

P AND JUSTICE

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

**File Ref: 96014
Decision Ref: D02296**

Participants:

P
Complainant

- and -

Ministry of Justice
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - reverse FOI complaint - complaint by a third party against a decision of an agency to give access to an access applicant - documents relating to a matter heard in the Court of Petty Sessions - clause 3 - personal information - personal information about third parties - limits on exemption - regulation 9 - personal information about an officer of an agency - prescribed details in relation to a person who is or has been an officer of an agency - section 24 - access to edited copies of documents - consultation with third parties.

Freedom of Information Act 1992 (WA) ss. 24, 32, 34, 72(1)(b), 75(1), 102(2); Schedule 1 clauses 3(1), 3(3), 3(5); Glossary in Schedule 2.

Freedom of Information Regulations 1993 (WA) regulation 9.

DECISION

The decision of the agency is confirmed. The matter in dispute is not exempt.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

1st May 1996

REASONS FOR DECISION

BACKGROUND

1. This is a “reverse FOI” complaint. That is, it is a complaint to the Information Commissioner by a third party arising out of a decision of the Ministry of Justice (‘the agency’) to grant an applicant access to certain documents requested by the applicant under the *Freedom of Information Act 1992* (‘the FOI Act’).
2. On 8 November 1995, an access application under the FOI Act was lodged with the agency in which access was sought to copies of documents relating to a matter heard in the Court of Petty Sessions, Perth, in November 1989 involving the access applicant. The agency identified the documents that fell within the ambit of that access application and obtained the views of “P” (‘the complainant’) and other third parties as to whether the documents contain matter that is exempt under clause 3 of Schedule 1 to the FOI Act. I have decided not to identify the complainant in my decision or these reasons because the name of the third party is included in the matter claimed by the third party to be exempt under clause 3(1). Further, I have not identified the access applicant by name as that may in turn reveal the identity of the complainant.
3. On 8 December 1995, the complainant through his solicitor informed the agency of his objection to the proposed disclosure of the documents. However, on 11 December 1995, after considering the complainant’s objections, the agency decided nonetheless, to grant the applicant access to edited copies of the documents. However, the agency deferred giving access to enable the complainant and other third parties to exercise their rights of review under the FOI Act, although access to edited copies of two of the documents had previously been given in accordance with s.24 of the FOI Act and an edited copy of another was given to the access applicant by the agency on 13 December 1995.
4. Subsequently, the decision of the agency was confirmed on internal review and, on 18 January 1996, the complainant’s solicitor applied to the Information Commissioner for external review of the agency’s decision.

REVIEW BY THE INFORMATION COMMISSIONER

5. On 22 January 1996, I notified the agency that I had received this complaint and, pursuant to my powers under s.75(1) and s.72(1)(b) of the FOI Act, I sought the production to me of the documents in dispute together with the file maintained by the agency in respect of this matter.

6. After examining the original documents and copies of those documents in the form which the agency proposed to release to the applicant and, after considering the submission of the complainant, it was my preliminary view that the agency's decision was correct. On 19 March 1996, I provided the parties with my preliminary view and reasons for that view. On 2 April 1996, I received a further submission from the complainant's solicitors objecting to the disclosure to the access applicant of any personal information about third parties, and also to the proposed disclosure of the entire contents of the documents.

THE DISPUTED DOCUMENTS

7. There are 5 documents in dispute between the parties. Those documents and the matter which is in dispute in each of them is described as follows:

Document	Folio	Description of document	Description of matter in dispute
1	6	Form entitled "Request for certified copies and photocopies of complaints", to the Manager, Court Records, Perth Magistrates' Court dated 15/3/95, with a handwritten note dated 16/3/95.	Whole of document other than those parts claimed by the agency to be exempt under clause 3(1).
2	7	Note for the attention of the complainant, dated 23/3/95, with handwritten note dated 24/3/95.	Whole of document other than those parts claimed by the agency to be exempt under clause 3(1).
3	13	Form entitled "Request for certified copies and photocopies of complaints", to the Manager, Court Records, Perth Magistrates' Court dated 14/3/95.	Handwritten notation of one word in the bottom right hand corner.
4	20	Agency Memorandum dated 11 July 1995, from acting Manager, Court Records to acting Court Administrator.	The name of the complainant in line 2 of paragraph 4.
5	22	Handwritten file note dated 19/9/95.	The name of the complainant where it appears.

The disputed matter

8. The complainant complains that access to edited copies of 3 of the documents has already been given and claims that the whole of each document is exempt under clause 3(1) of Schedule 1 to the FOI Act. The disputed matter in Document 1 is the whole of the document, other than those parts which the

agency claims are exempt because it is matter that would reveal the identity of, and personal information about, a named third party and the initials of the author of a handwritten note in the bottom right hand corner. The disputed matter in Document 2 comprises the entire contents of the document other than matter which would identify a named third party and the signature of the author of a handwritten note on the bottom and reverse of the page. The disputed matter in Document 3 consists of a one-word handwritten note in the bottom right hand corner.

9. The disputed matter in Documents 1 and 2 consists of forms, entries on the forms and handwritten notes which record the actions taken by the agency in processing a request for a copy of a particular complaint. That request was made according to existing administrative procedures in the agency and not pursuant to the right of access under the FOI Act. The disputed matter in Documents 4 and 5 consists only of the name of the complainant.

Access to Edited Copies

10. Edited copies of Documents 4 and 5 - with all personal information about third parties deleted, other than personal information about one third party closely concerned with the access applicant and who had contacted the agency and indicated his consent to disclosure to the access applicant of personal information about him, and certain other personal information which may not have been exempt but to which the access applicant indicated access was not required - were given to the access applicant on 23 November 1995, prior to any consultation with those third parties. In my view, in so doing, the agency acted in accordance with its obligation under s.24 of the FOI Act. Section 24 requires that, if a document contains exempt matter and it is practicable to give access to a copy with that matter deleted and the agency considers that the access applicant would wish to be given access to an edited copy, then the agency must give access to an edited copy. Further, s.32(6) provides that, in those circumstances, the agency need not consult the third parties. That is what the agency did in respect of Documents 4 and 5 and, in my opinion, that was in accordance with the relevant provisions of the FOI Act.
11. The third parties were subsequently consulted as to their views in respect of the personal information about them which had been deleted from the edited copies. Subsequent to that process, an edited copy of Document 3 was given to the access applicant by the agency. The access applicant has not yet been given access to Documents 1 and 2 in any form.
12. The complainant in this matter was consulted in accordance with the provisions of s.32 of the FOI Act. Section 34 of the FOI Act provides the procedure to be followed following consultation. Section 34(1) provides that if the agency obtains the views of a third party in relation to a document under s.32, and those views are that the document contains matter that is exempt matter under clause 3 of Schedule 1, and the agency decides nonetheless to give access to the document, the agency has to give the third party written notice of the decision

without delay, and defer giving access to the document until the decision is final. This is to afford the third party an opportunity to apply for a review of that decision.

13. However, in this instance, the agency obtained the views of the complainant, and those views were that the documents contain some matter that was exempt under clause 3. The agency decided to give access to the documents with that matter deleted. The agency also decided that some of the matter claimed by the complainant to be exempt was not exempt. The agency gave the complainant written notice of that decision. However, the agency had already given access to edited copies of Documents 4 and 5 and did not defer giving access to Document 3. The wording of s.34 appears to have the effect that, in the circumstances described, access to the document is to be deferred whether or not the document has been edited to delete the disputed matter. However, although it may be argued that, by not deferring the giving of access to Document 3, s. 34(1)(e) was not complied with, in my opinion, the complainant was not disadvantaged in any way by the agency's action in that regard.
14. The agency was required to consult with the complainant only in respect of his views as to whether or not the document contains matter that is exempt matter under clause 3 of Schedule 1. As I have said, s.32(6) provides that such consultation is not required if access is given to a copy of the document from which the personal information referred to has been deleted under s.24. Accordingly, had the agency not even contemplated giving access to the personal information contained in the document about the complainant, it would have been entitled to disclose to the access applicant edited copies of those documents, including Document 3, with the personal information about the complainant deleted. In the event, that is what occurred.
15. In view of the complainant's objection to disclosure of personal information about him which he claims to be exempt under clause 3, the agency had deferred giving access to the personal information about the complainant which the agency has decided is not exempt.
16. Upon a complaint to me, a complainant third party does not appear to be limited to arguing only in respect of matter concerning the third party which may be exempt under clause 3 or clause 4. In this instance, the complainant's solicitor argued in respect of personal information contained in the documents not only about the complainant, but also about other third parties. The other third parties were also consulted by the agency in the course of dealing with the access application. Some had no objection to the personal information about them in the documents being disclosed. That matter was not deleted from the edited copies of Documents 3, 4 and 5 released to the access applicant.
17. Given that that matter has already been disclosed, even if I did consider it to be exempt, there is nothing I could do to "undisclose" it. I do not consider that I need make a decision in respect of that matter in Documents 3, 4 and 5 as access has already been given to it and the people about whom it may be personal information consented to its disclosure. In any event, were I required to decide

upon that matter, my view would be that it is clearly not exempt because the third parties consented to its disclosure and, therefore, clause 3(5) operates to render it not exempt under clause 3(1).

18. The complainant claimed only that the documents are exempt under clause 3 and made no submissions as to whether they may be exempt under any other clause. From my inspection of the documents and consideration of the surrounding circumstances as gleaned from the submissions of the parties and press reports at the time of the particular incident, I am of the view that those documents would not be exempt for any other reason.
19. Some of the other third parties, who are not officers of an agency, objected to disclosure of the personal information about them. The agency, taking those views into account, decided that matter to be exempt under clause 3 and deleted it from the edited documents given to the access applicant. The complainant argues that that matter is exempt under clause 3. The access applicant has not sought to be joined as a party to the complaint. That matter is not, therefore, the subject of the dispute before me and requires no decision by me. Similarly, none of the matter in Documents 1 and 2 for which the agency has claimed exemption is the subject of dispute between the parties.
20. Accordingly, the only matter upon which I consider that I am required to make a decision is that identified in paragraphs 7, 8 and 9 above (the disputed matter). That comprises matter for which the agency claims no exemption and proposes to disclose to the access applicant, and which has not yet been disclosed to the access applicant.

THE EXEMPTION

21. The agency decided that certain matter in the disputed documents is exempt matter under clause 3(1) of Schedule 1 to the FOI Act, but that the disputed documents are otherwise not exempt. Further, the agency decided that whilst some of the remaining matter which it proposes to disclose to the access applicant may be *prima facie* personal information about the complainant and exempt under clause 3(1), it is not exempt because of the limitation in clause 3(3). Further, although not so stated in any of the agency's notices of decision to either the access applicant or the third party, the agency did not claim exemption for personal information about third parties who consented to its disclosure.
22. Clause 3 of Schedule 1 to the FOI Act provides:

“Exemption

(1) Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).

Limits on exemption

(2) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal personal information about the applicant.*

(3) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to -*

(a) the person;

(b) the person's position or functions as an officer; or

(c) things done by the person in the course of performing functions as an officer.

(4) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who performs, or has performed, services for an agency under a contract for services, prescribed details relating to -*

(a) the person;

(b) the contract; or

(c) things done by the person in performing services under the contract.

(5) *Matter is not exempt matter under subclause (1) if the applicant provides evidence establishing that the individual concerned consents to the disclosure of the matter to the applicant.*

(6) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.”*

23. In the Glossary in Schedule 2 to the FOI Act, “personal information” is defined to mean:

“...information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead-

(a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or

(b) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample.”

24. The prescribed details referred to in clause 3(3) are set out in regulation 9 of the *Freedom of Information Regulations 1993* (‘the Regulations’). Regulation 9, so far as is relevant, provides:

“9(1) In relation to a person who is or has been an officer of an agency, details of-

- (a) the person’s name;*
- (b) any qualifications held by the person relevant to the person’s position in the agency;*
- (c) the position held by the person in the agency;*
- (d) the functions and duties of the person, as described in any job description document for the position held by the person; or*
- (e) anything done by the person in the course of performing or purporting to perform the person’s functions or duties as an officer as described in any job description document for the position held by the person,*

are prescribed details for the purposes of Schedule 1, clause 3(3) of the Act.”

The complainant’s submission

25. In relation to all of the disputed documents, the solicitor for the complainant made the following submission, which I have summarised:
- the whole of Document 1 is exempt because it contains personal information about a third party;
 - the whole of Document 2 is exempt because it contains personal information about a third party, and the notations on the document, including a signature and handwritten comments to which the signature relates must also be exempt; and
 - in relation to Document 3, if the initials are exempt then the words connected with the initials are also exempt because one piece of information cannot be exempt and the other not exempt.
26. The complainant’s solicitor also submitted that a whole document is either exempt or not exempt and, in relation to names of third parties, all names should be exempt and the whole document should, therefore, be exempt. It was also the submission of the complainant’s solicitor that the name of the complainant where it appears in the documents must be exempt if the words associated with the name are exempt because, it was claimed the words cannot be exempt and not the name. Further, it was submitted that disclosure would create a mischief, which I cannot describe as it may identify the complainant.

Findings

27. There is material before me from the agency that establishes that some of the third parties have consented to the disclosure of personal information about them to the access applicant. There is also material before me from the agency that

establishes that the complainant was, at the material time, an officer of the agency performing his usual duties and functions as an officer of the agency. I have examined each of the documents the subject of this complaint, and other documents produced to me by the agency, and considered the parties' submissions in respect of each.

Document 1

28. Document 1 is a completed form, entitled "Request for Certified Copies of Photocopies of Complaints". The document contains matter which, in my view, is *prima facie* personal information, as defined in the FOI Act, about three people. There is evidence before me that the first-named third party consented to disclosure of the personal information about him contained in the document. Accordingly, in my view, clause 3(5) of the FOI Act operates to limit the only exemption claimed by the complainant, that provided by clause 3(1), so as to render that matter not exempt. The second-named third party, who is not an officer of an agency, objected to disclosure of the personal information about that party contained in the document. Taking that view into account, the agency claimed that matter to be exempt under clause 3(1), and proposes to give access only to an edited copy of the document with that matter deleted. As the complainant also claims that matter is exempt under clause 3(1) and the access applicant has not sought to be joined as a party to this complaint, that matter is not in dispute and I need not make a decision in respect of it.
29. The only other matter in Document 1 which may be, in my view, considered to be personal information comprises a handwritten note in the bottom right hand corner of the page. The initials of the author of that note are claimed by the agency to be exempt under clause 3. As that is also the claim of the complainant, that matter is not in dispute before me. Therefore, of that note, the only remaining matter in dispute is the two words and the date appearing immediately above the initials. I am informed that the initials are those of the complainant and that the annotation was made by the complainant.
30. If the initials of the complainant are deleted from the document, there does not appear to be any way to identify the complainant from the information itself, except by the handwriting. Whilst the complainant may be able to be identified by any person who is sufficiently familiar with his handwriting to do so, I consider that to be unlikely. In any event, even if I considered that it were possible to identify the complainant from the information in the document, including the handwriting, the note is clearly one that has been made by the complainant in the course of his duties as an officer of the agency. Therefore, the limit provided by clause 3(3) operates to make that matter not exempt by reason of the fact that it constitutes prescribed details under regulation 9 of the Regulations.
31. The printed form itself clearly, in my view, is not and could not be exempt under any exemption clause contained in the FOI Act. Accordingly, in respect of Document 1, I find that, other than the initials of the author of the handwritten

note in the bottom right hand corner and the personal information, identified by the agency, about the second-named third party, that document is not exempt.

Document 2

32. The complainant claims that the whole of Document 2 is exempt under clause 3(1). The agency claims that only that matter which would identify a third party named in the document, and the signature of the complainant appearing beneath the handwritten note on the bottom and reverse of the page, is exempt under clause 3(1). The agency's decision in respect of that matter is not in dispute. In respect of the balance of the document, firstly, in my opinion the handwritten note appearing at the bottom and reverse of the page was made by the complainant in the course of the exercise or purported exercise of his duties as an officer of the agency. Accordingly, in my view, clause 3(3) operates to limit the exemption provided by clause 3 and I find that matter is not exempt. Similarly, the name of the complainant, to whom that document is addressed, is, for that reason, not exempt. Further, once the signature, name, address, facsimile number and phone number of the author of the typed text of the document is deleted, the document does not contain any personal information, other than personal information about one other named third party who consents to disclosure of the personal information about him contained in the documents. Accordingly, I find that, other than the name, signature, address, facsimile number and telephone number of the author of that document, the document is not exempt.

Document 3

33. As I have said, I consider that the only matter contained in Document 3 which requires my decision is the single-word notation in the bottom right hand corner of the page. The signature appearing immediately under it is claimed by the agency to be exempt under clause 3 and is, therefore, not in dispute and will be deleted by the agency prior to access being given to the document. In my opinion, for similar reasons as those given in respect of the handwritten note on Document 2, the handwritten note appearing in the bottom right-hand corner of Document 3 is not exempt.
34. Although I do not consider the balance of the document to require a decision by me, given that it has already been disclosed, I make the following comments. The printed form itself contains no personal information about any person and could not, therefore, be exempt under clause 3, although that is the only clause under which the complainant has claimed it is exempt. Neither, in my view, is - or could be - that form exempt under any other exemption provided by the FOI Act. The handwritten entries comprise matter which may be considered to be *prima facie* personal information, as defined in the FOI Act, about two named third parties. However, there is clear evidence before me that both those third parties consented to the disclosure of the personal information about them

contained in that document. Accordingly, clause 3(5) operates to limit the exemption provided by clause 3(1) and has the effect that the personal information about those two third parties is not exempt under clause 3. No other exemption for that matter was suggested, nor do I consider that it is exempt under any other exemption provided by the FOI Act.

Documents 4 and 5

35. In Documents 4 and 5, the only matter requiring my decision is the complainant's name wherever it appears in those two documents. Other than the complainant's name and personal information concerning other third parties who have consented to disclosure of that information, the agency does not propose to disclose any of the matter deleted from the edited copies of those documents provided which were provided to the access applicant. Access had already been given to the balance of the documents which, as I have said, do not, in my view contain any other personal information. I have read both of the documents. Although disclosure of the complainant's name may reveal *prima facie* personal information about him contained in the documents, the only matter that is revealed is, in my view, actions taken by the complainant in the exercise or the purported exercise of the duties of his position as an officer of the agency. Accordingly, clause 3(3) operates to limit the exemption provided by clause 3(1) and I find that matter is not exempt. Further, I find that the personal information about the other third parties who have consented to the disclosure of personal information about them and to which the agency proposes to give access is not exempt by virtue of the operation of clause 3(5).
36. The complainant's solicitor sought to persuade me that the documents in their entirety are exempt and that if there is exempt matter in a document it cannot be excised and the whole document is exempt. I reject that argument. In my view, s.24 of the FOI Act creates a clear duty on agencies to consider the practicality of providing an access applicant with access to an edited copy of a requested document with exempt matter deleted. That section is in accordance with the objects of the FOI Act and with the intent to maximise disclosure of agency documents to give effect to the statutory right of access created by freedom of information legislation.
37. Further, each of the exemptions provided in Schedule 1 is expressed to apply to "matter" rather than to documents, clearly contemplating that certain matter contained within a document may be exempt as opposed to the entire document.
38. Accordingly, I do not consider that the complainant has satisfied the onus he bears under s.102(2) of the FOI Act to establish that access should not be given or that a decision adverse to the access applicant should be made. I find that the disputed matter is not exempt and I confirm the decision of the agency under review.
