

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

**File Ref: F2003057
Decision Ref: D0192003**

Participants:

Thomas Askew
Complainant

- and -

City of Gosnells
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access – document containing agency’s response to Department of Local Government and Regional Development concerning complaints made against the agency by a Councillor of the agency - clause 8(2) - confidential communications - whether information of a confidential nature obtained in confidence - whether disclosure could reasonably be expected to prejudice future supply of that kind of information.

Freedom of Information Act 1992 (WA) Schedule 1 clauses 7, 8(2).
Local Government Act 1995 (WA), Part 8.

DECISION

The decision of the agency is set aside. I find the disputed document is not exempt under clause 8(2).

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

14 July 2003

REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by the City of Gosnells ('the agency') to refuse Mr Thomas Askew ('the complainant') access to a document requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. The complainant is a former councillor of the agency having resigned as an elected member on 31 March 2002. In January 2002, the complainant sent a facsimile message to the Minister for Local Government ('the Minister'), which contained a number of allegations against the agency. The Minister asked the complainant to provide material in support of his allegations, but I understand that the complainant did not provide any such material to the Minister.
3. The allegations were forwarded to the Department of Local Government and Regional Development ('the Department') for inquiry. I understand that the allegations provided to the Minister contained potentially defamatory statements and so the Department summarized the substance of each allegation and asked the agency to respond in writing to each of them, which it did. The Department considered the agency's response. In the absence of any material from the complainant to support his allegations, the Department informed the Minister that the allegations could not be substantiated and recommended that no further action be taken in respect of those allegations. The Minister accepted the Departmental advice and informed the complainant accordingly.
4. In January 2003, the complainant made an application to the Department for access under the FOI Act to various documents, including a copy of the agency's response to his allegations. The Department transferred part of his application to the agency. The agency dealt with the request and refused him access to the requested document on the grounds that it is exempt under clause 8(2) of Schedule 1 to the FOI Act. Following that refusal, the complainant lodged a complaint with me seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

5. I obtained the requested document from the agency and examined it. The document consists of a main report, of 23 pages containing the agency's response to each allegation, plus a number of attachments. I also considered the material on the agency's FOI file relating to the complainant's access application and the information provided by the complainant. After considering that material, I made a preliminary assessment of the agency's claim for exemption and formed the view that the requested document may not be exempt under clause 8(2). I informed the parties in writing of my view and gave my reasons.
6. Following that, the agency gave the complainant access to all but two of the attachments to the requested document. However, the agency maintained its

claim that the main report of 23 pages is exempt under clause 8(2) and provided written reasons in support of that claim.

7. The agency also claimed that the two remaining attachments are exempt under clause 7. The two attachments are letters from the agency's solicitors containing legal advice. In my view, the two attachments are exempt under clause 7. Following discussions with my office, the complainant withdrew his complaint in respect of those two attachments. The only information remaining in dispute between the parties is the main report of 23 pages containing the agency's response to each allegation ('the disputed document').

THE EXEMPTION – Clause 8(2)

8. Clause 8, so far as is relevant, provides:

"8. Confidential communications

Exemptions

(1)...

(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

(3)...

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

9. There are two limbs to the exemption in clause 8(2). To establish a *prima facie* claim for exemption under that clause, the requirements of both paragraph (a) and paragraph (b) must be met. That is, it must be shown that the document would, if disclosed, reveal information of a confidential nature obtained in confidence, and also that disclosure could reasonably be expected to prejudice the future supply to the agency of information of the kind under consideration. If the requirements of paragraphs (a) and (b) are satisfied then the limit on exemption in clause 8(4) must be considered.

8(2)(a) – information of a confidential nature obtained in confidence

10. Information is inherently confidential if it is not in the public domain. That is, it must be known only by a small number or limited class of persons. Information is obtained in confidence where there is material to establish that the information

was both given and received on the basis of either an express or implied understanding of confidence.

11. The disputed document is marked "*Strictly Private & Confidential*" and it contains a note at the front that states "*The material [in the report] is provided to members of Council on a confidential basis and is to be received by members of Council on the same basis*". In my view, merely marking a document as 'Confidential', whether by a stamp or by the inclusion of words to that effect, as is the case in this instance, does not establish that the document contains confidential information or that the information was obtained in confidence. It is necessary to consider both the nature of the information and the circumstances in which that information was both given and received.
12. I understand that the disputed document was prepared by the Executive Team of the agency for the Department. The agency informs me that access to the disputed document has been strictly limited and controlled and that councillors were given access to the document during a special Council meeting held on 19 March 2002. Each councillor was given access to a numbered copy of the disputed document and all copies were collected at the end of the meeting. The complainant did not attend that special meeting. If he had done so, he would have been entitled to read and examine the disputed document in his capacity as a councillor.
13. The Department informs me that it dealt with the disputed document in accordance with its usual practices. The Department states that the disputed document was treated confidentially by officers of the agency and that it was only made available to a limited number of officers within the Department. The Department retains responses from local government agencies, which are provided when concerns, such as the allegations made by the complainant, are raised with it, on investigation files which are secured in a locked cabinet in the Records Section of the Department. Access to the locked cabinet is restricted to relevant staff and access is recorded so that any unauthorized access can be logged and tracked.
14. Taking all of that information into account, I am satisfied that the disputed document contains information of a confidential nature. However, I do not consider that it was obtained by the Department on the basis of an express understanding of confidentiality. Further, although the Department ensured that the disputed document was kept securely and limited access to it, I consider that those precautions are part of an agency's normal record-keeping practices.
15. I accept that, as a matter of course, the Department receives documents containing similar kinds of information, and that it receives such documents in confidence and treats them confidentially. In this instance, I have had regard to the confidential markings on the document, together with the administrative practices of the Department and I accept that the disputed document contains information of a confidential nature, which was obtained by the Department on the basis of an implied understanding of confidentiality. Accordingly, I am satisfied that the requirements of clause 8(2)(a) are established.

8(2)(b) – prejudice the future supply of information of that kind to the Government or to an agency

16. Paragraph (b) of clause 8(2) is directed at the future ability of agencies and the Government to obtain the kind of information contained in the disputed document. It is not concerned with the question of whether the particular source of a document would refuse to supply that kind of information in the future. Rather, the question is directed at the ability of the Government or an agency to obtain the relevant kind of information from the sources generally available to it. To determine that question, it is necessary to characterise the information in dispute.
17. In my view, the information in the disputed document is properly described as the responses of a local government agency to a series of allegations made against it. The agency submits that, if it had known that its response might have been subject to access under the FOI Act, it would not have provided the information to the Department to the extent and in the form, which it did. However, the agency did not specify the manner in which its responses would be submitted to the Department in the future, nor did it explain what would be different.
18. The FOI Act is not new. It has been operating in Western Australia since 1993. In the financial year 1999/2000, the agency received 5 applications for access under the FOI Act. In the year 2000/2001, it received 9 such requests. Therefore, I do not accept the claim made by the agency that it did not know that its response to the Department was subject to the FOI Act. After almost ten years, I expect all local government agencies are aware of the existence of the FOI Act and of the rights of access conferred by that Act. The agency's own website refers to the FOI Act and describes some of the records which are accessible under the provisions of that Act.
19. The agency also claims that disclosure would not only prejudice the future supply of information of the relevant kind by the agency to the Department, but it would also result in a greater likelihood that other local government agencies who are informed of the decision would adopt a similar approach. The agency informs me that it has a statutory duty under the *Local Government Act 1995* to provide for the good government of persons in its district. The agency submits that, in order to comply with its duty, it took action to ensure the confidentiality of its response and is concerned that damaging and defamatory allegations are not disclosed.

Consideration

20. The question, which I must decide, is whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that local government agencies, that would otherwise respond to allegations made against them when requested to do so by the Department, would decline or fail to do so if the disputed document were disclosed under the FOI Act. The agency expects that they would and I must decide whether that expectation is reasonably based.

21. As I understand it, part of the function of the Department is to receive complaints about councillors and local government agencies and to enquire into those complaints. I understand that when a complaint is received the Department seeks a response from the particular local government agency concerned, either in writing or during discussions and, after assessing the response, a decision is made as to whether further investigation is warranted.
22. Under Part 8 of the *Local Government Act 1995*, the Minister and the Executive Director of the Department have the power to require a local government agency to provide information and, in addition, persons authorized to conduct inquiries under that Act have the power, among other things, to access documents, enter property and to interrogate individuals. Finally, the Minister has the power, in certain circumstances, to suspend the council of a local government agency. Given those facts, a local government agency is unlikely to decline or fail to respond to allegations made against it.
23. I do not consider that the harm or prejudice described by the agency is one that could reasonably be expected to follow if the disputed document were to be disclosed under the FOI Act. If a local government agency were to refuse to answer complaints and allegations made against it, or if it responded in a less than full and frank manner, it risks a formal investigation or even suspension by the Minister. In my view, it is highly unlikely that a local government agency would refuse to co-operate fully with the Department and I consider that there is no reasonable basis for the claims made by the agency. It follows that I am not persuaded that the requirements of clause 8(2)(b) are established. Accordingly, I find the disputed document is not exempt under clause 8(2).
