

## CAPELLI & FIEDUKOWICZ AND EAST FREMANTLE

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

**File Ref: 95135  
Decision Ref: D04895**

Participants:

**Peter Alexander Capelli and  
Janine Krystyne Fiedukowicz**  
Complainants

- and -

**Town of East Fremantle**  
Respondent

### DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - correspondence between the agency and the Parliamentary Commissioner for Administrative Investigations - Schedule 1 clause 14(1)(c) - matter of a kind mentioned in s.23(1) of the *Parliamentary Commissioner Act 1971* - refusal of access - correspondence between agency and its legal advisers - Schedule 1 clause 7 - legal professional privilege - document brought in existence for "sole purpose" of giving or obtaining legal advice - clause 3(1) - information provided by third parties - personal information about third parties - personal information about complainant - public interest factors for and against disclosure of personal information.

*Freedom of Information Act 1992 (WA)* ss.3(3), 21, 68(1), 72(1)(b), 75(1), 76(4), 102(1); Schedule 1 clause 3(1), 7, 8(2), 14(1)(c), 14(2).

*Parliamentary Commissioner Act 1971 (WA)* s. 23(1).

*Re Morton and City of Stirling* (Information Commissioner, WA, 5 October 1994, unreported).

*Re Read and Public Service Commission* (Information Commissioner, WA, 16 February 1994, unreported).

*Re Guyt and Health Department of Western Australia* (Information Commissioner, WA, 16 March 1994, unreported).

*Re Weeks and the Shire of Swan* (Information Commissioner, WA, 24 February 1995, unreported).

*Re Nazaroff and Department of Conservation and Land Management* (Information Commissioner, WA, 24 March 1995, unreported).

*Re Waghorn and Christmass and Police Force of Western Australia* (Information Commissioner, WA, 22 May 1995, unreported).

*Re Johnson and State Government Insurance Commission* (Information Commissioner, WA, 20 May 1995, unreported).

*Re Rehman and Medical Board of Western Australia* (Information Commissioner, WA, 1 August 1995, unreported).

*Re "E" and Department for Family and Children's Services* (Information Commissioner, WA, 29 August 1995, unreported).

*Re Michael and Attorney General* (Information Commissioner, WA, 14 September 1995, unreported).

*Re Coastal Waters Alliance of Western Australia Incorporated and Department of Environmental Protection and Cockburn Cement Limited* (Information Commissioner, WA, 28 September 1995, unreported).

*Grant v Downs* (1976) 135 CLR 674.

*Baker v Campbell* (1983) 153 CLR 52.

## DECISION

The decision of the agency is varied. In substitution it is decided that:

- Documents 7, 10, 13, 17, 21 and paragraphs two and three of Document 24 are exempt under clause 14(1)(c) of Schedule 1 to the *Freedom of Information Act 1992* ('the FOI Act');
- Documents 25, 26, 27 and 28 are exempt under clause 3(1) of Schedule 1 to the FOI Act;
- Documents 30, 33, 35-37, 39-41 and 43 are exempt under clause 7 of Schedule 1 to the FOI Act; and
- The parts of Document 32 described in paragraph 30 of this decision, are exempt under clause 7 of Schedule 1 to the FOI Act, but Document 32 is otherwise not exempt.

B.KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

3rd November 1995

## REASONS FOR DECISION

### BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Town of East Fremantle ('the agency') to refuse Mr Capelli and Ms Fiedukowicz ('the complainants') access to documents of the agency requested by them under the *Freedom of Information Act 1992* ('the FOI Act')
2. On 23 May 1995, the complainants applied to the agency under the FOI Act for access to copies of correspondence in relation to their property and a neighbouring property and general correspondence from January 1993 to the date of the application. On 6 July 1995, the agency granted the complainants access to 17 documents and refused access to other documents on the grounds that those documents were exempt under various clauses of Schedule 1 to the FOI Act. In addition, the agency determined that the charges for access would be \$338.40.
3. On 10 July 1995, the complainants sought internal review of the agency's decision. On 17 July 1995, Mr Beres Coley, principal officer of the agency, confirmed the initial decision of the agency that certain documents were exempt under clauses 3, 7, 8(2) and 14(1)(c) of Schedule 1 to the FOI Act. On 19 July 1995, the complainants applied to the Information Commissioner for external review of the agency's decision to deny them access to documents and in respect of the charges for access to other documents.

### REVIEW BY THE INFORMATION COMMISSIONER

4. On 25 July 1995, in accordance with my statutory obligation under s. 68(1) of the FOI Act, I notified the agency that I had formally accepted this complaint. In accordance with my authority under s.75(1) and s.72(1)(b) of the FOI Act, I required the agency to produce to me the originals of the documents in dispute, together with the agency's FOI file maintained in respect of the access application. I also required a further explanation of the basis for the charges calculated by the agency for dealing with the access application. The requested documents were delivered by hand to my office on 25 July 1995, and the explanation for the charges was provided to me on 7 August 1995.
5. On 8 September 1995, after examining the disputed documents and considering the submissions of the parties, I informed the parties of my preliminary view. It was my preliminary view that 4 documents were outside the ambit of the access application; other documents and parts of documents may be exempt under clauses 3(1), 7, 8(2) and 14(1)(c) of Schedule 1 to the FOI Act; some documents were not exempt as claimed; and the charges calculated by the agency were, in the circumstances, reasonable.

6. After receiving my preliminary view, the agency released to the complainants copies of those documents which, in my preliminary view, may not be exempt documents. The agency also accepted my preliminary view that its claims for exemption under clause 8(2) and some of its claims under clause 14(1)(c) for some documents had not been substantiated. The complainants withdrew that part of the complaint relating to documents which, in my preliminary view, were outside the ambit of their access application, and withdrew that part of their complaint relating to the charges imposed by the agency. Both parties made additional submissions following receipt of my preliminary view and both parties were given the opportunity to respond to the submission of the other party.
7. At the conclusion of that process, 20 documents remained in dispute. In my view, there is matter in those documents that is exempt matter either under clause 3(1), clause 7 or clause 14(1)(c) of Schedule 1 to the FOI Act as claimed by the agency. My reasons follow.

## **THE DISPUTED DOCUMENTS**

8. For the purpose of this decision, I have grouped the disputed documents into 3 categories according to the exemption claimed. The disputed documents are identified below by reference to the numbers on the schedule of documents provided to the parties by my office and are described as follows:

### **Group 1 Documents claimed to be exempt under clause 14(1)(c)**

Documents 7, 10, 13, 17, 21 and 24, comprising copies of correspondence between the agency and the Parliamentary Commissioner for Administrative Investigations ('the Ombudsman').

### **Group 2 Documents claimed to be exempt under clause 3(1)**

Documents 25, 26 and 27 comprising copies of letters of complaint from third parties to the agency, and Document 28, being a letter from the agency to a third party.

### **Group 3 Documents claimed to be exempt under clause 7**

Documents 30, 33, 35-37, 39-41 and 43, and parts of Document 32 comprising copies of correspondence between the agency and its legal advisers.

## **THE EXEMPTIONS**

### **(a) Clause 14(1)(c)**

9. Clause 14 (1)(c) provides that matter is exempt if it is "*matter of a kind mentioned in...section 23(1) of the Parliamentary Commissioner Act 1971.*" Section 23(1) of the *Parliamentary Commissioner Act 1971* provides:
- "(1) *Information obtained by the Commissioner or his officers in the course of, or for the purpose of, an investigation under this Act, shall not be disclosed except-*
- (a) *for the purposes of the investigation and of any report or recommendations to be made thereon under this Act; or*
- (b) *for the purposes of any proceedings for any perjury or any offence under the Royal Commissions Act 1968, or under this Act alleged to have been committed in any proceedings upon such an investigation.*"
10. There is no "public interest test" attached to this exemption. Hence the claim for exemption is established if the documents contain information of the kind described in paragraph 9 above.
11. Document 7 is a letter dated 29 November 1993, from the agency to the Parliamentary Commissioner for Administrative Investigations ('the Ombudsman'). From my examination of that document, and after consulting with the Ombudsman, I am satisfied that Document 7 contains information obtained by the Ombudsman during the course of, or for the purposes of, an investigation under the *Parliamentary Commissioner Act 1971*. Therefore, I find that document 7 is exempt under clause 14(1)(c) of Schedule 1 to the FOI Act.
12. Document 10 is a letter dated 23 December 1993 with hand-written annotations, from the Ombudsman to the Mayor of the agency. Document 21 is a copy of Document 10 without hand-written annotations. The Ombudsman has informed the agency and my office that he does not object to the disclosure of those two documents. However, from my own examination of Documents 10 and 21, I am satisfied that each contains information obtained by the Ombudsman during the course of, or for the purposes of, an investigation under the *Parliamentary Commissioner Act 1971*. Therefore, I find that Document 10 and Document 21 are exempt under clause 14(1)(c) of Schedule 1 to the FOI Act.
13. Document 13 is a copy of a letter dated 2 May 1994, from the Mayor of the agency to the Ombudsman. In the letter the agency addresses a number of points raised in previous correspondence by the Ombudsman. In my view, the agency's response to those matters of concern constitute information obtained by the Ombudsman during the course of, or for the purposes of, an investigation under the *Parliamentary Commissioner Act 1971*. Therefore, I find that Document 13 is exempt under clause 14(1)(c) of Schedule 1 to the FOI Act.
14. Document 17 is an attachment to Document 13. It consists of an undated "statement" from a third party. From my examination of that document, and the material before me, I am satisfied that Document 17 was obtained by the Ombudsman from the agency solely for the purpose of an investigation under the

*Parliamentary Commissioner Act 1971*. Therefore, I find that Document 17 is exempt under clause 14(1)(c) of Schedule 1 to the FOI Act.

15. Document 24 is an unsigned copy of a letter dated 25 January 1994, from the Town Clerk of the agency to the Ombudsman in response to the Ombudsman's letter of 23 December 1993 (Document 10). The agency claims that paragraphs two and three which have been deleted from that letter, consist of matter that is exempt under clauses 14(1)(c) and 14 (2) of Schedule 1 to the FOI Act. From my examination of that document, I am satisfied that the deleted matter consists of information obtained by the Ombudsman during the course of, or for the purposes of, an investigation under the *Parliamentary Commissioner Act 1971*. Therefore, I am satisfied that that matter is exempt under clause 14(1)(c) of Schedule 1 to the FOI Act. Whilst the agency has not provided any material to justify its claims for exemption under clause 14(2), and has not discharged its onus under s.102(1) of the FOI Act, as I have found that the two paragraphs deleted from Document 24 are exempt under clause 14(1)(c) it is unnecessary that I consider whether they may also be exempt under clause 14(2) of Schedule 1 to the FOI Act.
16. Finally, I note that the Ombudsman only objects to the disclosure of parts of Documents 7, 10, 13, 17, 21 and 24. In the Ombudsman's view, the most sensitive information obtained during the course of his investigation is the information which should not be disclosed to the complainants. Further, s.3(3) of the FOI Act provides an agency with the discretion to give access to matter which may be technically exempt under Schedule 1 to the FOI Act. In this instance, the agency has chosen not to exercise that discretion and claims exemption for all, or almost all of each of those documents. I am prevented by s.76(4) of the FOI Act, from making a decision to the effect that access is to be given to a document that is an exempt document. Therefore, although the Ombudsman has no strong objection to the disclosure of some parts of Documents 7, 10, 13, 17, 21 and 24, I must find those documents, or parts of documents, to be exempt under clause 14(1)(c) of Schedule 1 to the FOI Act, for the reasons given in paragraphs 9-15 above.

**(b) Clause 3(1)**

17. The agency initially claimed that Documents 25, 26, 27 and 28 were exempt, *inter alia*, under clause 14(1)(c). However, after being advised of my preliminary view on the matter, the agency now claims that Documents 25, 26, 27 and 28 are exempt under clause 3(1) of Schedule 1 to the FOI Act. The complainants were also advised that it was my preliminary view that Documents 25, 26, 27 and 28 were not exempt under clause 14(1)(c), but may be exempt under clause 3. Clause 3, so far as is relevant, provides:

**"3. Personal information**

***Exemption***

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



*Limits on exemption*

- (2)...
- (3)...
- (4)...
- (5)...

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

18. In the Glossary in Schedule 2 to 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."*

19. I have previously expressed the view that paragraphs (a) and (b) of the definition quoted in paragraph 18 above suggest that disclosure of matter must reveal something more about an individual than his or her name to attract the exemption in clause 3(1). In my view, the purpose of the exemption in clause 3 is to protect the privacy of individuals, the exemption being 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.

20. Documents 25 and 26 are letters of complaint from third parties to the agency about the complainant. Document 27 is an exact copy of Document 25. Document 28 is a letter from the agency to a third party responding to one of those complaints. I am satisfied, from my examination of Documents 25, 26, 27 and 28 that they contain personal information about third parties. I am also satisfied that there is personal information about the complainant in those documents. In my view, the personal information about third parties in the disputed documents is, *prima facie*, exempt matter under clause 3(1) of Schedule 1 to the FOI Act.

21. Where exempt matter consists of personal information about an access applicant as well as one or more third parties, it is necessary that I balance the public interest in an applicant having access to his or her personal information, which interest is enshrined in s.21 of the FOI Act as a factor in favour of disclosure to the applicant, against the public interest in maintaining the privacy of third parties. In this instance, the personal information about the complainants is so entwined with personal information about third parties that it is not possible, in my view, to provide the complainants with access to edited copies of those

documents in order to satisfy their right to access personal information about them.

22. The onus of persuading me that the disclosure of matter that is otherwise exempt under clause 3(1) would, on balance, be in the public interest, lies with the complainant. I have previously recognised a public interest in a person being informed of allegations made against him or her and being informed of any action taken in response to those allegations and the outcomes of an agency's inquiries. In response to my preliminary view, the complainants stated:

*“At no time has this agency ever informed us of any complaint or enquiry made against ourselves.*

*We have no correspondence or explanation or enquiry in regard to any such matters and therefore have not been given the opportunity to reply, explain or defend ourselves.”*

23. After receiving the complainants' response, I made further inquiries with the agency in respect of this aspect of the matter. The agency was unable to confirm that it had ever formally written to the complainants about any complaint or inquiry made against the complainants. However, the agency provided me with copies of additional correspondence between the Ombudsman and one of the complainants and informed me that the issues concerned were directly related to the matters about which the complainants have complained to the agency and subsequently, to the Ombudsman. The agency also provided me with copies of documents which the agency decided to release to the complainants but which the complainants have not yet collected from the agency. In my view, if the complainants had collected those documents they would be aware of the nature of the matters concerning them received by the agency.
24. I am informed by the agency that the matters relate to an on-going building dispute which dates back to 1991. From my examination of all of the material before me, I am satisfied that whilst the agency has not directly informed the complainants about the matters contained in Documents 25, 26, 27 and 28, it is clear that the complainants would be aware of the nature of the matters in dispute. I am also satisfied, from my examination of all of the material before me, including the disputed documents, that the complainants have been given an opportunity to respond to the issues concerning the building dispute: (*contra* the position of the complainant in my decision in *Re Morton and City of Stirling* (5 October 1994, unreported), at paragraph 37).
25. In my view, there is a public interest in maintaining the peace between parties involved in neighbourhood disputes of this nature, especially in circumstances where the disclosure of documents may exacerbate that dispute. In balancing the competing interests, I consider that public interest, together with the public interest in maintaining the privacy of third parties, should prevail. Accordingly, I find that Documents 25, 26, 27 and 28 are exempt under clause 3(1) of Schedule 1 to the FOI Act.

(c) **Clause 7**

26. The agency also claims that Documents 30, 33, 35, 36, 37, 39, 40, 41 and 43 and parts of Document 32 are exempt under clause 7 of Schedule 1 to the FOI Act. Clause 7 provides:

*"Legal professional privilege*

*Exemption*

- (1) *Matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege.*

*Limit on exemption*

- (2) *Matter that appears in an internal manual of an agency is not exempt matter under subclause (1)."*

27. In a number of my previous formal decisions, I have discussed the principle and application of legal professional privilege: *Re Read and Public Service Commission* (16 February 1994, unreported), at paragraphs 65-66; *Re Guyt and Health Department of Western Australia* (16 March 1994, unreported), at paragraphs 11-18; *Re Weeks and the Shire of Swan* (24 February 1995, unreported), at paragraphs 15-20; *Re Nazaroff and Department of Conservation and Land Management* (24 March 1995, unreported), at paragraphs 15-19; *Re Waghorn and Christmass and Police Force of Western Australia* (22 May 1995, unreported), at paragraphs 19-36; in *Re Johnson and State Government Insurance Commission* (20 May 1995, unreported), at paragraphs 20-24; *Re Rehman and Medical Board of Western Australia* (1 August 1995, unreported), at paragraphs 59-73; *Re "E" and Department for Family and Children's Services* (29 August 1995, unreported), at paragraphs 22-23, 25 and 26; *Re Michael and Attorney General* (14 September 1995, unreported), at paragraphs 24-28; *Re Coastal Waters Alliance of Western Australia Incorporated and Department of Environmental Protection and Cockburn Cement Limited* (28 September 1995, unreported), at paragraphs 38-59.
28. It is clearly established law in Australia that confidential communications passing between a legal adviser and his or her client need not be given in evidence or otherwise disclosed by the client and, without the client's consent, may not be given in evidence or otherwise disclosed by the legal adviser, if made for the sole purpose of enabling the client to obtain, or the adviser to give, legal advice or for use in existing or anticipated legal proceedings: *Grant v Downs* (1976) 135 CLR 674; *Baker v Campbell* (1983) 153 CLR 52.
29. From my examination of Documents 30, 33, 35-37, 39-41 and 43, I am satisfied that each is a communication between an officer of the agency and the agency's legal advisers. I am also satisfied that they are confidential communications between the agency and its legal advisers for the sole purpose of seeking and

giving legal advice. I am, therefore, satisfied that those documents would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find each of those documents is exempt under clause 7 of Schedule 1 to the FOI Act.

30. Document 32 is a note of costs payable to the legal advisers by the agency. In my view, some of the details in that document if disclosed, would reveal something of the nature of the advice sought and given. That is, in my view, certain of the details in that document reveal the nature of the confidential communications between the agency and its legal advisers. However, if those details were deleted from Document 32, the balance of the document, in my view, would not be privileged from production in legal proceedings on the ground of legal professional privilege. I consider it is practicable to delete exempt matter from Document 32 and to provide the complainants with access to an edited copy of that document. The details which I find to be exempt matter under clause 7 comprise the following:

- \* the name appearing at the end of the line below the line alongside the date "21.04.94" and after the name "Mr Coley";
- \* the words appearing directly alongside the date "24.08.94"; and
- \* the first entry under the heading "Disbursements".

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