

DECISION SUMMARY ISSUED BY THE INFORMATION COMMISSIONER (WA)

Decision title and citation: *Re Kin Kin Resorts Pty Ltd and Ministry for Planning* [1999] WAICmr 9

COMPLAINT No: F0311999

DECISION No: D0091999

PARTIES: KIN KIN RESORTS PTY LTD

Complainant

MINISTRY FOR PLANNING

Respondent

No. of documents in dispute: 6

Exemption clause(s): Clause 14(2)

Kin Kin Resorts Pty Ltd ('the complainant') is the registered owner of land comprising Nelson location 3627 and part of Nelson location 3628 situated in the Shire of Manjimup. Around 1980-1981, the Shire of Manjimup re-zoned the complainant's property from Rural to Short Stay Residential. Following the re-zoning of the complainant's property, a dispute arose between the complainant and the Shire of Manjimup.

It is my understanding that, some time during 1991-1992, the Secretary of the complainant, Mr Cutting, lodged a complaint with the Parliamentary Commissioner for Administrative Investigations ('the State Ombudsman') concerning the re-zoning process. The State Ombudsman investigated that complaint and Mr Cutting was informed of the result of the investigation in September 1992. I understand that Mr Cutting remained dissatisfied with the initial investigation and, in June 1995, the State Ombudsman made additional inquiries and the original complaint was subject to a formal investigation under the *Parliamentary Commissioner Act 1971*. In November 1995, the State Ombudsman informed the complainant of the result of the second investigation.

By letter dated 20 January 1999, Mr Cutting, on behalf of the complainant, lodged an application with the Ministry for Planning ('the agency') seeking access under the *Freedom of Information Act 1992* ('the FOI Act') to planning documents lodged with the agency by the Shire of Manjimup concerning the complainant's land.

The agency granted the complainant access to some, but not all, of the requested documents. The agency claimed that 8 documents were exempt under clause 1 of Schedule 1 to the FOI Act. On 1 February 1999, the complainant sought internal review of the agency's decision. Following internal review, the agency granted the complainant access to 2 documents, but claimed that the remaining documents were exempt under clause 14(2) of Schedule 1 to the FOI Act. On 4 March 1999, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

Review by the Information Commissioner

I obtained the disputed documents from the agency. Inquiries were made with the parties and with the State Ombudsman to determine if this matter could be resolved by conciliation. As a result, the agency granted the complainant access to additional material in the disputed documents, but otherwise maintained its claims for exemption for the balance.

After considering the material before me, on 19 April 1999, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was established that 4 of the documents to which access had been denied were subject to a direction given under s.23(1a) of the *Parliamentary Commissioner Act 1971* by the State Ombudsman. Therefore, it was my preliminary view that those documents were, *prima facie*, exempt under clause 14(2) of Schedule 1 to the FOI Act.

Two other documents, being a letter from the State Ombudsman to the agency and a copy of that letter, although not specifically subject to a direction given by the State Ombudsman, refer to the contents of the other documents. Except for one sentence, it was also my preliminary view that the matter deleted from those documents was exempt under clause 14(2).

The State Ombudsman consented to the disclosure of part of the letter and the agency released that matter to the complainant. I received a further submission from the complainant, including copies of documents in its possession

relating to the dispute with the Shire of Manjimup. The complainant's submission has not dissuaded me from my preliminary view. A summary of my reasons follows.

The disputed documents

Document 1 (folios 73-86), dated 2 November 1995, consists of extracts from the State Ombudsman's draft findings on the complainant's complaint. I understand that the complainant received a copy of the final report of the investigation conducted by the State Ombudsman.

Documents 2 and 5 are respectively the original and a copy of a letter dated 2 November 1995, addressed to the then Chief Executive Officer of the agency from the then State Ombudsman. The complainant has been granted access to edited copies of those documents.

Document 3 (folios 79-86) consists of copies of the last 8 pages of Document 1. Document 4 (folios 87-92) consists of copies of the first six pages of Document 1. Document 6 (folios 99-112) are a copy of Document 1, with handwritten notes on pages 6, 8, 9, 11, 12, 13 and 14.

The exemption

Clause 14(2) of Schedule 1 to the FOI Act provides that "[m]atter is exempt matter if it is matter to which a direction given under section 23 (1a) of the Parliamentary Commissioner Act applies."

Section 23(1a) of the *Parliamentary Commissioner Act 1971* provides that the State Ombudsman may in writing direct the person to whom a document is sent by the State Ombudsman not to disclose to any other person any information contained in the document except for the purposes of the investigation to which the document relates, and a person to whom such direction is given shall comply with the direction.

I have examined Documents 1, 3, 4 and 6. Documents 1, 3 and 6 have been stamped with a note, which reads "[NOTE: CONFIDENTIAL Section 23(1a) Direction The contents of this document are not to be disclosed except for the purposes of the investigation]". That stamped note has been signed and dated by the former State Ombudsman. Documents 1, 4 and 6 are also each covered by an explanatory note which, in summary, states that each is the subject of "a section 23(1a) direction" and is to be treated as highly confidential and not disclosed to any person outside the agency. Document 4 is also covered by an explanatory note in those terms. It is clear to me that those documents fall within the terms of the exemption in clause 14(2) of Schedule 1 to the FOI Act.

I am also satisfied that the information deleted from Documents 2 and 5 is subject to the s.23(1a) direction because it refers to extracts of the draft findings of the State Ombudsman.

Although the letter (Documents 2 and 5) is not expressed to be subject to the s.23(1a) direction, I accept, as a matter of common sense, that any information in that document that would reveal the subject of the direction would, implicitly, also be subject to the direction. In my opinion, the matter deleted from Documents 2 and 5 appears, on its face, to be information of that kind. In my view, the exemption in clause 14(2) applies to the contents of a document, and not just to the physical documents itself.

Insofar as the contents of a document subject to a s.23(1a) direction are outlined in Documents 2 and 5, those relevant parts of Documents 2 and 5 are, in my view, also subject to the direction and therefore exempt under clause 14(2).

The arguments raised by the complainant in response to my preliminary view essentially amount to public interest arguments. However, clause 14(2) is not subject to a public interest test. Therefore, there is no scope for me to consider whether disclosure of the disputed matter would be in the public interest. The complainant also referred me to certain decisions of the High Court of Australia and the House of Lords. Whilst I have read and considered those decisions, I do not consider that they are relevant to the matter before me.

Accordingly, I find that the matter in dispute between the parties is exempt under clause 14(2) of Schedule 1 to the FOI Act. I confirm the decision of the agency to refuse access to that matter.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER
11 May 1999