

KOLO AND DOLA

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

**File Ref: 94049
Decision Ref: D00295**

Participants:

Dieter Hans Gustav Kolo
Applicant

- and -

Department of Land Administration
Respondent

- and -

Sun Land Pty Ltd
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - third part joined to complaint - documents available for public inspection or copying - further search for documents - definition of person - clause 3 - personal information - clause 4(3) - business, professional, commercial or financial information about third parties - public interest in maintaining privacy of individual - public interest served by public availability of information - onus on applicant to establish that, on balance, disclosure of documents would be in the public interest.

Freedom of Information Act 1992 (WA) ss. 6; 10(1); 12; 32(2); 33(3); 72(1)(b); 75(1); 102(1); 102(3); Schedule 1 clauses 3(1), 4(3), 4(7).

Interpretation Act 1984 (WA) section 4.

DECISION

The decision of the agency of 31 March 1994 is set aside and in substitution it is decided that the documents remaining in dispute, namely the financial statements of Sun Land Pty Ltd and the financial statements of the shareholders of Sun Land Pty Ltd, are exempt under clause 4(3) of Schedule 1 to the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

6th February 1995

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Department of Land Administration (DOLA) ('the agency') to provide Mr Kolo ('the applicant') with access to certain documents in edited form and also to refuse access to others. In the course of dealing with this matter, Sun Land Pty Ltd ('the third party') was joined as a party to this complaint.
2. The third party also lodged a separate complaint to the Information Commissioner against the decision of the agency to grant the applicant access to edited copies of the requested documents. However, the applicant declined to be joined as a party to the third party's complaint. Following negotiations by my office and advice to the parties of my preliminary view of the exemption claims, the agency reconsidered its position, the result being that there remained no dispute between the agency and the third party, and the third party withdrew its complaint.
3. On 28 October 1993, the applicant wrote to the agency seeking access to copies of all documents relating to Walpole Lot 650, being all documents submitted by the third party in support of its application for leasing of Lot 650 including the actual leasing documents. It appears from the information supplied to me that, subsequently, the agency required the applicant to complete a standard application form for the purpose of dealing with his request under the *Freedom of Information Act 1992* ('the FOI Act'). It is also apparent to me that the applicant's letter of 28 October 1994 sufficiently complied with the requirements of s.12 of the FOI Act (except for the inclusion of the application fee payable for access to non-personal information), and the completion of a standard form was, therefore, unnecessary.
4. On 7 January 1994, the agency advised the applicant that Mr Dan Collins, Acting Director, Land Operations, had decided on that date to grant access to all the requested documents. However, access was deferred pending the outcome of an internal review requested by the third party, who had been consulted by the agency in accordance with its obligations under ss. 32(2) and 33(3) of the FOI Act. The third party claimed that the documents were exempt from disclosure under clauses 3 and 4 of Schedule 1 to the FOI Act.
5. On 31 March 1994, after the benefit of consultations with the third party, David Lloyd Mulcahy, Executive Director of the agency, advised the applicant that he had decided to vary the original decision and that it was the decision of the agency to provide him with access to edited copies of some documents and to deny access to others. On 25 April 1994, the applicant applied to the Information Commissioner for external review of the agency's decision of 31 March 1994.

6. On 27 April 1994, the third party, through its solicitors, also applied to the Information Commissioner for external review of the agency's decision to grant the applicant access to some of the requested documents from which information had been deleted. The third party claimed that the unedited portions of the requested documents were exempt from disclosure under clauses 3 and 4 of Schedule 1 to the FOI Act.

REVIEW BY THE INFORMATION COMMISSIONER

7. On 4 May 1994, I notified the agency that I had accepted this complaint for review. In accordance with my authority under s.75(1) and s.72(1)(b) I sought the production to me of the originals of the documents in dispute together with the file maintained by the agency in respect of this matter. I also sought further and better reasons, including material findings of fact, for the decision that some of the documents and parts of other documents were exempt from disclosure under the FOI Act. The disputed documents were provided to me on 9 May 1994 and further reasons for the refusal of access were provided to me on 16 May 1994.
8. On 3 August 1994, following my examination of the documents and a consideration of the reasons supplied by the agency, the applicant was informed that, in my view, some of the deleted matter consisted of personal information about third parties which was exempt under clause 3(1) of the FOI Act and other deleted matter contained business, professional, commercial or financial information about third parties which was also exempt under clause 4(3) of the FOI Act. The applicant was provided with a copy of the agency's additional reasons for decision (with exempt matter deleted) and he was invited to reconsider his complaint in light of my view and this additional information. He was also invited to identify the public interest factors favouring disclosure of this information if, in the circumstances, he wished nonetheless to pursue his complaint. The applicant was also informed of the substance of the complaint before me made by the third party and he was provided with the opportunity to be joined as a third party to that complaint.
9. On 19 August 1994, I received a response from the applicant. In that letter, he indicated that he did not wish to be joined as a third party to the complaint, then before me, made by the third party. However, he did indicate that it was his desire to pursue his complaint against the decision of the agency and, to that end, provided a submission identifying public interest factors which, he claimed, favoured disclosure of the documents in question.
10. The agency had originally identified 7 documents which fell within the ambit of the access application. They are described as follows:
 - (i) the Concept Plan for Walpole Lot 650;
 - (ii) the Land Board Questionnaire;
 - (iii) attachments to document (ii) relating to questions 6 and 11;

- (iv) letter from the Bank referred to in question 12 of document (ii);
 - (v) financial statements of Sun Land Pty Ltd referred to in questions 7, 8 and 12 of document (ii);
 - (vi) Form 3, Application for Lease, dated 23 June 1993; and
 - (vii) the lease.
11. During the course of my officers' investigation of this complaint, I became aware that some of the requested documents were already in the public domain. Inquiries were made by my office with the Shire of Manjimup and the Walpole Library. Both sources confirmed that document (i) above, identified as the Concept Plan for Walpole Lot 650, was available to the public, both from the Shire and from the Library. The applicant also confirmed that he was in possession of a copy of this document but was, nonetheless, seeking access to it under the FOI Act.
12. Inquiries by my office also confirmed that documents (ii), (iii) and (vi) above, were available for public inspection and copying at the Shire of Manjimup and document (vii) was available from the agency for a fee. On 20 October 1994, the applicant was advised that his right to access these documents under the FOI Act was precluded by s.6 of the FOI Act, and he was invited to withdraw his complaint in relation to these documents. The applicant declined to do so.
13. As a result of further information provided to my office by the applicant, I caused the agency to make a further search of its records for documents which might satisfy the access application. That search resulted in the agency identifying 4 additional documents that had been submitted by the third party in support of its lease application. Those documents were within the ambit of the access application but had not been identified by it in the first instance. They consist of:
- a covering letter from Sun Land, dated 23 June 1994 (document (viii));
 - laminated aerial photograph (document (ix));
 - laminated and framed subdivisional concept plan (document (x)); and
 - financial statements of the shareholders of Sun Land Pty Ltd (document (xi)).
14. On 24 November 1994, the third party, through its solicitors, agreed to grant the applicant access to document (viii). It also transpired that documents (ix) and (x) had been returned to the third party after consideration by the agency of the application for lease and were, therefore, no longer documents of the agency to which the FOI Act applied. However, both the agency and the third party claimed exemption for document (xi) under clause 4(3) of the FOI Act. Further concessions to the applicant were made on 14 December 1994, when the third party agreed to provide the applicant with access to document (iv) with a reference number deleted. The applicant accepted this form of access and the agency's reasons for the editing with respect to this document.
15. On 9 January 1995, the applicant was informed that it was my understanding that only two documents remained in dispute, namely, documents (v) and (xi). The position of the parties, at that time, with respect to those documents, in my view, can be summarised as follows:

- the agency is prepared to provide access to a copy of document (v) from which certain information has been edited on the grounds that this information consists of exempt matter under clauses 3(1) and 4(3) of Schedule 1 to the FOI Act. Exemption is claimed by the agency for the whole of document (xi) on the grounds that it is also exempt under clauses 3(1) and 4(3);
 - the third party claims that the entire contents of documents (v) and (xi) are exempt from disclosure under clauses 3(1) and 4(3) of schedule 1 to the FOI Act; and
 - the applicant seeks access to both documents (v) and (xi) in total, as well as documents (i), (ii), (iii), (vi) and (vii).
16. All parties were advised in writing of my preliminary view, in respect of both complaints before me, that the exemption under clause 4(3) claimed by the third party in respect of all of documents (v) and (xi) was justified. All parties were informed of the reasons for my reaching this conclusion and why I considered that, on balance, the public interest did not favour disclosure of the documents. On the basis of those reasons, the applicant and the agency were invited to reconsider their positions.
17. On 18 January 1994, I received a response from the agency. In light of my preliminary view, the agency had reconsidered its decision to grant the applicant access to an edited copy of document (v) and now considered that the document contained matter that was exempt under clause 4(3) of Schedule 1 to the FOI Act. On this basis it had decided to refuse the applicant access to the whole of document (v). In light of that decision, the third party formally withdrew its complaint. The third party remained, of course, a party to the complaint the subject of this decision.
18. On 19 January 1995, I received a response from the applicant. The applicant claimed that all or most of documents (v) and (xi) were publicly available and he was, therefore, at a loss to understand how the claims for exemption could be sustained. Although he declined to formally withdraw his application for access to documents (i), (ii), (iii), (vi) and (vii), I am satisfied that those documents are in the public domain and available, for a fee or for public inspection. Copies of documents (i), (ii), (iii), (vi) and (vii) were obtained by my office from the Walpole Library and the Shire of Manjimup and were compared to the disputed documents provided to me by the agency and found to be identical. Consequently, I am satisfied that the applicant has no right of access under the FOI Act to those documents by virtue of s.6 of the FOI Act which provides:

"Access procedures do not apply to documents that are already available

6. *Parts 2 and 4 do not apply to access to documents that are -*

- (a) *available for purchase by the public or free distribution to the public;*
- (b) *available for inspection (whether for a fee or charge or not) under Part 5 or another enactment;*
- (c) *available for inspection in the State archives;*
- (d) *publicly available library material held by agencies for reference purposes; or*
- (e) *made or acquired by an art gallery, museum or library and preserved for public reference or exhibition purposes."*

19. I am also satisfied that documents (v) and (xi) are not documents that are publicly available. The applicant, of course, is not in a position to know the precise contents of those documents. The fact that some of the information contained in documents (v) and (xi) may be on the public record elsewhere does not make either document one to which s.6 of the FOI Act applies, since the right of access under s.10(1) of the FOI Act is a right to access documents rather than information, and s.6 excludes documents that are publicly available, rather than information that is publicly available. The position is otherwise with respect to documents (i), (ii), (iii), (vi) and (vii). The only matter for my decision, therefore, is the claims of the respective parties in relation to documents (v) and (xi), which claims are summarised in paragraph 15 above.

THE EXEMPTION - CLAUSE 4 COMMERCIAL OR BUSINESS INFORMATION

20. Clause 4(3) provides:

"(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) Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of an agency.

(5) *Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of the applicant.*

(6) *Matter is not exempt matter under subclause (1), (2) or (3) if the applicant provides evidence establishing that the person concerned consents to the disclosure of the matter to the applicant.*

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

21. This exemption is clearly designed to protect the commercial and business information of third parties who have business dealings with government. In my view, its purpose is to ensure that the flow of business information to government is not diminished by the operation of the FOI Act and that those organisations and individuals who have dealings with government are not exposed to any unfair disadvantage from disclosure under the FOI Act. To establish the exemption under clause 4(3) the requirements of both parts (a) and (b) must be satisfied.
22. Documents (v) and (xi) are described as financial statements of Sun Land Pty Ltd and the shareholders of Sun Land Pty Ltd respectively. Both documents contain information consisting of a statement of assets and liabilities, income and expenditure and accounting policies. In my view, such information is, *prima facie*, information about the business, commercial and financial affairs of the third party and the shareholders of the third party. Further, I consider that the company known as Sun Land Pty Ltd is "a person" within the scope of clause 4(3)(a), by virtue of the definition of "person" in s.4 of the *Interpretation Act 1984* which provides as follows:

""person" or any word or expression descriptive of a person includes a public body, company, or association or body of persons, corporate or incorporate;"

23. I am, therefore, satisfied that both documents meet the requirements of part (a) of clause 4(3). In order to satisfy the requirements of part (b) of clause 4(3) the agency claimed that disclosure could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the third party. However, the agency did not state the precise nature of the effect contemplated by disclosure of either of these documents, nor why any such effect could reasonably be expected. In the absence of any such explanation I do not consider that the agency has discharged its onus under s.102(1) of the FOI Act with respect to this exemption.
24. The third party, on the other hand, claimed that disclosure of the documents could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency. Solicitors for the third party said that *"...if information of this nature is disclosed, individuals will be reluctant or will cease to provide information of this nature to government agencies.*

Alternatively, the information which will be provided will be less comprehensive."

25. I was informed that the disputed documents were provided by the third party as support material to the Land Board and, in particular, to satisfy the requirements of the Land Board Questionnaire. It is my understanding that the Land Board did not require that the third party lodge its financial statements but only requested certain information relating to the financial affairs of the third party, including details of other company assets, interests in other land and current mortgages. It is also my understanding, which is confirmed from my examination of the disputed documents, that those documents contain considerably more information than was required to satisfy the Land Board Questionnaire and that the third party provided additional information about its shareholders which it was not required to provide.
26. The third party, through its solicitors, claimed that the information supplied to the agency was confidential and that it was supplied for the sole purpose of an assessment of the third party's tender for land. In addition to the information provided to me by the parties to this complaint, I also sought information from the Australian Securities Commission (ASC). From the information provided by the ASC, I am satisfied that each of the three companies to which the disputed documents relate, is classified as an "exempt proprietary company" under the relevant legislation administered by the ASC. The statutory obligations of companies under legislation administered by the ASC do not require an exempt proprietary company to make public its full financial affairs. However, an exempt proprietary company is required to include in its annual return to the ASC details of its key financial data. This data includes, *inter alia*, summaries of assets, liabilities and profit. Further, the annual return of a company is available for public inspection at the offices of the ASC.
27. In the circumstances, given that the information provided by the third party to the agency was considerably more information and more detailed information than was required by the agency in order to determine the third party's application for lease, and given that it appears to be inherently confidential in nature, I accept the claims of the third party that the future supply of financial and business information of this kind could reasonably be expected to be prejudiced by the disclosure of these documents. On the information before me, I find that the requirements of part (b) of clause 4(3) are satisfied.

The public interest test

28. Clause 4(3) is limited by a "public interest test" in sub-clause (7) of clause 4. That limitation indicates that, in some instances, there may be a public interest in the disclosure of commercial and business information of third parties which would otherwise be exempt from disclosure under the FOI Act. The onus of establishing that, on balance, disclosure of documents would be in the public interest is on the applicant, by virtue of s.102(3).

(a) The applicant's submission

29. The applicant's submission, dated 19 August 1994, on this point is as follows:

"(a) In the middle of September 1993 DOLA announced Sun Land P/L as the successful applicant for the residential development. This caused immediate great unrest in the Walpole community, and only a few days later on 17.09.93 the first public meeting was held, many residents voicing serious concerns. An Interim Committee of five Walpolians was elected at that meeting to coordinate public input and to liaise the many concerns of Walpolians with the Authorities.

(b) On 05.10.93 the second public meeting was held in the full Walpole Town Hall. Of the 21 speakers only 3 spoke in favour of the proposed residential development, namely the developer himself plus two real estate agents who would have sole selling rights for the 232 proposed properties. All other speakers voiced serious concerns. As well several Manjimup Shire Officers and Councillors, plus the representatives from 6 Government Authorities attended and addressed the meeting...

(c) On 20.10.93 a well attended Public Workshop (30 people) was held in Walpole during which not a single participant spoke in favour of the proposed development...

(d) On 23.05.94 another Public Meeting was held in the once again full Walpole Town Hall. All senior Manjimup Shire Officers and 11 Shire Councillors (out of 13) attended the meeting. Of the many speakers this time only one spoke in favour of the proposed development, namely a real estate sales agent from the agency with sole selling rights. The meeting overwhelmingly passed a motion to call on the Manjimup Shire Council not to support the proposed development...

(e) 12 newspaper articles in various papers reported on this Walpole issue...

(f) 5 pages of Media Releases were issued on various dates...

(g) Various submissions were sent to the Premier, Minister and various Authorities.

(h) Walpole residents addressed the MSC at various Shire Council Meetings.

(i) On three occasions "To The Householder"[sic] pamphlets (4 to 12 pages each) were distributed to all Walpole households...

(j) Four submissions and two appeals were lodged with the EPA...

(k) The Minister for Local Government and the Minister for Health were invited by residents and inspected the proposed development site.

(l) A "Group of Concerned Citizens" was formed, opposing the proposed development."

30. In addition, the applicant said there was a public interest favouring disclosure of the documents for the following reasons, which I have summarised:

- it would be potentially of great benefit which may flow to the general community;
- it would make a valuable contribution to public debate;
- it would assist public understanding of the processes of government; and
- it would disclose reasons for a decision of the agency.

(b) The Third Party's submission

31. The third party, through its solicitors, acknowledged that there was a public interest in the local community being informed of the design of the proposed development as a whole and its impact on the local environment. However, it said that there was also a public interest in keeping private information about the business, commercial and financial affairs of members of the public. On balance, it said, the latter interest should prevail especially as there was sufficient information publicly available on the financial affairs of the proposed developer.

(c) Conclusions

32. I accept the evidence provided by the applicant which indicates a considerable interest in the development on Lot 650 at Walpole and I accept that there is a public interest in the local community of Walpole being informed of the nature of the development proposed in its environs and of the *bona fides* of the developer. I also acknowledge that the factors identified by the applicant, and summarised in paragraph 30 above, form part of the policy arguments for the very existence of FOI legislation. Against this background and the right of access to documents held by State and local government agencies under the FOI Act, it must also be recognised that the FOI Act provides exemptions from disclosure where these are necessary to protect personal and business information and to ensure the proper workings of government agencies.

33. I recognise that, in certain circumstances, some or all of the factors identified by the applicant in paragraph 30 above are likely to have a bearing on my consideration of where the balance of the public interest should lie. In this instance, the disputed documents clearly contain financial and business information concerning the third party and shareholders and the applicant must persuade me that it is in the public interest for this information to be disclosed. I

acknowledge the fact that the applicant is at a disadvantage in that he does not have access to these documents and he is, therefore, not in a position to know the extent of the financial information contained in either document. However, I am satisfied that the documents themselves have been sufficiently described so as to inform him, in a general sense, of their contents.

34. The applicant has made a number of submissions to me outlining his concerns and interest in the development of Walpole Lot 650. He is not required to provide reasons for seeking the documents but he claims that the public must be given the opportunity, through access to documents, to legally scrutinise the submissions and suitability of a private company applying to lease public land through a government agency.
35. Having considered the public interest factors identified by the parties, together with the information available to me from the ASC, referred to in paragraph 26 above, and my examination of the two documents remaining in dispute, I am satisfied that the public interest in members of the Walpole community, in particular, and in tax payers, in general, being informed as to the financial status of a company awarded a government contract, in this instance, has been satisfied by the information available on the public record at the offices of the ASC described in paragraph 26 above, as well as by the disclosure of the documents to which the applicant has already been given access following his complaint to my office and the significant negotiations that followed.
36. The applicant has not provided any other material that persuades me that the disclosure of private financial information could, in any way, contribute further to the public debate about the development in Walpole. Neither has he shown how such information, if disclosed, could assist in furthering the public understanding of the decision-making processes of the agency or of government, such that the balance should tilt in favour of disclosure.
37. Further, I am not persuaded that disclosure of the disputed documents would reveal, or make any clearer, the reasons for the decision to grant the third party the lease for which it had applied. Whilst I do not intend to speculate on the reasons for the applicant seeking access to these particular documents, I am satisfied, from my reading of them, that their disclosure cannot assist in any greater understanding of the reasons for the agency's decision and the applicant has not persuaded me that there is any other public interest that requires their disclosure.
38. I find that document (v) containing financial details of Sun Land Pty Ltd and document (xi) containing financial details of the shareholders of Sun Land Pty Ltd are exempt from disclosure under clause 4(3) of Schedule 1 to the FOI Act. Although the agency and the third party both claimed that the disputed documents and parts of those documents were exempt from disclosure under clause 3(1) of Schedule 1 to the FOI Act, in view of the conclusion I have reached, it is unnecessary that I consider those additional arguments.
