

STRELLEY AND OTHERS AND DOLA

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

**File Ref: 94043
Decision Ref: D00995**

Participants:

**Strelley Pastoral Pty Ltd
Coongan Aboriginal Corporation
Pinga Pty Ltd
Strelley Housing Incorporated**
Complainants

- and -

Department of Land Administration
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - reverse FOI - third party objection to release of document - Pastoral Inspector's report - clause 3 - personal information about third parties - clause 4(3) - matter relating to the business, professional, commercial or financial affairs of a person - public interest in maintaining privacy of individual - onus on third party to establish that access should not be given or that a decision adverse to the access applicant should be made - clause 5(1)(b) - reveal an investigation - fact or substance of investigation - pastoral leases.

Freedom of Information Act 1992 (WA) ss. 24; 33; 68(1); 72(1)(b); 75(1); 102(1);102(2); 102(3); Schedule 1 clauses 3(1), 4(2), 4(3), 5(1)(b), 6; Glossary in Schedule 2.

Land Act 1933 (WA) ss. 23(1); 103(3)(a).

Re Tickner and Police Force of Western Australia (Information Commissioner WA, 7 March 1995, unreported).

Re Veale and Town of Bassendean (Information Commissioner WA, 25 March 1994, unreported).

Re Kobelke and Minister for Planning and Others (Information Commissioner WA, 27 April 1994, unreported).

Re A and Heathcote Hospital (Information Commissioner WA, 9 June 1994, unreported).

Re Hayes and The State Housing Commission of Western Australia (Homeswest) (Information Commissioner WA, 17 June 1994, unreported).

Re Gray and The University of Western Australia (Information Commissioner WA, 23 June 1994, unreported).

Re Manly and Ministry of the Premier and Cabinet (Information Commissioner WA, 16 September 1994, unreported).

Re C and Department for Community Development (Information Commissioner WA, 12 October 1994, unreported).

Re Smith and State Government Insurance Commission (Information Commissioner WA, 5 December 1994, unreported).

Re Edwards and Ministry of Justice (Information Commissioner WA, 12 December 1994, unreported).

Re Kiernan and Western Australia Police Force (Information Commissioner WA, 17 June 1994, unreported).

Re Burkala and City of Belmont (Information Commissioner WA, 25 August 1994, unreported).

Re Morton and City of Stirling (Information Commissioner WA, 5 October 1994, unreported).

Re Jeanes and Kalgoorlie Regional Hospital (Information Commissioner WA, 7 February 1995, unreported).

DECISION

The decision of the agency of 11 April 1994 is varied. The disputed document is not exempt under clause 4(3) of the *Freedom of Information Act 1992*.

It is further decided that the matter described in paragraph 28 of the reasons for this decision is exempt under clause 5(1)(b).

It is further decided that the matter described in paragraph 24 of the reasons for this decision is exempt under clause 3(1) and, in any event, is no longer within the ambit of the complaint.

It is further decided that the document is otherwise not exempt.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

27th March 1995

REASONS FOR DECISION

BACKGROUND

1. This is a "reverse FOI" application for external review by the Information Commissioner made by Strelley Pastoral Pty Ltd, Coongan Aboriginal Corporation, Pinga Pty Ltd and Strelley Housing Incorporated ('the complainants') who object to a decision made by the Department of Land Administration (DOLA) ('the agency') to release one document of the agency. That document is the subject of an access application made under the *Freedom of Information Act 1992* ('the FOI Act') by Ms Tickner ('the applicant'), a journalist with *The West Australian* newspaper.
2. On 1 November 1993, the applicant lodged an access application with the agency seeking access to "*documents concerning information held by the Pastoral Board on Pilbara Pastoral and Special Leases - Strelley, Lalla Rookh, Carlindie, Callawa and Coongan from 1 January 1992 to the present.*"
3. On 9 November 1993, the agency, in accordance with s.33 of the FOI Act, wrote to the complainants seeking their views on the release of documents subject to the access application, as the documents appeared to contain matter relating to the complainants of the type described in that section, that is, matter relating to the business, professional, commercial or financial affairs of the complainants. The agency advised the complainants that the documents comprised Stock Returns, Inspection Reports, extracts of minutes of board meetings and Pastoral Board Reports to the Minister. A more detailed description, in the form of a schedule, was not provided. The agency also informed the complainants that the applicant was a journalist from the *West Australian*.
4. By letter dated 22 November 1993, Strelley Pastoral Pty Ltd, on behalf of all the complainants, lodged with the agency its written objection to the release of any of the documents by the agency to the applicant. The complainants claimed all the documents were exempt under clause 4 of Schedule 1 to the FOI Act. At this stage, the agency had not prepared a schedule of documents for the parties to consider in more detail.
5. Following a request by the applicant, the agency prepared and provided to the applicant a list of the types of documents identified to assist the applicant in reducing the ambit of the application. Following advice from the applicant, the agency identified 137 documents which met the ambit of the reduced request.
6. On 18 February 1994, after considering the objections and reasons given by the complainants, Mr P K Morland, Director, Land Operations Division of the agency, made a decision in relation to 126 documents. Without specifying the number of documents or describing each document, Mr Morland decided to

grant access to some documents and deny access to others, either in part or in full. Exemption was claimed under clauses 4(2), 5(1)(b) and 6 of Schedule 1 to the FOI Act. Both the complainants and the applicant were advised of that decision. A schedule describing the documents was enclosed with the decision. On 16 March 1994, the complainants lodged with the agency a request for internal review of Mr Morland's decision.

7. On 11 April 1994, Mr J L Gladstone, Deputy Commissioner of Titles, varied the original decision in relation to a number of documents and confirmed the original decision that the other documents were exempt. Mr Gladstone enclosed a revised schedule of 137 documents incorporating the schedule of 126 documents provided by Mr Morland in his decision. Mr Gladstone decided to grant access to an edited copy of item 116 in the revised schedule ('the disputed document') from which exempt matter had been deleted. He claimed that certain information in the disputed document was exempt, as it may reveal the investigation of a contravention or possible contravention of the law in a particular case. Mr Gladstone indicated the exemption claim was made under clause 5(1)(b), although he did not specify the clause. He also advised both the applicant and the complainants that further consultation was necessary before other documents, including the disputed document, identified on the schedule prepared by the agency, could be released.
8. On 22 April 1994, Mr Jerry Roberts, ('the agent'), an authorised agent for the complainants, applied to the Information Commissioner for external review of the decision of the agency to grant access to all of the documents requested by the applicant, including the disputed document, Item 116 on the agency's schedule.

REVIEW BY THE INFORMATION COMMISSIONER

9. On 22 April 1994, in accordance with my obligation under s.68(1) of the FOI Act, I advised the agency that I had accepted this complaint for review. Following discussions between my office, the agency and the agent, it appeared likely that the number of documents in dispute could be substantially reduced by agreement between the parties concerned. As a result, the complaint to my office was narrowed in its scope so that it only applied to 6 documents. On 6 May 1994, the complainants provided a submission to me claiming exemption for the six documents under clause 4 of Schedule 1 to the FOI Act. On 12 May 1994, pursuant to my authority under s.75(1) and 72(1)(b) of the FOI Act, I sought the production to me of those 6 documents, the agency's file maintained in respect of the access application and a copy of the schedule of documents prepared by the agency in the first instance. These were provided to me by the agency on 16 May 1994.
10. On 21 July 1994, I advised the complainants of my preliminary view in relation to the decision of the agency on the six documents. My view was that the agency appeared to have appropriately edited exempt matter, and the

complainants had not provided sufficient evidence to justify exemption of the entire document, in each instance, under clause 4. The complainants, and an individual third party, provided additional submissions and reasons for objecting to the release by the agency of the documents. Following consideration of those submissions, the agency agreed to further edit the disputed document so as not to disclose personal information about certain third parties.

11. During the course of dealing with this complaint a number of additional third parties were identified who should have been consulted but had not been. In order to ensure that all relevant parties likely to be affected by a decision on access were provided with the opportunity to make submissions, this complaint has taken some time to finalise. It has also proved difficult to contact some of those additional third parties in the remote areas of Western Australia and to obtain their views about personal information contained within some of the documents including the disputed documents.
12. On 11 January 1995, I informed the parties in more detail of my preliminary view in respect of the six documents in dispute including the disputed document. That view was that the matter contained in the disputed document is not exempt under clause 4, but certain matter deleted by the agency may be exempt under clause 3(1) (Personal information) and other matter under clause 5(1)(b).
13. By letter dated 19 January 1995 the agency advised that it had reconsidered its claims in light of my preliminary view and would further edit the documents in accordance with that view. However, by a process of conciliation and negotiation by officers with both the applicant and the agent, the number of documents in dispute was reduced to one. On 27 February 1995 the agent withdrew the complaint in respect of document 106, but indicated that the complainants wished to pursue their complaint in respect of the other 5 documents. On 3 March 1995 the applicant informed my officer verbally, later confirmed in writing, that she withdrew her application in respect of 4 of the remaining 5 documents.
14. The applicant is not seeking access to personal information about individuals who may be identified in the disputed document although she has not received an edited copy of the disputed document because of the reverse FOI complaint made to my office by the complainants. The agency is prepared to release the disputed document in an edited form in order to satisfy the access application. The complainants, through the agent, object to the release of any part of the disputed document on the ground that the document is exempt under clause 4(3) of Schedule 1 to the FOI Act. Therefore, the issue for my determination concerns the exempt status or otherwise of the disputed document.

THE DISPUTED DOCUMENT

15. The disputed document is identified on the agency's schedule as Item 116. That document is a three page inspection report dated 24 February 1993, prepared by Mr J James, Pastoral Inspector, Department of Agriculture (Karratha). It is addressed to Mr J Morrissey, Department of Agriculture, and concerns an inspection of the pastoral leases known as Carlindi, Strelley, Coongan and Warralong.
16. It is my understanding that in 1987 the responsibility for Pastoral Inspectors was transferred from the Pastoral Board to the Department of Agriculture as the duties of those inspectors were more closely related to the functions of that department. The Pastoral Board is constituted under the *Land Act 1933* ('the Land Act'), and is responsible, *inter alia*, for the fixing of rents payable for pastoral leases and for advising the Minister for Lands on the renewal and granting of pastoral leases.
17. It is also my understanding that the Pastoral Board utilises the services of Pastoral Inspectors from time to time, to inspect pastoral leases and to record their observations of the state of the properties and whether the conditions attached to the leases are being complied with. As a matter of routine, pastoral leases are inspected officially every five or six years, but may be inspected more frequently depending on the circumstances. Pastoral leases may also be inspected at the specific request of the Pastoral Board.
18. The agency proposes to release the disputed document to the applicant with certain matter deleted from that document. The agency claims the deleted material consists of matter which is exempt under clause 3(1) and clause 5(1)(b) of Schedule 1 to the FOI Act. The agent claims that the whole of the disputed document is exempt under clause 4(3) of Schedule 1 to the FOI Act. Under s.102(2) of the FOI Act, the complainants bear the onus of establishing that access should not be given to the applicant. Although she was entitled to do so under s.69(3) of the FOI Act, the applicant did not seek to be joined as a party to the complaint and, accordingly, took no part in these proceedings.

THE EXEMPTIONS

(a) Clause 3 - Personal information

19. The agency proposes to delete personal information from the disputed document in order to facilitate the granting of access to that document. If there is evidence that a document contains matter that may be exempt under clause 3 or clause 4 of Schedule 1 to the FOI Act, s.24 of that Act allows an agency to delete exempt matter and to provide an applicant with access to an edited copy of a document. Clause 3(1) of Schedule 1 to the FOI Act 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)...
- (4)...
- (5)...

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

20. In the Glossary in Schedule 2 to the FOI Act, "**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. As I have said on numerous occasions and most recently in *Re Tickner and Police Force of Western Australia* (7 March 1995, unreported, at para 18), in my view, the purpose of the exemption in clause 3(1) is to protect the privacy of third parties (see *Re Veale and Town of Bassendean* (25 March 1994, unreported, at para 34); *Re Kobelke and Minister for Planning and Others* (27 April 1994, unreported, at para 68); *Re A and Heathcote Hospital* (9 June 1994, unreported, at para 23); *Re Hayes and The State Housing Commission of Western Australia (Homeswest)* (17 June 1994, unreported, at para 20); *Re Gray and The University of Western Australia* (23 June 1994, unreported, at para 14); *Re Manly and Ministry of the Premier and Cabinet* (16 September 1994, unreported, at para 46); *Re C and Department for Community Development* (12 October 1994, unreported, at para 22); *Re Smith and State Government Insurance Commission* (5 December 1994, unreported, at para 13); and *Re Edwards and Ministry of Justice* (12 December 1994, unreported, at para 15).

22. In some instances, the mention of a person's name in the context of an agency's document may reveal "personal information" about that individual. However, more is normally required to establish an exemption under clause 3(1). Information which I have found in previous decisions to be "personal

information" includes names of third parties involved in the incarceration of a patient in a psychiatric hospital (*Re A and Heathcote Hospital*, 9 June 1994, unreported); name and signature revealing an employment relationship (*Re Kobelke and Minister for Planning and Others*, 27 April 1994, unreported); information in police records containing the substance of an allegation against a police officer (*Re Kiernan and Western Australia Police Force*, 17 June 1994, unreported); names and addresses, gender, employment and family connections of tenants in a residential complex where that information would enable the applicant to identify those individuals (*Re Hayes and The State Housing Commission of Western Australia (Homeswest)*, 17 June 1994, unreported); name and address of a complainant ratepayer (*Re Burkala and City of Belmont*, 25 August 1994, unreported); names and addresses, personal relationships, financial details and business arrangements (*Re Manly and Ministry of the Premier and Cabinet*, 16 September 1994, unreported); name, address, employment status, relationships, signatures (*Re Morton and City of Stirling*, 5 October 1994, unreported); and the name and address of a medical practitioner subject to peer review (*Re Jeanes and Kalgoorlie Regional Hospital*, 7 February 1995, unreported).

23. The matter for which exemption is claimed under clause 3(1) consists of names and details of employment of three individuals involved with various management functions of the respective pastoral leases, together with other information about those individuals. Taken together this information would enable the identity of those individuals to reasonably be ascertained. In my view, that information is, *prima facie*, personal information about those individuals and is exempt matter under clause 3(1) of Schedule 1 to the FOI Act. Only one of the three has been contacted and expressed his views in relation to disclosure of the information. He has provided his written objection to disclosure of any information which may identify him.
24. Under s.102(3) of the FOI Act, the applicant bears the onus of establishing that the disclosure of exempt matter would, on balance, be in the public interest. However, the applicant has informed me that she is not seeking access to personal information about others. Although the agent claims the whole of the disputed document is exempt under clause 4(3), there is no material before me establishing that the matter consisting of personal information about individuals is also exempt matter under clause 4(3). Therefore, I reject any claims of the agent that the matter described below is exempt under clause 4(3), which matter I find is exempt matter under clause 3(1) of Schedule 1 to the FOI Act, and, in any event - given, the applicants advice that she does not seek personal information about third parties - is no longer within the ambit of the complaint. I confirm the decision of the agency to delete that matter from the disputed document in accordance with s.24 of the FOI Act:

Under the heading "**STRELLEY P/L No. 3114/510**" on page 1:

- the first four words.

Under the heading "**COONGAN P/L No. 3114/1061, WARRALONG P/L**" on page 2:

- the last 9 words in line 6;
- all of line 8;
- the first word of line 9;
- the name in line 11;
- the first 2 sentences commencing in line 20 and finishing in line 21;
and
- the name in line 24.

(b) Clause 5(1)(b) - Law enforcement, public safety and property security

25. In its notice of decision on internal review, the agency also appears to have claimed that certain information in the disputed document was exempt under clause 5(1)(b) of Schedule 1 to the FOI Act, although it described but did not specify the clause. Clause 5(1)(b) 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) reveal the investigation of any contravention or possible contravention of the law in a particular case, whether or not any prosecution or disciplinary proceedings have resulted;"

26. The meaning to be given to the exemption in clause 5(1)(b) was considered in my decision in *Re Tickner and Police Force of Western Australia* (7 March 1995, unreported, at paragraphs 33-45). As I stated in that decision, it is my view that the exemption in clause 5(1)(b) applies to those documents the disclosure of which could reasonably be expected to reveal the substance of an investigation of any contravention or possible contravention of the law in a particular instance.
27. Although the agency asserted that disclosure of parts of the disputed document would reveal the investigation of a contravention or possible contravention of the law, it did not elaborate further on this claim. As I stated in *Re Tickner*, the mere fact that an agency relies upon clause 5(1)(b) is sufficient to reveal the existence (the fact) of an investigation of some type. In my view, however, that is not the meaning that is intended by this clause. As I have said, I consider that the exemption is designed to protect the substance of an investigation.
28. Having inspected the document, I am of the view that those parts for which exemption is claimed under clause 5(1)(b) would reveal something of the substance of an investigation. As I have said, the very fact of the agency having claimed exemption under that clause reveals, at the very least, the existence of an

investigation of a possible contravention of the law. The matter for which exemption is claimed under that clause reveals something of the substance of an investigation, in that it specifies, *inter alia*, the particular law under consideration. For this reason, and being satisfied that none of the limits on the exemption applies, I find that the following parts of the document are exempt under clause 5(1)(b):

Under the heading, "**COONGAN P/L 3114/1061, WARRALONG P/L**" on page 2:

- the second sentence of paragraph 6;
- the last eight words of paragraph 7;
- the last sentence of paragraph 1 on page 3.

(c) Clause 4(3) - Commercial or business information

29. The agent objects to the release of the disputed document on the ground that it contains information which, if disclosed, would adversely affect the business affairs of the lessees of the properties concerned, some of the complainants. Clause 4(3) of Schedule 1 to the FOI Act provides:

"4. Commercial or business information

Exemptions

(1)...

(2)...

(3) *Matter is exempt matter if its disclosure -*

(a) would reveal information (other than trade secrets or information referred to in subclause (2)) about the business, professional, commercial or financial affairs of a person; and

(b) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.

Limits on exemptions

(4) Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of an agency.

(5) Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information

about the business, professional, commercial or financial affairs of the applicant.

(6) Matter is not exempt matter under subclause (1), (2) or (3) if the applicant provides evidence establishing that the person concerned consents to the disclosure of the matter to the applicant.

(7) Matter is not exempt matter under subclause (3) if its disclosure would, on balance, be in the public interest."

30. To establish the exemption under clause 4(3) disclosure of the documents in question must reveal information of the type mentioned, about any person, including an incorporated body, and it must be reasonable to expect that disclosure in this manner would produce some adverse effect on those affairs, or would prejudice the future supply of information of that kind. The public interest test in sub-clause (7) envisages that some kinds of business or commercial information may be disclosed if, on balance, it would be in the public interest to disclose it.
31. The agent made a number of submissions to me in which he argued that the disputed document should not be released to the applicant. Some of those submissions included background material on the history of the pastoral leases in question. However, it was also apparent that much of the agent's arguments against release of the disputed document centred on the fact that the applicant was a journalist and that previous articles written by her had resulted in unwanted and adverse publicity.
32. In his submissions the agent claimed that the disputed document was unbalanced and inaccurate. He disputed many of the conclusions of the pastoral inspector and claimed that the properties visited by the inspector cover approximately 500,000 hectares and that his report was based on inadequate research. The agent further claimed that it is not in the public interest to disclose the report because it is unbalanced, inaccurate and incomplete. Those arguments were put to the agency in the first instance and then to me in the course of the external review. It appears that the claims were considered but rejected by the agency's decision-maker who decided that there would be no adverse effects following from the disclosure of the document.

Does the disputed document contain information about the business, professional, commercial or financial affairs of a person?

33. The disputed document records information about access to the properties concerned; infrastructure on the properties, including mills and fences; the existence and condition of stock; the condition of feed for the stock and the degree of management exercised in relation to the properties. The agent claims that information about stock numbers and asset values is information about the commercial affairs of the complainants.
34. From my examination of the disputed document, I accept the claim of the agent that the information in that document described in paragraph 29 above comprises information concerning the business or commercial affairs of the complainants relating to the pastoral leases. There is also evidence before me that this claim was accepted by the agency in the first instance when it sought the views of those parties.

What is the nature of the adverse effect on the business or commercial affairs of the third parties which it is claimed will result from disclosure of the document?

35. It is the submission of the agent that there are a number of interested parties waiting to take control of pastoral leases that may be forfeited under the provisions of the Land Act. It is my understanding that it is his submission that disclosure of the disputed document to the applicant will result in further sensational stories about the leased properties. If that happens, and he assumes that it will as a matter of certainty, he claims that the publicity would be damaging to the Aboriginal owners of the properties who are at the crucial stages of re-developing and re-building those properties into viable enterprises. The agent also claims that the information in the disputed document is "...*strictly a matter for the pastoral enterprises concerned and the relevant authorities and is by no means a matter of public interest.*"
36. The Land Act is a law relating to Crown land. It deals, *inter alia*, with grants of Crown land, the granting of leases of land to Aborigines and the granting of pastoral leases. It establishes the Pastoral Board which assists the Minister for Lands in determining if pastoral leases are liable for forfeiture. Leases may be forfeited under s.103(3)(a) of the Land Act. One ground for forfeiture is that the land the subject of the lease is not stocked or kept stocked with the number of sheep or cattle, or both, the Board considers to be a number sufficient for stocking, taking into account the carrying capacity of the land, seasonal climatic conditions and the period of time that has elapsed since the commencement of the lease. The Land Act also prescribes certain conditions which attach to pastoral leases including "improvement conditions" requiring the lessee to effect and maintain a certain level of improvement to the property.
37. I accept the claim that forfeiture of the pastoral leases would adversely affect the business or commercial affairs of the third parties. However, the question is whether forfeiture could reasonably be expected to result from disclosure of the disputed document.

38. Before forfeiture under the Land Act may occur, the Pastoral Board is required to make certain recommendations to the Minister for Lands concerning the number of stock, fencing requirements and compliance with conditions attached to the grant of a particular lease. On receiving such a report from the Pastoral Board, the Minister for Lands is required to give the lessee a notice requiring the lessee to comply with the requirements of the Pastoral Board. Failure to comply with such a notice may result in forfeiture of the lease under s.23(1) of the Land Act.
39. I accept the claim that disclosure of the disputed document may result in publicity, especially as the applicant is a journalist. However, the agent has not persuaded me that there is a causal connection between disclosure of the disputed document, publicity about the pastoral leases that may result and any adverse effects on the commercial or business affairs of the complainants.
40. Accordingly, I am not satisfied that the claims of the complainants for exemption under clause 4(3) of Schedule 1 to the FOI Act for the whole of the disputed document have been established.
