

Decision D0182013 - Published in note form only

***Re Cumming and Department of Housing* [2013] WAICmr 18**

Date of Decision: 17 July 2013

Freedom of Information Act 1992: Section 27(1) and (2); Schedule 1: clauses 3(1), 4(3) and 5(1)(f)

David and Janeanne Cumming ('the complainants') applied to the Department of Housing ('the agency') for access under the *Freedom of Information Act 1992* ('the FOI Act') to certain documents concerning a housing development, including documents passing between the agency and a third party ('the third party').

The agency identified 227 folios within the scope of the application. The agency gave access or edited access to 48 folios and refused access to 179 folios, citing exemptions under clauses 4(2) and 3(1) of Schedule 1 to the FOI Act ('the agency's decision'). In the course of dealing with the access application the agency consulted with the third party who advised the agency that it did not consent to disclosure of the disputed documents.

The complainants applied for an internal review of the agency's decision and the agency confirmed its original decision. In 2012, the complainant applied to the Information Commissioner for external review of the agency's decision to refuse access to the disputed documents. Following receipt of the complaint, the Commissioner obtained the originals of those documents, together with the agency's FOI file in relation to the complainants access application.

In the course of the Commissioner's office dealing with the matter, the agency withdrew its claim that the disputed documents were exempt under clause 4(2) and substituted claims under clauses 4(3) and 5(1)(f) of Schedule 1 to the FOI Act. The agency also maintained its claim under clause 3(1).

On external review, the complainants confirmed that the access application was for documents that consisted of plans ('the disputed plans') and a letter ('the disputed letter'). Together, the disputed plans and the disputed letter comprise the disputed documents.

After examining all the material before him, the Commissioner advised the parties that he considered that the disputed plans were subject to copyright pursuant to s10(1) of the *Copyright Act 1968* (Cth). Although copyright belonging to a person other than the State is not a ground of exemption under the FOI Act – nor is it a basis on which access to a document can be refused – it does have an effect in terms of the manner in which access to the document may be given: see *Re Zurich Bay Holdings Pty Ltd and City of Rockingham and Others* [2006] WAICmr 12 at [109].

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.

The complainants submitted that their application for access to the disputed documents would only be satisfied if they were provided with copies of the disputed documents. However, in these circumstances, access should only be given to documents which are subject to copyright in the manner set out in s27(1)(a) of the FOI Act, that is “*by giving a reasonable opportunity to inspect the document.*”

The Commissioner considered all the relevant material before him, including submissions from the parties. The Commissioner also observed that, contrary to its earlier view, the third party agreed on external review that the complainants may have supervised inspection of the disputed plans.

The Commissioner considered that while it may be possible for the agency to demonstrate that disclosure of the disputed documents would reveal information concerning the commercial affairs of the third party, he was not persuaded that disclosure of the disputed documents could reasonably be expected to have an adverse effect on those affairs as required by clause 4(3)(b).

The Commissioner was also not persuaded that the agency had discharged its onus of demonstrating that disclosure of the disputed documents could reasonably be expected to endanger the security of any property as required by clause 5(1)(f).

Accordingly, the Commissioner set aside the agency’s decision and, in substitution, found that the disputed documents were not exempt under clauses 4(3) or 5(1)(f) of Schedule 1 to the FOI Act. As the disputed plans are subject to copyright, access is to be given by the agency making the disputed plans available to the complainants for supervised inspection.

In addition, the Commissioner found that the disputed letter contains information which is outside the scope of the complainants’ application. It also contains a small amount of personal information which is exempt under clause 3(1) of Schedule 1 to the FOI Act.