

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

**File Ref: F0622000
Decision Ref: D0412000**

Participants: **Ross Francis Herbert**
Complainant

- and -

Ministry of Housing
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access - request for access to house plan - clause 5(1)(e) - public safety - whether disclosure could reasonably be expected to endanger the life or physical safety of any person - clause 5(1)(f) - property security - whether disclosure could reasonably be expected to endanger security of property - clause 3(1) - personal information - whether document contains personal information.

Freedom of Information Act 1992 (WA) s. 10; Schedule 1 clauses 3(1), 5(1)(e) and 5(1)(f); Schedule 2, Glossary.

Attorney General’s Department v Cockcroft (1986) 10 FCR 180.
Searle Australia Pty Ltd v Public Interest Advocacy Centre (1992) 108 ALR 163.
Manly v Ministry of Premier and Cabinet (1995) 14 WAR 550

DECISION

The decision of the agency is varied. The document is exempt under clause 5(1)(f) of Schedule 1 to the *Freedom of Information Act 1992*.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

21 July 2000

REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Ministry of Housing ('the agency') to refuse Mr Herbert ('the complainant') access to a document requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. In late December 1999, the complainant wrote to the Chief Executive Officer of the agency seeking a copy of scaled drawings of a rental property owned by the agency. The complainant stated that he required specific details of a property located at a particular address, for the purpose of certain legal proceedings and asked for scaled drawings showing the physical dimensions and the size of the rooms at that property.
3. The complainant was advised that his request for a copy of the document would need to be dealt with under the FOI Act, because he was not the current owner or tenant of the rental property. The complainant was also advised that the requested document may be an exempt document.
4. On 5 January 2000, the complainant made an application to the agency for access under the FOI Act to a copy of the scaled plans of the rental property. In a notice of decision dated 10 February 2000, the agency refused the complainant access to the requested document on the grounds that the document is exempt under clause 5(1)(e) and (f) of Schedule 1 to the FOI Act.
5. On 17 February 2000, the complainant applied to the agency for an internal review of its decision. An internal review was conducted, but the reviewer confirmed the decision to refuse access on the ground that the document is exempt under clause 5(1)(e) and (f). However, in an attempt to assist the complainant, the agency gave him detailed information about the dimensions of the rooms in the rental property concerned. The complainant was dissatisfied with the information given to him and, on 27 March 2000, he made a complaint to the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

6. I obtained the disputed document from the agency, together with the file maintained by the agency in respect of the complainant's access application. My Investigations Officer met with the complainant and inquiries were made with the parties to determine whether this complaint could be resolved by conciliation. However, at that stage of the proceedings the option of resolving this matter by conciliation did not appear to be a possibility.
7. On 24 May 2000, after considering the material before me, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that the document may not be exempt under clause 5(1)(e) or (f).

8. The agency provided further submissions to me in support of its claims for exemption under clause 5(1)(e) and (f), and claimed, in addition, that the document is exempt under clause 3(1).
9. Following my further consideration of the agency's submissions, my Legal Officer met with the complainant and informed him that I had revised my earlier opinion about the document and was now of the preliminary view that the document may be exempt under clause 5(1)(f), including the reasons why I had reached that view. Another attempt was made to resolve this complaint by conciliation between the parties. Subsequently, the agency agreed to allow the complainant to inspect the document with his solicitor, subject to certain conditions. However, the complainant refused that offer.

THE DISPUTED DOCUMENT

10. The disputed document is a copy of a house plan of a rental property owned by the agency.

THE EXEMPTIONS

(a) Clause 5(1)(e) and (f)

11. Clause 5(1), so far as is relevant, provides:

“5. Law enforcement, public safety and property security

Exemptions

(1) *Matter is exempt matter if its disclosure could reasonably be expected to -*

...

(e) *endanger the life or physical safety of any person;*

(f) *endanger the security of any property”.*

12. Matter will be exempt under clause 5(1)(e) or (f) if its disclosure “*could reasonably be expected to*” cause the harm described in the clause. The phrase “*could reasonably be expected to*” appears in a number of exemption clauses in the FOI Act. In *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 at page 190, the Full Federal Court said that the words “*could reasonably be expected*” in the Commonwealth FOI Act were intended to receive their ordinary meaning and require a judgement to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect the stated consequences to follow if the documents in question were disclosed.

13. The meaning of the phrase was also considered by the Full Court of the Federal Court of Australia in *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 108 ALR 163. In that case it was held that, on an objective view of the evidence, there must be real and substantial grounds for expecting certain consequences to follow from the disclosure of documents. I accept that the decisions in *Cockcroft's* case and *Searle's* case correctly state the test that is to be applied when considering the application of the exemptions in the FOI Act that contain the phrase “*could reasonably be expected*”. The standard of proof required does not have to amount to proof on the balance of probabilities. However, it must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasonable decision-maker: see the comments of Owen J in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at 573.

The agency's claims

14. The agency submits that it is reasonable to expect that disclosure could have the consequences stated in the exemption clauses for the following reasons, which I have summarised:
- the complainant seeks access to plans of a house at a specific address, which puts the nature of the requested information into a quite different category from a request for house plans generally;
 - disclosure of the specific plans would reveal information not publicly known, for example, the side and rear access points to the house and locality of rooms that could assist a person to gain access to the house without consent;
 - whilst there is a low probability of an illegal entry, there is a real risk that if a person is in possession of this specific information, this could happen;
 - the disclosure of house plans for a particular house at a specific address, which include the internal arrangements of the rooms of the house and the access routes into the house would lead to a real and serious increase in the risk of the property being broken into and place the physical safety of the occupants in jeopardy;
 - if the house plans are disclosed under the FOI Act, then no conditions or controls can be imposed upon the use the plans are put to after disclosure, and the practical effect of disclosure under the FOI Act is to make them publicly available;
 - the reasonableness of an expectation of endangerment to the life or physical safety of the tenant or the security of the house in question should be considered if the plans are publicly available;
 - if an illegal entry occurred, the consequence could be severe, including damage to the property or its contents;
 - it follows that if the security of the property is at risk, the life or physical safety of any occupant could also be endangered;
 - the agency has a duty of care to protect the privacy and security of the tenants of its properties; and

- since house plans held by local government agencies may only be inspected with the permission of the owner or mortgagee under the *Building Regulations 1989* (made under the Local Government Act) the requirement would be the same for any agency whose functions require the holding of similar records.
15. I accept that disclosure of the disputed document would reveal information that is not publicly known, in the sense that the actual house plan is not a document that is otherwise in the public domain. However, the reasons that governments enact FOI legislation is to give a right of access to documents that are not publicly available (except those that are exempt under one or more of the exemption clauses in Schedule 1). Therefore, I do not consider that that reason alone determines the matter.
- (a) *Clause 5(1)(e)*
16. For the exemption in clause 5(1)(e) to apply, the agency must establish that disclosure of the disputed document could reasonably be expected to endanger the life or physical safety of any person. I accept that the agency has a duty of care to its tenants. However, I am not persuaded by the agency's claims that disclosure of the disputed document could reasonably be expected to endanger the life or physical safety of the tenant of the particular property.
17. In my view, the likelihood of endangerment to life or physical safety is a remote possibility only. It seems to me that that result will only follow if a number of other pre-conditions exist. It would require, for example, that the disputed document be used for the purpose of facilitating a burglary, that a burglary should actually occur, that the tenant be in the property at the time, and so forth. I accept that such a result is a possibility. However, I consider that possibility too remote to amount to a reasonable expectation.
18. Therefore, the agency has not persuaded me that there is sufficient connection between the disclosure of the disputed document and the harm that the agency claims could follow from such disclosure. Accordingly, I find that the disputed document is not exempt under clause 5(1)(e).

(b) *Clause 5(1)(f)*

19. Clause 5(1)(f) provides that matter is exempt if its disclosure could reasonably be expected to endanger the security of any property. In its notice of decision on internal review, the agency accepted the complainant's argument that it is unlikely that he would apply for access to the document under the FOI Act and reveal his identity if he were planning to break into the property. However, the agency took the view that, as it could not restrict the use to which the document would be put subsequent to its disclosure, the agency should assess the likely risks from disclosing the document to the public in general.
20. Documents produced to me by the agency reveal that, prior to making its decision, the agency consulted the Bureau of Crime Prevention and Community Services Branch of the Police Service and the Neighbourhood Watch program

about the likely effects of disclosure. An officer from the Bureau of Crime Prevention expressed the view that disclosure would not endanger the security of a property, since most crimes are based on opportunity. An officer from the Community Services Branch also expressed the view that burglars are opportunists and would be unlikely to obtain house plans in order to commit a burglary, but that officer also expressed the view that disclosure of house plans could create a security risk. The Neighbourhood Watch representative expressed the view that disclosure of house plans would assist a person to break into a house by revealing the number and kind of entry points and their distance from the ground.

21. An applicant seeking access to a document under the FOI Act is not required to establish any antecedent reasons for seeking access and the right of access in the legislation is not affected either by any reasons the person gives for wishing to obtain access or by the agency's belief as to what the person's reasons might be (s.10(2)). Further, disclosure under the FOI Act is considered to be "disclosure to the world at large" because no restrictions or conditions can be attached to the disclosure of documents, or their further dissemination by a successful access applicant, other than those that apply under the general law.
22. The difficulty I face in determining this matter is that the complainant has explained that he seeks access to the document for a specific legitimate purpose. I accept that that is the purpose for which he intends to use the document and there is no evidence before me that disclosure of the document to the complainant could reasonably be expected to pose any risk of endangerment to the security of the property from the complainant. Material in the documents produced to me by the agency suggests that the agency shares that view.
23. Although floor plans of houses including room dimensions, are published regularly in newspapers and in promotional literature freely available from building firms, and particular house plans are made public from time to time (for example where additions to an existing home are proposed, or a new home is to be built), I accept that plans of particular existing houses are not generally publicly available and that the disputed document contains information that is not in the public domain.
24. Further, I accept that a plan of a house contains information that would be useful if any person was inclined to consider breaking into the property or otherwise causing a mischief to it. For example, a house plan would indicate relevant access points to the property and the interior rooms served by, or adjacent to, each of those access points. That information would assist a potential burglar to determine the best access point to facilitate the quickest and easiest access and egress to the property. On that basis, I am satisfied that the security of the property to which the disputed document relates could reasonably be expected to be endangered by its disclosure. Accordingly, I find that the document is exempt under clause 5(1)(f).

25. By way of comment, I understand that, following internal review, the complainant asked the agency for the opportunity to inspect the disputed document. He gave the agency his reasons for seeking inspection. In my view, those reasons were credible and legitimate. I consider that the agency could have dealt with his request at that time outside the FOI Act. Had it done so, it is possible that this complainant could have been avoided. Taking into account the agency's most recent offer to the complainant to allow inspection, subject to conditions, it seems to me that, in the circumstances, that would have been the most appropriate way to resolve this matter.

(c) Clause 3 - Personal information

26. The agency also claims that the disputed document is exempt under clause 3(1). Although I need not consider that claim in view of my finding that the document is exempt under clause 5(1)(f), I make the following comments in respect of it. Clause 3(1) provides that matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead). 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".

27. For the exemption in clause 3(1) to apply, the disputed document must reveal personal information, as defined in the FOI Act, about an individual. I have examined the disputed document. In my view, it does not contain personal information about any individual, nor could its disclosure reveal personal information about any individual. It contains information about a house. There is nothing on the face of that document that could be considered to be information of a personal kind about any person, nor do I consider that its disclosure would or could reveal personal information. No individual's identity is apparent or could reasonably be ascertained from the information contained in the document. Accordingly, it would not be exempt under clause 3(1).
