

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

**File Refs: F2004081  
Decision Ref: D0032006**

Participants:

**Dan Mossenson, Diane Susan  
Mossenson, Kevin Shaw, Eugene  
O'Doherty, Budubarri (aka Joe  
Green), Frank Kitpi, Thalma (aka  
Kitty Green) and Nyilma (aka  
Annie Nada)**

Complainants

- and -

**Kimberley Development  
Commission**

Respondent

**DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access and access to edited copies – documents relating to an art exhibition – clause 3(1) – whether disclosure of the disputed information would reveal personal information about third parties – clause 3(3) - whether the disputed information is ‘prescribed details’ relating to officers of agencies - clause 3(6) - whether disclosure would be in the public interest.

*Freedom of Information Act 1992 (WA)*: sections 32, 74, 102(3); Schedule 1, clauses 3(1), 3(2), 3(3), 3(4), 3(5), 3(6).

*Freedom of Information Regulations 1993 (WA)*: regulation 9(1).

*Re Winterton and Police Force of Western Australia* [1997] WAICmr 15.

*Re Schatz and Department of Treasury and Finance* [2005] WAICmr 8.

## DECISION

The decision of the agency is confirmed. The disputed information in the requested documents, as detailed in paragraph 12 of my reasons for decision, is exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*.

D A WOOKEY  
A/INFORMATION COMMISSIONER

16 February 2006

## REASONS FOR DECISION

1. This complaint arises from a decision made by the Kimberley Development Commission ('the agency') to refuse access to one document and to give access to an edited copy of another document to Dan Mossenson, Diane Susan Mossenson, Kevin Shaw, Eugene O'Doherty, Budubarri (aka Joe Green), Frank Kitpi (or Kidby), Thalma (aka Kitty Green) and Nyilma (aka Annie Nada) ('the complainants'), on the ground that that document and information is exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992* ('the FOI Act').

## BACKGROUND

2. I understand that:
  - Mr Dan Mossenson and Dr Diane Mossenson trade as "Indigenart", a gallery specialising in indigenous art with two outlets in Perth;
  - Mr Kevin Shaw is an anthropologist, art documenter and promotions and media facilitator;
  - Mr Eugene O'Doherty is a fine arts facilitator and production manager; and
  - Budubarri (aka Mr Joe Green), Mr Frank Kitpi, Thalma (aka Mrs Kitty Green), Nyilma (aka Mrs Annie Nada) are artists collectively known as the Yarri Yarri Artists.
3. I understand that, in late October 2003, Indigenart invited the former Minister for the Kimberley, Pilbara and Gascoyne ('the Minister') to open an exhibition of works of art by "the Loomas from Derby" at its Fremantle gallery on 11 December 2003. In the event, the Minister did not open the exhibition.
4. On 27 January 2004, Mr Mossenson, as the complainants' lawyer, applied to the agency on behalf of the complainants, under the FOI Act, for access to copies of:
  1. *All responses or replies sent by the Commission and/or by John Silver to the Honourable TG Stephens BA MLC Minister for the Kimberley and the Minister's office in connection with the exhibition 'Kimberley Desert' which the Minister was scheduled to open at Indigenart Fremantle on 11 December 2003.*
  2. *All responses which the Commission or John Silver received in pursuing any enquiries which were made as a consequence of both the Minister's and his office's requests or instructions*

*relating to the background to any of my clients in connection with the exhibition.”*

John Silver is an officer of the agency.

5. The agency identified two documents as within the scope of the access application. On 19 March 2004, the agency refused the complainants access to Document 1 but gave them access to an edited copy of Document 2. The agency claimed that Document 1 was exempt in full under clauses 3, 4(2) and 8(2) of Schedule 1 to the FOI Act and that the information deleted from Document 2 was exempt under clause 3.
6. On 23 April 2004, the agency confirmed its decision but then claimed that Document 1 was exempt under clause 4(3) rather than clause 4(2). On 30 April 2004, the complainants applied to the Information Commissioner, seeking external review of the agency’s decision.

#### **REVIEW BY THE A/INFORMATION COMMISSIONER**

7. I obtained the disputed documents and the agency’s FOI file from the agency. Having examined the latter, I considered that two additional documents came within the scope of the access application.
8. Following further consultation and inquiries with the agency, on 7 October 2005, I provided the parties with a detailed letter setting out my preliminary view of this complaint and my reasons for that view. My preliminary view was that certain specified information in Documents 2 and 3 was not within the scope of the access application and that other specified information in the four disputed documents was exempt under clause 3(1), but that it was practicable to give access to edited copies of those documents, in accordance with section 24 of the FOI Act, as set out in my letter.
9. The agency accepted my preliminary view and gave the complainants access to the disputed documents edited in the manner proposed. The complainants did not accept my preliminary view and advised that they wanted access to the deleted information. However, the complainants made no further submissions to me in respect of that information.
10. In addition, my office contacted two third parties to seek their views on certain information about them that had been deleted from the disputed documents. One of those third parties has now consented to the disclosure of the information concerning him, which is contained in paragraph 9 of Document 3. As a result, the agency withdrew its claim for exemption for that information, which is no longer in dispute between the parties, and I need not deal with it further. The other third party did not seek to be joined as a party to this complaint and did not make any submissions to me.

## THE DISPUTED INFORMATION

11. The four documents, the subject of this complaint, are described as follows:

**Document 1** is a two-page briefing note, dated 27 November 2003.

**Document 2** is a one-page memorandum, dated 7 November 2003 and a one-page unsigned letter from Indigenart to the Minister, dated 28 October 2003.

**Document 3** is page 1 of an undated file note.

**Document 4** is a series of internal e-mails between officers of the agency, dated 21-25 November 2003.

12. The disputed information in Documents 1-4 is set out below:

### Document 1

- The first three words in paragraph 1 on page 1.
- The first two sentences in paragraph 2 on page 1.
- Lines 1 and 2 and the first word in line 3 of paragraph 4 on page 1.
- The words in brackets in line 2 of paragraph 5 on page 1.
- The last three words on line 1 and all of lines 2 and 3 of paragraph 6 on page 1.
- Words 4-7 of line 3 of paragraph 7 on page 1.
- All bar the last six words of line 1 and the first ten words of line 2 in paragraph 8 on page 2.
- The signature on page 2.

### Document 2

- The e-mail address in line 10 of the memorandum.
- The name in the signature block of the letter.

### Document 3

- Words 2-8 in line 1; word 3 in line 2; the names in words 2 and 7 (and word 8 in brackets immediately following) in line 5 of paragraph 2.
- All of line 1; words 1, 2 and 3 in line 2; all bar the first and last words of line 5; the last six words of line 6; and the first four words of line 7 of paragraph 3 (numbered 1).
- The first sentence of paragraph 4 (numbered 2).
- The first five words of line 1; the last six words of line 2; and all of line 3 of paragraph 5 (numbered 3).
- The first ten words of line 1; words 5-9 of line 2; and the last sentence of paragraph 6 (numbered 4).
- The first two words of paragraph 7 (numbered 5) and all of the dot point appearing immediately after.

- The names in paragraph 10.
- Words 2 and 3 in line 1 and the first word in line 2 of paragraph 11.

#### Document 4

- The e-mail addresses wherever they appear.
- The second sentence of paragraph 1 of the second e-mail on page 1.
- Paragraph 3 of the third e-mail on page 2.
- All of paragraph 5 of the third e-mail on page 2, except words 10-14 of line 1, words 1-6 of line 2 and line 3.
- All of paragraph 6 of the third e-mail on page 2.
- Lines 2 and 3 of paragraph 7 of the third e-mail on page 2.
- The names in paragraph 8 of the third e-mail on page 2.
- Paragraph 3 on page 4.
- All bar words 10-14 in line 1 and words 1-6 in line 2 of paragraph 5 on page 4.
- All of paragraph 6 on page 4.
- Lines 2 and 3 of paragraph 7 on page 4.
- The names in paragraph 8 on page 4.

### **THE EXEMPTION CLAIMED**

13. The agency claims that the disputed information is exempt under clause 3(1) of Schedule 1 to the FOI Act.

#### **Clause 3 – personal information**

14. Clause 3 provides:

**“3. *Personal information***

***Exemption***

- (1) *Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).*
- (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.”*
- 15. The Glossary to the FOI Act defines the term ‘personal information’ 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”.*
- 16. The definition of ‘personal information’ makes it clear that any information or opinion about a person whose identity is apparent or can reasonably be ascertained is exempt under clause 3(1), subject to the application of the limits on exemption in subclauses 3(2) – 3(6) of Schedule 1 to the FOI Act.
- 17. In my view, the purpose of the exemption in clause 3(1) is to protect the privacy of individuals about whom information may be contained in documents held by State and local government agencies.

## **Consideration**

- 18. I have examined Documents 1-4 and considered the disputed information. In my view, that information would, if disclosed, reveal personal information about a number of individuals other than the complainants, including some of their names, a signature, their contact details and details about their activities

from which their identities could be ascertained. That kind of information is *prima facie* exempt under clause 3(1).

19. The agency submits that, although some of the disputed information makes no mention of particular individuals, the identities of third parties could reasonably be ascertained from the context of information in the documents and particular circumstances which I cannot disclose in accordance with the obligations imposed on me by section 74 of the FOI Act. Section 74(2) requires me to ensure that, among other things, exempt matter is not included in a decision on a complaint or in reasons given for a decision.
20. Having examined the disputed information in Documents 1, 3 and 4, I consider that the identities of certain third parties could reasonably be ascertained from that information, although some of the third parties are not referred to by name. However, I am unable to give detailed reasons without disclosing information that is claimed to be exempt, which I am prohibited from doing by section 74 of the FOI Act.

### **The limits on exemption**

21. In my view, the limits on exemption in clauses 3(2), 3(4) and 3(5) of Schedule 1 to the FOI Act do not apply because the disputed information does not contain any personal information about the complainants and there is nothing before me to show that it concerns persons who perform or who have performed services for an agency under a contract for services or that the third parties identified in that information have consented to their personal information being disclosed to the complainants.
22. In my opinion, the only limits on exemption that might apply to the disputed information are those set out in clauses 3(3) and 3(6).

### **Clause 3(3)**

23. Clause 3(3) provides that information is not exempt under clause 3(1) ‘merely’ because its disclosure would reveal certain ‘prescribed details’ about persons who are, or have been, officers of agencies. In my view, the use of the term ‘merely’ in clause 3(3), according to its ordinary dictionary meaning, means ‘solely’ or ‘no more than’, for example, an officer’s name or position. The prescribed details are listed in regulation 9(1) of the *Freedom of Information Regulations 1993* (‘the Regulations’) as follows:

*“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".*
24. I agree with the decision in *Re Winterton and Police Force of Western Australia* [1997] WAICmr 15, in which the former Information Commissioner determined that handwritten signatures are generally exempt under clause 3(1). I consider that clause 3(3) does not apply to the handwritten signature of an officer which, in my view, is personal to the individual concerned and relates to more than merely the officer's work as an officer. Consequently, I do not consider the signature on page 2 of Document 1 to be a prescribed detail for the purposes of clause 3(3).
25. Further, I do not consider that the e-mail addresses - which appear in Documents 2 and 4 - are prescribed details as described in any of the paragraphs of regulation 9(1) of the Regulations, since they appear to be the direct e-mail addresses of particular officers rather than the general address of the agency concerned. Although they are information relating to the work of those officers rather than their personal lives, they are nonetheless personal information as defined in the FOI Act and, in my view, they are not prescribed details for the purposes of the limit in clause 3(3). Accordingly, I consider that the limit in clause 3(3) does not apply to those e-mail addresses.
26. Following my preliminary view of this complaint, I caused further inquiries to be made in relation to certain information in Documents 1 and 3, which appeared to be personal information about individuals who were officers of government agencies and my office consulted the relevant third parties, pursuant to section 32 of the FOI Act. As noted previously, one of those third parties consented to the disclosure of information about him. However, the other third party did not consent to the disclosure of the relevant information or provide me with submissions.
27. I obtained a copy of that person's job description document and, as a result of my inquiries and my examination of the job description document, I am satisfied that the other third party is an officer of an agency for the purposes of the FOI Act. However, I am also satisfied that the information deleted from paragraph 4 of Document 1 and paragraph 11 of Document 3 concerning that person is not information that is prescribed details for the purposes of clause 3(3). In my view, that information would not 'merely' reveal prescribed details about that person because it goes beyond the kind of information set out in regulation 9(1) and, consequently, I consider the limit on exemption in clause 3(3) applies to the relevant information in Documents 1 and 3.

### ***Clause 3(6)***

28. Clause 3(6) provides that information is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. Pursuant to s.102(3) of the FOI Act, the onus is on the complainants to establish that it would, on balance be in the public interest to disclose the disputed information to them.

Despite being advised by me of that onus, the complainants have made no submissions to me addressing the public interest issue.

29. Applying the “public interest test” involves identifying those public interest factors that favour disclosure and those that favour non-disclosure, weighing them against each other and making a judgment as to where the balance lies. The question for my determination is whether the disclosure of the disputed information would be of some benefit to the public generally and whether such public benefit is sufficient to outweigh the strong public interest in maintaining the personal privacy of individuals.
30. In favour of disclosure, the agency acknowledges that there is a public interest in access applicants being able to exercise their rights of access to documents under the FOI Act. Weighing against disclosure, the agency notes that there is a public interest in protecting the personal privacy of individuals. In weighing the competing interests, the agency submits that, on balance, the strong public interest in protecting personal privacy outweighs any countervailing interest in the disclosure of the disputed information.
31. I consider that there is a strong public interest in maintaining personal privacy. The significance of that public interest is recognised by the inclusion in the FOI Act of the clause 3 exemption and, in my view, that public interest may only be displaced by some other stronger and more persuasive public interest that requires the disclosure of personal information about one person to another person. As I noted in *Re Schatz and Department of Treasury and Finance* [2005] WAICmr 8 at paragraph 30: “[t]he FOI Act is intended to make governments, its agencies and officers more accountable, not to call to account or unnecessarily intrude upon the privacy of private individuals”.
32. Of particular relevance to this case, weighing in favour of disclosure, I recognise a public interest in the accountability of agencies for the manner in which they discharge their functions and obligations on behalf of the public in Western Australia. In my view, that accountability includes informing the public, where possible, of the basis for decision-making and the material considered relevant to the decision-making process. I also consider there to be a public interest in people whose interests have been directly affected by a decision or action of a government agency being as fully informed as possible of the reasons for the decision or action and the material on which it was based, in furtherance of the public interests in, among others: the accountability of agencies for their actions; private individuals being - and being seen to be - fairly dealt with by government; and the maintenance of the public’s trust in its government and agencies.
33. However, in this case, I consider that those public interests have been adequately served by the disclosure already made to the complainants by the agency releasing edited copies of Documents 1-4 to them.
34. In respect of the personal information, as defined, concerning some particular third parties I have identified to the agency, I am of the view that some of it, but not necessarily all of it, may well be known to the complainants.

However, it is, nonetheless, personal information about those people and I do not consider that any of the public interests in favour of disclosure identified above requires the disclosure of personal information about those people. Therefore, I find that the information about those people - which is contained in the first two sentences of paragraph 2 and the first two sentences of paragraph 4 on page 1 of Document 1, the third paragraph of the main e-mail on page 2 and the third paragraph on page 4 of Document 4 - is exempt under clause 3(1).

35. In respect of the personal information concerning the two individuals named in paragraph 1 on page 1 and the second sentence of paragraph 9 on page 2 of Document 1; the signature block in the letter in Document 2; paragraph 10 of Document 3; paragraph 8 of the main e-mail on page 2 of Document 4; and paragraph 8 on page 4 of Document 4, it seems to me that the balance of the public interests is different.
36. Given the nature of the information and the likelihood that it would be known to some of the complainants, it does not appear to me that disclosure of the information about those two named people in the documents would involve any real impingement on their personal privacy and, therefore, the public interest in maintaining personal privacy is not as strong as I consider it to be in respect of other information contained in the documents.
37. However, although that information may be known to some of the complainants, it may not be to the others. In any event, disclosure under the FOI Act is considered to be disclosure to the world at large as no conditions can be attached by an agency to the use to which documents released under FOI may be put. Further, I am not persuaded that any of the public interests favouring disclosure require the disclosure of the identities of those two people. Therefore, I find that that information is exempt under clause 3(1).
38. Clearly, with regard to the e-mail addresses in Documents 2 and 4, there is a public interest in members of the public - and, in particular, members of the public transacting business of some kind with the government - being able to contact agencies and relevant officers. However, I do not consider that public interest to require that members of the public have the direct contact details of officers, unless those officers - or the agency concerned as a matter of policy - choose to provide them.
39. Weighing against disclosure is the public interest in public officers being able to manage their work so that they can discharge their duties in an efficient and effective manner. Given that the telephone directory, both in hard copy and online, provides telephone numbers and a website address for the agency, and given that its website contains an e-mail address for the agency as well as a form by which people can contact the agency by e-mail, I do not consider that the public interests in the accessibility of agencies and their officers require the disclosure of the officers' individual e-mail addresses. Therefore, I find that the e-mail addresses in Documents 2 and 4 are exempt under clause 3(1).

40. In respect of the remainder of the personal information in question, in weighing the competing public interests, I am not persuaded that those favouring disclosure require the identities of, and personal information about, those individuals who voluntarily gave information to the agency at the request of the agency to be disclosed - particularly given that there is some evidence before me that those persons were given assurances of confidentiality, at least as to their identities. Therefore, I find that the disputed information which would reveal the identities of the private individuals who gave particular information is exempt under clause 3(1).
  
41. For those reasons, in balancing the competing public interests, based on the material available to me, it appears to me that the strong public interest in protecting the personal privacy of the third parties is not outweighed by the public interests favouring disclosure in this instance. I therefore find that the disputed information listed in paragraph 12 above is exempt under clause 3(1) of Schedule 1 to the FOI Act.

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