

CAMERON AND WANNEROO

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

**File Ref: 95235
Decision Ref: D00196**

Participants:

Gordon Maurice Cameron
Complainant

- and -

City of Wanneroo
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - correspondence received by agency - clause 5(1)(e) - law enforcement, public safety and property security - whether real or substantial grounds for believing disclosure would endanger life or physical safety of any person - clause 3(1) - personal information about third parties - public interest factors for and against disclosure of personal information.

Freedom of Information Act 1992 (WA) ss. 24, 68(1), 72(1)(b), 75(1), Schedule 1 clauses 3(1), 5(1)(e).

Manly v Ministry of Premier and Cabinet (Supreme Court of Western Australia, 15 June 1995, unreported).

Attorney General's Department v Cockcroft (1986) 10 FCR 180.

Searle Australia Pty Ltd v Public Interest Advocacy Centre (1992) 108 ALR 163.

DECISION

The decision of the agency is set aside. In substitution it is decided that the disputed documents are not exempt under clause 5(1)(e) of Schedule 1 to the *Freedom of Information Act 1992*. However, parts of the documents contain matter that is exempt matter under clause 3(1) and the complainant is entitled to be given access to an edited copy of those documents with the exempt matter deleted in accordance with this decision.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

5th January 1996

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the City of Wanneroo ('the agency') to refuse Mr Cameron ('the complainant') access to certain documents requested under the *Freedom of Information Act 1992* ('the FOI Act').
2. On 16 November 1995, the complainant applied to the agency for access to certain correspondence received by the agency from third parties which contained allegations about him. The complainant had previously applied to the agency for access to one of the documents in February 1994. Later that same day, Mr Higgs, the agency's FOI Co-ordinator, informed the complainant that the agency had been unable to contact the third parties and, accordingly, he was unable to consult with the third parties as required by the FOI Act. However, relying upon the previous inquiries conducted by the agency in February 1994 in respect of the complainant's previous access application, Mr Higgs informed the complainant that he had decided to deny him access to one document on the ground that that document was exempt under clause 5(1)(e) of Schedule 1 to the FOI Act.
3. On 17 November 1995, the complainant sought internal review of the agency's decision and, that same day, Mr Coffey, Town Clerk of the agency, confirmed the agency's initial decision that the requested document was exempt under clause 5(1)(e) of Schedule 1 to the FOI Act. On 17 November 1995, the complainant sought external review by the Information Commissioner.

REVIEW BY THE INFORMATION COMMISSIONER

4. The complainant informed my office that there was some urgency in his obtaining access to the requested document, as it was required for an impending court action in which he was involved. Accordingly, on 20 November 1995, one of my officers met informally with Mr Coffey and Mr Higgs in an attempt to conciliate this matter.
5. Those officers informed my investigations officer of the background to this matter, which involved a dispute over an alleged debt and the tenancy of a property. After those discussions, it was apparent that conciliation of this complaint was not a possibility. On 24 November 1995, in accordance with my obligations under s.68(1) of the FOI Act, I notified the agency that I had formally accepted this complaint. In accordance with my authority under s.75(1) and 72(1)(b) of the FOI Act, I sought the production to me of the documents in dispute, together with the agency's FOI file maintained in respect of this matter.

6. After examining those documents and considering the information provided to me by both the agency and the complainant, I provided the parties with my preliminary view, and reasons for that view on 7 December 1995. It was my preliminary view that the agency held two documents that were within the ambit of the complainant's access application, namely, two items of correspondence dated 20 July 1992 and 23 November 1993. It was my preliminary view, on the information before me, that neither document was exempt under clause 5(1)(e) of Schedule 1 to the FOI Act. However, it was also my preliminary view that certain parts of the 2 documents contained personal information about the third parties which is, *prima facie*, exempt matter under clause 3(1) of Schedule 1 to the FOI Act.
7. After receiving my preliminary view, the complainant informed me that he was prepared to accept access to an edited copy of the disputed documents from which personal information about third parties had been deleted as exempt matter under clause 3(1). However, the agency maintained its claims for exemption for the documents under clause 5(1)(e) and did not consider the provision of access to edited copies of the disputed documents in accordance with my preliminary view.

THE DISPUTED DOCUMENTS

8. There are two documents in dispute between the parties. Those documents are:
 - Letter to Town Clerk and Rates Supervisor in the agency, dated 23 November 1993; and
 - Letter to Rates Supervisor in the agency, marked 20 July 1992, from third parties, concerning a rateable property.

THE EXEMPTION

9. The agency claims that the disputed documents are exempt under clause 5(1)(e) of Schedule 1 to the FOI Act. Clause 5(1)(e) provides:

“5. ***Law enforcement, public safety and property security***

Exemptions

(1) *Matter is exempt matter if its disclosure could reasonably be expected to -*

(a)...

(b)...

(c)...

(d)...

(e) *endanger the life or physical safety of any person;*”

10. The words "*could reasonably be expected to*" appear in other exemption clauses in Schedule 1 to the FOI Act, and in like provisions in the FOI Acts in other jurisdictions. The meaning of the phrase "*could reasonably be expected to*" was considered by Owen J in a decision of the Supreme Court of Western Australia, *Manly v Ministry of Premier and Cabinet* (15 June 1995, unreported). In the context of considering the application of the exemption in clause 8(2) of Schedule 1 to the FOI Act, Owen J, referred to the judgment of Sheppard J in *Attorney General's Department v Cockcroft* (1986) 10 FCR 180 and said, at page 44:

"How can the [Information] Commissioner, charged with the statutory responsibility to decide on the correctness or otherwise of a claim to exemption, decide the matter in the absence of some probative material against which to assess the conclusion of the original decision maker that he or she had "real and substantial grounds for thinking that the production of the document could prejudice that supply" or that disclosure could have an adverse effect on business or financial affairs? In my opinion it is not sufficient for the original decision-maker to proffer the view. It must be supported in some way. The support does not have to amount to proof on the balance of probabilities. Nonetheless, it must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasoned decision-maker."

11. The meaning of the phrase "*could reasonably be expected to*" was also discussed in the decision of the Full Federal Court in *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 108 ALR 163. In that case it was held that, on an objective view of the evidence, there must be real and substantial grounds for expecting certain consequences to follow from the disclosure of documents.

The agency's argument

12. The agency reached the conclusion that the disputed documents are exempt under clause 5(1)(e) on the basis of advice received from the third parties that the complainant had allegedly threatened the lives of the third parties in 1987. It was the view of the agency, based upon the advice received from the third parties, that the third parties had clearly expressed the view that the disclosure of the letters could reasonably be expected to endanger the life or physical safety of the third parties, and that this was a reasonable expectation.
13. Further, both Mr Coffey and Mr Higgs expressed the view to my investigations officer that it was the responsibility of people who were paid to make decisions to release documents of this particular kind, such as the Information Commissioner, to do so. Neither Mr Coffey nor Mr Higgs wished to be responsible for the release of documents where there was a potential for violence following such release. Accordingly, the officers of the agency were not prepared to make the decision and did not accept that they had a responsibility

and a statutory duty under the FOI Act to decide questions of access to documents and deferred to my function in that regard.

Consideration of issues

14. I accept that the agency properly took into account the allegations of the third parties that their lives had been threatened by the complainant. However, whilst some regard must be had to those allegations, regard must also be had, in my view, to the whole of the circumstances of the matter, including the fact that the alleged threat was made in 1987. Inquiries conducted by my office indicate that there is no record of any complaint being made to the police by the third parties concerning the alleged threat in 1987. I would expect the matter to be reported officially if the third parties were at all concerned about the potential for violence against themselves by the complainant.
15. My inquiries reveal that there is no record of the complainant having any propensity for violence. Further, other than the allegations of the third parties, there is no evidence put before me by the agency of the complainant having made any threats to any person, including officers of the agency with whom he has been in contact for some time. The complainant is aware of the identity of the third parties who wrote to the agency and has had a substantial knowledge of the contents of the disputed documents since November 1993, following a discussion between him and the former Rates Supervisor of the agency. Finally, the complainant claims to know the present address of the third parties and there is no evidence of him making any threats to those parties since he became aware of the nature of the contents of the disputed documents.
16. Therefore, whilst I consider that the agency was right to take into account the concerns of the third parties, I do not attach great evidentiary weight to the allegation that the complainant uttered a threat against the third parties. The complainant emphatically denies making the alleged threat. In my view, based on the material before me, it is not reasonable to expect any endangerment to the life or physical safety of any person to follow from the disclosure of the disputed documents. Objectively, I am unable to find that the exemption under clause 5(1)(e) has been established. Accordingly, I find the disputed documents are not exempt under clause 5(1)(e) of Schedule 1 to the FOI Act.

Are the disputed documents exempt for any other reason?

17. I have had the opportunity of examining the documents in dispute. On the basis of my examination, I am satisfied that the documents contain personal information about the complainant and about third parties as well. Matter that is personal information about third parties other than the complainant is, *prima facie*, exempt matter under clause 3(1) of Schedule 1 to the FOI Act. The complainant is prepared to accept access to edited copies of the disputed documents from which matter that is exempt under clause 3(1) has been deleted. In my view, if it is practicable for the agency to delete that exempt matter and

provide access to an edited copy of a requested document, s.24 of the FOI Act places a positive duty on the agency to provide access in that manner.

18. In my view, the following matter is exempt under clause 3(1) of Schedule 1 to the FOI Act and should be deleted from the disputed documents:

- Letter dated 23 November 1993 - the telephone number in the last paragraph on page 2; and the signatures and hand-written notes opposite the signatures on page 2.
- Letter marked 20 July 1992 - the second sentence on page 2; the last word in line 10 and all of lines 11 and 12 on page 3; lines 15-18 on page 3; lines 1-3 on page 4; the sentence beginning in line 8 on page 4 and finishing in line 11.
