

Participants:

**Aniveb Pty Ltd & Blackbeard Pty Ltd
trading as Urban Endeavour and
Avon Capital Estates (Australia)
Limited**

Complainants

- and -

City of Canning
First Respondent

- and -

'Y'
Second Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – written transcript of a tape-recording of a Council meeting – clause 3(1) – personal information – whether councillor of a local government is an officer of an agency – clause 3(3) – whether prescribed details.

Freedom of Information Act 1992: sections 76(1) and 102(2); Schedule 1, clauses 3(1), 3(3), 3(6), 6(1) and 11(1); Schedule 2, Glossary, clause 1

Local Government Act 1995: section 2.10

Freedom of Information Regulations 1993: regulation 9(1)

Re Veale and Town of Bassendean [1994] WAICmr 4

Re Swift and Shire of Busselton [2003] WAICmr 7

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

DECISION

The decision of the agency is set aside. In substitution, I find that the disputed document is not exempt under clause 3(1) of Schedule 1 to the FOI Act.

Sven Bluemmel
INFORMATION COMMISSIONER

29 October 2010

REASONS FOR DECISION

1. This complaint arises from a decision made by the City of Canning ('the agency') to refuse access to a document requested by Aniveb Pty Ltd and Blackbeard Pty Ltd, a partnership trading as Urban Endeavour ('Urban Endeavour') and Avon Capital Estates (Australia) Limited ('Avon Capital') (together 'the complainants'), under the *Freedom of Information Act 1992* ('the FOI Act'). In this complaint a third party, who opposes the giving of access to the disputed document, has been joined as the second respondent. Since the second respondent claims that the document in dispute in this matter would disclose personal information about him that is exempt, I have identified him only as 'Y'.

BACKGROUND

2. Avon Capital is the owner of land at Canning Vale ('the Land') and Urban Endeavour is a construction management consultancy that applied to the agency on behalf of Avon Capital to develop the Land.
3. On 12 February 2010, Urban Endeavour on behalf of Avon Capital, applied to the agency under the FOI Act seeking access to a copy of a tape recording of a particular Council meeting and identified the specific item number, which relates to the Council discussion of the development of the Land. Urban Endeavour paid the \$30.00 application fee payable under the FOI Act for applications for non-personal information.
4. By notice of decision dated 9 March 2010, the agency advised the complainants that it would allow a representative of the complainants to listen to the tape recording of that item presented at the relevant Council meeting. The agency also advised that a written transcript of the tape recording could be provided.
5. However, access to the tape recording was deferred pending internal review sought by two third parties consulted by the agency who were named in the tape recording and who had both objected to its disclosure on the ground that the information contained on that tape recording is exempt matter.
6. As both third parties sought internal review of the agency's decision, the CEO of the agency conducted an internal review and set aside the initial decision. In substitution, the CEO decided to refuse access to the tape recording and the transcript, on the ground that they contained matter that was exempt under clause 11(1) of Schedule 1 to the FOI Act. Thereafter, on 27 May 2010, the complainants' lawyers applied to me on behalf of both Avon Capital and Urban Endeavour for external review of that decision.

REVIEW BY THE INFORMATION COMMISSIONER

7. The definition of 'document' in the Glossary to the FOI Act includes any record, any part of a record, any copy, reproduction or duplicate of a record or any part of a copy, reproduction or duplicate of a record. 'Record' is defined in

the Glossary to the FOI Act to mean any record of information however recorded including:

- “(e) any article or material from which sounds, images or writing can be reproduced whether or not with the aid of some other article or device;*
- (f) any article on which information has been stored or recorded, either mechanically, magnetically or electronically”*

In my view, the tape recording and the transcript made from it are both ‘documents’ as defined in the FOI Act.

8. Following my receipt of this complaint, the agency produced to me the original of the transcript of that part of the tape recording which discusses the relevant item together with the agency’s FOI file maintained in respect of the access application. The original tape recording was not provided at that stage.
9. Having examined that material, my A/Legal Officer made inquiries with the complainants’ solicitors to clarify the form and scope of the matter in dispute. By letter dated 8 July 2010, the complainants’ solicitors confirmed that the complainants would accept a written transcript of that portion of the tape recording relating to the discussion of the relevant item, on the basis that it had been accurately and completely transcribed.
10. Following inquiries made by my A/Legal Officer with the agency, my officer attended at the agency’s office to verify the tape recording against the written transcript and an accurate transcription of the relevant part of the tape recording was subsequently provided to my office (‘the disputed document’).
11. On 4 August 2010, after considering the information then before me, including the disputed document, the agency’s FOI file and information provided by the complainants, I wrote to the parties setting out my preliminary view of the complaint. It was my preliminary view that the disputed document was not exempt under clauses 11(1)(a) or 11(1)(b) of Schedule 1 to the FOI Act as claimed by the agency.
12. 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. Accordingly, I considered whether the exemptions in clauses 3(1) and 6(1) of Schedule 1 to the FOI Act applied to the disputed document. However, my preliminary view was that the disputed document was not exempt under either clause 3 or clause 6.

14. In light of my preliminary view, I invited the agency to reconsider its decision or alternatively to provide me with further submissions relevant to the matter for my determination. As the disputed document contained personal information about two third parties who had objected to its disclosure, I invited both third parties to provide me with submissions and invited them to be joined as parties to this complaint.
15. By facsimile and letter dated 13 September 2010, the agency withdrew its claims for exemption and agreed to disclose the disputed document to the complainants. In addition, one of the third parties consented to the disclosure of the disputed document.
16. However, the second respondent, Y, maintained his objection to the disclosure of the disputed document and provided me with submissions by email dated 12 September 2010 to the effect that the disputed document was exempt under clause 3(1). On 19 September 2010, Y elected to be joined as a party to this complaint and provided me with further submissions, maintaining that the disputed document was exempt under clause 3(1).

THE DISPUTED DOCUMENT

17. The disputed document is the written transcript of that part of the tape recording of the discussion at the agency's Council meeting of the item relating to the Land.

BURDEN OF PROOF

18. Section 102(2) of the FOI Act provides that where a third party – in this case, Y – opposes the giving of access to a document, the onus lies with that person to establish that access should not be given or that a decision adverse to the access applicant should be made. In the present case, Y claims that the disputed document is exempt under clause 3(1) of Schedule 1 to the FOI Act.

THE EXEMPTION – CLAUSE 3 – PERSONAL INFORMATION

19. Insofar as it is relevant, clause 3 provides:

“3. Personal information

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

(2)...

(3) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to –

(a) the person;

- (b) *the person's position or functions as an officer; or*
- (c) *things done by the person in the course of performing functions as an officer.*
- (4) ...
- (5) ...
- (6) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.”*

Definition of ‘personal information’

20. 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.”*

21. The definition of ‘personal information’ 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 the face of it, exempt information under clause 3(1), subject to the application of the limits on exemption in clauses 3(2)-3(6).
22. 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, but not to call to account or unnecessarily intrude upon the privacy of private individuals, where there is no demonstrable benefit to the public interest in doing so.

Y’s submissions

23. Y’s submissions are set out in his letters to the agency, dated 23 February 2009 and 15 March 2009, and his emails to my office dated 12 September and 19 September 2010. In particular, Y made detailed submissions to me as to why councillors are not employees of local governments. In brief, Y makes the following submissions:

- Merely because councillors are paid an allowance does not mean that they are persons “*employed in, by, or for the purposes of, the agency*” and are, thus, ‘officers of an agency’ as defined in the Glossary to the FOI Act.
- The disputed document should be considered exempt and the information relating to Y should not be released.
- “[R]ecordings of [a Council] meeting are basically a tool and method of ensuring correction of the minutes” and the information contained in the tape recording should not be allowed to be used for other purposes.
- Disclosure of the disputed document would set a “*dangerous precedent and would ultimately stifle debate and could be used as an instrument to intimidate members of council who act in the best interest[s] of the ratepayer without fear or favour.*”

The complainants’ submissions

24. The complainants’ submissions, insofar as they are relevant to clause 3(1), are set out in their application for external review dated 27 May 2010 and in an email dated 17 March 2010 sent to the agency. In brief, the complainants submit as follows:
- The disputed document is not exempt under any of the exemptions listed in Schedule 1 to the FOI Act and the agency has not identified any valid reason for denying access to it.
 - The name of any councillor who spoke at the relevant Council meeting is not exempt under clause 3(1) by virtue of clause 3(3) of Schedule 1 to the FOI Act and regulation 9 of the *Freedom of Information Regulations 1993* (‘the FOI Regulations’).
 - It would be counter-intuitive to suggest that any valid objection could be upheld on the basis that comments made by councillors revealed ‘personal information’ as those comments were made openly at a public Council meeting, for which minutes have been published which disclose the names of some of the speakers.
 - It is clearly in the public interest that recordings of public meetings are made available to members of the public that the Council is empowered to represent.

CONSIDERATION

25. I have examined the disputed document. A small amount of information in the disputed document refers to a person or persons involved in the planning process. My officer made detailed inquiries in relation to this matter and as a result of those inquiries I am satisfied that the identity of that person or persons

could not reasonably be ascertained from that information. Therefore that information is not personal information as defined in the FOI Act.

26. However, the remainder of the disputed document contains, among other things, information or opinion about a number of individuals whose identities are apparent or can reasonably be ascertained from that information or opinion. In my view, all of that information is ‘personal information’, as that term is defined in the FOI Act.
27. 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 my view, only the limit in clause 3(3) is applicable in this case.

Clause 3(3)

28. Clause 3(3) provides that certain information about officers or former officers of agencies is not exempt merely because its disclosure would reveal prescribed details about the officer or things done by the officer in the course of performing functions as an officer. In my view, the use of the word ‘merely’ in clause 3(3) means – according to its ordinary dictionary meaning – ‘solely’ or ‘no more than’ prescribed details.
29. Regulation 9(1) of the FOI Regulations sets out those prescribed details as follows:

“In relation to a person who is or has been an officer of an agency, details of—

- (a) the person’s name;*
- (b) any qualifications held by the person relevant to the person’s position in the agency;*
- (c) the position held by the person in the agency;*
- (d) the functions and duties of the person, as described in any job description document for the position held by the person; or*
- (e) anything done by the person in the course of performing or purporting to perform the person’s functions or duties as an officer as described in any job description document for the position held by the person,*

are prescribed details for the purposes of Schedule 1, clause 3(3) of the Act.”

30. In relation to officers of government agencies, the FOI Act makes a distinction between purely private personal information – such as an officer’s home address or health details – and certain information that relates to the performance of their functions as an officer of the agency. In my view, clause 3(3) is a

recognition by Parliament that the exemption in clause 3(1) is not intended to provide anonymity for public sector officers each time one of them is mentioned in a document. Such a result would be contrary to the stated aims of the FOI Act and would not assist in promoting openness or accountability: see *Re Veale and Town of Bassendean* [1994] WAICmr 4 at paragraph 35.

31. Based on my examination of the disputed document, I consider that – with the exception of the third parties referred to in paragraph 38 below – all of the individuals identified in the disputed document are officers of an agency and most of them are elected members or councillors of the agency. Y submits that councillors are not employees of the agency and therefore do not fall within the definition of ‘officer of an agency’ for the purposes of the FOI Act.
32. 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))”*

Accordingly, a councillor of the agency will be an ‘officer of an agency’ if he or she comes within one of paragraphs (a) to (d) above. Thus, an officer of an agency will include both elected members (paragraph (a)) and persons employed in, by, or for the purposes of the agency (paragraph (c)).

33. In *Re Swift and Shire of Busselton* [2003] WAICmr 7, the former Commissioner considered whether a local government councillor was a ‘member of the agency’ and therefore an ‘officer of an agency’ where the agency was a local government. In particular, the former Commissioner noted at paragraphs 14-16 that:

- “14. Part 1 of the Local Government Act 1995 (‘the LG Act’) contains general provisions describing the content and intent of the LG Act, which is to establish a system of local government consisting of elected members and, among other things, a framework for the administration and financial management of that system. Under the provisions in Part 2 of the LG Act, the State is divided into districts or wards and a local government, which is designated as a body corporate, is established for any district so created. An elected council is created for each local government and the members of that council are its governing body. In my view, both the elected council and its administrative arm comprise the ‘local government agency’ for the purposes of the FOI Act.*

15. *Initially, the agency sought to draw a distinction between its administrative arm and its elected members and submitted that the Shire President is an officer of the Council, but not of the agency. However, I do not consider that such a distinction can logically be drawn because of the conclusion I have reached in paragraph 14 above.*
16. *The FOI Act does not define “member” but the Australian Concise Oxford Dictionary, at p.836, defines that word to include “a person formally elected to take part in the proceedings of certain organisations”. Further, s.14 of the LG Act defines the word ‘member’, in relation to the council of a local government, as being an elector mayor or president or a councillor. I consider that the plain meaning of ‘member’ includes a person formally elected as a councillor or president of a local government. In the FOI Act, the words ‘officer of an agency’ are defined to include a member of that agency. Accordingly, I am satisfied that the Shire President is a member of the agency and, therefore, an officer of the agency for the purposes of the FOI Act.”*
34. I agree with the former Commissioner’s view. Accordingly, for the same reasons given in *Re Swift*, I find that the councillors identified in the disputed document are members of the agency and are therefore officers of the agency for the purpose of the FOI Act.
35. The role of councillors, as set out in s.2.10 of the *Local Government Act 1995*, includes participating in the local government’s decision-making processes at council and committee meetings. In this instance, the disputed document discloses no more than the names, positions and opinions of officers of an agency on matters within the decision-making responsibilities of those officers.
36. From my examination of the disputed document, I consider that all of the personal information about officers of the agency is ‘prescribed details’ as defined in regulation 9(1) of the FOI Regulations because it consists of either the officer’s name or position or is information that relates to their functions as officers of an agency or things done by them in the course of performing their functions as employees or councillors of an agency.
37. Accordingly, I find that the disclosure of the personal information about officers of an agency in the disputed document would do no more than reveal prescribed details and therefore the limit on exemption in clause 3(3) applies in this case.
38. The disputed document contains a small amount of personal information that is not ‘prescribed details’ on page 1, paragraph 3 under (c)(i), words 3-10 since its disclosure would enable the identities of certain third parties who are not officers of agencies to be ascertained. In light of that, my office consulted with each of those third parties, all of whom have consented to the disclosure of that matter.

39. Both Y and the complainants made submissions in relation to public interest. The question of public interest under clause 3(6) does not arise in the context of clause 3(3), where matter is not exempt merely because its disclosure would reveal prescribed details about an officer of an agency. Consequently, it is not necessary for me to consider those public interest arguments.
40. The FOI Act is intended to open the process of decision-making by government and its agencies to public scrutiny and thereby promote greater understanding, accountability and public participation in the processes of government. By way of comment only, if I were required to consider and weigh the public interest factors for and against disclosure of the disputed document pursuant to clause 3(6), I would be inclined to the view that the public interest in the agency maintaining a fully transparent and accountable process for discussions held in open Council meetings would carry considerable weight in favour of disclosure.

CONCLUSION

41. For the reasons given above I find that the disputed document is not exempt under clause 3(1) as the second respondent claims.
