

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

**File Ref: F2002184
Decision Ref: D0072003**

Participants:

Michael Swift
Complainant

- and -

Shire of Busselton
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – extracts from notebook and notes of discussions – definition of ‘agency’ – whether an elected member of a local government is an officer of an agency- whether requested documents are documents of an agency – clause 8(2) – confidential communications.

Freedom of Information Act 1992 (WA) section 10(1); Schedule 1, clause 8(2); Schedule 2, Glossary, clause 4(1)

Local Government Act 1995(WA) ss 2.7, 2.8, 2.10, 3.1 , 3.4 and 5.23(2)

State Records Act 2000 (WA)

DECISION

The agency's decision is varied. It is decided that:

- with the exception of Document 187, the disputed documents are documents of the agency; and
- Documents 45, 51-53, 69, 85 and 94 are exempt under clause 8(2).

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

11 March 2003

REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Shire of Busselton ('the agency') to refuse Mr Michael Swift ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. The complainant is the former Chief Executive Officer of the agency. In 2001, certain concerns were raised about his salary packaging arrangements with the agency. An investigation was conducted and a report was made to the agency, which found that the evidence against the complainant was inconclusive. However, the report highlighted other issues relating to the complainant and his employment in the agency.
3. Subsequently, in July 2002, the agency appointed the law firm Minter Ellison to investigate whether or not the complainant had breached the agency's Code of Conduct or his contract of employment. On 17 October 2002, following receipt of the Minter Ellison report, the council of the agency ('the Council') terminated the complainant's employment contract. In the meantime, on 16 July 2002, the complainant made an application to the agency for access under the FOI Act to documents relating to him dating from 1 May 2001 to 16 July 2002.
4. In his application, the complainant identified and described the requested documents and said:

"During the specified period the Shire President is known to have initiated/participated in many discussions and meetings of which I was a primary topic of conversation and/or correspondence. The Shire President holds documents/notes pertaining to these meetings in her own filing system. It is these documents that I wish to access. I do not seek to access notes associated with Ordinary Meetings of Council or the like, but I do want access to notes associated with meetings held behind closed doors, informal meetings with councillors, staff and others and similar sessions. The Shire President has from time to time also obtained documents that relate to my personal affairs and interaction with staff and others. I seek access to those documents as well."

5. On 1 October 2002, the agency refused the complainant access to the requested documents on the ground that they are not documents of the agency to which the FOI Act applies. On 17 October 2002, the complainant lodged a complaint with me seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

6. The agency claims that the requested documents are not 'documents of an agency' to which the complainant has a right of access under the FOI Act. If that contention is correct, the complainant has no right of access to those documents.

7. In order to determine that question, and in accordance with s.75(1) of the FOI Act, I obtained copies of the requested documents, together with the agency's FOI file relating to the complainant's application. I also sought further information and reasons from the agency in support of its decision. At my request, the Shire President provided a Statutory Declaration containing her reasons for creating various documents and an explanation of her reasons for keeping those documents. The complainant also provided me with information and made submissions to me.
8. After considering all of the material before me, I made a preliminary assessment of this complaint. In a letter, dated 9 December 2002, I advised the parties that it was my view that the requested documents are 'documents of an agency' to which the FOI Act applies. Subsequently, the agency made detailed submissions to me concerning that issue and, in the alternative, claimed that the requested documents were exempt. After considering those submissions, in February 2003, I made a further assessment of this complaint and again gave my reasons, in writing to the parties.
9. Subsequently, both parties made various concessions and a number of documents were released to the complainant, either in full or in edited form. At the conclusion of that process eight documents remained in dispute. Notwithstanding the fact that the agency has now given the complainant access to a substantial number of the requested documents, the agency maintains its claim that the requested documents are not 'documents of an agency' or, in the alternative, that they are exempt.

THE DISPUTED DOCUMENTS

10. Of the eight documents remaining in dispute, Document 187 comprises a number of pages taken from a notebook of the Shire President. Documents 45, 51-53, 69, 85 and 94 are notes made by the Shire President on loose pieces of paper of official *in camera* discussions held between the elected officials of the agency at special meetings of the Council.

PRELIMINARY ISSUE

11. Section 10(1) of the FOI Act provides that a person has a right to be given access to the documents of an agency (other than an exempt agency) subject to and in accordance with the FOI Act. The term 'documents of an agency' is defined in clause 4(1) of the Glossary in Schedule 2 to the FOI Act, and provides, so far as is relevant, that:

"... a reference to a document of an agency is a reference to a document in the possession or under the control of the agency including a document to which the agency is entitled to access and a document that is in the possession or under the control of an officer of the agency in his or her capacity as such an officer."

12. The agency does not dispute the fact that the disputed documents are in the possession of the Shire President. However, the agency claims firstly, that the Shire President is not an officer of the agency. Secondly, the agency claims that documents in the possession of the Shire President must be held by her in an official capacity and, at the same time, the documents must also be under the control of the Council or the agency if the FOI Act is to apply to those documents. That being the case, two questions arise for my determination. The first question is whether the Shire President is an officer of the agency. The second question is whether the Shire President holds the requested documents in her official capacity as such an officer.

The first question

13. The definition of 'agency' in clause 1 of the Glossary includes a local government or regional local government. Although the term "local government" is not defined, it is a well-settled principle of statutory interpretation that, if general words are used, they should be given their plain and ordinary meaning, unless the contrary is shown or unless those words are limited by their context. The Australian Concise Oxford Dictionary of Current English (3rd edition, 1997), at p.788, defines "local government" to mean "*a system of administration of a city, town, municipality, shire, etc., by the elected representatives of those who live there*".
14. Part 1 of the *Local Government Act 1995* ('the LG Act') contains general provisions describing the content and intent of the LG Act, which is to establish a system of local government consisting of elected members and, among other things, a framework for the administration and financial management of that system. Under the provisions in Part 2 of the LG Act, the State is divided into districts or wards and a local government, which is designated as a body corporate, is established for any district so created. An elected council is created for each local government and the members of that council are its governing body. In my view, both the elected council and its administrative arm comprise the 'local government agency' for the purposes of the FOI Act.
15. Initially, the agency sought to draw a distinction between its administrative arm and its elected members and submitted that the Shire President is an officer of the Council, but not of the agency. However, I do not consider that such a distinction can logically be drawn because of the conclusion I have reached in paragraph 14 above.
16. The FOI Act does not define "member" but the Australian Concise Oxford Dictionary, at p.836, defines that word to include "*a person formally elected to take part in the proceedings of certain organisations*". Further, s.1.4 of the LG Act defines the word 'member', in relation to the council of a local government, as being an elector mayor or president or a councillor. I consider that the plain meaning of "member" includes a person formally elected as a councillor or president of a local government. In the FOI Act, the words 'officer of an agency' are defined to include a member of that agency. Accordingly, I am satisfied that the Shire President is a member of the agency and, therefore, an officer of the agency for the purposes of the FOI Act.

The second question

The agency's submission

17. The agency submits that the LG Act does not give the Council power to demand the production of documents held by individual councillors, the mayor or the president and, therefore, such documents are not under the control of the agency.
18. The agency submits, among other things, that:
 - notes made by councillors are not made in their official capacity because they are not required to do this in the course of their functions. Accordingly, such notes are made for their personal use and reflect their personal views; they are not made for the purposes, or on behalf, of the local government;
 - the administrative functions of local governments are separate from the roles of councillors or Shire President and the Shire President would exceed her statutory authority if she became involved in administrative matters. The Shire President acts and speaks on behalf of the agency and not on her own initiative;
 - documents of the agency are documents created by the Chief Executive Officer or staff acting under his or her direction;
 - documents held by the Shire President are not under the control of the agency and the agency has no power to compel the production of such documents;
 - if there is a conflict between the LG Act and the FOI Act, greater weight should be given to the former because it is the primary source of guidance as to the roles and responsibilities of councillors and the administration of local government; and
 - the *State Records Act 2000* may apply to documents created by the administration or third parties, and received by councillors in pursuit of their roles under the LG Act, but it does not apply to documents created by councillors because councillors are not employees.

The Shire President's submission

19. In a signed Statutory Declaration, the Shire President states that, in mid July 2001, she became aware of problems associated with the complainant's salary packaging arrangements and sought advice from the Department of Local Government and Regional Development. The Shire President states that it is second nature for her to make notes of significant or serious events or conversations about which she could be challenged in the future.
20. The Shire President states that she has been threatened with legal action by the complainant and she regards the disputed documents as her own private record of events associated with the dispute involving the complainant. The Shire President states that the disputed documents are kept to assist her recollection in the event that she is called on in the future to explain her actions and she treats them as her private documents and would use them if she became involved in legal action.

21. The Shire President also states that most of the documents were created by her on the same day as the events recorded or soon after. However, she may have made notes on some documents well after the date of the event because, for example, she read the document at some later stage and wanted to recall some personal opinion or feeling about the document, or because she recalled something relevant to that document and made a note of it for her own purposes. The documents are her thoughts and opinions and partly a record of particular events and conversations and partly a journal or diary entry relating to ongoing or significant issues in her life.

The complainant's submission

22. The complainant submits that the disputed documents only exist due to the role played by the Shire President acting in her official capacity. The complainant submits that if any of the disputed documents are found not to be documents of the agency within the meaning of the FOI Act, then the result would be a loophole in the FOI Act, which would allow any public official to keep selected information in personal, private documents and, by doing so, avoid transparency and accountability that is the cornerstone of the FOI Act.

Consideration

23. In deciding whether the Shire President has possession of the disputed documents in her official capacity as an officer of the agency, I have considered the submissions of the parties, including the Statutory Declaration made by the Shire President, and I have taken into account the nature of the documents in question. I have had regard to the role and functions of elected officials in local government. I have also taken into account the requirements of the *State Records Act 2000*, an Act that applies to local government and regulates the keeping of government records.
24. I do not accept that the definition of 'documents of an agency' in the FOI Act requires both possession by an officer of the agency, in his or her official capacity as such an officer, as well as control of those documents by the agency. Rather, in my view, the definition plainly states that a document of an agency includes a document that is in the possession or under the control of an officer of the agency in his or her official capacity. It is the act of possession of a document or the power of control over a document by an officer acting in an official capacity, which brings a document within the purview of the FOI Act.
25. The agency contends that the question of whether a local government agency has possession or control of a document might be to ask whether a councillor holds the document on behalf of the Council as a body or whether the Council, as a body could properly demand access to a document held by a councillor. In my opinion, in accordance with the definition in the FOI Act, the proper question is to ask whether an elected official, in this case, the Shire President, has documents in her possession or under her control, in her capacity as an officer of the agency.

26. In my opinion, personal diaries, personal correspondence and notes, and other private documents in the possession of an officer of an agency, are not covered by the provisions of the FOI Act, even if those documents are kept in the officer's desk or drawer at work. For example, documents created by agencies' employees outside their official duties, would not, in my opinion, be documents of those agencies. However, any documents created or kept by officers of agencies to assist them in the official discharge of their duties are, in my opinion, documents of an agency and potentially accessible under the FOI Act.
27. The distinction between what may be classed as a private document and what may be classed as an official document is not always an easy one to make. However, I have considered the nature and functions of elected members under the LG Act to determine whether documents may be held by elected members, in an official capacity and therefore, may be documents of an agency for the purposes of the FOI Act.
28. Section 2.7 of the LG Act provides that the role of a local government council is to direct and control the local government's affairs and be responsible for the performance of its functions. Sections 3.1(1) and 3.4 provide that the general function of a local government, which includes legislative and executive functions, is to provide for the good government of persons in its district.
29. Sections 2.8 and 2.10 of the LG Act set out the role or functions of mayors, presidents and councillors. Section 2.10 provides that a councillor's functions include representing the interests of electors, ratepayers and residents of the district; facilitating communication between the community and the council; and participating in the local government's decision-making processes at council and committee meetings. Pursuant to section 2.8(2), those functions apply to a councillor who is also the mayor or president.
30. Clearly, in my view, the role or functions of elected members contemplate the creation of records by those elected officials. From inquiries made with the Department of Local Government and Regional Development, I understand that local governments have generally taken the view that documents held by councillors at their homes are the personal records of those elected members. However, as far as the FOI Act is concerned, I do not consider that the deciding factor is where a document might be held or filed by an elected member. I understand that elected officials in local government usually do not have offices allocated to them and it is to be expected that some, or all, of their work as elected officials may be performed from home. In my view, the question involves determining the capacity in which documents are held by elected officials.
31. In addition to the role and functions described in ss.2.7 and 2.8 of the LG Act, I understand that the roles of council and the mayor or president of a local government include, when necessary, the selection, appointment and performance review of a Chief Executive Officer. In this instance, as the position and continued employment of the Chief Executive Officer was under threat, it appears to me that the Shire President became involved in the day to day administration of the agency and assumed some of the responsibility for the

ongoing management of the agency as spokesperson and on behalf of the council, pursuant to ss.2.7(1) and 2.8(1)(d) of the LG Act. That is, the Shire President became involved in the administration of the agency and, of necessity, created records relating to some vexed administrative issues then facing the agency.

32. Documents 45, 51-53, 69, 85 and 94, in my opinion, are akin to file notes that would be made by any officer of an agency in the course of performing his or her official duties. In this case, the documents were created by the Shire President in the course of her performing her role and function as Shire President, during several special council meetings in July 2001 and July and August 2002. It does not appear to me that any of the activities or events recorded, or referred to in those notes concerns the Shire President as a private individual. The fact that she might have created those documents for personal reasons as well does not, in my view, detract from a conclusion that those documents were created by her, and are retained and held by her, as a result of her attendance at those special council meetings in an official capacity. In my opinion, they clearly relate to the decision-making functions of the agency and they form part of the accountability processes of the agency. They deal with human resource management issues in the agency, which are an essential part of the agency's administration and financial management.
33. If it was otherwise, it would mean that any elected official could create records, which not only relate directly to his or her official duties as an officer of a local government, and which may contain vital information for accountability purposes and evidentiary purposes and yet such documents would not be regarded as documents of an agency. It seems to me that that result would mean that a large part of the business of local government could be conducted in secret and without any means of making elected officials accountable for their actions and decisions. In my view, such an outcome is contrary to the objects and intent of both the FOI Act and the LG Act and would not be conducive to good government, nor, in my view, would it be an outcome acceptable to the community. On this point, I agree with the submission of the complainant.
34. I acknowledge that some local government elected officials may lack the administrative experience of State Government officers and may not yet realize the implications of the FOI Act for public administration at local government level. However, those apparent shortcomings do not, in my opinion, change the nature of documents which are created or held by elected officials in their official capacity as members of an agency. Accordingly, I find Documents 45, 51-53, 69, 85 and 94 to be documents of an agency to which the FOI Act applies.
35. Notwithstanding that, I have reached a different view of Document 187. In my view, Document 187 is in a different category to Documents 45, 51-53, 69, 85 and 94. I have carefully read and considered the contents of Document 187, which comprise extracts from the Shire President's notebook. The notebook contains entries dating from 1995, which are clearly personal and unrelated to the role and function of Shire President. Some of the parts of that notebook, which are covered by the terms of the complainant's access application, were

written by the Shire President while she was on holidays. In my view, the notebook is more like a personal diary. It contains a substantial amount of personal information, within which is mixed some information about things done by her as the Shire President.

36. In respect of Document 187, I accept the evidence of the Shire President that she keeps the notebook to assist her recollection in the event that she is called on in the future to explain her actions and she that treats it as a private document and would use it if she became involved in legal action. In my view, the form and content of the notebook support the evidence from the Shire President in that respect. I accept that the notebook is not in the possession of the Shire President in her capacity as an officer of the agency. Rather, taking the contents of the notebook as a whole, it seems to me that she holds it in her personal capacity and not by virtue of her position as Shire President.
37. Accordingly, I find that Document 187 is not a document of the agency to which the FOI Act applies and the complainant has no right of access to that document. As I have found that Documents 45, 51-53, 69, 85 and 94 are documents of an agency to which the FOI Act applies, I shall now consider whether or not those documents are exempt as claimed by the agency.

THE EXEMPTION

38. The agency claims, among other things, that Documents 45, 51-53, 69, 85 and 94 are exempt under clause 8(2). Clause 8, so far as is relevant, provides:

“8. Confidential communications

(2) *Matter is exempt matter if its disclosure -*

(a) would reveal information of a confidential nature obtained in confidence; and

(b) could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.

Limits on exemption

...

(4) *Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest.”*

39. For the exemption in clause 8(2) to apply, it must be established that disclosure would reveal confidential information that was obtained in confidence and that such disclosure could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency. If both those requirements are established, then the onus falls on the complainant to persuade me that disclosure of the disputed documents would, on balance, be in the public interest.

40. Documents 45, 51-53, 69, 85 and 94 are notes made by the Shire President of discussions at special council meetings held *in camera*, in accordance with s.5.23(2) of the LG Act, which provides, in brief, that a council may close a meeting to members of the public when dealing with certain issues. The agency submits that s.5.23(2) recognises that matters of particular sensitivity should be discussed away from the public gaze. I was also referred to clause 16.3(5) of the agency's Standing Orders, which states:

“All matters and questions considered or discussed by the meeting behind closed doors shall be treated as strictly confidential and shall only be disclosed by a member or officer to another person (whether that other person is a member or officer or not) to the extent that it is necessary for that member or officer to do so in the performance of his or her duties.”

41. In those circumstances, the agency submits that disclosure of documents containing sensitive and confidential information, would discourage open and frank discussion and inhibit the types of questions and the nature of the information exchanged at such meetings. The agency submits that, consequently, the quality of decision-making could reasonably be expected to be prejudiced.
42. The agency also submits that there is no public interest in the disclosure of the disputed documents because of the prejudice referred to and because the accuracy of the notes made by the Shire President cannot be assured. The agency also submits that it would not be in the public interest to disclose information while there are ongoing investigations into the complainant's salary packaging arrangements being conducted by certain statutory bodies.

Consideration

43. It is my understanding that, in local government council meetings, the only agency records retained of *in camera* meetings consists of the publicly available minutes of such meetings, which record the motions and decisions of the council concerned. It is also my understanding that no official documentary record of the business discussed in the course of *in camera* discussions is made and retained by local government councils.
44. Having examined the disputed documents, I accept that they contain a record of the business discussed at special meetings of councillors of the agency, which were held *in camera*. The business discussed at those meetings related directly to the personal affairs of the complainant, in his capacity as the Chief Executive Officer of the agency and I am satisfied that those discussions took place *in camera* in order to ensure confidentiality and to secure the privacy of the complainant in respect of those matters. I also accept that the information recorded in the disputed documents was recorded by the Shire President during the course of those *in camera* discussions, and that it is information which is only known to a small group of people and is not otherwise in the public domain. Accordingly, I am satisfied that the requirements of clause 8(2)(a) are established in respect of Documents 45, 51-53, 69, 85 and 94.

45. I accept the agency's submission that *in camera* discussions promote frank discussion and a free flow and exchange of information by local government officers. The minutes of the relevant special meetings expressly state that those meetings proceeded behind closed doors because the business related to an employee of the agency (the complainant) and, further, that standing orders were suspended to allow free and open discussion of the business of the meetings. In this instance, the agency says, and in the absence of anything to the contrary, I accept, that none of the other councillors present at those special council meetings knew that the Shire President retained notes about the matters then discussed.
46. It seems to me that, in the circumstances of this particular case, if the other councillors had known that the Shire President made and retained notes of the matters discussed in confidence by them, contrary to the general understanding of confidentiality relating to *in camera* meetings, then the councillors present during those meetings would have been less frank and less open in those discussions. Further, it seems to me that if it became generally known that any matters discussed during *in camera* meetings would be recorded, thus creating a document of the agency that would be subject to disclosure under the FOI Act, it could reasonably be expected that councillors would be less frank and open during *in camera* discussions, because confidentiality could no longer be guaranteed.
47. I consider that that result would prejudice the ability of the agency to obtain candid opinions from councillors in the future, which may prove to be vital to the deliberative processes held *in camera* in accordance with the provisions of the LG Act. It seems to me that, as a matter of human nature, councillors and staff would be less frank and less open in such discussions, if it were not for a general understanding of confidentiality in relation to *in camera* discussions. Accordingly, I am satisfied that the requirements of clause 8(2)(b) are established in respect of Documents 45, 51-53, 69, 85 and 94.

The complainant's submission

48. It is the responsibility of the complainant to persuade me that the disclosure of confidential communications would, on balance, be in the public interest. The complainant submits that the disputed documents relate to his personal affairs and are not of consequence to the current or future administration of the agency. The complainant submits therefore, that the public interest should not prevail over his own interests and that the interests of an individual should prevail over the interests of the bureaucracy, wherever possible. The complainant also pointed out that, in the processing of his access application, the confidentiality of the disputed documents would appear to have been compromised, in that in dealing with the application, a number of officers of the agency have become aware of the contents of the disputed documents, which have been widely circulated, and that that fact should be a factor in favour of access.

Public Interest

49. I recognize that there is a public interest in maintaining the ability of an agency to obtain confidential information, but that it is not absolute. When a *prima facie* claim for exemption has been established, as it has in this instance, then I accept that there is a strong public interest in ensuring effective public administration, which weighs against disclosure.
50. However, weighing in favour of access, I recognize a public interest in the complainant being able to exercise his rights of access under the FOI Act and to obtain access to documents containing personal information about him. I do not accept the complainant's proposition that his interests ought to prevail over those of the agency, whether or not the disputed documents have any ongoing significance for the administration of the agency. In accordance with s.21 of the FOI Act, if documents contain personal information about an applicant that fact must be considered a factor in favour of disclosure for the purpose of making a decision as to whether it is in the public interest for the documents to be disclosed. However, it is a factor only and I have considered that fact as a factor in favour of disclosure in the balancing process.
51. I also recognize a public interest in accountability and in the disclosure of documents, which make the persons and bodies responsible for State and local government more accountable to the public. In the circumstances of this matter, I consider that the public interest in the accountability of the agency for the decisions made by it, which relate to the termination of the employment contract of the complainant, has largely been satisfied by the disclosure of documents already released to him. In that regard, I note that the minutes of the relevant special meetings of the agency, recording the agency's decisions relating to the complainant, are publicly available documents and, therefore, accessible by him.
52. I accept the agency's claim that the accuracy of the information recorded in Documents 45, 51-53, 69, 85 and 94 cannot be guaranteed by the agency because, as I understand it, the documents have been considered as personal notes of the Shire President. In my view, the accuracy or otherwise of the information recorded in the disputed documents is also a factor to be considered and weighed in the balancing process and, in my view, it is a factor, against the giving of access.
52. There is nothing before me, which indicates that the disputed documents have been quite widely circulated, as claimed by the complainant. Rather, I consider that the agency has handled the disputed documents in an appropriate manner. The only question for me is whether there are significant public interest factors favouring disclosure which outweigh the public interest in ensuring effective public administration by local government agencies. The only significant factor, in my view, is the fact that the disputed documents contain some personal information about the complainant.

53. In the circumstances of this complaint, I have given more weight to the public interest in ensuring effective public administration by local government agencies. The personal information about the complainant contained in the disputed documents is of a minor nature only and is not the kind of information of which he would be unaware. Accordingly, I find Documents 45, 51-53, 69, 85 and 94 exempt under clause 8(2) and confirm the agency's decision to refuse access to those documents.
