invited by the complainant. The standard of proof that decision-makers must meet under the FOI Act was recently considered by A/Information Commissioner Shanahan in *Re WA Newspapers Ltd and Civil Service Association of WA Inc and Salaries and Allowances Tribunal and Mercer (Australia) Pty Ltd* [2007] WAICmr 20.
33. In that case, A/Commissioner Shanahan reviewed two previous decisions of the Supreme Court of Western Australia in relation to the provisions of the FOI Act – *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 and *Police Force of Western Australia v Winterton* (unreported; Supreme Court of Western Australia; Library Number 970646; 27 November 1997. After reviewing these two decisions, A/Commissioner Shanahan concluded that, for the purposes of the FOI Act, the standard of proof to be applied that must be met by decision-makers, in order to establish a claim for exemption under the FOI Act, must be the balance of probabilities. I agree with A/Commissioner Shanahan's findings in that regard. In my view, the same standard of proof applies to a third party claiming an exemption in support of its opposition to an agency's decision to give access to documents.
34. In the present case, the onus is on the complainant to establish its claim for exemption to the required standard. In my view, it had not established, on the balance of probabilities, that such a claimed outcome will occur. Further, even if, the complainant were to establish a case in support of such negative publicity (which I do not accept), the complainant would then have to provide sufficient evidence to support a claim that publicity of that kind would directly impact on enrolments. In my view, the complainant has made a number of speculative assumptions which it has not properly supported with probative evidence. I refer to the comments of Owen J of the Supreme Court of Western Australia in *Manly v Ministry of Premier and Cabinet*. In *Manly's* case, Owen J considered, amongst other things, a claim for exemption under clause 4(3) of Schedule 1 to the FOI Act. His Honour said, at page 573 of his judgment:

*“How can the [Information] Commissioner, charged with the statutory responsibility to decide on the correctness or otherwise of a claim to exemption, decide the matter in the absence of some probative material against which to assess the conclusion of the original decision maker that he or she had “real and substantial grounds for thinking that the production of the document could prejudice that supply” or that disclosure could have an adverse effect on business or financial affairs? In my opinion it is not sufficient for the original decision maker to proffer the view. It must be supported in some way. The support does not have to amount to proof on the balance of probabilities. Nonetheless, it must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasonable decision maker”.*

35. Therefore, based on the information currently available to me, the complainant has not persuaded me that disclosure of the disputed documents could reasonably be expected to result in an adverse effect on the business, professional, commercial or financial affairs of the BPCS.
36. I have also considered whether disclosure could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency
37. The complainant has not made any submissions of substance on this issue. The only reference I can identify is in the complainant’s letter to the agency on 8 May 2008 in which it states that:

*“...the release of past financial results and future strategic financial models may impact on the willingness of similar bodies to provide such information to Government agencies going forward.”*
38. Under section 159 of the *School Education Act 1999*, the Minister, in determining an application for registration, or for renewal of registration, of a school is to take into account, among other things, the sufficiency of the school’s financial resources.
39. In this case, the disputed documents relate to the various matters associated with the consideration of the renewal of registration of the BPCS, including the agency’s assessment of the sufficiency of the financial resources of the BPCS. In my view, it is not reasonable to claim that a non-government school which, for its own benefit for the purpose of obtaining registration, provides financial information to the agency as it is required to do, would decline to provide that kind of information to the agency or to the Government in the future. Accordingly, without anything more of substance in support of its assertion described in paragraph 37, I do not accept the complainant’s submission in that respect.
40. In light of the above and on the information currently before me, I am not persuaded that the requirements of clause 4(3)(b) have been established.

Accordingly, I find that the disputed documents are not exempt under clause 4(3).

41. However, if I were satisfied, which I am not, that the complainant had discharged its onus under s.102(2) of establishing that access should not be given or that a decision adverse to the access applicant should be made, I would, still need to consider whether the limit on exemption in clause 4(7) applied. That is, whether disclosure would, on balance, be in the public interest. There is a public interest in it being made known how the agency administers its responsibilities under the *School Education Act* and also in ensuring that non-government schools are managed in a manner that is consistent with the statutory obligations of the agency and for the long-term benefit of all of the community. I accept that there is a countervailing public interest in not disclosing information that is more likely than not to do damage to the reputation and standing of the BPCS.
42. The complainant submits that release of the disputed documents would threaten the reputation and standing of the BPCS. However, as I have found earlier, there is little supportive material provided by the complainant to substantiate its belief that this outcome would necessarily or likely follow from the release of the disputed documents.
43. Accordingly, I consider in this instance there to be a stronger public interest in public scrutiny of the decision-making processes of the agency in relation to the registration and re-registration of non-government schools which, in the context of questions raised about the operation of the BPCS, outweighs the public interest against disclosure of the information contained in the disputed documents. It has not been demonstrated to me, for example, that the public interest in protecting the reputation of the BPCS from possible unwanted negative publicity would necessarily or probably be damaged by disclosure of the disputed documents. On the contrary, the evidence before me indicates that issues about the management of the BPCS have been a subject of debate within the broader school community for some time, and have led to a change in the appointees to the BPCS Advisory Council. It is also apparent from the agency's files that the agency had regard to the matter in the disputed documents during the course of its deliberations regarding the re-registration of BPCS under the *School Education Act*.
44. On the information before me, I consider that in this case, the balance of public interest would be better served by providing disclosure of the relevant material which the agency took into consideration so that there is an opportunity for interested persons to be more fully informed of the process conducted by the agency.

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