

ROSS AND CITY OF PERTH

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

**File Ref: 95149
Decision Ref: D03995**

Participants:

Clive Michael Ross
Complainant

- and -

City of Perth
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - letter from third party to agency objecting to development proposal - clause 3 - personal information - disclosure through discovery process - disclosure under FOI cannot reveal information not already revealed.

Freedom of Information Act 1992 (WA) ss. 24, 27, 68(1), 72(1)(b), 75(1); Schedule 1 clause 3(1).

Re Lithgo and City of Perth (Information Commissioner, WA, 3 January 1995, unreported).

DECISION

The decision of the agency is set aside. In substitution it is decided that the requested document is not exempt under the *Freedom of Information Act 1992*.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

9th October 1995

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the City of Perth ('the agency') to refuse Mr Ross ('the complainant') access to a document of the agency requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. The complainant is the owner of property situated at 49 Cargill Street, Victoria Park. In June 1994, the complainant submitted a development application to the agency for the construction of four, two storey grouped dwellings on his land in Cargill street. The agency initially refused the complainant's development application. However, the agency later approved the development proposal but placed conditions on the planning approval. On 20 March 1995, the complainant applied to the agency under the FOI Act for access to copies of all file notes, reports, comments and background information connected with his development proposal. The complainant also sought a full statement of reasons for the decision of the agency to place conditions upon the planning approval.
3. On 3 May 1995, the agency advised the complainant that it had identified 78 documents as being within the ambit of his access application. Access in full was granted to 71 documents. However, Ms Lesley Ferguson, FOI Coordinator in the agency, decided to grant access to edited copies of the remaining documents on the ground that those documents contain matter that is exempt under clause 3(1) of Schedule 1 to the FOI Act.
4. On 8 May 1995, the complainant sought internal review of that decision. It appears that the scope of the request for internal review was narrowed to relate to one document only. The disputed document is an original hand written letter to the agency from a third party objecting, *inter alia*, to the development proposal. The internal review was conducted by Mr L Delahaunty, Director, Corporate Services in the agency. On 2 June 1995, Mr Delahaunty confirmed the original decision to deny access to that document on the ground that it contains exempt matter under clause 3(1).
5. On 31 July 1995, the complainant applied to the Information Commissioner seeking external review of the agency's decision. Although the agency provided the complainant with a typed extract of a small part of the disputed document recording the third party's objections to his development proposal, the complainant contends that the provision of a typed extract of only part of the disputed document is not the form of access to which he is entitled under the FOI Act.

REVIEW BY THE INFORMATION COMMISSIONER

6. On 4 August 1995, in accordance with my statutory obligation under s.68(1) of the FOI Act, I notified the agency that I had accepted this complaint for review. Pursuant to my authority under ss.75(1) and 72(1)(b) of the FOI Act, I required the production to me of the original of the document in dispute, together with the agency's file maintained in respect of this access application. Those documents were delivered by hand to my office on 8 August 1995.
7. On 21 August 1995, after examining the disputed document and considering the submissions of the parties, I informed the parties of my preliminary view. It was my preliminary view that the disputed document contains matter which is, *prima facie*, exempt matter under clause 3(1) of Schedule 1 to the FOI Act. However, it was also my preliminary view that it was practicable to delete exempt matter and to provide the complainant with access to an edited copy of the disputed document.
8. Following receipt of my preliminary view, the agency contacted the author of the letter and provided him with a copy of the letter containing my preliminary view. He subsequently contacted my office and informed a member of my staff of his objection to the release of the disputed document. That view was confirmed in writing by a letter dated 25 August 1995. Although the author was informed of his rights he did not seek to be joined as a party to the complaint, nor did he provide any reasons for his objection.
9. The agency provided a further submission in response to my preliminary view in which it maintained its claim for exemption for the whole document. The agency claims an exemption for the document in order to protect the privacy of its author.
10. It came to my attention that the complainant was alleged to be in possession of a copy of the disputed document which he had obtained from the agency by normal discovery processes following an appeal to the Town Planning Appeal Tribunal against the decision to refuse his original development proposal. The complainant provided my office with a copy of the document obtained by him through the discovery process. That document is identical to the disputed document. However, the complainant is not prepared to withdraw his complaint and the agency is not prepared to withdraw its claims for exemption. Therefore, I must decide the issue of whether, in the circumstances outlined above, the disputed document is exempt and, if so, for what reasons. There is also a preliminary issue which I will address concerning the form in which access may be provided under the FOI Act.

Form of access

11. Section 27 of the FOI Act describes the ways in which access may be given to requested documents. Sub-section (2) of that section provides that, if an applicant has requested access be given in a particular way, the agency must comply with that request unless to do so would either interfere unreasonably with the agency's operations, damage or harm the document or involve an infringement of copyright.
12. In this instance, the complainant requested access in the form of a copy of the disputed document. In my view, he is entitled to access in that form, subject to any legitimate claims for exemption for exempt matter and to the operation of s.24 of the FOI Act. Further, I consider that the decision of the agency to provide the complainant with a typed extract of 17 words reproduced verbatim from the substance of that document, is not a form of access authorised by the FOI Act. This case is not an instance where it is open to the agency to satisfy part of the relevant public interest in access, by creating a document and providing some information albeit limited. This is an instance where the applicant is entitled to access in the form of an edited copy of the actual document, subject to the proper identification of exempt matter and its deletion in accordance with s.24 of the FOI Act.

Deletion of exempt matter - section 24

13. Section 24 provides that, if access is requested to a document containing exempt matter and it is practicable for the agency to give access to a copy of that document from which exempt matter has been deleted, and the agency considers the applicant would wish to be given access in that form, then access must be given to an edited copy of the requested document. In my view, there is a positive duty on the agency to comply with this section in circumstances where deletion of exempt matter is practicable.
14. The complainant's request for internal review made it clear to the agency that he was prepared to accept access to an edited copy of the requested document. However, the agency is of the view that, as the document is hand-written, access in that form is not practicable as the handwriting would identify the author of that document. For that reason the agency is of the view that the document consists of personal information about the author and that it is, therefore, *prima facie*, exempt under clause 3(1).
15. In those circumstances - being that the agency considered the whole of the document to be exempt under clause 3(1) as disclosure of any part of it may identify its author - I do not consider the provision of a typed extract of that part of the document that was within the ambit of the access application to have been unreasonable. If the agency considered the whole of the document to be exempt, it need not have provided any form of access and I accept that the provision of a typed extract of relevant matter was, at that stage, an endeavour by the agency to comply with the spirit and intent of the FOI Act.

Exempt matter - personal information

16. Clause 3(1) of Schedule 1 to the FOI Act exempts matter that contains personal information about a third party. In the Glossary in the FOI Act, "**personal information**" is defined as meaning "*...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.*"
17. I have previously expressed the view that the purpose of the exemption in clause 3 is to protect the privacy of individuals. That exemption is a recognition by Parliament of the fact that all government agencies collect and hold a vast amount of important and sensitive private information about individual citizens and that information of that kind should not generally be accessible by other persons without good cause.
18. When an agency decides that a document contains personal information about a person, and that document is the subject of an access application under the FOI Act by some other person, it may provide access to that document with personal information deleted. An agency may delete all of the personal information, including the relevant name of the person to whom the information relates, from which that person could be identified. In some instances, this may be achieved by deleting the name only and providing access to the remaining information if the identity of the person to whom the information relates is not able to be ascertained from that information itself.
19. In this case, leaving aside for a moment the question of the document being hand-written, a little more than the name would require deletion, in my view, to prevent identification of the document's author. In this instance, the agency did not consider the provision of an edited copy of the disputed document to be an option because it claimed that the whole document was exempt under clause 3(1) of Schedule 1 to the FOI Act.
20. In order for a hand-written document to be exempt under clause 3(1), the identity of the person in whose hand the document is written must be ascertainable from the disclosure of that document. Whilst I accept that a person may be identifiable by reference to his or her hand-writing, unless disclosure of the document in question identifies that person the exemption in clause 3(1) will not apply. In my view, unless an access applicant has personal knowledge of the author of a document or is able to recognise the hand-writing because of some contact or

relationship with the writer, it is unlikely that disclosure, *per se*, of such a document would reveal personal information.

21. There is no information before me that would enable me to conclude that disclosure of the disputed document to the complainant would reveal personal information about its author that is not already within the knowledge of the complainant (*contra*: my decision in *Re Lithgo and City of Perth* (3 January 1995), where the complainant knew the identity of the author of the document and was familiar with her hand-writing).
22. I am satisfied, from my examination of the disputed document and a consideration of the material before me, that the agency should have and could have provided the complainant with access to an edited copy of the disputed document with exempt matter deleted in accordance with my preliminary view. However, as the complainant is already in possession of an unedited copy of the document, the agency's claims for exemption, in my view, can no longer be sustained, as disclosure of the document would reveal nothing to the complainant as the information has already been revealed in the copy of the document previously obtained.
23. That is not to say, however, that in every case in which an access applicant has obtained by other means a document of an agency that the agency's copy may not be exempt under the FOI Act. In this instance, however, the agency has provided me with no persuasive arguments in justification of maintaining its claims for exemption in the circumstances.
24. In the circumstances of this case, I consider that the privacy of the third party is no longer an issue. In my view, the public interest in maintaining the privacy of the third party is outweighed by the public interest in the complainant being able to exercise his right of access under the FOI Act. I find the disputed document is not exempt.
