

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

**File Ref: F2001175  
Decision Ref: D0112002**

Participants: **Mark James Neilson**  
Complainant  
  
- and -  
  
**City of Swan**  
Respondent

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

FREEDOM OF INFORMATION – refusal of access – letters and plans – section 27 –access by inspection - correspondence between agency and its legal advisers – clause 7(1) – legal professional privilege – clause 14(1)(c) – matter of a kind mentioned in section 23(1) of the *Parliamentary Commissioner Act 1971* – information obtained by the Parliamentary Commissioner for Administrative Investigations – whether obtained in the course of or for the purpose of an investigation – sufficiency of search.

*Freedom of Information Act 1992 (WA)* ss. 27(1)(a), 27(2)(c); Schedule 1 clauses 7(1) and 14(1)(c).

*Copyright Act 1968 (Cth)*

*Parliamentary Commissioner Act 1971 (WA) s. 23(1)*

*Interpretation Act 1984 (WA) s.19*

*Esso Australia Resources Ltd v The Commissioner of Taxation* [1999] 74 ALJR 399

*Re Nield and Shire of Serpentine-Jarrahdale* [2001] WAICmr 14

*Director of Public Prosecutions Reference Under Section 693A of the Criminal Code;*

*Re Y and Ors* (1998) 19 WAR 47

*Re Clements and Health Department of Western Australia* [1994] WAICmr 3

## DECISION

The decision of the agency is set aside. In substitution, it is decided that:

- Documents 6 and 7 are not exempt, but access to those documents is to be given by way of inspection;
- Documents 2 and 5 are exempt under clause 7 of Schedule 1 to the *Freedom of Information Act 1992*; and
- Document 3 is exempt under clause 14(1)(c) of Schedule 1 to the *Freedom of Information Act 1992*.

B. KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

8 March 2002

## REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision of the City of Swan ('the agency') to refuse Mr Neilson ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ("the FOI Act").
2. In 1998, the agency received a development proposal for the property situated at Lot 504 Toodyay Road, Gidgegannup, which is adjacent to the complainant's property. Among other things, the development proposal required the agency to adopt an Outline Development Plan ('ODP 106'), in accordance with the relevant Town Planning Scheme then in force.
3. On 7 August 1998, the complainant made a complaint to the Parliamentary Commissioner for Administrative Investigations ('the State Ombudsman') about the planning process undertaken by the agency in relation to the proposed development of Lot 504. The State Ombudsman investigated the complaint. On 8 October 1998, the State Ombudsman advised the complainant that he could not take the matter further and closed his file.
4. On 20 November 1998, the complainant made a second complaint to the State Ombudsman about the agency's planning process in relation to the development proposal for Lot 504, both generally and specifically relating to issues outlined in his first letter of complaint. In accordance with usual practice, the State Ombudsman forwarded a copy of the second complaint to the agency and sought its response to the matters of complaint. In the interim, the complainant informed the State Ombudsman that he wished to withdraw his second complaint. However, I understand that the State Ombudsman did not close his file.
5. As requested, the agency provided a letter of response to the State Ombudsman and, in January 1999, after receiving legal advice concerning the second complaint, the agency forwarded a copy of that legal advice to the State Ombudsman. Following that, at the request of the State Ombudsman, I understand that the agency sent further material and, in February 1999, the State Ombudsman informed the complainant that his first complaint had been adequately investigated and the matter would not be re-opened.
6. On 19 July 2001, the complainant made an application to the agency under the FOI Act for access to certain documents relating to, among other things, ODP 106. On 26 July 2001, the complainant made another application to the agency for access to certain additional documents. The agency treated both requests as one access application and dealt with the one application under the FOI Act.
7. On 2 October 2001, the agency granted the complainant access to some of the requested documents, but refused access to seven others. The agency claimed that three documents were exempt under clause 6 of Schedule 1 to the FOI Act and four others either could not be found or did not exist. Following an internal review, one additional document was found, but the agency deferred giving access to that document. On 23 November 2001, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

## REVIEW BY THE INFORMATION COMMISSIONER

8. I obtained the disputed documents from the agency, together with the agency's FOI file in respect of this matter. I also directed the agency to undertake additional searches for some of the documents described by the complainant in his access application. I obtained copies of correspondence between the State Ombudsman and the agency and made inquiries with the State Ombudsman. I also consulted with third parties who might be affected by my decision on this complaint.
9. On 12 February 2002, after examining the disputed documents and considering the information before me, I informed the parties in writing of my preliminary view of this complaint and my reasons. My preliminary view was that two documents might be exempt under clause 7(1) and one might be exempt under clause 14(1)(c). It was also my preliminary view that two documents may not be exempt, but may be subject to copyright under the *Copyright Act 1968* (Cth) and, accordingly, that access to those documents should be given by inspection.
10. The agency accepted my preliminary view. The complainant did not accept my preliminary view and made six written submissions to me in support of his claim for access. Those submissions were, in the main, directed to the complainant's claim that Document 3 was not exempt under clause 14(1)(c).

## THE DISPUTED DOCUMENTS

11. There are five disputed documents, which are referred to as Documents 2, 3, 5, 6 and 7 in the agency's notices of decision. Document 2 is a request for legal advice, dated 16 December 1998, from the agency to its solicitors. Documents 3 and 5 are letters containing legal advice, dated respectively 13 January 1999 and 11 June 2001, from the agency's solicitors to the agency. Document 6 is a survey plan and Document 7 is a landscape plan.

### Documents 6 and 7

12. Initially, the agency did not claim exemption for Documents 6 and 7. Rather, it deferred making a decision on access to Document 6 and refused access to Document 7 because a third party objected to its disclosure. I have consulted with third parties who have an interest in Documents 6 and 7, but none is joined as a party to these proceedings. Notwithstanding that, I have considered and taken into account the objections made by one third party to the disclosure of Document 7. There is nothing on the face of Document 6 or Document 7 that persuades me that either document is exempt. Further, there are no material objections from the third party, which persuade me that these documents should not be disclosed under the FOI process. Accordingly, I find those documents are not exempt.
13. However, I am satisfied that both documents are original works within the terms of the *Copyright Act 1968* (Cth) and that it would be an infringement of copyright belonging to a person other than the State if the agency were to give the complainant access to copies of those documents. Therefore, access should be given by way of inspection only.

## THE EXEMPTIONS

### (a) Clause 7 – Legal professional privilege

14. The agency claims that Documents 2, 3 and 5 are exempt under clause 7 of Schedule 1 to the FOI Act. 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 applies to, among other things, confidential communications between a solicitor and client made for the dominant purpose of giving or seeking legal advice or for use in existing or anticipated legal proceedings: *Eso Australia Resources Ltd v The Commissioner of Taxation* [1999] 74 ALJR 399.
15. Having examined Documents 2, 3 and 5, I am satisfied that they are confidential communications between the agency and its legal advisers, which were made for the dominant purpose of seeking and giving legal advice. In my view, those documents would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I consider that there is a *prima facie* claim for exemption for those documents under clause 7(1). However, the complainant raised the question of waiver and submitted that the agency had waived privilege for Document 5 by disclosing its legal advice in the minutes of a meeting of the Council of the agency ('the Council') held in April 2001.
16. I have examined various minutes of the Council. Unlike the complainant, I have had the advantage of examining the disputed documents, together with other material that is not available to him. There is nothing in the information before me that suggests to me that the agency has waived its right to claim privilege for Document 5. The reference to legal advice, which appears in the Council minutes in April 2001, in my view, does not relate to the legal advice contained in Document 5. Therefore, I do not consider that the question of waiver of privilege arises in respect of Document 5. Further, there is nothing before me to suggest that privilege has been waived with respect to Document 2. Accordingly, I find Document 2 and Document 5 exempt under clause 7(1) of Schedule 1 to the FOI Act.
17. The complainant submits that the agency has waived privilege in Document 3 by, among other things, referring to the legal advice in that document in a letter to him, dated 14 January 1999, and in the Council minutes of 10 February 1999. Having examined the letter and the minutes, it is apparent to me that the agency may have disclosed a summary of the legal advice it received and part of the detail of that advice. Accordingly, I consider that privilege might have been waived by the agency in respect of Document 3. Ordinarily, such a finding would mean that Document 3 may not be privileged from production in legal proceedings on the grounds of legal professional privilege and, therefore, may not be exempt under clause 7(1). However, I need not determine whether privilege has, in fact, been waived in relation to Document 3 because my inquiries into this complaint have established that the legal advice in Document 3 was obtained by the agency, at the suggestion of the State Ombudsman, and provided to the State Ombudsman by the agency, in response to issues raised in the second complaint made to the State Ombudsman by the complainant. In those circumstances, I consider that the exemption in clause 14(1)(c) of Schedule 1 to the FOI Act applies.

**(b) Clause 14 – Information protected by certain statutory provisions**

18. Clause 14(1)(c) provides that matter is exempt matter if it is matter of a kind mentioned in s.23(1) of the *Parliamentary Commissioner Act 1971*. Section 23(1) of the *Parliamentary Commissioner Act 1971* provides, among other things, that information obtained by the State Ombudsman or his officers in the course of, or for the purpose of, an investigation under that Act, shall not be disclosed, except for the purposes of the investigation and of any report or recommendation to be made thereon under that Act.
19. A claim for exemption under clause 14(1)(c) will be satisfied once it is established that a document contains information or matter of the kind described in s.23(1) of the *Parliamentary Commissioner Act 1971*, that is, information obtained by the State Ombudsman or his officers in the course of, or for the purpose of, an investigation under the *Parliamentary Commissioner Act 1971*.
20. The outcome of my inquiries into this complaint is set out in paragraphs 3-5 above. Based on those facts, I am satisfied that the agency's letter of response to the State Ombudsman and Document 3 comprise material or information obtained by the State Ombudsman in the course of, or for the purpose of, an investigation under the *Parliamentary Commissioner Act 1971*. Accordingly, I consider that Document 3 contains matter of a kind mentioned in s.23(1) of the *Parliamentary Commissioner Act 1971* and is, *prima facie*, exempt under clause 14(1)(c). The complainant made a number of submissions to me on this point.

**The complainant's submissions**

21. Firstly, the complainant submits that clause 14(1)(c) does not apply to Document 3 because, at the relevant time, there was no investigation being conducted by the State Ombudsman. He submits that the legal advice in Document 3 was sought in response to issues raised by him with the agency and not in response to issues raised by the State Ombudsman. The complainant claims that the State Ombudsman did not obtain Document 3 for the purpose of an investigation because he withdrew his second complaint in December 1998 and Document 3 was not given to the State Ombudsman by the agency until January 1999. The complainant submits that the secrecy requirement in s.23(1) of the *Parliamentary Commissioner Act 1971* should only apply to documents obtained by the State Ombudsman at the time that his investigation is active and he submits that my decision in *Re Nield and Shire of Serpentine-Jarrahdale* [2001] WAICmr 14 supports his view.
22. I am satisfied that the State Ombudsman was conducting an investigation in January 1999, notwithstanding that the complainant had withdrawn his second complaint. Clearly, the State Ombudsman has power to initiate his own investigations and continue investigating until he is satisfied about all of the issues and it is apparent to me that he was conducting an investigation on this occasion. Further, the facts in *Re Nield* are entirely different. In *Re Nield*, the State Ombudsman had finished the investigation more than 2 years earlier. In this matter, between August 1998 and February 1999, the State Ombudsman was actively investigating various aspects of

both the first and second complaints made to him by the complainant. I am satisfied that the State Ombudsman obtained Document 3 in the course of, or for the purpose of, an investigation under the *Parliamentary Commissioner Act 1971*.

23. Secondly, the complainant submits that Document 3 falls within the exception in s.23(1)(b) of the *Parliamentary Commissioner Act 1971*, because he is seeking access in order to bring proceedings against the agency, in which he will allege, among other things, that the agency has committed an offence under that Act.
24. The fact that the complainant is contemplating legal action against the agency is, in my view, irrelevant to the question before me. The question I must decide is whether Document 3 contains matter of the kind mentioned in s. 23(1) of the *Parliamentary Commissioner Act 1971*. Section 23(1)(b) of that Act is merely an exception to the prohibition on disclosure of information in s.23(1), which allows disclosure for the purposes of certain legal proceedings. It is not an exception to the exemption in clause 14(1)(c) of Schedule 1 to the FOI Act.
25. Thirdly, the complainant submits that the prohibition on disclosure under s.23(1) only applies to the State Ombudsman and he referred me to the decision of the Supreme Court of Western Australia in *Director of Public Prosecutions: Reference Under Section 693A of the Criminal Code; Re Y and Ors (1998)* 19 WAR 47 in support of that contention. The complainant submits that he is seeking access to the copy of Document 3 held by the agency, not the copy held by the State Ombudsman.
26. I have considered the decision in *Re Y and Ors*, which includes some comments on the interpretation of s.23(1). That case involved several questions of law referred to the Supreme Court by the Director of Public Prosecutions. The decision in *Re Y and Ors* is not a decision concerning the interpretation or application of clause 14 of Schedule 1 to the FOI Act. In my opinion, *Re Y and Ors* is distinguishable from the matter presently before me and I do not accept this part of the complainant's submissions.
27. Fourthly, the complainant submits that Parliament did not intend clause 14(1)(c) to exempt any document held by an agency that is also copied to the State Ombudsman in the course of, or for the purpose of, an investigation, because that would mean that public documents, such as Council minutes obtained by the State Ombudsman, would be exempt. In my view, although a document may be obtained by the State Ombudsman as part of an investigation and, thereby, be caught by the secrecy provisions of s.23(1), such a document will not necessarily be exempt under the FOI Act. This is because s.6 of the FOI Act makes it clear that there is no right of access under the FOI Act to public documents or to documents that are available for purchase or inspection (see also, *Re Clements and Health Department of Western Australia* [1994] WAICmr 3).
28. Essentially, the complainant submits that clause 14(1)(c) should be interpreted narrowly. In support of that view, he claims that the Second Reading Speech of the former Attorney General, reported in *Hansard*, at page 9517 on 19 October 1995, during the debate on the *Freedom of Information Amendment Bill*, clearly shows that Parliament intended that clause 14(1)(c) of the FOI Act should operate to protect information such as draft reports of investigations sent by the State Ombudsman to agencies from being accessed under the FOI Act. It is the complainant's submission

that the exemption clause only applies to information emanating from the State Ombudsman to another agency, and not information sent to the State Ombudsman by an agency.

29. Section 19(1) of the *Interpretation Act 1984* allows the use of extrinsic materials, including the extract from *Hansard* referred to in paragraph 28 above, to assist in ascertaining the meaning of the written law in order to confirm that the meaning of a provision is the ordinary meaning conveyed by the text of the provision; or if a provision of the written law is ambiguous or obscure; or if the ordinary meaning conveyed by the text of the provision, taking into account its context in the written law and the purpose or object underlying the written law, leads to a result that is manifestly absurd or is unreasonable.
30. However, in my view, I do not consider that the material provided by the complainant assists in confirming the ordinary meaning of clause 14(1)(c) of Schedule 1 to the FOI Act or s.23(1) of the *Parliamentary Commissioner Act 1971*, nor do I consider that the meaning of those provisions is ambiguous or obscure. Further, I do not consider that giving the words of that clause or that section their ordinary meaning would lead to a result that is manifestly absurd or unreasonable. I consider that the language of clause 14(1)(c) of Schedule 1 to the FOI Act is clear and unambiguous, as is the language of s.23(1) of the *Parliamentary Commissioner Act 1971*. Accordingly, I do not find it necessary to revert to extrinsic material such as extracts from *Hansard*, to determine the meaning of those provisions.
31. In considering whether a document is exempt under clause 14(1)(c), I am only required to decide whether or not the document contains matter of a kind mentioned in s.23(1) of the *Parliamentary Commissioner Act 1971*. If it does, then the exemption applies. In this case, it is apparent that the agency tendered Document 3 to the State Ombudsman as its response to the legal issues raised by the complainant in his second complaint. In those circumstances, I am satisfied that Document 3 consists of information obtained by the State Ombudsman, in the course of, or for the purpose of, an investigation under the *Parliamentary Commissioner Act 1971*. Accordingly, I find Document 3 exempt under clause 14(1)(c) of Schedule 1 to the FOI Act.

### **Sufficiency of search**

32. In the course of my dealing with this complaint, the agency advised me that it was uncertain as to whether the document described as Document 6 is the specific landscaping concept plan sought by the complainant. The sole reference to that document appears in the Council minutes dated July 2001. However, information provided to me by the agency suggests that this reference is incorrect. In the event that Document 6 is not the document described by the complainant in his access application, I am satisfied that the agency has taken all reasonable steps to find the relevant survey plan, but that it either does not exist or cannot be found.

\*\*\*\*\*