

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

**File Ref: F2014134
Decision Ref: D0082015**

Participants:

Jason Penfold
Complainant

- and -

Shire of Exmouth
Agency

- and -

**David and Cheryl Stinson; and Donald
and Diane Stinson**
Third Parties

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – building plans – whether documents subject to copyright – section 27 – clause 3 – whether personal information – clause 3(6) – whether disclosure would, on balance, be in the public interest.

Freedom of Information Act 1992: sections 27(2)(c) and 102(2)-(3); Schedule 1, clauses 3(1)-3(6).

Copyright Act 1968 (Cth): section 10.

DPP v Smith [1991] 1 VR 63

Re Post Newspapers Pty Ltd and Town of Cambridge [2006] WAICmr 25

Re ‘R’ and City of Greater Geraldton and ‘S’ [2012] WAICmr 25

DECISION

The agency's decision is set aside. I find that Documents 4, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25 are not exempt under clause 3(1) of Schedule 1 to the FOI Act. Further, I find that the disputed documents are subject to copyright and that access should be given by way of inspection only.

Sven Bluemmel
INFORMATION COMMISSIONER

15 May 2015

REASONS FOR DECISION

1. This complaint arises from a decision made by the Shire of Exmouth (**the agency**) to give Mr Jason Penfold (**the complainant**) access to documents under the *Freedom of Information Act 1992* (**the FOI Act**).

BACKGROUND

2. On 10 March 2014 the complainant applied to the agency under the FOI Act for access to the application plans and approval plans (Planning and Building) for two named properties (**the Properties**).
3. By notice of decision dated 15 April 2014 the agency decided to give the complainant access to a number of documents within the scope of the access application.
4. The agency decided to refuse the complainant access to the approved house plans for the Properties on the ground they are exempt under clause 3(1) of Schedule 1 of the FOI Act.
5. On 26 April 2014 the complainant applied for internal review of the agency's decision.
6. By letter dated 12 May 2014 the agency confirmed its decision.
7. By letter dated 30 May 2014 the complainant applied to me for external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

8. Following my receipt of the complaint, the agency produced to me the original of the disputed documents together with its FOI file maintained in respect of the complainant's access application.
9. As a result of inquiries made by my office the complainant provided further background information and submissions to support his claim that the disputed documents are not exempt and should be disclosed to him.
10. On 27 August 2014, as a result of discussions with my office, the agency provided the complainant with access to additional documents within the scope of his access application. Those documents were the standard specification documents for the Properties. However, by letter dated 4 September 2014 the complainant advised my office that this did not resolve the matter for him and that he still sought access to the house plans for the Properties (Documents 1 to 25).
11. On 6 November 2014, after considering the information then before me, I provided the parties with my preliminary view. It was my preliminary view that the documents comprising the internal plans for the Properties (Documents 2, 3, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21 and 22) are exempt under clause 3(1) of Schedule 1 to the FOI Act but that the documents comprising the external plans and elevations for the Properties (Documents 1, 4, 11, 12, 13, 14, 17, 23, 24 and 25) (**the external plans**) are

not exempt as the agency claimed. I invited the parties to make further submissions to me if they did not accept my preliminary view and asked the agency to consult with the owners of the Properties (**the third parties**) in the event that the agency accepted my preliminary view.

12. The complainant did not accept my preliminary view that the internal plans for the Properties are exempt under clause 3 and provided further submissions by letter dated 18 November 2014. The complainant also provided a copy of a document titled 'Shire of Exmouth – Minutes – 23 October 2014' (**the Minutes**). This document related to a request for planning approval for one of the Properties to be used as holiday accommodation.
13. By letter dated 19 November 2014 the agency advised me that it accepted my preliminary view.
14. After considering the further submissions made by the complainant, including in relation to the public interest limit on the exemption in clause 3, I reconsidered my view in relation to Documents 15, 16, 18, 19, 20, 21 and 22, being the internal house plans for the property for which approval for holiday accommodation had been sought and approved by the Council of the agency. Accordingly, on 10 December 2014 I provided the parties with a letter setting out my supplementary preliminary view of this matter. It was my supplementary preliminary view that Documents 15, 16, 18, 19, 20, 21 and 22 are not exempt under clause 3(1) of Schedule 1 to the FOI Act. I remained of the view that Documents 2, 3, 5, 6, 7, 8, 9 and 10 are exempt under clause 3(1) of Schedule 1 to the FOI Act.
15. Again I invited the parties to provide further submissions to me and asked the agency to consult with the third parties if it accepted my supplementary preliminary view.
16. By letter dated 23 December 2014 the agency advised me that it accepted my supplementary preliminary view and that it withdrew its claims that Documents 15, 16, 18, 19, 20, 21 and 22 are exempt under clause 3.
17. On 23 December 2014, the third parties made submissions to me in relation to Documents 15, 16, 18, 19, 20, 21 and 22, and were subsequently joined as parties to this complaint. Since the agency has now withdrawn its claim for exemption in relation to the documents the third parties bear the onus of establishing that access should not be given to the disputed documents, pursuant to section 102(2) of the FOI Act.
18. On 24 December 2014 the complainant advised me that he accepted my supplementary preliminary view that Documents 2, 3, 5, 6, 7, 8, 9 and 10 are exempt under clause 3(1) of Schedule 1 to the FOI Act. Accordingly those documents are no longer in dispute.
19. Discussions took place between the third parties and my office in an attempt to resolve the matter by agreement. During the course of these discussions it became apparent that the agency had not consulted with the third parties in relation to my preliminary view dated 6 November 2014.

20. As a result of this, by email dated 16 April 2015, the third parties were invited to make submissions to me in relation to my preliminary view that the external plans for the Properties are not exempt as the agency claimed.
21. The third parties did not accept my preliminary view that the external plans and elevations for the Properties are not exempt and provided submissions to me by email dated 23 April 2015.
22. As the complainant accepted my supplementary preliminary view, it is left for me to determine whether the external plans together with Documents 15, 16, 18, 19, 20, 21 and 22, being the internal house plans for the property for which approval for commercial use has been given (**the internal plans for the commercial property**), are exempt under clause 3 of Schedule 1 to the FOI Act.

THE DISPUTED DOCUMENTS

23. The disputed documents consist of the external plans and the internal plans for the commercial property. The agency has numbered the documents 1, 4, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25 (**the disputed documents**).

CLAUSE 3 – PERSONAL INFORMATION

24. The third parties claim that the disputed documents are exempt under clause 3(1) of Schedule 1 to the FOI Act.
25. Clause 3, insofar as is relevant, provides as follows:

3. *Personal information*

- (1) *Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).*
- (2) ...
- (3) ...
- (4) ...
- (5) ...
- (6) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.”*

26. The term ‘personal information’ is defined in the Glossary to the FOI Act to mean:

[I]nformation 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. That definition makes it clear that ‘personal information’ is information about an identifiable individual.
28. The exemption in clause 3(1) is intended to protect the privacy of individuals about whom personal information may be contained in documents held by State and local government agencies. Information of that kind is exempt under clause 3(1), subject to the application of any of the limits on exemption in clauses 3(2)-3(6).

THE THIRD PARTIES’ SUBMISSIONS

29. The third parties’ submissions in relation to the external plans are set out in an email dated 23 April 2015. In summary the third parties submit:
 - The plans show the details of the engineer and draftsman who designed the building for the third parties. The third parties were required to pay for the drawings, therefore the documents are subject to copyright.
 - To release documents relating to the construction of the building is to disclose information that is specific to the construction and design of a private dwelling including dimensions of rooms, sizes of living space, wall thicknesses, roof space, floor plan layout, window dimensions, external door access, egress locations and electrical layout.
 - It is possible for any person to look at the external facades of the Properties and view the fences around the Properties, measure the walls or window sizes or view the fence construction, as the third parties do not reside at the properties. It is also possible for anyone who has access to Google Earth to obtain an aerial view of the Properties. However, the third parties do not know what the complainant wants to use the plans for and are concerned that the plans may be used to build a dwelling, or to do malicious acts to the Properties.
30. The third parties’ submissions in relation to the internal plans for the commercial property are set out in a letter dated 23 December 2014. In summary the third parties submit as follows:
 - The agency has approved these documents as per its building approval process and subsequently inspected the construction of the premises as it was built. The dwelling was constructed during the period of late 2011 and late 2013 as per the appropriate building codes. The documents provide the agency with personal details, engineers design details and other private information.
 - At the time of the application to build the property there were no established dwellings either beside or behind the property.
 - The documents contain personal information as defined in clause 3(1) of Schedule 1 to the FOI Act.

- The disputed documents all relate to the actual original private dwelling, including the building's engineering design and construction. As the third parties were required to pay costs associated with the engineering design drawings they are personal information and furthermore copyright should apply.
- The application to the agency for the property to be used as holiday accommodation, lodged in 2014, required the following documentation to be provided:
 - site plans (showing location of house, parking etc);
 - floor plans (showing length, width and ceiling heights of each room);
 - emergency response plan (a floor plan showing fire escape route maps, location of a fire extinguisher, fire blanket, smoke alarms, emergency lighting and outside meeting place);
 - Tenant Code of Conduct (including information on noise levels, vehicles and parking, rubbish bins, pets, fish cleaning etc); and
 - Management Statement (including information on occupancy levels, occupier's code of conduct and maintenance and upkeep of property).
- These documents are made available to prospective holiday tenants (the public) who wish to reside at the property as per the rental agreement process that is managed by a local real estate company. The site and floor plans are displayed as part of the emergency exit plans within the premises. The Tenant Code of Conduct and Management Statement are readily accessible by any tenant who has paid a fee to use the property as holiday accommodation.
- The application to use the property as holiday accommodation is subject to an annual review by the agency as part of the renewal of approvals process of the agency's policy in relation to holiday accommodation.
- The original building application documentation should remain private and confidential.
- The information the complainant is seeking was not required to be provided to the agency as part of the approval application to change the activities at the property from private residential dwelling to holiday accommodation.

THE COMPLAINANT'S SUBMISSIONS

29. Section 102(3) provides that if, under a provision of Schedule 1, matter is not exempt matter if its disclosure would, on balance, be in the public interest, the onus is on the access applicant to establish that disclosure would, on balance, be in the public interest.
30. By letter dated 18 November 2014 the complainant made the following submissions:

- No permanent tenants have occupied the Properties since the completion of their construction. It is contradictory to suggest that the size, layout and features of the Properties are personal information as the agency granted planning approval for one of the Properties to be used as holiday accommodation at the Ordinary Council Meeting held in October this year.
- The Properties are being used for commercial accommodation purposes rather than private home ownership.
- As the complainant lives adjacent to the Properties, the agency's statement that disclosure of the documents will enable him to 'identify the plans as relating to the adjoining dwellings' does not make sense.
- There has never been any opportunity to comment on the third parties' planning proposals as the agency claims that the two structures did not require planning approval.
- The complainant seeks access to the disputed documents to determine whether the Council of the agency was and is required to make a decision for planning approval under State planning legislation including the residential design codes. He further wishes to ascertain whether the agency was required to consult him in relation to planning proposals for the two Properties.
- The public interest in personal privacy is outweighed by the public interest in the agency properly implementing its local planning scheme.
- There is a public interest in maintaining an acceptable standard for residential dwellings, specifically, avoiding an invasion of personal privacy on adjoining properties.

CONSIDERATION

31. I have examined the disputed documents. They consist of the external and internal plans for named dwellings. They contain details of the names and other specific identifying information about third parties, including details of their addresses. That particular information is 'personal information' about the third parties, as defined in the FOI Act, which is prima facie exempt under clause 3(1) of Schedule 1 to the FOI Act.
32. I am also of the view that the documents would, if disclosed in their entirety, reveal personal information, as defined, about the property owners because the complainant requested the plans of identified properties, built at a particular location and the complainant is aware of the identities of the property owners. Their identities are, in any event, ascertainable from the address of the Properties as I understand them to be the registered owners. The information about them that would be revealed by disclosure of the disputed documents is that they have built the homes to which the plans relate, the size and layout of their homes and the features that they have chosen to include in their homes. I am of the view, therefore, that the documents in their entirety are prima facie exempt under clause 3(1).

33. The exemption in clause 3(1) is subject to the application of the limits on exemption in clauses 3(2) to 3(6) of Schedule 1 to the FOI Act. Accordingly, I have considered whether any of the limits on exemption in clauses 3(2) to 3(6) may apply to the information I consider to be prima facie exempt under clause 3(1). In this matter the only relevant limit on exemption is clause 3(6).

Clause 3(6) – public interest

34. Clause 3(6) provides that matter is not exempt matter under clause 3(1) if its disclosure would, on balance, be in the public interest.
35. The term ‘public interest’ is not defined in the FOI Act. In my view, it is best described in the decision by the Supreme Court of Victoria in *DPP v Smith* [1991] 1 VR 63, at page 75, where the Court said, in distinguishing between the public interest and a matter of public interest:

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 ... There are ... several and different features and facets of interest which form the public interest. On the other hand, in the daily affairs of the community, events occur which attract public attention. Such events of interest to the public may or may not be ones which are for the benefit of the public; it follows that such form of interest per se is not a facet of the public interest.

36. 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 judgement as to where the balance lies in the circumstances of the particular case.
37. In my preliminary view I considered the external plans separately from the internal plans. I have received no submissions from the third parties in relation to the external plans to dissuade me from my view that the personal information contained in the external plans is not information of a particularly private or sensitive nature. It consists of addresses, the names of individuals, and the size and certain external features of the buildings on the Properties. Much of that information is publicly available via Landgate, or merely by looking at the Properties. In fact the third parties acknowledge that the external features of the Properties are visible to members of the public by various means. Indeed the third parties submit that it would be possible for an individual to take measurements at the property without their knowledge, as they do not reside at the Properties.
38. In *Re ‘R’ and City of Greater Geraldton and ‘S’* [2012] WAICmr 25, I expressed the view that householders do not, in general, have a right to consider the external facades of their homes to be private information. In considering the matter currently before me, I have not been provided with submissions that dissuade me from that view. I do

not therefore accept that disclosure of the external house plans would involve any real intrusion on the personal privacy of the third parties.

39. In favour of disclosure, I recognise the public interest in the accountability of agencies for the manner in which they discharge their functions and consider their actions and decisions should be as transparent as possible. I also recognise a public interest in individuals exercising their rights under the FOI Act to access information about those actions and decisions.
40. In weighing the public interests I consider that the public interest in disclosure is stronger than the public interest in the third party's privacy. Accordingly, I find that the external plans are not exempt under clause 3(1) of Schedule 1 to the FOI Act.
41. I will now consider the internal plans for the commercial property. Against disclosure, I believe there is a public interest in the maintenance of personal privacy. The protection of an individual's privacy is a strong public interest that is enshrined in the FOI Act by clause 3.
42. In favour of disclosure, I recognise a public interest in persons exercising their rights under the FOI Act to gain access to government held information.
43. The Minutes, as noted at [12], confirm that approval has been granted by the agency for one of the Properties (**the Commercial Property**) to be used as commercial holiday accommodation.
44. From the Minutes it would appear that the accommodation comprises six bedrooms, which can accommodate 12 overnight occupants over the age of 10 years. I consider it is reasonable to conclude that the Commercial Property will be used to provide accommodation from time to time for a significant number of people. Accordingly a large number of members of the public, who make a payment to reside in the accommodation for certain periods of time, will be able to view the size and layout of the Commercial Property and the features that the owners have included in the Commercial Property. Any guests of those members of the public will also be able to view the size and layout of the Commercial Property.
45. Further, as the local estate agent holds certain documents relating to the Commercial Property containing some of the information in the disputed documents, it is likely that this information will also be provided to prospective tenants of the accommodation.
46. Accordingly, in the particular circumstances of this matter, it is my view that the personal information that would be revealed by disclosure of the internal plans for the Commercial Property is not information of a particularly private or sensitive nature.
47. Further, I do not consider that the disclosure of the internal plans for the Commercial Property will involve any real intrusion on the personal privacy of the third parties, given that the premises will effectively be accessed by members of the public. Accordingly, I consider that the change in status of the Commercial Property to commercial use, rather than private use, considerably weakens the public interest in protecting the personal privacy of the third parties.

48. In *Re Post Newspapers Pty Ltd and Town of Cambridge* [2006] WAICmr 25 the Acting Information Commissioner considered whether internal house plans were exempt under clause 3(1) of Schedule 1 to the FOI Act. In that particular case she decided that the public interest in disclosure did not override the public interest in protecting the personal privacy of the third parties. However, the facts of that matter differ from those in this particular case in that the plans were for a private dwelling, rather than a dwelling that will be used as commercial holiday accommodation by members of the public.
49. In favour of disclosure I consider that there are public interests in private individuals who have dealings with government agencies maintaining trust in those agencies and being – and being seen to have been – fairly dealt with. This particular matter relates to the agency’s local planning scheme and exercise of the agency’s discretion in the approval of planning permission for dwellings in a particular zone. In my view, the history of the agency’s dealings with the complainant gives him an interest of that nature.
50. Having considered the submissions of the third parties and the complainant, I am not persuaded that the public interest in the third parties’ privacy is particularly strong in this case. In balancing the competing public interests I consider that those favouring disclosure outweigh those favouring non-disclosure in this particular case. Consequently I find that the limit to the exemption in clause 3(6) applies and that the internal plans for the commercial property are not exempt under clause 3(1) of Schedule 1 to the FOI Act.

COPYRIGHT

51. The third parties submit that the documents are the subject of copyright. Copyright belonging to a person other than the State is not a ground of exemption under the FOI Act, but it does have an effect on the manner in which access to the document may be given. Section 27(2)(c) of the FOI Act provides that if an applicant has requested that access to a document be given in a particular way, the agency has to comply with the request unless giving access in that way would involve an infringement of copyright belonging to a person other than the State, in which case access may be given in some other way, for example, by giving a reasonable opportunity to inspect the documents.
52. Having examined the disputed documents I consider they are prima facie the subject of copyright, pursuant to section 10(1) of the *Copyright Act 1968* (Cth). Accordingly I find that access to the disputed documents should be given by way of inspection only.

CONCLUSION

53. The agency’s decision is set aside. I find that Documents 4, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25 are not exempt under clause 3(1) of Schedule 1 to the FOI Act. Further I find that the disputed documents are subject to copyright and that access should be given by way of inspection only.
