

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

**File Ref: F2010206  
Decision Ref: D0292010**

Participants:

**Mark McGowan**  
Complainant

- and -

**Shire of Murray**  
Respondent

### **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - refusal of access - documents relating to a property owned by a third party or parties - permitted period to deal with application - third party consultation - requirements of a notice of decision - clause 3(1) - personal information - clause 3(6) - whether disclosure would, on balance, be in the public interest - whether documents can be edited.

***Freedom of Information Act 1992***: sections 10(1), 13(1), 13(2), 24, 30(f), 30(h), 32(6), 43, 74(2), 76(5), 102(1) and 102(3); Schedule 1, clauses 3(1)-3(6), 5(1)(b), 5(1)(d) and 7(1); Schedule 2, Glossary, clause 1

***Freedom of Information Regulations 1993***: regulations 9(1) and 9(2)

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

## DECISION

The decision of the agency is confirmed. I find that the disputed documents are exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*.

SVEN BLUEMMEL  
INFORMATION COMMISSIONER

3 November 2010

## REASONS FOR DECISION

1. This complaint arises from a decision of the Shire of Murray ('the agency') to refuse Mr Mark McGowan MLA ('the complainant') access to documents under the *Freedom of Information Act 1992* ('the FOI Act').

## BACKGROUND

2. On 22 March 2010, the complainant applied to the agency under the FOI Act for access to certain documents relating to a property owned by a third party or parties.
3. By letter dated 2 June 2010, the FOI Officer at the agency notified the complainant of her decision in respect of the complainant's access application, which was – without identifying any documents – to refuse access to the requested documents on the ground that they were exempt under clauses 3(1), 5(1)(b), 5(1)(d) and 7(1) of Schedule 1 to the FOI Act.
4. The complainant applied to the agency for internal review of that decision. On 23 June 2010, the agency's Chief Executive Officer ('the CEO') advised the complainant that he was of the "...*opinion that giving* [access to the requested documents] *is not in the public interest*". In effect, that letter purported to be the agency's notice of decision on internal review which confirmed the agency's decision to refuse access to the requested documents.
5. By letter dated 28 June 2010, the complainant applied to me for external review of the agency's decision.

## REVIEW BY INFORMATION COMMISSIONER

6. 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 documents the subject of the agency's notices of decision. On 9 September 2010, having examined all of those documents, including the agency's notices of decision and the correspondence between the complainant and the agency about the access application, I wrote to the parties setting out my preliminary view of the complaint, which was that the disputed documents are exempt under clause 3(1) of Schedule 1 to the FOI Act.
7. In light of my preliminary view, I invited the complainant to withdraw his complaint or, alternatively, to provide me with further submissions relevant to my determination. The complainant declined to withdraw his complaint and provided me with further submissions.
8. A number of issues concerning the manner in which the agency dealt with the complainant's application was drawn to the agency's attention in my preliminary view letter. The agency was invited to make submissions in response to my preliminary view but declined to do so. Those issues are set out in paragraphs 9 to 24 below.

***The permitted period to deal with an application***

9. Under the FOI Act, an agency has to deal with an access application as soon as is practicable, but in any event within 45 days ('the permitted period'), unless the parties agree to some other period or an extension of time is allowed by my office. 'Dealing with an application' includes giving an applicant written notice of the decision in the form required by s.30: see s.13 of the FOI Act.
10. In this case, it appears that the agency did not provide the complainant with a notice of decision within the permitted period. The complainant's access application was received by the agency on 23 March 2010 which – in the absence of evidence that the complainant agreed to some other period or that an extension of time had been allowed by my office – by my calculations, means that the 45 day period expired on 7 May 2010. Accordingly, when the agency wrote to the complainant on 12 May 2010 advising the complainant, amongst other things, that it "...hoped to be able to make a decision within the next few days", the permitted period for dealing with the access application had already expired.
11. Under s.13(2) of the FOI Act, if an applicant does not receive the agency's notice of decision within the permitted period, the agency is taken to have refused, at the end of that period, access to the documents. At that point an applicant is entitled to apply for internal review of the deemed decision to refuse access. Although the complainant did not exercise that right on this occasion, the agency clearly should have given him a notice of decision within the permitted period.

***Third party consultation***

12. I note that the FOI Coordinator of the agency wrote to the complainant on 12 May 2010 and said:

*"...some of the documents covered by the request contain personal information about a third party. Consequently, I am obliged to obtain the views of a third party before making an access decision..."*

That officer also advised the complainant that "*the FOI Act does not contain a period within which the third party must convey its views to me...*". In my view, that advice is misconceived.

13. Section 32 of the FOI Act provides that an agency is not to give access to a document which contains personal information about an individual (the third party) other than the applicant unless the agency has taken such steps as are reasonably practicable to obtain the views of the third party as to whether the documents contain matter that is exempt under clause 3. Consequently, an agency is only required to obtain the views of the third party if it is intending to give access to personal information about the third party. If - as in the present case - an agency does not intend to give the applicant access to that information, the agency is not obliged to consult with the third party (s.32(6)). Consultation with third parties in the latter case can unnecessarily increase the time it takes

for an applicant to receive an agency's notice of decision, as occurred here. Further, in my experience, consultation in those circumstances often raises unnecessary concerns with the third party and is more likely to hinder rather than assist in the process of dealing with the application.

14. In respect of the agency's advice to the complainant that the FOI Act does not prescribe a period within which a third party must give an agency his or her views when consulted under s.32 of the FOI Act, as noted above, the FOI Act requires an agency to give an applicant a decision as soon as practicable but in any event within 45 days (s.13(1)). That obligation is not affected by the time taken to consult with third parties as to whether the relevant documents are exempt under clause 3. Therefore, unless an applicant agrees to - or I have allowed - an extension of time to deal with the application, an agency is not entitled to defer giving an applicant a notice of decision pending receipt of a third party's views. When consulting with third parties I consider it good practice to require those persons to respond by a given date.

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

15. Under s.102(1) of the FOI Act, the onus is on the agency to establish that its decision to refuse access to 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 from disclosure and to demonstrate that it has established the requirements of any exemption in its notice of decision.
16. 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 refuse access to a document, section 30(f) of the FOI Act provides that the agency must include the following details in its notice of decision: the reasons for the refusal; the findings on any material questions of fact underlying those reasons; and reference or references to the material on which those findings were based.
17. In this case, neither the agency's initial decision nor the internal review decision complied with the requirements of s.30(f). No attempt was made to explain the factual basis underlying the decision to refuse the complainant access to the documents. In particular, the agency's notices did not demonstrate any consideration of relevant exemptions in the FOI Act or give reasons why the requested documents were exempt from disclosure under the FOI Act.
18. The initial decision merely said that the "[d]ocuments you have requested have been assessed as 'Exempt Documents' under the [FOI Act] and would, on balance, be contrary to public interest if disclosed" and cited the relevant exemption clauses. A case for exemption is not made out merely by citing an exemption clause or clauses.
19. The CEO stated in his internal review notice of decision that, among other things, "[m]y opinion is that giving this information is not in the public interest...So you may be aware, you have a right to have this issue brought

*before the State Records Commission.*” Section 43 of the FOI Act provides that on an application for internal review, an agency may decide to confirm, vary or reverse the decision under review. In this case, the CEO, in effect, decided to confirm the initial decision and I consider that should have been expressly stated in his notice of decision.

20. I acknowledge that, in this particular case, the agency was constrained from identifying exempt information in its decision and that this limits how much detail it was able to include in its findings of fact. Where requested documents contain 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. In such cases, I consider that an agency should, at the very least, explain to an applicant in its notice of decision that documents of the kind requested would contain information about identifiable individuals; that information of that kind is personal information as defined under the FOI Act; and that personal information is *prima facie* exempt under clause 3(1) of the FOI Act. The agency should, in addition, set out its consideration as to whether any of the limits on exemption in clauses 3(2) to 3(6) applies before concluding that the documents are exempt under clause 3.
21. Section 30(h) requires that the notice of decision an agency gives an applicant has to give details of the applicant’s rights of review and the procedure to be followed to exercise those rights. As noted above, the CEO advised the complainant that he had the right to “...*have the issue brought before the State Records Commission*”. That information was incorrect. Under the FOI Act, the office empowered to review decisions made by agencies under the FOI Act is my office, not the State Records Commission. Further, the decision did not expressly explain that the complainant had the right to have the decision reviewed, nor did it provide any information about the timeframe in which to seek review or the procedure to follow, as required by s.30(h).
22. In this case, the complainant has experience with and knowledge of the FOI Act and, as such, may have been aware of his rights of review and the procedure to follow, as indicated by the fact that he did apply to my office for external review within the prescribed period. However, members of the public unfamiliar with the FOI Act may have no knowledge of their review rights, so it is imperative that an agency’s notice of decision complies with s.30(h).

### ***Procedural matters raised by the complainant***

23. In a letter to me dated 28 June 2010, the complainant notes that the agency implied in its dealings with him that it would give him access to the requested documents. Having regard to the agency’s communications with the complainant - for example, the email to him dated 13 May 2010 from the Personal Assistant Director Corporate Services advising that the FOI Coordinator “*was not in a position at this point in time to release any documents until third party consultation is concluded*” - I agree that it was not unreasonable for the complainant to have concluded that the agency would give access to at least some of the requested documents, which ultimately was not the

case. That is an unfortunate and avoidable outcome of the manner in which the agency dealt with the access application.

24. The complainant also contends that the agency did not give him the opportunity to change the scope of his application to facilitate disclosure of the requested documents. However, taking into account the nature of the documents the complainant requested - that is, documents about a property owned by a third party - I am inclined to the view that changing the scope of the application would not have materially changed the outcome of the application.

### **Non-disclosure of exempt matter**

25. 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.
26. However, s.74(2) of the FOI Act places an obligation upon me not to include, among other things, exempt matter in a decision on a complaint or in reasons given for a decision. 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 all of 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.

### **THE DISPUTED DOCUMENTS**

27. The disputed documents are the documents identified by the agency as falling within the scope of the complainant's access application and to which access has been refused. Although the agency confirmed in its notices of decision that it holds documents of the kind requested, it did not identify or describe the documents found. In light of my obligation under s.74(2), I consider that I am constrained from describing the disputed documents because to do so may disclose exempt information.

### **CLAUSE 3 – PERSONAL INFORMATION**

28. Among other exemption claims, the agency claims that the disputed documents are exempt under clause 3(1) of Schedule 1 to the FOI Act. 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) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal personal information about the applicant.*

- (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) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who performs, or has performed, services for an agency under a contract for services, prescribed details relating to —*
  - (a) *the person;*
  - (b) *the contract; or*
  - (c) *things done by the person in performing services under the contract.*
- (5) *Matter is not exempt matter under subclause (1) if the applicant provides evidence establishing that the individual concerned consents to the disclosure of the matter to the applicant.*
- (6) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.”*

**Definition of ‘personal information’**

29. 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 finger print, retina print or body sample”.*

30. 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 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).



### The parties' submissions

31. The complainant's submissions are set out in his application for internal review made to the agency; his application for external review to me; and in his response to my letter of 9 September 2010. Pursuant to my obligations under s.74(2) of the FOI Act, I am constrained from providing a detailed account of the complainant's submissions in order to avoid disclosing exempt matter. In brief, the complainant submits that, in his view – for reasons which he has explained to me – some untoward activity has taken place that relates to the subject matter of his access application; there is a community interest in the disclosure of the disputed documents; and a public interest in the agency's demonstrating that the rule of law and local government by-laws and procedures are being adhered to.
32. The agency's submissions are set out in its initial decision and internal review decision. In effect, the agency simply submits that the disputed documents are exempt under clause 3(1) and that it is not in the public interest to disclose them.

### Consideration

33. In his access application to the agency, the complainant requested access to documents about a particular property owned by a third party or parties. Having examined the disputed documents, I accept that all of those documents are *prima facie* exempt under clause 3(1) because their disclosure would reveal personal information, as defined in the FOI Act, about individuals other than the complainant. However, I have considered whether any of the limits on exemption in clauses 3(2)-3(6) might apply in this case.
34. In my view, the limit on exemption in clause 3(2) does not apply to the disputed documents because none of those documents contains any personal information about the complainant.
35. The limits on exemption in clauses 3(3) and 3(4) apply, in my opinion, to a small amount of information that consists of prescribed details about officers of, or contractors to, the agency. Information that amounts to prescribed details is set out in regulations 9(1) and 9(2) of the *Freedom of Information Regulations 1993* and includes the person's name, job title and things done in the course of performing the person's functions, duties or services. However, I consider that most of that kind of information in the disputed documents is inextricably intertwined with personal information about other third parties who are not officers of an agency. Consequently, those prescribed details could not be disclosed without revealing personal information about other people. Accordingly, I consider that the limits on exemption in clause 3(3) and 3(4) do not apply to the disputed documents.
36. The limit on exemption in clause 3(5) does not apply because there is no evidence before me that any of the third parties identified in the disputed documents has consented to his or her personal information being disclosed to

the complainant. Accordingly, the only limit on exemption that might apply to the disputed documents is the limit on exemption in clause 3(6).

***The public interest***

37. 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. Under s.102(3) of the FOI Act, the access applicant (in this case, the complainant) bears the onus of establishing that it would, on balance, be in the public interest for the agency to disclose personal information about other people to him.
38. 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 ...”*

39. 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.
40. 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. Section 10(1) of the FOI Act provides that a person has a right to be given access to the documents of an agency (other than an exempt agency) subject to and in accordance with the FOI Act. The right created by s.10(1) is subject to a range of exemptions which are designed to protect significant public interests - including the protection and maintenance of personal privacy - that compete with the public interest in the openness and accountability of State and local government agencies.
41. The complainant submits that there is a community interest in the disclosure of the disputed documents. However, the public interest is not primarily concerned with the personal interests of access applicants or with public curiosity. Rather, the question is whether disclosure of the information would be of some benefit to the public generally. That is, whether it would be of some benefit to the public for the information sought by the complainant – that is, personal information about other people – to be disclosed to the complainant or to any other person and whether that public benefit is sufficient to outweigh the public interest in the maintenance of personal privacy.
42. The complainant submits that there is a public interest in the agency’s demonstrating that the rule of law and local government by-laws and procedures

are being adhered to. I recognise that there is a public interest in the agency performing its functions in a manner which endeavours to ensure, as far as possible, that relevant laws and procedures are complied with. I note that, on the material before me, there is nothing to suggest that has not happened in the present case.

43. In favour of disclosure, I recognise public interests in the openness and accountability of government agencies; in the actions and decisions of agencies being as transparent as possible; and in the public having confidence that agencies properly and effectively perform their functions. However, I consider that those public interests are satisfied in the main in this case by the ability of the public to attend meetings of the Council of the agency; the public availability of minutes of meetings of the Council of the agency; and the existence of accountability agencies capable of dealing with allegations of untoward activity at an agency. In my view, the public interests in transparency and accountability are substantially satisfied by those particular processes and procedures.
44. In favour of non-disclosure, I recognise that there is 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. It is not the intention of the FOI Act to open the private lives of its citizens to public scrutiny in circumstances where there is no demonstrable public benefit in doing so. The FOI Act is intended to make government, its agencies and officers more accountable, not to unnecessarily intrude upon the privacy of individuals.
45. In balancing the competing public interests, I am not persuaded that the public interests favouring disclosure of the disputed documents are sufficient to outweigh the public interest in the protection of personal privacy of other individuals to whom the information relates. Accordingly, I do not consider that the limit on exemption in clause 3(6) applies and I find that the disputed documents are exempt under clause 3(1) of Schedule 1 to the FOI Act.
46. I have also considered whether the agency is obliged under s.24 of the FOI Act to give the complainant access to edited copies of the disputed documents. However, as the identity of the property owner is known to the complainant and is otherwise ascertainable, there is not, in my view, any way the disputed documents could be edited so as not to disclose personal information about third parties. Accordingly, I do not consider that there is an obligation on the agency under s.24 to give the complainant access to edited copies of the documents.
47. In light of my finding that the disputed documents are exempt under clause 3(1), it is not necessary for me to consider the agency's other exemption claims described in paragraph 3.

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