

Participants:

Adele Farina
Complainant

- and -

Treasurer
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to Port Geographe Development – section 26 – sufficiency of searches – clause 3 – personal information – clause 3(3) – prescribed details – clause 3(6) – public interest.

Freedom of Information Act 1992: section 26(1); Schedule 1, clauses 3(1), 3(3) and 3(6); Schedule 2, Glossary

Freedom of Information Regulations 1993: regulation 9(1)

Re Malik and Office of the Public Sector Standards Commissioner [2010] WAICmr 25

Re 'A' and City of Albany & Anor [2008] WAICmr 10

Re Mossenson and Others and Kimberley Development Commission [2006] WAICmr 3

DPP v Smith [1991] 1 VR 63

DECISION

The decision of the Minister is confirmed. I find that the disputed information is exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*.

Sven Bluemmel
INFORMATION COMMISSIONER

29 April 2011

REASONS FOR DECISION

1. This complaint arises from a decision made under the *Freedom of Information Act 1992* ('the FOI Act') by the former Treasurer, the Hon. Troy Buswell MLA ('the former Treasurer'), to refuse the Hon. Adele Farina MLC ('the complainant') access to documents.

BACKGROUND

2. On 25 February 2009, the complainant applied to the former Treasurer under the FOI Act for access to all documents on the Port Geographe Development from 23 September 2008 until 25 February 2009.
3. By decision dated 9 April 2009, the former Treasurer identified eight documents within the scope of the application. The former Treasurer gave the complainant access to edited copies of all eight documents after deleting personal information under clause 3(1) of Schedule 1 to the FOI Act.
4. On 22 April 2009, the complainant applied to me for external review of the former Treasurer's decision on the ground that further documents within the scope of her application existed or should exist pursuant to s.26 of the FOI Act.
5. The complainant did not seek external review of the former Treasurer's decision in respect of the eight documents, the subject of the agency's decision. Accordingly, that aspect of the former Treasurer's decision does not require my formal determination.
6. As a result of an unusually high number of complaints received by this office, which placed significant pressure on its resources, there was a delay in dealing with this matter. In the intervening period, the Premier, the Hon. Colin Barnett MLA held the position of Treasurer between April and December 2010. Since December 2010, the position of Treasurer has been held by the Hon. Christian Porter MLA ('the Minister').

REVIEW BY INFORMATION COMMISSIONER

7. Following the receipt of this complaint, the former Treasurer provided me with his FOI file maintained in respect of the complainant's application, together with copies of the documents identified as within the scope of the application.
8. My office obtained information from the former Treasurer concerning, among other things, the searches made for the requested documents. After reviewing that information and the initial searches conducted by the former Treasurer's office, I requested the Department of the Premier and Cabinet ('DPC') to conduct further searches for emails within the scope of the complainant's application using specific search terms. Those searches located further documents which the DPC provided to my office.
9. My office reviewed those documents and identified four additional documents within the scope of the application. In addition, having reviewed the material

on the former Treasurer's FOI file, my office also identified four further documents within the scope of the application. Those documents had been located by the former Treasurer's initial searches but not identified as being within the scope of the application. Accordingly, my office identified a total of eight further documents within the scope of the application ('the disputed documents').

10. In December 2010, my office invited the Minister to make a decision on access in respect of the disputed documents. The Minister subsequently gave the complainant edited copies of those documents after deleting a small amount of personal information pursuant to clause 3(1). However, the complainant did not withdraw her complaint in respect of the deleted information.

SECTION 26

11. Section 26 of the FOI Act provides as follows:

“(1) The agency may advise the applicant, by written notice, that it is not possible to give access to a document if –

- (a) all reasonable steps have been taken to find the document; and*
- (b) the agency is satisfied that the document –*
 - (i) is in the agency's possession but cannot be found; or*
 - (ii) does not exist.*

(2) For the purposes of this Act the sending of a notice under subsection (1) in relation to a document is to be regarded as a decision to refuse access to the document, and on a review or appeal under Part 4 the agency may be required to conduct further searches for the document.”

12. In light of the four documents located following the DPC's searches, I do not consider that the former Treasurer took “*all reasonable steps*” in the first instance to locate documents within the scope of the application, as required by s.26(1) of the FOI Act. Had all reasonable steps been taken to find those documents in the first instance and had all documents that fell within the scope of the application been correctly identified, this complaint might have been avoided or resolved much sooner.
13. In my view, this matter highlights the importance of proper searches being conducted by agencies (including Ministers) in the first instance: specifically, it highlights the need for adequate instructions to be given to officers conducting searches – particularly, as in this case, when searching for emails – and officers to properly record the specific searches made, including the locations searched and the search terms used. As not all of that information was recorded on the former Treasurer's FOI file in this case, the searches had to be conducted again on external review, which created an additional workload for both the DPC and

the Minister and significantly increased the time it has taken for my office to deal with this matter.

14. In light of the further searches conducted by the DPC, I am satisfied that all reasonable steps have now been taken to locate emails within the scope of the complainant's access application.

THE DISPUTED INFORMATION

15. The only information remaining in dispute in this matter ('the disputed information') is the personal information deleted from the disputed documents. That information consists of the direct work telephone number of a person who is or has been an officer of an agency, as that term is defined in the FOI Act, which the Minister deleted from four of the disputed documents. Those four documents were referred to by the Minister as Documents 4, 6, 7 and 8.

CLAUSE 3(1) – PERSONAL INFORMATION

16. The Minister claims that the disputed information is exempt under clause 3(1) of Schedule 1 to the FOI Act.
17. Clause 3, insofar as it is relevant, provides:

“3. Personal information

- (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.*
- (4) ...*
- (5) 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 fingerprint, 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 any information or opinion about a person from which that person can be identified is exempt information under clause 3(1).

Consideration

20. Having examined the disputed information, I consider that, if disclosed, it would reveal ‘personal information’ as defined in the FOI Act because a person’s identity could reasonably be ascertained from that information. As such, that information is *prima facie* exempt under clause 3(1). However, clause 3(1) is subject to the limits on exemption in clauses 3(2)-3(6). In my opinion, the limits in clauses 3(3) and 3(6) are relevant to this matter.
21. Clause 3(3) provides that information is not exempt merely because its disclosure would reveal ‘prescribed details’ in relation to officers or former officers of agencies (‘officers’). The FOI Act makes a distinction between private information – such as a person’s home address or health details – and certain specific information that relates solely to the person’s performance of functions and duties for an agency. In regard to the latter, only certain specific information – defined as prescribed details and set out in regulation 9(1) of the *Freedom of Information Regulations 1993* (‘the Regulations’) – will be subject to the limit on the exemption.
22. Regulation 9(1) provides, as follows:
- “9(1) *In relation to a person who is or has been an officer of the 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.”

23. In effect, the Regulations provide that certain limited work-related information about an officer – even though it is ‘personal information’ as defined in the FOI Act – will not be exempt under clause 3(1).
24. The prescribed details covered by the limits include the names and titles of officers of any government agency – not just the Minister’s office – and the actions undertaken by those officers in the course of carrying out their functions or duties. Information of that nature in the disputed documents is not exempt, pursuant to clause 3(3) of Schedule 1 to the FOI Act.
25. As stated, the disputed information consists of the direct work telephone number of an officer. I have considered whether the disputed information amounts to prescribed details as defined in the Regulations.
26. Although information of that kind relates to the work of the officer rather than his or her personal life, in my opinion and that of my predecessors, that information is nonetheless personal information as defined in the FOI Act and its disclosure would reveal more than the prescribed details listed in the Regulations. Accordingly, information of that type is not covered by the limit on exemption in clause 3(3): see for example *Re Malik and Office of the Public Sector Standards Commissioner* [2010] WAICmr 25 at [42]; *Re ‘A’ and City of Albany & Anor* [2008] WAICmr 10 at [60]-[61]; and *Re Mossenson and Others and Kimberley Development Commission* [2006] WAICmr 3 at [38].

Clause 3(6) – the public interest

27. Clause 3(6) provides that matter will not be exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. Accordingly, it remains for me to consider whether the disclosure of the disputed information - being personal information about an officer that is not ‘prescribed details’ - would, on balance, be in the public interest. Pursuant to s.102(3) of the FOI Act, the onus is on the complainant, as the access applicant, to establish that the limit on exemption in clause 3(6) applies.

The complainant’s submissions

28. By letter dated 14 March 2011, the complainant submits as follows:

“Public officers are public servants. They are funded from the public purse to serve the public.

Public officers...direct telephone numbers are funded from the public purse to assist public officers perform their duties serving the public.

Public officers... direct telephone numbers are provided on business cards (the cost of production of the business cards being paid from

the public purse) and are frequently provided in department letters. They are therefore already in the public domain.

...

Further, given the frequency with which government agencies claim FOI Access Applications would 'divert unreasonable staff resources away from other duties' as the reason for refusing an FOI Access Application or for requiring the scope to be narrowed, it is not in the public interest for officers of government agencies to devote time to editing this information from documents, especially when the information is in the public domain and in any event, is and ought to be public as it is funded from the public purse.

...

Where a public officer's mobile phone number is funded from the public purse, the same arguments apply. Mobile phones are provided to public officers to assist them in the performance of their duties in serving the public. Most public officers have their mobile phone numbers on their business cards (which are produced with public monies) and are therefore already in the public domain. For these reasons, it is difficult to understand how one can conclude that a public officer's mobile phone number (if funded from the public purse and provided for the purposes of performing their duties) is personal information..."

Balancing the public interest factors

29. Determining whether disclosure would, on balance, be in the public interest involves identifying those public interests that favour disclosure and those that weigh against it and making a determination as to where the balance lies.
30. The public interest is not defined in the FOI Act. I consider that the term is best described in *DPP v Smith* [1991] 1 VR 63 at p.65 where the Supreme Court of Victoria 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."
31. In favour of disclosure in this case, there clearly is a public interest in members of the public transacting business with the government being able to contact agencies and relevant officers. However, I do not consider that public interest always requires that members of the public have the direct work telephone numbers, including mobile phone numbers – as opposed to the general office telephone number, of officers, unless those officers – or the agency concerned as a matter of policy – choose to provide them by, for example, handing out a business card.
32. In this case, I understand that the publicly available telephone numbers for particular agencies have been disclosed to the complainant.

33. I do not agree with the complainant's submission that direct work telephone numbers of officers are already in the public domain by virtue of them being recorded on government business cards or in external correspondence. As I understand it, it is not government policy to require officers to disclose their direct and mobile telephone numbers on business cards or in correspondence with the public and officers have discretion to do so.
34. Although agencies or public officers may choose to make that information public, I am not persuaded that there is a public interest in that information being disclosed without the consent or knowledge of the relevant officers. There is a strong public interest in protecting the personal privacy of individuals which, in my view, is recognised by the limited range of work-related information that is counted as 'prescribed details'. The disputed information is not included in the prescribed details listed in Regulation 9(1) of the Regulations. In my opinion, there are a number of practical reasons why a government officer might not choose to be contacted directly by members of the public, provided that members of the public are adequately informed of agency functions and services, and are able to contact relevant functional areas through published contact details.
35. While I recognise a public interest in government agencies, including ministers, being accountable to the public for the manner in which telephone services paid by the public purse are used, I do not consider that public interest requires the disclosure of direct work telephone or mobile numbers of government officers.
36. While I agree that it may be more time efficient for officers not to have to delete direct work telephone numbers from documents when dealing with an access application, I do not consider that outweighs the public interest in the privacy of individuals. Given that the telephone directory, both in hard copy and online, provides telephone numbers for direct access to government agencies, I do not consider that the public interest in the accessibility of agencies and their officers requires the disclosure of officers' direct work telephone numbers including mobile phone numbers.
37. In weighing the competing public interests, I consider that those favouring non-disclosure of the disputed information outweigh those favouring disclosure in this case. I find that the limit in clause 3(6) does not apply to the disputed information and the disputed information is exempt under clause 3(1) of Schedule 1 to the FOI Act.
