

**OFFICE OF THE INFORMATION  
COMMISSIONER (WA)**

**File Ref: F2016079  
Decision Ref: D0132016**

Participants:

**Daniel Shuttleworth**  
Complainant

- and -

**Town of Victoria Park**  
Agency

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – statutory declaration – document relating to a land transaction – public interest in access rights under the FOI Act – clause 3(1) – personal information about third parties.

***Freedom of Information Act 1992 (WA)***: sections 30(3), 65(1)(b), 102(1) and 102(3); Schedule 1, clauses 3(1), 3(2), 3(3), 3(4), 3(5) and 3(6), Glossary to Schedule 2 of the FOI Act.

***Oaths, Affidavits and Statutory Declarations Act 2005 (WA)***

***DPP v Smith*** [1991] 1 VR 63

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

***Re Q and City of Cockburn, and R*** [2009] WAICmr 26

***Vulep and Queensland Police Service*** [2013] QICmr 10

## DECISION

The agency's decision is varied. I find that the agency's decision is partly justified. Part of the disputed information, being the signature of the third party deleted from the disputed document, is exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992* (WA) and none of the limits on exemption apply. However, the name, address and occupation of the third party are not exempt under clause 3.

Sven Bluemmel  
INFORMATION COMMISSIONER

4 October 2016

## REASONS FOR DECISION

1. This complaint arises from a decision made by the Town of Victoria Park (**the agency**) to give Daniel Shuttleworth (**the complainant**) access to an edited copy of a document under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**).

### BACKGROUND

2. I understand that the complainant made an offer to purchase a block of land on 14 December 2012. He planned to build a home on it. It appears that, as part of the documentation related to the land transaction, a statutory declaration (**the disputed document**) executed on 10 April 2013, represented that:

*[a]ll septic sewer systems including all tanks and pipes and associated drainage systems including stormwater disposal systems have been decommissioned, removed and filled with clean sand and compacted.*

3. Upon commencement of building on the block some eight months after the sale had been completed, the complainant's builder discovered a number of septic tanks and pipes still in place on the block. In addition, a quantity of rubble was buried at the site. These had to be removed before building could begin.
4. On 28 July 2015, the complainant applied to the agency under the FOI Act seeking access to:

*[t]he issue of the titles for [a named property]. In particular the statutory declaration about the removal of the septic tanks and leach drains.*
5. In a notice of decision dated 2 September 2015, the agency identified the disputed document as coming within the scope of the complainant's access application and gave him access to an edited copy of that document deleting a small amount of information the agency considered exempt under clause 3(1) of Schedule 1 to the FOI Act.
6. On 23 October 2015, the complainant sought internal review of the agency's decision. By letter dated 30 October 2015, the agency confirmed its initial decision to give the complainant access to an edited copy of the disputed document.
7. By email dated 11 March 2016 the complainant applied to me for external review of the agency's decision.

### REVIEW BY THE INFORMATION COMMISSIONER

8. After receiving this complaint, I required the agency to produce to me the FOI file maintained by the agency in relation to the complainant's access application and the disputed document.
9. On 11 July 2016 my Principal Legal Officer (**PLO**) contacted the agency and advised it that its notice of decision did not comply with the requirements of section 30(c) of the FOI Act. She invited the agency to provide my office with further information to

support its claim for exemption for the disputed information, in a form that could be provided to the complainant, by no later than 4:00 pm on Tuesday 26 July 2016.

10. The agency provided further information on its decision to my office by email dated 26 July 2016, and my PLO forwarded the information to the complainant for his consideration and response.
11. The complainant responded by stating that he knew the identity of the declarant of the disputed document (**the third party**) but sought the signature in order to prove alleged fraud by the seller.
12. While it is my usual practice to require the parties to attend a compulsory conciliation conference, on this occasion I considered it was not necessary to do so. Accordingly I decided to provide the parties with my preliminary view of the matter by letter dated 25 August 2016.
13. By letter dated 25 August 2016 I provided the third party with an edited copy of my preliminary view and invited the third party to either be joined to the complaint as a third party and to make submissions to me, or if not joined, to make submissions to me. I did not receive a response to that letter.
14. Following the preliminary view the agency made further submissions, by letter dated 16 September 2016.

#### **THE DISPUTED DOCUMENT AND THE DISPUTED INFORMATION**

15. The disputed document is a Statutory Declaration executed and provided to the agency for the purpose of verifying that certain work had been carried out on a block prior to its subdivision and sale as a strata titled block.
16. The disputed information consists of the name, address, occupation and signature of the third party contained in the disputed document (**the disputed information**).
17. By email dated 28 June 2016 the complainant confirmed that he did not require the name and signature of the witness in the disputed document. That information is therefore out of scope and I have not considered it further.

#### **Onus of proof**

18. Under section 102(1) of the FOI Act, the onus is on the agency to establish that its decision to grant access to edited copies of the requested documents is justified. Applicants are not required to establish that they are entitled to access the requested documents; it is up to the agency to establish a case for exempting a document or information from disclosure and to demonstrate that it has established the requirements of any exemption in its notice of decision.

#### **The agency's notice of decision**

19. Section 30 of the FOI Act sets out the details that must be included in an agency's notice of decision given to an access applicant. In cases where an agency decides to

grant access to a document from which exempt information has been deleted, section 30(c) of the FOI Act provides that the agency must include the following details in its notice of decision:

- the fact that access is to be given to an edited copy;
- the reasons for classifying the information as exempt;
- the findings on any material questions of fact underlying those reasons; and
- reference or references to the material on which those findings were based.

20. In this case, the agency's initial decision was made by the agency's principal officer. This means that internal review by the agency was not available to the complainant. The notice of decision did not comply with the requirements of section 30(c). No attempt was made to explain the factual basis underlying the decision to refuse the complainant access to the information deleted from the disputed document. The initial decision merely said that:

*[n]ames and signatures of the person who made the declaration and the witness have been edited from the document in accordance with Schedule 1(3) Personal Information...*

21. A case for exemption is not made out by merely referring to an exemption clause or clauses. The agency should, in addition, set out its consideration of whether any of the limits on exemption in clauses 3(2) to 3(6) apply before reaching a conclusion as to whether the disputed information is exempt under clause 3.
22. However, following a request from my PLO, the agency provided substantial further information to my office that addressed the matters required by section 30(c) of the FOI Act. A copy of this information was sent to the complainant by email dated 28 July 2016 with an invitation to the complainant to respond or provide any further submissions he wished to make.

### **CLAUSE 3(1) – PERSONAL INFORMATION**

23. The agency claims that the disputed information is exempt under clause 3 of Schedule 1 to the FOI Act.
24. Clause 3(1) provides that matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead). The term 'personal information' is relevantly defined, in the Glossary to Schedule 2 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...*

25. 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. 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 agency’s submissions**

26. The agency’s further information provided to my office by email dated 26 July 2016 was comprehensive and includes the following submissions:
- Edited access to the disputed document was given to the complainant, deleting the names and signatures of the person who made the declaration and the witness.
  - On 3 July 2015 the complainant contacted the agency by email and advised that redundant septic and leach drains had not been removed from the property. The agency’s Building Surveyor advised the complainant that the agency had a statutory declaration stating that all septic sewer systems including all tanks and pipes had been decommissioned, removed and filled with clean sand and compacted.
  - The agency advised the complainant that if he wanted a copy of the statutory declaration he would need to apply through FOI or contact the WA Planning Commission as the declaration was made to the WA Planning Commission.
  - On 16 February 2015 the complainant lodged an access application with the agency for a copy of the statutory declaration.
  - The required document contains information about an identifiable individual which consists of their name, address, occupation, signature and handwriting, which is on its face exempt under clause 3(1).
  - The exemption in clause 3 is subject to a number of limits set out in clause 3(2)-3(6). The only limit on exemption that might apply is clause 3(6).
  - Application of the public interest test involves weighing the factors for and against disclosure to determine where the balance lies.
  - In favour of disclosure is the public interest in individuals being able to exercise their rights of access under the FOI Act and the public interest in providing a person with access to allegations made against them and giving them an opportunity to respond to those allegations.
  - Against disclosure is the public interest in protecting the privacy of individuals and the public interest in ratepayers and other members of the public coming forward with information to assist an agency to perform its regulatory function.
  - The public interest in a person being able to access information about a property will be satisfied by the provision of an edited copy of the document which states that the septic systems were decommissioned. The disclosure of the identity of the person who made the declaration would not further satisfy that interest.

- *The agency acknowledges that release of the document would assist the complainant in reaching a conclusion on an ongoing dispute that the applicant is seeking resolution on with the third party and that the access being sought is pertinent information for the applicant. However the agency considers the release of the document in question in full to potentially prejudice lawful methods or procedures that could result in the agency being found liable and the release of the requested document in full under the public interest test could result in disclosure that would prejudice the effectiveness of the applicant's ability to utilise the released information in future lawful procedures or methods.*
- The public interest is served by the agency's ability to maintain in confidence personal information provided to the agency and the agency's adherence to the consenting wishes of the third party.
- If the agency releases the information it could damage the future working relationships between the agency, its agents and the third party.
- Should the agency release the information disregarding the third party's objection to disclosure this could damage perceptions of the agency's treatment of private information and its ability to perform the planning and infrastructure services it is responsible for.
- The public interest factors in favour of protecting the privacy of third parties outweigh the public interests favouring disclosure.

### **The agency's submissions in response to the preliminary view**

27. The agency made further submissions to me in response to my preliminary view, which are summarised as follows:
- The agency maintains its claim that the personal information in the disputed document is exempt under clause 3(1).
  - In *Re Q and City of Cockburn, and R* [2009] WAICmr 26 (***Re Q***) the Commissioner stated that the FOI Act was not intended to open the private lives of its citizens to public scrutiny where there was no demonstrable benefit to the public in doing so.
  - The FOI request concerns a private matter between the parties that may involve legal proceedings.
  - The personal information in the disputed document is not material to the terms of the statutory declaration and its contents have already been released to the complainant.
  - Disclosure would breach the privacy of the third party.

- The Commissioner has generally found signatures to be exempt as they are unique personal identifiers. The name, address and occupation of the third party should be treated in the same way.
- The third party has not consented to the release of the information.
- Release of the personal information could damage perceptions of the agency's treatment of private information.
- The public interest in releasing the information does not outweigh the public interest in maintaining the private nature of personal information.

### **The complainant's submissions**

28. The complainant's submissions are contained in his application for external review dated 11 March 2016 and in his two emails to my PLO dated 28 July 2016. In summary the complainant submits that:

- He made an offer for a block of land on 12 December 2012.
- The seller signed a statutory declaration dated 10 April 2013 to the effect that  
*[a]ll septic sewer systems including all tanks and pipes and associated drainage systems including stormwater disposal systems have been decommissioned, removed and filled with clean sand and compacted.*
- He commenced building a home on the land some eight months later.
- His builder found that the block contained stormwater, septic and leach drains still in place together with a quantity of rubble.
- The agency has provided access to an edited copy of the disputed document. 'This statutory declaration shows that [the previous owner] has committed fraud in order to obtain the title by saying *'all septic sewer systems including all tanks and pipes and associated drainage systems including stormwater disposal systems have been decommissioned, removed and filled with clean sand and compacted.'*
- *I also contacted the real estate agent about this, he did not want to speak to me or acknowledge this until I could produce the statutory declaration. I then gave the former owner a call and he denied ever owning the property and hung up on me. All I am seeking is unedited access so I can seek reimbursement from the former owner for the additional costs incurred.*
- *I am seeking the signature in order to prove the alleged fraudulent misrepresentation. I do know the [former owner's name] and had provided the details to the Town of Victoria Park.*



### **The complainant's further submissions in response to the preliminary view**

29. By email dated 8 September 2016 the complainant claimed that the disputed document was fraudulently declared and signed by the former owner of the land.

### **Consideration**

30. The disputed information consists of the name, address, occupation and signature of the third party. Having examined the information, I am satisfied that it consists of information about an identifiable individual. Accordingly, I consider that the disputed information is prima facie exempt under clause 3(1) because it would, if disclosed, reveal personal information about an individual. However, I have also considered whether any of the limits on exemption in clauses 3(2)-3(6) might apply.

### **Clauses 3(2)-(4)**

31. In my view, the limits on exemption in clauses 3(2)-(4) do not apply to the disputed information because none of it contains any personal information about the complainant, and the disputed information does not relate to officers, or former officers of the agency or individuals who perform or have performed services for an agency under a contract for services.

### **Clause 3(5)**

32. The limit on exemption in clause 3(5) does not apply because there is no evidence presently before me that the third party consents to the disclosure of their personal information to the complainant. To the contrary, the third party has confirmed to the agency that they do not consent to the disputed information being disclosed to the complainant.

### **Clause 3(6) – the public interest**

33. 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. The 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 page 65, 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 ...*

34. The public interest is not primarily concerned with the personal interests of the particular access applicant or with public curiosity. Rather, the question is whether disclosure of the information would be of some benefit to the public generally. Under section 102(3) of the FOI Act, the access applicant bears the onus of establishing that it would, on balance, be in the public interest for the agency to disclose personal information about another person to the complainant.

35. 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.
36. Some previous decisions of this office, including *Re Malik and Office of the Public Sector Standards Commissioner* [2010] WAICmr 25 at [54], have stated that the public interest in favour of disclosure must be ‘considerably’ or ‘significantly’ stronger than the public interest in maintaining personal privacy before disclosure of personal information would, on balance, be in the public interest. While I consider that the public interest in maintaining personal privacy is indeed a strong one, I am of the view that, if the public interests in favour of disclosure are stronger, whether slightly stronger or considerably stronger, than those public interests against disclosure, then disclosure will, on balance, be in the public interest.
37. I recognise that the complainant has a strong personal interest in obtaining a copy of the disputed information. However, the questions to be answered are whether disclosure of personal information about the third party would be of some benefit to the public generally, and whether that public benefit is sufficient to outweigh any public interest in the maintenance of the third party’s personal privacy.
38. The third party has objected to disclosure of their personal information. I have taken this into account in my consideration of this matter but it has not been determinative.

#### **Factors in favour of disclosure**

39. 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 but are subject to and in accordance with the FOI Act, which includes a range of exemptions designed to protect other particular public interests.
40. While there are no current authorities on this point in the Western Australian jurisdiction, the Queensland Information Commissioner determined a matter where an applicant sought access to names and addresses of witnesses to an accident in which he was injured. In *Vulep and Queensland Police Service* [2013] QICmr 10 (*Vulep*) the Queensland Commissioner decided that disclosure under an analogous provision in the *Right to Information Act 2009* (Qld) was, on balance, in the public interest.
41. However the facts in that matter differ somewhat from the present matter. In the present case, the complainant may know the identity of the third party and the content of the disputed document, whereas in *Vulep* the applicant did not.
42. I consider that there is also a strong public interest in the public generally being able to rely upon the contents of a statutory declaration executed under the *Oaths, Affidavits and Statutory Declarations Act 2005* (WA) as true and correct, and for those making declarations to understand their obligations.

43. There is likewise a strong public interest in persons in the complainant's position being able to seek redress or compensation in circumstances where a statutory declaration was relied upon in good faith and a person suffers or may suffer a detriment in reliance upon that statutory declaration.
44. In the present case, the complainant acted in reliance on the statutory declaration, which was a statutory requirement for the creation of strata titles. The situation in which the complainant found himself could apply to anyone transacting in land. This is a strong factor in favour of disclosure.

### **Factors against disclosure**

45. In favour of non-disclosure, I recognise that there is generally a very strong public interest in the maintenance of personal privacy and that the protection of an individual's privacy is a public interest that is recognised in the FOI Act by clause 3. 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.
46. The public interest in maintaining privacy is weaker in this case, as the document in question is a declaration about a piece of land under the *Oaths, Affidavits and Statutory Declarations Act 2005* (WA) and is made for the purpose of other parties dealing with the land being able to rely on it.
47. In that regard I note but do not accept the agency's submission that disclosure of the personal information in this case could potentially damage perceptions of the agency's capacity to protect personal information. There is no information before me to establish that this is the case.
48. I note that the third party has objected to disclosure of their personal information. I do not consider that the third party's objection to disclosure should be determinative in this matter. There is no automatic right of veto to disclosure by a third party. The third party's view is but one factor to be taken into account when the agency considers the matter and makes its decision.
49. I also do not accept that disclosure could potentially expose the agency to being found liable and potentially prejudicing lawful methods and procedures.
50. Sections 104, 105 and 106 of the FOI Act provide protections for persons who make decisions under the FOI Act. Section 104 protects officers from defamation or breach of confidence action. Section 105 provides that if access to a document is given under a decision under the FOI Act, and the person who made the decision believes in good faith that the FOI Act permits or requires the decision to be made, neither the person who made the decision nor any other person concerned in giving access to the document is guilty of an offence merely because of the making of the decision or the giving of access.
51. The disputed information contains two elements – the name, address and occupation of the third party and the third party's signature. I consider that these elements should be treated differently.

52. The third party's signature is personal information and in previous decisions, including *Re Q*, I have taken the view that a person's signature is a unique identifier peculiar only to that individual and I have generally found the signatures of individuals to be exempt. I consider that the factors against disclosure of the signature outweigh those in favour of disclosure in respect of the third party's signature.
53. However with regard to the name, address and occupation of the third party, I consider there is a strong public interest in disclosing this information for the reasons set out above. The public needs confidently to be able to rely upon statutory declarations made as true and correct statements of fact, and equally those executing statutory declarations need to understand their obligations to be truthful.
54. There is a broader public interest in any person transacting in land within the state having the information necessary to ensure that parties act in good faith and in compliance with the law.

## CONCLUSION

55. Having weighed the competing public interests, I consider that in the particular circumstances of this case, those against disclosure of the third party's signature outweigh those in favour of disclosure but those favouring disclosure of the name, address and occupation of the third party to ensure the administration of justice outweigh the public interest in the protection of the personal privacy of the third party.
56. Accordingly, I find that the third party's signature is exempt under clause 3(1) of Schedule 1 to the FOI Act and the name, address and occupation of the third party are not exempt under clause 3(1).

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