

Participants:

K
Complainant

- and -

City of Canning
First Respondent

- and -

L
Second Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to a councillor’s travel expense claims – clause 3(1) – personal information – clauses 3(3) – prescribed details – clause 3(6) – whether disclosure on balance in the public interest.

Freedom of Information Act 1992: sections 3(1)(b), 10 (1), 10(2), 39(3)(a), 66(3), 102(2), 102(3); Schedule 1, clauses 3(1), 3(3), 3(6) and 5(1)(e),

Freedom of Information Regulations 1993: regulation 9(1))

Local Government Act (Rules of Conduct) Regulations 2007: regulation 3(1)(e)

DPP v Smith [1991] 1 VR 63

Re Swift and Shire of Busselton [2003] WAICmr 7

Re Mallet and Edith Cowan University [2007] WAICmr 22

Re V and Department of Premier and Cabinet [2010] WAICmr 7

DECISION

The respondent's decision to give access in full to documents is varied. I find that the disputed information is not exempt under clause 3(1) of Schedule 1 to the FOI Act except for the name of a third party appearing as part of a fax header in Documents 17 – 19, 21 – 22 and 24 – 30 of the list of documents in the Appendix to this decision.

Sven Bluemmel
INFORMATION COMMISSIONER

12 January 2012

REASONS FOR DECISION

1. This complaint arises from a decision made under the *Freedom of Information Act 1992* ('the FOI Act') by the City of Canning ('the agency') to grant L ('the applicant') access in full to certain documents. K ('the complainant') applied to the Information Commissioner for external review of the decision to grant access.

BACKGROUND

2. The complainant is a councillor of the agency. The applicant is a ratepayer in the City of Canning.
3. By letter dated 16 May 2011, pursuant to the FOI Act, the applicant applied to the agency for access to the following:

"Each document titled, Members Travelling and Telephone Expenses Claim, under Section 5.98, claimed by [the complainant], between the dates 1st July 2008 and 16th May 2011 ..."

4. The agency advised the complainant of the request, stating that it had identified documents for the period and sought the views of the complainant regarding release of the requested documents. On 13 June 2011, the complainant advised the agency of the complainant's objection to the release of that information and made submissions about why the documents should not be released.
5. On 15 June 2011, the CEO of the agency notified the applicant and complainant of the agency's decision to grant access in full to 32 travelling and expense claims. As the CEO is the principal officer of the agency, there was no right of internal review (see s.39(3)(a) of the FOI Act). Consequently, the CEO advised the applicant and complainant of the complainant's right to apply for external review to the Information Commissioner. Pursuant to s.66(3) of the FOI Act, all third parties have 30 days after being given written notice of the agency's decision in which to lodge a complaint against that decision with the Information Commissioner.
6. On 11 July 2011, the complainant applied to me for external review of the agency's decision.

REVIEW BY INFORMATION COMMISSIONER

7. Following the receipt of this complaint, I required the agency to provide me with the originals of the disputed documents and its FOI file maintained in respect of the applicant's access application.
8. In my opinion, the agency's decision was defective because it did not comply with s.30(f) of the FOI Act; in particular it did not refer to the relevant provision nor did it set out the agency's findings on the material questions of fact underlying its reasons for the release of the material. To enable the complainant

to understand why the documents should be released, the agency should have provided the complainant with information to show why it believed that the documents are not exempt matter.

9. By letter dated 25 July 2011, the applicant made submissions about why the documents should be released. On 29 July 2011, the applicant was joined as a party to this matter. By letter dated 9 August 2011, the applicant agreed to narrow the scope of his application to exclude any signatures, personal contact details and vehicle registration plate details contained in the disputed documents.
10. On 28 November 2011, my officer advised the complainant that, in her view, it appeared on balance to be in the public interest to release the disputed documents. She wrote to the complainant on 30 November 2011 inviting the complainant to make further submissions, if the complainant wished to pursue this matter.
11. By letter dated 6 December 2011, the complainant confirmed that he maintained the complaint and provided further written submissions on the matter.
12. On 16 December 2011, I provided the parties with a letter setting out my preliminary view of the agency's decision that the documents are not exempt under clause 3(1) of Schedule 1 to the FOI Act. On the information before me, my preliminary view was that, except for a small amount of matter described in the body of that letter, the disputed information is not exempt under clause 3(1) of Schedule 1 to the FOI Act.
13. I invited the parties to provide me with submissions in response to my preliminary view. The agency did not make any submissions. The applicant provided further submissions on 19 December 2011 and the complainant made further submissions on 30 December 2011.

THE DISPUTED MATTER

14. The disputed documents consist of 32 forms entitled "*Members Travelling and Telephone Expenses Claim Section 5.98*" and attached supporting documentation (rail and parking tickets). A numbered list of the 32 forms, identifying the forms by date, is attached as an appendix to this decision.
15. Although the title of the form suggests that telephone expenses are included on those forms, the forms have been completed only in relation to travel expenses. Information on the form includes: the member's name, the make of vehicle, registration number, vehicle displacement (selection from three categories), date of travel, particulars of travel, kilometres claimed, signature of the claimant and the calculations for, and amount of, the reimbursement. Fax details are visible at the top of each form, which include the date, time, fax number, sender name and page number. The forms are also stamped with a receipt date and record identification stamp.

16. As the scope of the access application has been reduced, the disputed matter consists of all of the information on the forms except for any signatures, personal contact details and vehicle registration plate details.

CLAUSE 3 – PERSONAL INFORMATION

17. The complainant submits that the disputed documents are exempt under clause 3(1) of Schedule 1 to the FOI Act. Clause 3, insofar as it is relevant, provides:

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

(2) ...

(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.*

...

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

18. The term ‘personal information’ is defined in the Glossary to the FOI Act 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 finger print, retina print or body sample”.*

19. 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. The definition of ‘personal information’ in the Glossary makes it clear that ‘personal information’ is information about an identifiable person.

The agency's submissions

20. In its notice of decision dated 15 June 2011, the agency's decision maker stated that:

"... having examined [the third party councillor's] reasons for objecting to the release of the requested documents, I can see no basis under the FOI Act as to why the request for the documents are an exempt matter and therefore should not be released."

21. From that I understand the agency has relied on the matter in the disputed documents being 'prescribed details' under clause 3(3), which are not exempt under clause 3(1).

The applicant's submissions

22. The applicant's submissions contained in his correspondence to me are, in essence, that public officers should have no objection to disclosing information to show that public monies are being spent in accordance with the appropriate rules. He also submits that he believes that travel expense forms are not subject to scrutiny by the agency prior to reimbursement.

The complainant's submissions

23. The complainant provided this office with copies of extracts from various Ordinary Council Meeting Minutes dated from between 21 October 2008 to 27 September 2011, which demonstrated that the applicant frequently asks questions in council question time. The complainant believes the Minutes demonstrate the efforts of the applicant to intimidate the complainant. The complainant believes the applicant has been unreasonable in his actions towards council officers and some councillors over this period. The complainant also stated that it is *"grossly unfair that one councillor is highlighted in regards his mileage claims with no reason given"*. Further, in a telephone conversation with my officer, the complainant raised concerns that release of the documents may result in the applicant resuming his alleged unreasonable conduct towards the complainant in Council meetings.
24. The complainant submits that the access applicant is seeking the information, not in the public interest, but *"as a personal matter"* and stated *"I am of the view the travel claims of a single council member as opposed to all members of Canning Council, would not be of public interest and no public benefit would be served by their release."* In addition, the complainant advised that any claims made by a councillor are for 'personal expenses' while on Council duty, which are presented, verified and processed before being approved by Council. The complainant submits that this is a personal matter between the councillor and the agency and is not a matter of public interest. The complainant further submits that the application is *"an individual interest by this person ... and cannot be construed as 'public interest'"*.

25. In response to my preliminary view letter, the complainant further submits that the applicant cannot be acting in the public interest in applying for access to the disputed documents because he was not connected with a “*credible community body or association*”, nor does he disseminate to the public the information he gains from answers to questions at council meetings. The complainant also submits that pursuant to s.102(3) the onus should be on the applicant to show he is acting in the ‘public interest’.

Consideration

26. Having examined the disputed documents, I consider that they all contain matter that is personal information (as defined in the Glossary to the FOI Act) about the complainant because the complainant’s identity is apparent from those documents. This means that the disputed documents are *prima facie* exempt under clause 3(1) because their disclosure would reveal personal information about the complainant.
27. In addition, in the disputed documents numbered 17-19, 21-22 and 24-30 in the Appendix, the name of a third party appears at the top or bottom of the documents. The disclosure of this name was not specifically considered by the CEO of the agency in his notice of decision. My officer has made enquiries with the agency about why this name appears on the faxed forms. I am advised that when the complainant’s fax machine was broken, the complainant was supplied with a fax machine that had belonged to a former councillor and the information automatically generated by this fax machine was not altered to reflect that the complainant was now the user. This additional third party information is also *prima facie* exempt under clause 3(1) because its disclosure would reveal personal information about that former councillor.
28. I consider the only limits on the exemption under clause 3(1) that are relevant to this matter are clauses 3(3) and 3(6) of Schedule 1 to the FOI Act.

Clause 3(3)

29. Clause 3(3) provides that information is not exempt merely because its disclosure would reveal prescribed details relating to an officer’s (or former officer’s) functions as an officer. It relates to individuals who are, or have been, officers of ‘an agency’. In *Re Swift and Shire of Busselton* [2003] WAICmr 7, the former Commissioner at [16] concluded that a local government councillor was a ‘member of the agency’ and therefore an ‘officer of an agency’ where the agency was a local government:

“The FOI Act does not define ‘member’ but the Australian Concise Oxford Dictionary, at p.836, defines that word to include “a person formerly elected to take part in the proceedings of certain organisations”. Further, s.1.4 of the L[ocal] G[overnment] Act defines the word ‘member’, in relation to the council of a local government, as being an elector mayor or president or councillor. I consider that the plain meaning of ‘member’ includes a person formally elected as a councillor or president of a local government. In the FOI Act, the words ‘officer of an agency’ are defined to include a member of

that agency. Accordingly, I am satisfied that the Shire President is a member of the agency, and therefore, an officer of the agency for the purposes of the FOI Act.”

30. In my view, the use of the word ‘merely’ in clause 3(3), means - according to its ordinary dictionary meaning - ‘solely’ or ‘no more than’ prescribed details.
31. Regulation 9(1) of the *Freedom of Information Regulations 1993* (‘the Regulations’) sets out the prescribed details in relation to a person who is, or has been, an officer of an agency, 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”.*

32. Having examined the disputed documents, I consider that certain information within the documents would do no more than ‘merely’ reveal prescribed details about the complainant. That information is the councillor’s name and the information contained in the column headed ‘Particulars of Travel’ on the form, which includes references to the councillor’s attendances at various places and events in the course of performing functional duties as an elected member.
33. However, in my view, information such as distances travelled, vehicle make and size, and travel expenses claimed, goes beyond the kind of information listed in (a)-(e) of regulation 9(1) of the Regulations. It is personal information that does not amount to prescribed details and, therefore, the limit in clause 3(3) does not apply to that information.
34. In my view, the third party name appearing as part of a fax header in 12 of the disputed documents does not amount to prescribed details. While the matter is the name of a former officer of an agency, its presence suggests that this third party sent the fax when the third party was no longer an officer of the agency. The explanation of its presence provided by the agency is that the inclusion of the name was not because the third party had sent the fax, but because the third party had previously had possession and use of the fax machine and had returned it to the agency when the third party ceased to be a councillor. At a later date the fax machine was lent to the complainant without the fax machine being altered to prevent the name of the former councillor being automatically generated as part of the fax header when a fax was sent.

35. In *Re Mallet and Edith Cowan University*, [2007] WAICmr 22, the former A/Commissioner considered whether the names of University officers, included in Minutes of a University meeting, were prescribed details that were not exempt under clause 3(3). Several of the officers disputed that they had attended the meeting. The former Commissioner stated at [37- 43]:

“Regulation 9(1) relates to individuals who are or have been officers of ‘an’ agency... In this case, it appears on the face of the disputed document that the personal information about the third parties merely discloses certain prescribed details about a person who is or has been an officer of an agency... Clause 3(3) provides that information is not exempt as personal information under clause 3(1) merely because its disclosure would reveal certain prescribed details about a person who is or has been an officer of an agency... Taking into account the fact that it has not been clearly established that the requested document is a true and accurate record of the agency and in view of the disputed nature of the information recorded in that document, I am not satisfied that the disputed matter consists of prescribed details of the kind referred to in regulation 9(1).”

36. In my opinion, the third party name, automatically generated as part of the fax header in documents 17-19, 21-22 and 24-30, does not fall under the clause 3(3) because, on the information available, it is not in itself an accurate record of the role played by the third party in the relation to the disputed documents. Therefore, its disclosure would do more than merely disclose prescribed details.
37. In summary, I consider the information such as that in the ‘Particulars of Travel’ column in the disputed documents is not exempt under clause 3(1), being prescribed details, but that other information such as travel expenses claimed and the third party name are not prescribed details.
38. Matter that is not exempt under clause 3(3) - being ‘prescribed details’ - is not subject to consideration about whether or not disclosure would be in the public interest. The public interest referred to in clause 3(6) cannot result in matter that is otherwise not exempt, becoming exempt.

Clause 3(6)

39. I have considered clause 3(6) in relation to the disputed information that is not ‘prescribed details’ under clause 3(3).
40. Section 102(2) of the FOI Act provides that if a third party initiates or brings proceedings opposing the giving of access to a document, the onus is on that third party to establish that access should not be given or that a decision adverse to access applicant should be made. However, s.102(3) of the FOI Act provides that the onus is on the access applicant to establish that disclosure of personal information about a third party would, on balance, be in the public interest.

41. In this situation, I am of the view that the onus is on the complainant under s.102(2) to satisfy me that it is not in the public interest to disclose the personal information because the agency has made a decision that the documents can be released and it is that decision which I am reviewing. In any event, both the applicant and the complainant have made submissions on this issue to me, which I have considered in making my decision.
42. Clause 3(6) provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. The term ‘public interest’ is not defined in the FOI Act. In my view, the term is best described in the decision by the Supreme Court of Victoria in *DPP v Smith* [1991] 1 VR 63 at p.75, where the Court said:

“The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals”

43. The public interest is not primarily concerned with the personal interests of a particular applicant or with public curiosity. Rather, the question is whether disclosure of the information would be of some benefit to the public generally.
44. It is my view that my consideration of the public interest should not include taking into account that the applicant is persistent in asking questions of the agency and councillors, nor whether he is a member of any particular community organisation. Section 10(2) provides that a person’s reasons for wishing to seek access do not affect the right to be given access to documents pursuant to the FOI Act. This means that the motives and actions of an applicant are not relevant to the question of whether or not the material should be released under clause 3(6).
45. The FOI Act includes exemptions where the identity or actions of the applicant may be relevant: for example, clause 5(1)(e) provides that matter is exempt if it would endanger the life or physical safety of a person. However, in considering clause 3(6) the issue is whether the material itself is exempt and whether disclosure of that material is in the public interest. I must consider whether the release of the disputed information would in itself be in the public interest regardless of the nature or identity of the applicant.
46. Determining whether or not disclosure would, on balance, be in the public interest involves identifying the relevant competing public interests – those favouring disclosure and those favouring non-disclosure – weighing them against each other and making a judgment as to where the balance lies in the circumstances of the particular case.
47. In favour of disclosure, I recognise that there is a public interest in applicants being able to exercise their rights of access to documents under the FOI Act.

However, those rights are not absolute rights. Section 10(1) of the FOI Act provides that a person has a right to be given access to the documents of an agency (other than an exempt agency) subject to and in accordance with the FOI Act. The right created by s.10(1) is subject to a range of exemptions which are designed to protect significant public interests – including the protection and maintenance of personal privacy – that compete with the public interest in the openness and accountability of State and local government agencies.

48. In addition, I recognise that there is a public interest in the accountability of State and local government agencies for the expenditure of public funds, including the payment of benefits, such as travel expenses, from the public purse. The objects of the FOI Act include making the persons and bodies that are responsible for State and local government more accountable to the public (s.3(1)(b) of the FOI Act).

49. I also recognise a public interest in the community being informed of how ratepayer funds are spent. In *Re V and Department of Premier and Cabinet* [2010] WAICmr 7, I considered whether the names and amounts of itemised claims for expenses claims, including travel expenses, for former WA State Parliamentarians were exempt under clause 3(3). I concluded at [29]-[35] that:

“The way in which a government spends public money is a matter of legitimate public interest and is not simply a matter of public curiosity... the identities of persons receiving entitlements for performing or having performed functions on behalf of the public of Western Australia – as well as the amounts of those entitlements - are matters of legitimate public interest.”

50. In my opinion, the details of the travel claims made by an individual councillor are matters of legitimate public interest rather than being a personal matter for the complainant and the Council, as the complainant claims. In that regard, Regulation 3(1)(e) of the *Local Government Act (Rules of Conduct) Regulations 2007* provides that, as a general principle, Council members should be open and accountable to the public.

51. I acknowledge the complainant’s concerns about the disputed documents being used unfairly and inaccurately if disclosed. However, if the information is accurate and proper, there should be no legitimate scope for taking the matter further. In my view, it is desirable for public officers to be accountable for the expenditure of public funds. In my opinion, the provision of the disputed information would assist in informing the public as to how ratepayer funds are distributed.

52. Favouring non-disclosure of the disputed information, I recognise that there is a strong public interest in maintaining personal privacy. That public interest is recognised by the inclusion in the FOI Act of the exemption in clause 3(1) and, in my view, that public interest may only be displaced by some other, considerably stronger, public interest that requires the disclosure of private information about the complainant or the third party, in this case.

53. However, in my opinion, the information about the complainant in the disputed documents is not of a particularly private personal nature. Details of travel and the amount claimed in respect of this travel, while performing duties as an elected member that relate to activities conducted in public and on behalf of the public, do not appear to be particularly personal or private.
54. In balancing the competing public interests, I am of the view that the public interests in the disclosure of personal information about the complainant contained in the disputed documents outweigh any right to privacy in this case. Consequently, I consider that the limit on the exemption in clause 3(6) applies and disclosure of the disputed information that relates to the complainant would, on balance, be in the public interest.
55. In my view, it is not in the public interest to release the name of the additional third party in documents 17-19, 21-22 and 24-30. Release of that information would not contribute to a debate about expenditure of public funds. In that case, I consider that the interest in maintaining personal privacy outweighs the public interest in disclosure.

CONCLUSION

56. The decision of the agency to grant full access to the disputed documents is varied. I find that the disputed information in the documents is not exempt under clause 3(1) of Schedule 1 to the FOI Act except for the name of a third party appearing as part of a fax header in Documents 17 – 19, 21 – 22 and 24 – 30 in the Appendix to this decision.

APPENDIX

List of the disputed documents described by the first and last dates claimed on the '*Members Travelling and Telephone Expenses Claim*' form.

1. 1 July to 31 July 2008
2. 1 Aug to 28 August 2008
3. 1 September to 30 September 2008
4. 7 October to 30 October 2008
5. 3 November to 27 November 2008
6. 1 December to 18 December 2008
7. 13 January to 29 January 2009
8. 2 February to 25 February 2009 – no fax header
9. 2 February to 25 February 2009 – with fax header
10. 2 June to 24 June 2009
11. 6 April to 28 April 2009
12. 4 May to 28 May 2009
13. 1 July to 24 July 2009
14. 1 August to 25 August 2009
15. 1 September to 30 September 2009
16. 5 October to 27 October 2009
17. 3 November to 30 November 2009 – includes fax header with additional third party name
18. 2 December to 24 December 2009 – includes fax header with additional third party name
19. 11 January to 27 January 2010 – includes fax header with additional third party name
20. 1 February to 24 February 2010
21. 3 March to 30 March 2010– includes fax header with additional third party name
22. 8 April to 30 April 2010– includes fax header with additional third party name
23. 6 May to 27 May 2010
24. 8 June to 30 June 2010 – includes fax header with additional third party name
25. 5 July to 27 July 2010 – includes fax header with additional third party name
26. 3 August to 24 August 2010-- includes fax header with additional third party name
27. 2 September to 30 September 2010-- includes fax header with additional third party name
28. 10 October to 28 October 2010 – includes fax header with additional third party name
29. 2 November to 30 November 2010 -- includes fax header with additional third party name
30. 2 December to 24 December 2010 -- includes fax header with additional third party name
31. 11 January to 25 February 2011
32. 8 March to 29 March 2011