

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

**File Ref: F2013322
Decision Ref: D0222014**

Participants:

'I'
Complainant

- and -

**Department of Agriculture and Food
Agency**

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – decision to give access – complaint by third party – documents relating to conduct of a general inspector employed by RSPCA – clause 3(1) personal information – clause 3(3) prescribed details – whether a general inspector employed by RSPCA is an officer of an agency under the Glossary to the FOI Act – clause 3(6) – whether disclosure would, on balance, be in the public interest.

Freedom of Information Act 1992: sections 32 and 102(2); Schedule 1, clauses 3(1)-3(6) and 5(1)

Freedom of Information Regulations 1993: regulation 9(1)

Animal Welfare Act 2002

Interpretation Act 1984

Re Leighton and Department of Local Government and Regional Development [2008] WAICmr 50

Re Swift and Shire of Busselton [2003] WAICmr 7

Re Aniveb Pty Ltd & Blackbeard Pty Ltd trading as Urban Endeavour and Avon Capital Estates (Australia) Limited and City of Canning and 'Y' [2010] WAICmr 28

Salaries and Allowances Tribunal v West Australian Newspapers Ltd [2008] WASC 39

Ireland v Ian Johnson CEO of the Department of Corrective Services [2009] WASCA 162

DECISION

The agency's decision is confirmed. I find that the disputed information is not exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*.

Sven Bluemmel
INFORMATION COMMISSIONER

8 December 2014

REASONS FOR DECISION

1. This complaint arises from a decision made by the Department of Agriculture and Food (**DAFWA**) to give an access applicant access to documents under the *Freedom of Information Act 1992* (**the FOI Act**).
2. Given the personal nature of the issues involved in this matter, I have not identified the complainant by name in order to preserve the complainant's privacy.

BACKGROUND

3. In an undated access application received by DAFWA on 27 June 2013, the access applicant applied under the FOI Act for access to documents relating to the complaint the access applicant had lodged with DAFWA under the *Animal Welfare Act 2002* (**the AW Act**).
4. As a result of discussions between the access applicant and DAFWA, the scope of the access application was reduced to the following documents:
 1. *All communications between DAFWA and the Royal Society for the Prevention of Cruelty to Animals (RSPCA) relating to [the access applicant's] complaint, lodged under the Animal Welfare Act 2002; and*
 2. *All briefing notes relating to [the access applicant's] complaint, lodged under the Animal Welfare Act 2002.*
5. In accordance with its obligations under section 32 of the FOI Act, the agency consulted with 'I' (**the complainant**) in order to obtain their consent or otherwise to the disclosure to the access applicant of certain documents which contained information about the complainant.
6. In a letter to DAFWA dated 11 September 2013, the complainant confirmed that they do not consent to the disclosure of the documents on the basis that they are exempt in full under clause 3(1) and clause 5(1) of Schedule 1 to the FOI Act.
7. After taking the complainant's views into account, DAFWA notified the complainant by notice of decision dated 25 September 2013 that it had decided to grant access to the documents.
8. On 25 October 2013 the complainant applied for internal review of DAFWA's decision. By letter dated 7 November 2013 DAFWA confirmed its decision. In a letter dated 4 December 2013 the complainant applied to me for external review of DAFWA's decision.

REVIEW BY THE INFORMATION COMMISSIONER

9. Following my receipt of this complaint, DAFWA produced to me the original of the disputed documents together with its FOI file maintained in respect of the access applicant's access application.

10. I also obtained from DAFWA a copy of the instrument of appointment dated 15 June 2011 and the instrument of appointment dated 2 December 2013, appointing the complainant as a general inspector under the AW Act.
11. On 6 March 2014 the parties attended a conciliation conference before my Principal Legal Officer. The matter was not able to be resolved at the conference.
12. I provided the parties with my preliminary view of the matter on 7 August 2014 and invited further submissions from each party.
13. My preliminary view was that DAFWA's decision was justified, and I invited the complainant to withdraw their application.
14. DAFWA accepted my preliminary view by letter dated 21 August 2014.
15. The complainant did not accept my preliminary view and made further submissions to me dated 27 August, 16 and 18 November 2014, which I have considered carefully.
16. DAFWA also provided at my request, via its solicitors, a further letter dated 10 November 2014 which I have also carefully considered.

ONUS OF PROOF

17. 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 the third party to establish that access should not be given or that a decision adverse to the access applicant should be made.
18. As a result, the onus is on the complainant to establish that access to the disputed documents should not be given.

THE DISPUTED DOCUMENTS AND THE DISPUTED INFORMATION

19. The disputed documents consist of emails between DAFWA and the Royal Society for the Prevention of Cruelty to Animals (**the RSPCA**); an internal DAFWA memorandum; and a letter dated 16 April 2013 from DAFWA to the complainant.
20. DAFWA has deleted certain information from those documents which it claims is exempt under clause 3(1) of Schedule 1 to the FOI Act because it is personal information about individuals other than the access applicant or the complainant. That information consists of the signatures, email addresses and direct telephone numbers of individuals. That information is not in dispute in this matter.
21. DAFWA has decided to grant the access applicant access to information about the complainant consisting of the complainant's name; title as a general inspector; and other information relating to the complainant's role as a general inspector and, in particular, their role in removing animals from the care of the access applicant (collectively **the disputed information**).

22. The complainant claimed that the disputed information is exempt under clause 3(1) because none of the limits on exemption in clauses 3(2)-3(6) applies. The complainant also claimed that the disputed information is exempt under clause 5(1) of Schedule 1 to the FOI Act. However I understand that the complainant's submissions of 27 August 2014 withdraw the complainant's objection under clause 5 of Schedule 1 to the FOI Act and I have therefore not considered this exemption further.
23. In my preliminary view dated 7 August 2014 I invited DAFWA to reconsider its decision in respect of the letter dated 16 April 2013 from DAFWA to the complainant. DAFWA and the complainant both accepted my preliminary view that the document was not within the scope of the access application, and I have therefore not considered it further.

CLAUSE 3 – PERSONAL INFORMATION

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 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).
25. The disputed information consists of the name, title and other information about the complainant as a general inspector. It is common ground between DAFWA and the complainant that the disputed information contains personal information about the complainant. Accordingly, I consider that the disputed information is on its face exempt under clause 3(1) because it would, if disclosed, reveal personal information about an individual, being the complainant. However, I also considered whether any of the limits on exemption in clauses 3(2)-3(6) might apply.
26. It is also common ground between DAFWA and the complainant that the only limits on exemption which may apply in the present case are clauses 3(3) and 3(6).

Clause 3(3) – Prescribed details about officers of Agencies

27. Clause 3(3) of Schedule 1 to the FOI Act provides that certain information – termed 'prescribed details' - about a person who is or has been an officer of an agency is not exempt under clause 3(1). The prescribed details covered by the limit include the name and title of an officer of an agency, the position held and things done or purported to be done by the person in the course of performing functions as an officer.
28. The type of information that amounts to prescribed details is set out in regulation 9(1) of the *Freedom of Information Regulations 1993 (the Regulations)*:

Prescribed personal details (FOI Act Schedule 1 clause 3)

- (1) *In relation to a person who is or has been an officer of an agency, details of —*
 - (a) *the person's name; or*

- (b) *any qualifications held by the person relevant to the person's position in the agency; or*
- (c) *the position held by the person in the agency; or*
- (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, are prescribed details for the purposes of Schedule 1, clause 3(3) of the Act.'*

29. The FOI Act makes a distinction between private information – such as a person's home address or health details – and information that relates solely to the person's performance of functions, duties or services for an agency.
30. In effect, the Regulations provide that certain specified 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). Consequently, information of that kind amounts to 'prescribed details' and is not exempt under clause 3(1) by virtue of the limit on exemption in clause 3(3).

The complainant's submissions – clause 3(3)

31. In the complainant's application for external review dated 4 December 2013, the complainant submitted that:
- whilst they accept that as a general inspector they may be an agency for the purposes of the FOI Act, that does not mean that the complainant is an officer of DAFWA.
 - they have never been employed by DAFWA, nor been a party to a contract for services with DAFWA; and
 - the disputed documents contain more than merely prescribed details about the complainant.
32. In their extensive further submissions dated 27 August 2014 in response to my preliminary view the complainant submitted that:
- there was a distinction between the terms 'agency' and 'the agency', asserting that '...the personal information is exempt information unless the person to whom the information relates is an officer of the agency to which the access application has been made';
 - DAFWA in its notice of decision dated 25 September 2013, formed the view that general inspectors, having been appointed to a public office pursuant to section 33 of the AW Act, were an agency within the meaning of that term in the FOI Act;

- the complainant had no objection to the release of disputed documents and disputed information concerning the performance of their office as a general inspector, further stating that they probably would have agreed to the release of information outside of the FOI process had they been asked;
 - although the complainant had not been provided with copies of the documents, some of the disputed information contained ‘harmful, unsubstantiated and ill-informed opinions’ influenced by DAFWA staff and not formed in a procedurally fair manner;
 - the complainant did not agree that the application of the FOI Act to general inspectors is founded upon them being employed (in the general sense of using the services of that person) for the purposes of DAFWA;
 - my preliminary view did not consider whether a general inspector is in itself an agency or whether it is part of an agency other than the agency;
 - there is no employment relationship between a general inspector in this case and DAFWA;
 - a general inspector is a separate agency pursuant to the FOI Act; and
 - DAFWA formed this view in its notice of decision dated 24 September 2013 and the complainant agrees with this view.
33. I acknowledge that the agency was constrained from providing the complainant with copies of the disputed documents and therefore revealing potentially exempt information about individuals other than the complainant. In such circumstances where an application for documents contains personal information about other people, even the identification or description of documents falling within the scope of that application may disclose personal information about a third party.

DAFWA’s submissions – clause 3(3)

34. DAFWA’s submissions are contained in its notice of decision dated 25 September 2013, its internal review decision dated 31 October 2013 and also a letter to me from its legal advisers dated 10 November 2014. In summary DAFWA submits as follows:
- general inspectors appointed under section 33 of the AW Act are officers of the agency for the purposes of the FOI Act;
 - ‘agency’ is defined in the Glossary to the FOI Act to include ‘a public body or office’ and ‘a public body or office’ includes ‘a body or office established for a public purpose under a written law’;
 - on the basis that general inspectors are appointed under section 33 of the AW Act, and section 37 of the AW Act confers upon them functions and powers, an individual appointed as a General Inspector essentially holds ‘a public office’ as

provided in paragraph (e) of the definition of ‘public body or office’ in the Glossary to the FOI Act;

- an individual who is appointed as a general Inspector under section 33 of the AW Act is an ‘agency’ as that term is defined in the Glossary to the FOI Act; and
- consequently the prescribed details of an officer of an agency are not exempt under clause 3(3) of Schedule 1 to the FOI Act.

Consideration – Clause 3(3)

35. As noted above, it is common ground between the parties that the disputed information is personal information about the applicant. The only issue in dispute, therefore, is whether the information about the complainant in the disputed information is merely prescribed details about a person who is or has been an officer of an agency. If so, it will not be exempt from disclosure.
36. Clause 3(3) relates to officers or former officers of agencies, (such as their names, job titles and things done by them in the course of performing their functions or services as an officer). It is not confined, as the complainant asserts, to officers of the agency to which the access application has been made, but extends to officers of any agency.

Officer of an agency

37. The Glossary to the FOI Act defines ‘officer of an agency’ to include:
- (a) *a member of the agency;*
 - (b) *the principal officer of the agency;*
 - (c) *any person employed in, by, or for the purposes of, the agency; and*
 - (d) *if the agency is a contractor or subcontractor, a director of the contractor or subcontractor (in addition to the persons referred to in paragraphs (a), (b) and (c)).*
38. Accordingly, a general inspector will be an ‘officer of an agency’ if he or she comes within one of paragraphs (a) to (d) above. It is not relevant in determining that question as to which agency received the access application: see the Commissioner’s decision in *Re Leighton and Department of Local Government and Regional Development* [2008] WAICmr 50 at [23]:
- Regulation 9(1) relates to individuals who are or have been officers of ‘an’ agency. That is, it is not restricted to the prescribed details that relate to an officer or officers of the agency to which the access application was made but may also extend to prescribed details relevant to officers of other government agencies.*
39. To assist me in determining this issue, the following is noted about the appointment and functions of a general inspector in Western Australia.

40. The office of a general inspector is a statutory position. Section 33(1) of the AW Act provides that the Chief Executive Officer of DAFWA (**the CEO**) is to appoint as general inspectors (a) those members of staff of the RSPCA nominated by the RSPCA; and (b) in accordance with section 33(2), as many other people whom the CEO considers to be suitably qualified or experienced as the CEO considers necessary for the purposes of the AW Act.
41. Under section 33(2), the CEO may appoint a member of the staff of (i) DAFWA; (ii) Agriculture WA; (iii) Conservation and Land Management; (iv) Fisheries Western Australia; or (v) a local government, who is nominated by the chief executive officer of that department or local government; or any other person whom the CEO considers is appropriate to appoint.
42. The terms of appointment of a general inspector are to be determined by the CEO and set out in the instrument of appointment (section 33(3)). Appointments remain in force for five years, unless before then the inspector ceases to be a member of the staff of the RSPCA or of the relevant department or local government; the inspector resigns; or the appointment is revoked by the CEO.
43. The functions of general inspectors are set out in section 37 of the AW Act and include enforcing Part 3 of that Act, which deals with offences against animals, and to provide information and assistance to the CEO in relation to matters arising under the AW Act. General inspectors have broad powers under the AW Act, including the power to enter and search a place or vehicle, seize animals or property, require information and commence proceedings for an offence committed under the AW Act.
44. The complainant holds an instrument of appointment with DAFWA. While the complainant claimed that their instrument of appointment was with the Department of Local Government there are two instruments of appointment in existence. The first was with the Department of Local Government and was dated 15 June 2011. However when responsibility for the AW Act transferred from that agency, a new instrument of appointment was executed on 2 December 2013. The second document is the instrument of appointment to which I will refer. It is a one page document signed by the Chief Executive Officer of the RSPCA and the CEO or delegate of DAFWA. There is no provision for the complainant to sign the instrument of appointment to indicate acceptance of the appointment. It consists of a heading as follows:

*General Inspector
Animal Welfare Act 2002
Nomination and Instrument of Appointment (s33).*

45. Section 33(3) of the AW Act states that ‘The terms of appointment of a general inspector are to be determined by the CEO and set out in the instrument of appointment.’
46. The instrument of appointment contains no reference to any duties, functions or obligations owed by the complainant to DAFWA or any direction, management or control of the complainant in the execution of their functions under Part 4 Division 2 of the AW Act that would be indicative of an employer/employee relationship or a contract for the provision of services.

47. It may be desirable to see the scope of the appointment and the core responsibilities to be clearly set out in such a document, not least for the avoidance of doubt as to the nature of the appointment and its obligations and duties. However I accept that the intention of the instrument of appointment is to confer upon the appointee functions and powers under Part 4 Division 2 of the AW Act and that the duties and responsibilities are those set out in Part 4 Division 2 of the AW Act.
48. I have considered whether a general inspector is a ‘member of an agency’ under paragraph (a), the principal officer of an agency under paragraph (b) or a ‘person employed in, by or for the purposes of an agency’ under paragraph (c) of the definition of ‘officer of an agency’ in the Glossary to the FOI Act.

Member of an agency – (a)

49. The word ‘member’ is not defined in the FOI Act. In *Re Swift and Shire of Busselton* [2003] WAICmr 7, the former Commissioner had regard to the definition of that word in the Australian Concise Oxford Dictionary, that is, ‘a person formally elected to take part in the proceedings of certain organisations’. Applying that definition, the Commissioner decided that a person who is formally elected as a councillor of a local government is a ‘member of’ the local government agency and therefore an officer of an agency: see also my decision in *Re Aniveb Pty Ltd & Blackbeard Pty Ltd trading as Urban Endeavour and Avon Capital Estates (Australia) Limited and City of Canning and ‘Y’* [2010] WAICmr 28.
50. In the present case, applying the same dictionary definition, I do not consider that general inspectors are members of DAFWA as they are not formally elected to their office but rather are appointed by the CEO on the recommendation of the RSPCA.
51. I have also considered the meaning of ‘member’ in the Macquarie Dictionary (Fifth Edition), which includes ‘1. each of the persons composing a society, party, community or other body. 2. each of the persons included in the membership of a legislative body, as parliament’. I do not consider that a general inspector can be regarded as a member of DAFWA for the purposes of the FOI Act.

Principal officer of an agency – (b)

52. Both parties submit that a general inspector is an agency in and of itself for the purpose of the FOI Act. They submit that a general inspector is an agency consisting of one person – the general inspector. An agency is defined in the Glossary to the FOI Act as ‘a public body or office’. The definition of ‘public body or office includes at paragraph (e) ‘a body or office that is established for a public purpose under a written law’.
53. The definition of principal officer in the Glossary to the FOI Act includes relevantly ‘in relation to an agency that consists of one person (not being an incorporated body) – that person’. It necessarily follows that a general inspector is both an agency, and an officer of an agency, for the purposes of the FOI Act.

‘Employed in, by, or for the purposes of an agency’ – (c)

54. In light of my finding that a general inspector is an officer of an agency, it is not strictly necessary for me to consider whether general inspectors are ‘employed in, by, or for the purposes of an agency.’ However, for completeness, I now do so.
55. The FOI Act does not define the term ‘employ’. However, the Macquarie Dictionary defines that word to include ‘to use the services of (a person); have or keep in one’s service; keep busy or at work’.
56. In *Salaries and Allowances Tribunal v West Australian Newspapers Ltd* [2008] WASC 39, when considering a question about the meaning and interpretation of words or phrases used in the FOI Act, Martin CJ said at [49]:

In my opinion, the question at issue is sufficiently answered by applying the primary approach to statutory construction, which is the application of the natural and ordinary meaning of the words used in the statute to the particular provision of the statute, having regard to that provision in the context of the statute read as a whole, and the objects and purposes of the statute to be inferred from the statute as a whole.

57. The Supreme Court of Western Australia considered the meaning of ‘employed’ in *Ireland v Ian Johnson CEO of the Department of Corrective Services* [2009] WASCA 162. At [31] Le Miere J said:

*[I]n their natural and ordinary meaning the words ‘employment’ and ‘employed’ are not confined to a person being engaged under a contract of service. The meaning of ‘employment’ includes the state of being employed and the meaning of ‘employed’ includes ‘to use the services of or to keep busy or at work’. Words take colour from their surroundings and words of wide signification may be limited by their context. However, such a limitation must be demonstrated. If general words are used, they should be given their plain and ordinary meaning unless the contrary is shown: *Cody v J H Nelson Pty Ltd* [1947] HCA 17; (1947) 74 CLR 629, 647 Dixon J.*

In this context I consider that I should use the natural and ordinary meaning of the terms ‘employed in, by, or for the purposes of an agency’.

58. According to DAFWA’s website¹, it has the responsibility ‘of assisting the Minister for Agriculture and Food in the administration of [the AW Act] including undertaking a range of compliance and enforcement activities under [the AW Act].’ To achieve that, DAFWA states that it has separated its animal welfare responsibilities from its animal research role; placing the compliance and enforcement responsibilities with its Livestock Compliance Unit. According to its website, DAFWA’s role includes ‘administering animal welfare legislation, promoting compliance with [the AW Act] and appointing General Inspectors under [the AW Act].’

¹ <https://www.agric.wa.gov.au/animalwelfare/animal-welfare-roles-and-responsibilities>

59. The services provided by general inspectors are used for that purpose. Accordingly, I consider that a general inspector is a person ‘employed’ (in the general sense of ‘using the services of’ that person) *for the purposes* of DAFWA and, therefore, is an officer of an agency for the purposes of the FOI Act even though no contract of employment exists between the complainant and DAFWA.

Conclusion – Clause 3(3)

60. For the reasons given above, I consider that the complainant, as a general inspector under the AW Act, is an officer of an agency. The complainant is either the principal officer of an agency consisting of one person, as asserted by both the complainant and DAFWA, or they are employed for the purposes of DAFWA.
61. As the disputed information consists of the complainant’s name, their title as a general inspector and other information relating to the complainant’s role as a general inspector, its disclosure would do no more than reveal prescribed details about a person who is or has been an officer of an agency. It therefore follows that the disputed information is not exempt under clause 3 of Schedule 1 to the FOI Act.

Clause 3(6) – Public interest

62. As I have determined that the disputed information is not exempt under clause 3(3) it is not strictly necessary for me to consider the public interest test in clause 3(6) of Schedule 1 to the FOI Act. However I consider the public interest test below for completeness.
63. Clause 3(6) provides that matter is not exempt matter under subclause 3(1) if its disclosure would, on balance, be in the public interest.
64. Determining whether or not disclosure would, on balance, be in the public interest involves identifying the public interests for and against disclosure, weighing them against each other and deciding where the balance lies.
65. The complainant submitted strongly that it was not in the public interest to release their personal information for the following reasons:
- it is not fair nor in the public interest for information which may be defamatory to be released to the world at large pursuant to the provisions of the FOI Act and particularly under the protection of section 104 of the FOI Act;
 - the disputed documents contain hearsay information and opinion about the complainant, this personal information is exempt and does not come within the limits to the exemption in the FOI Act;
 - the disputed information ‘... is unsubstantiated opinion, has not been formed in a proper or procedurally fair manner, and it appears it may have been influenced by biased officers within DAFWA. These actions of DAFWA are currently subject to a separate complaints process’;

- the complainant '[does not] accept that Parliament when enacting the FOI legislation intended for it to permit an agency to create personal information, that is create not collect information about a person, with absolutely no regard to the truth or accuracy of the personal information it created, and with a total disregard of due process, and then enable this information to be released to the world at large through its provisions'; and
 - 'there is an overwhelming public interest in protecting personal information especially when that information has not been formed in a procedurally fair or proper process.'
66. 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:
- 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...*
67. In favour of disclosure I recognise a public interest in individuals such as the access applicant being able to exercise their rights of access under the FOI Act, subject to the exemptions in Schedule 1. This interest is particularly strong where, as here, those functions impact on the rights of individuals.
68. There is also a strong public interest in the transparency and accountability of government agencies that carry out functions on behalf of the community.
69. In favour of non-disclosure, I recognise a strong public interest in the maintenance of personal privacy, which interest may only be displaced by some stronger public interest that requires the disclosure of personal information about one person to another person. The protection of a person's privacy is a public interest that is recognised in clause 3. As noted, the FOI Act is not intended to open the professional and private lives of citizens to public scrutiny where there is no demonstrable public benefit in doing so.
70. While the personal privacy of individuals who are officers of an agency is limited by the provisions of clause 3(3) and regulation 9 as set out in paragraphs 27-28 above, I consider in the circumstances that the public interest is best served by disclosing the disputed information.
71. In particular I also note that the complainant stated in their submissions dated 27 August 2014 that they had no objection to the release of disputed documents and disputed information concerning the performance of their office as a general inspector, and that the complainant probably would have agreed to the release of information outside of the FOI process had the complainant been asked.

72. I therefore consider that, were I asked to determine the question, I would decide that on balance the public interest weighs in favour of disclosure of the disputed documents and information.

CONCLUSION

73. I find that the agency's decision to grant access to the disputed documents is justified. The disputed information is not exempt under clause 3(1) of Schedule 1 to the FOI Act.
