

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

**File Ref: F2010061
Decision Ref: D0232010**

Participants:

X
Complainant

- and -

Department of Local Government
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to the outcome of a prosecution of a local government councillor – clause 7(1) – legal professional privilege – whether communications privileged – clause 3(1) – personal information – clause 3(3) – whether prescribed details – clause 3(6) – whether disclosure would, on balance, be in the public interest – scope of obligation of Information Commissioner on external review.

Freedom of Information Act 1992: sections 6, 76(1) and 102(3); Schedule 1, clauses 3(1), 3(3), 3(6) and 7(1); Schedule 2, Glossary, clause 1

Magistrates Court Act 2004: sections 33(8) and 33(9)(a)

Local Government Act 1995

Freedom of Information Regulations 1993: regulation 9(1)

Financial Management Act 2006: section 61

Manly v Ministry of Premier and Cabinet (1995) 14 WAR 550

Eso Australia Resources Ltd v The Commissioner of Taxation (1999) 201 CLR 49

Commissioner of Australian Federal Police and Another v Propend Finance Pty Ltd and Others [1997] 188 CLR 501

Trade Practices Commission v Sterling (1979) 36 FLR 244

Grant v Downs (1976) 135 CLR 674

DPP v Smith [1991] 1 VR 63

Police Force of Western Australia v Kelly and Smith (1996) 17 WAR 9

DECISION

The decision of the agency is varied. I find that:

- Documents 1 and 2 fall outside the scope of the complainant's access application;
- Document 3, the last paragraph on page 1 of the briefing note in Document 4 and Document 5 are exempt under clause 7(1); and
- the disputed information in Document 4 is exempt under clause 3(1) of Schedule 1 to the FOI Act.

Sven Bluemmel
INFORMATION COMMISSIONER

18 August 2010

REASONS FOR DECISION

1. This complaint arises from a decision made by the Department of Local Government ('the agency') under the *Freedom of Information Act 1992* ('the FOI Act') to refuse 'X' ('the complainant') access to documents relating to a named third party. 'Y' is the third party named in the requested documents. To protect the privacy of the third party, I have decided not to identify that person by name or to identify the complainant by name to avoid the possibility that the identity of the third party could be ascertained in these reasons for decision.

BACKGROUND

2. The complainant is a councillor of a local government ('the Local Government') and he was also the presiding member of a committee of the Local Government ('the Committee'). 'Y' is also a councillor of the Local Government and was a member of the Committee at the time. Certain events which occurred during the Committee meetings resulted in 'Y' being prosecuted by the agency and the matter was ultimately heard in the Magistrates Court of Western Australia.
3. On 17 November 2009 the complainant applied to the agency under the FOI Act seeking access to:

"...the outcome and result of the case prosecuted by the Department of Local Government and Regional Development against the accused, [Y] ..."

4. The complainant paid the \$30.00 application fee payable under the FOI Act for applications for non-personal information.
5. From the agency's file maintained in respect of the complainant's application it is clear that the agency treated his letter as an application for documents that contained the requested information, since under the FOI Act there is a right of access to documents rather than to information.
6. By letter dated 31 December 2009, the agency advised the complainant that it was seeking legal advice in relation to his access application and therefore sought to defer access to any documents. On 6 January 2009, the complainant agreed to give the agency an extension of time to 2 February 2010 to deal with his access application.
7. By notice of decision dated 1 February 2010, the agency refused the complainant access to the requested information on the ground that such information was exempt under clause 3(1) (personal information) of Schedule 1 to the FOI Act. The complainant applied for internal review of the agency's decision. On 9 February 2010 the agency confirmed its initial decision. In neither decision did the agency identify any documents relevant to the complainant's access application.

8. Thereafter, on 10 February 2010, the complainant applied to me for external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

9. Following my receipt of the complainant's application for external review, the agency produced to me the originals of five documents that it had identified as coming within the scope of his application, together with the agency's FOI file maintained in respect of that application.
10. Having examined that material, my officer made inquiries with the Magistrates Court of Western Australia and was advised that in order to obtain a copy of a decision of a Magistrate, a person could apply in writing and provide reasons for seeking access.
11. Accordingly, I have considered the application of s.6 of the FOI Act to this matter. Section 6 provides that the access procedures under the FOI Act do not apply to documents that are already publicly available for free or for inspection or purchase. However, since it appears that access to a copy of a Magistrates Court decision is conditional on, among other things, the reasons for seeking access (see *Magistrates Court Act 2004*, ss.33(8) and 33(9)(a)), I do not consider that s.6 applies in the circumstances of this case.
12. In dealing with a complaint made to me under the FOI Act against a decision of an agency, I stand in the shoes of the decision maker. Section 76(1) of the FOI Act provides that, in dealing with a complaint under the FOI Act, I have the power to decide any matter in relation to the complainant's access application that could, under the FOI Act, have been decided by the agency.
13. On 28 June 2010, after considering the information then before me, including all the documents produced to me, the agency's FOI file and information provided by the complainant, I wrote to the parties setting out my preliminary view of the complaint. It was my preliminary view that two of the documents produced to me are outside the scope of the complainant's access application; two documents are exempt under clause 7(1) of Schedule 1 to the FOI Act; and one document contains information that is exempt under clauses 3(1) and 7(1), although a covering letter dated 2 February 2009 in that document could be disclosed after deleting a small amount of personal information.
14. In light of my preliminary view, I invited the complainant to withdraw his complaint or, alternatively, to provide me with further submissions relevant to the matter for my determination by 14 July 2010. I also invited the agency to provide me with any further submissions it wished to make in response to my preliminary view.
15. The complainant declined to withdraw his complaint and sought an extension of time in which to provide his submissions. The complainant subsequently provided me with his submissions by email on 26 July 2010.

16. The agency accepted my preliminary view but provided no further submissions. Accordingly, the agency has agreed to release the covering letter referred to in paragraph 13 above, edited to delete personal information in accordance with my preliminary view. Therefore the information released to the complainant no longer forms part of the disputed information in that document.

Non-disclosure of exempt matter

17. Section 76(5) of the FOI Act provides that, in dealing with a complaint, the Information Commissioner has to include in the decision the reasons for the decision and the findings on material questions of fact underlying those reasons, referring to the material on which those findings were based.
18. However, s.74(1) of the FOI Act requires me to, among other things, ensure that exempt matter is not disclosed during the course of my dealing with a complaint and s.74(2) places a further obligation upon me not to include, among other things, exempt matter in a decision on a complaint or in reasons given for a decision.
19. In my view, the obligation not to disclose exempt matter extends to the disclosure of matter claimed to be exempt by an agency. Having regard to the provisions of ss.74 and 76, I consider that I am constrained, in the circumstances of this particular case, from including in my decision my findings on some of the material questions of fact underlying the reasons for my decision. I am also constrained from referring to the material upon which those particular findings are based and the evidence before me which supports those reasons, because I do not consider that I can do so without revealing exempt matter and thereby breaching my statutory obligations under s.74(2) of the FOI Act.
20. I acknowledge that, in some instances, this places a complainant at a disadvantage in making submissions to me on some of the contested issues. The difficulties faced by complainants and the constraints placed on me by s.74 of the FOI Act, were recognised by Owen J in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at 556-557. In that case, Owen J took the view that provisions such as s.74 should be construed strictly to avoid the disclosure of exempt matter.

THE FIVE DOCUMENTS

21. The agency did not provide the complainant with a description of the documents that it considers fall within the scope of his access application. Although agencies often consider it useful to give an applicant a schedule of documents, they are not required to do so under the FOI Act. However, I consider that it is possible to describe the documents identified by the agency without revealing exempt matter or matter claimed to be exempt as follows:
 - Document 1 is an Assessment Report dated April 2006.
 - Document 2 is an Inquiry Report dated 2007.
 - Document 3 is a letter dated 23 January 2009 with attachments.

- Document 4 is a letter dated 2 February 2009 attaching a briefing note and another attachment from the agency to a third party.
- Document 5 is a facsimile transmission sheet and letter dated 17 February 2009 with attachments.

DOCUMENTS OUTSIDE THE SCOPE OF THE ACCESS APPLICATION

22. As described at paragraph 3, the information sought by the complainant in his access application is information concerning the outcome and result of the case prosecuted by the agency. That information is contained in Documents 3, 4 and 5.
23. From my examination of the five documents, it is clear on their face, that Documents 1 and 2 do not relate to the “*outcome and result*” of the case prosecuted by the agency. On that basis, I consider that Documents 1 and 2 are outside the scope of the complainant’s access application and I do not propose to deal with them further. Therefore, the documents remaining in dispute in this matter are Documents 3, 4 and 5 (‘the disputed documents’).

THE EXEMPTION – CLAUSE 7 – LEGAL PROFESSIONAL PRIVILEGE

24. Clause 7(1) provides that matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege. Legal professional privilege protects from disclosure confidential communications between clients and their legal advisers if made or brought into existence for the dominant purpose of giving or seeking legal advice or for use in existing or anticipated legal proceedings: *Esso Australia Resources Ltd v The Commissioner of Taxation* (1999) 201 CLR 49 at [35].
25. The privilege is concerned with confidential communications and seeks to promote communication with a legal adviser, not to protect the content of a particular document. In *Commissioner of Australian Federal Police and Another v Propend Finance Pty Ltd and Others* [1997] 188 CLR 501, Toohey J observed, at p.525:

“... privilege does not attach to a piece of paper. It attaches to a communication, written or oral, and it is the communication that is at issue. While it is natural to speak of legal professional privilege in terms of documents, it is the nature of the communication within the document that determines whether or not the privilege attaches.”

26. Although legal professional privilege is most commonly applied to communications between clients and their legal advisers, it also extends to other classes of documents. For example, in *Trade Practices Commission v Sterling*, (1979) 36 FLR 244, Lockhart J of the Federal Court of Australia held that the privilege extends to other categories of documents, including, insofar as it is relevant:

“(a) Any communication between a party and his professional legal adviser if it is confidential and made to or by the professional adviser in his

professional capacity and with a view to obtaining or giving legal advice or assistance; notwithstanding that the communication is made through agents of the party and the solicitor or the agent of either of them...;

.....

- (d) *Notes, memoranda, minutes or other documents made by the client or officers of the client or the legal adviser of the client of communications which are themselves privileged, or containing a record of those communications, or relate to information sought by the client's legal adviser to enable him to advise the client or to conduct litigation on his behalf...".*

Consideration

27. I have examined Documents 3, 4 and 5. Document 3 is a letter from the State Solicitor's Office ('SSO') to the agency with an attachment. Document 5 is a facsimile from the SSO to the agency enclosing a letter from the SSO to the agency with an attachment. From the information before me, I am satisfied that the SSO was acting as the agency's legal adviser in relation to these matters.
28. As noted above, the decision in *Esso* has made it clear that privilege attaches to a confidential communication between clients and their legal advisers. The question of whether the disputed documents were created for the relevant dominant purpose is a question of fact, which may be disclosed by the content of that document: see *Grant v Downs* (1976) 135 CLR 674 at 689.
29. On their face, Documents 3 and 5 are both confidential communications to the agency from the agency's legal advisers. I consider that the attachments to those letters form part of those communications. On the information presently before me, I am satisfied that those confidential communications were made for the dominant purpose of giving legal advice to the agency.
30. With respect to Document 4, and in accordance with the decision in *Sterling's* case, I am satisfied, from my examination of that document, that the last paragraph of page 1 of the briefing note contains a record of communications between the agency and the agency's legal adviser which is privileged because it relates to advice sought by the agency.
31. In my view, Documents 3 and 5 and the last paragraph on page 1 of the briefing note in Document 4 would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find those documents and that information exempt from disclosure under clause 7(1) of Schedule 1 to the FOI Act.
32. The exemption in clause 7 is not subject to a limit on exemption in the form of a public interest test and thus, there is no scope for me to consider whether it would, on balance, be in the public interest for Documents 3 and 5 and the relevant information in Document 4 to be disclosed to the complainant.

THE EXEMPTION – CLAUSE 3 – PERSONAL INFORMATION

33. The agency claims that the information which the complainant requested is personal information about third parties that is exempt under clause 3(1) of Schedule 1 to the FOI Act. As I consider that Documents 3 and 5 and the relevant information in Document 4 are exempt under clause 7(1), it is not necessary for me to consider whether that matter is also exempt under clause 3(1).
34. Moreover, as the agency has disclosed a small amount of information to the complainant as described in paragraph 16 above, I am only required to consider whether the remainder of Document 4 is exempt under clause 3(1) ('the disputed information').
35. Clause 3, insofar as it is relevant, provides:

"3. Personal information

Exemption

- (1) *Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).*

Limits on exemption

- (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)
- (6) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest."*

Definition of 'personal information'

36. In the Glossary to the FOI Act the term 'personal information' is defined 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.”*

37. The definition of ‘personal information’ in the Glossary to the FOI Act makes it clear that any information or opinion about a person whose identity is apparent – or whose identity can reasonably be ascertained from the information or opinion – is, on its face, exempt information under clause 3(1).
38. I consider that 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. In my view, the FOI Act is intended to make Government, its agencies and officers more accountable, not to unnecessarily intrude upon the privacy of individuals, where there is no demonstrable benefit to the public interest in doing so.

The complainant’s submissions

39. The complainant’s submissions are set out in his access application dated 17 November 2009; in his application for internal review dated 8 February 2010; his application for external review dated 10 February 2010; in an email dated 3 July 2010; and his letter to me dated 24 July 2010. I have summarised those submissions, insofar as they relate to clause 3(1), as follows:
- The complainant originally sought the disputed information out of personal interest, as he was the presiding member of the Committee at the time of the alleged offence, and he was also called as a witness for the agency.
 - The disputed information should be disclosed to the complainant as he is an elected member and councillor of the Local Government, and members should be aware of the consequences of contravening the provisions of the *Local Government Act 1995* (‘the LG Act’) and what penalties may apply if found guilty.
 - As part of Council inductions and briefings it was made clear to the complainant that any breach of the LG Act was a very serious matter. ‘Y’ also signed and made an affirmation to uphold the Local Government’s code of conduct. Accordingly, the public should have the right to know what the outcome was in respect to this matter.
 - The outcome of the prosecution should be made public consistent with other cases where the ‘misdemeanours’ of other Western Australian local government councillors have been publicly advertised.

- Although the judicial system has been used in this case, the LG Act was not used by the agency as the LG Standards Panel was not in place at that time. Therefore the public interest in public officers being informed of the seriousness of breaching the LG Act or the relevant code of conduct has not been satisfied.
- The complainant asserts that, given the reluctance of the agency to give access to the disputed information and the denial of his right to this information, he can only assume that Council systems were breached. Therefore, it is in the public interest that this matter “...*be put in the public arena and see what ‘shakes’ loose.*”
- The complainant does not seek the names of the officers or the agencies involved.
- The complainant does not consider that the disclosure of the ‘outcome’ of a case prosecuted against a councillor would “*unnecessarily intrude on the privacy of individuals*” and considers that there is a “*demonstrable benefit to the public interest in doing so.*”

Consideration

40. I have examined the disputed information in Document 4 and in my view all of that matter is ‘personal information’ about individuals as defined in the FOI Act, because it is information or opinion that identifies those individuals. Accordingly, the disputed information is *prima facie* exempt under clause 3(1). The exemption in clause 3(1) is, however, subject to a number of limits which are set out in clauses 3(2) - 3(6) of Schedule 1 to the FOI Act. In the circumstances of this complaint, I consider that only clauses 3(3) and 3(6) are relevant.

Clause 3(3)

41. A number of the individuals identified in the disputed information are officers of government agencies. Clause 3(3) provides that certain information about officers or former officers of agencies that relates to the work performed by them is not exempt as personal information under clause 3(1). That information – which is referred to as ‘prescribed details’ – is listed in regulation 9 of the *Freedom of Information Regulations 1993* (‘the FOI Regulations’).
42. Having examined the disputed information, it is my opinion that some – but not all – of the personal information about officers of an agency is ‘prescribed details’ as defined in regulation 9 of the FOI Regulations. For example, information that relates to their functions and duties as officers of the agency or things done by them in the course of performing their functions as officers of the agency are prescribed details.
43. However, the disputed information also contains personal information about individuals who are not officers of an agency as well as personal information

about officers that is not ‘prescribed details’. That information is *prima facie* exempt under clause 3(1).

44. In addition, that information is inextricably intertwined with the prescribed details of officers of agencies, so that disclosure of the disputed information would not ‘merely’ reveal prescribed details about officers of agencies, as that information could not be disclosed without also revealing personal information about other people. Therefore, the limit on exemption in clause 3(3) does not apply in this case.

Clause 3(6) – the public interest

45. Clause 3(6) provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. Under s.102(3) of the FOI Act, the onus is on the complainant as the access applicant to establish that the disclosure of personal information about third parties would, on balance, be in the public interest.
46. 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.
47. 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...”

48. As the complainant has submitted, he initially sought the disclosure of the disputed information out of personal interest, as he was called as a witness for the agency. However, the public interest is not primarily concerned with the personal interests of the particular access applicant or with public curiosity – public interest is a matter in which the public at large has an interest as distinct from the interest of a particular individual or individuals.
49. Favours disclosure, there is a public interest in the complainant, as an access applicant, being able to access documents under the FOI Act. I also accept the complainant’s submission that there is a public interest in public officers being informed of the seriousness of breaching the LG Act and their obligations under the relevant code of conduct. In this particular instance, I consider that those public interests are largely satisfied with the procedures that are put in place by the LG Act in dealing with any alleged breaches, as well as the judicial system in Western Australia. It is my understanding that those procedures were in fact used in this instance.

50. I also accept there is a public interest in the public being informed of the outcome of a prosecution of a local government councillor. I am aware that the agency has an obligation under s.61 of the *Financial Management Act 2006* to prepare an annual report that reports on the operations of the agency during the financial year. As the operations of the agency in this case include the investigation of allegations and complaints about various aspects of the operations of all local governments in Western Australia, I understand that the annual report includes details of those investigations and the outcomes. I consider that this obligation imposed on the agency largely satisfies that public interest.
51. In relation to the complainant's submission that the LG Act was not used by the agency as the LG Standards Panel was not in place at that time, it is my understanding that, even prior to the introduction of a LG Standards Panel which came into operation in October 2007, there were and are provisions in the LG Act which deal with alleged breaches by public officers in local government, and those provisions were in fact relied on in this case. Those provisions have not been superseded by the introduction of such a panel and continue to be in force.
52. It is not my role under the FOI Act to order that the outcome of a matter be publicised so that it be consistent with the outcomes of other local government prosecutions. That decision is for the particular body hearing the prosecution of the matter to make. Further, for me to do so would result in revealing exempt matter and thereby breaching my statutory obligations under s.74(1) of the FOI Act.
53. The complainant submits that given the reluctance of the agency to give access to the disputed information and the denial of his right to this information, it is now a "*matter of public importance*" and perhaps "*...needs to be put in the public arena and see what 'shakes' loose*". There is nothing in the disputed information or the material before me to suggest that the agency was acting other than in accordance with its obligations under the FOI Act in dealing with this matter.
54. The FOI Act creates a right of access to Government documents. However, it is not an absolute right, and the public interest in this right is balanced in the FOI Act against a number of other public interests which are contained in the form of exemptions and which are essential for the proper workings of Government.
55. Favours non-disclosure in this case, I recognise that there is a strong public interest in maintaining the personal privacy of third parties. As I have said, 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. That public interest is recognised by the inclusion of the exemption in clause 3(1) and, in my view, that public interest will only be displaced by a very strong countervailing public interest that requires the disclosure of personal information about one person to another person. As I am satisfied that the matter in the disputed information contains personal information about third parties the question is whether the public interest in

maintaining the privacy of these individuals is outweighed by some other public interest or interests that favour disclosure of that personal information.

56. As noted in paragraph 11, the courts in Western Australia have systems which regulate the granting of access to court records. Those systems have been developed to provide the general public a means of access to the outcome and result of court proceedings where appropriate, and accordingly, I consider that the availability of this method partially satisfies the public interest in the complainant being able to access information relating to court proceedings.
57. While the complainant notes that he was the presiding member of the Committee at the time of the alleged offence and was also a witness for the agency, the right of access to a document under the FOI Act does not depend on how much of the information is already known by an access applicant. In *Police Force of Western Australia v Kelly and Smith* (1996) 17 WAR 9, Anderson J of the Supreme Court of Western Australia said at p.14 - in relation to a claim for exemption under clause 5(1)(b) of the FOI Act:

“In considering the question of whether exemption is lost once the matter has found its way into the hands of the applicant or into public hands, I think it must be remembered that what is under consideration is the right of access to the particular documents of an agency. One would not expect the character of the documents as exempt documents to depend on whether, by some means, the subject matter of the documents, or some of it, had already got out ... it would mean that an applicant could overcome a claim of exemption by showing or claiming that he already knew something of the matter from other sources. I do not think it could have been intended that exemption should depend on how much the applicant already knows or claims to know of the matter.”

58. I agree with those comments. Accordingly, on the material presently before me, I am not persuaded that the general right of access and the regime of openness and accountability inherent in the FOI Act requires the disclosure to the complainant of personal information about other people in this instance. Having weighed the competing public interests, I do not consider that those favouring disclosure outweigh the very strong public interest in the protection of the personal privacy of third parties.

CONCLUSION

59. For the reasons given above, I find that:
- Documents 1 and 2 fall outside the scope of the complainant’s access application;
 - Document 3, the last paragraph on page 1 of the briefing note in Document 4 and Document 5 are exempt under clause 7(1); and
 - the disputed information in Document 4 is exempt under clause 3(1) of Schedule 1 to the FOI Act.
