

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

**File Ref: F2002093
Decision Ref: D0292002**

Participants:

Fulton Joseph Borthwick
Complainant

- and -

Town of Victoria Park
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – application for amendment of personal information under Part 3 – refusal to amend personal information by way of obliteration or destruction – whether information is inaccurate and misleading – whether certification under s.48(3) by Information Commissioner warranted – whether prejudice or disadvantage to complainant outweighs public interest in maintaining record.

Freedom of Information Act 1992 (WA) ss.45(1), 46(1), 48(1)-(4), 49(5), 50; Part 3; Glossary.

State Records Act 2000 s.78(3)

Local Government Act 1995

DECISION

The decision of the agency not to amend the disputed information is set aside. In substitution, it is decided that the disputed information is to be amended, by striking out the disputed information, in accordance with s.48(1)(b) of the FOI and by inserting a note in relation to the disputed information, in accordance with s.48(1)(d) and s.48(2) of the FOI Act, in the manner described in paragraph 40 of my reasons for decision.

T P KENNEDY
A/INFORMATION COMMISSIONER

13 August 2002

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner ('the Commissioner') arising from a decision of the Town of Victoria Park ('the agency') not to amend information in accordance with an application for amendment made under Part 3 of the *Freedom of Information Act 1992* ('the FOI Act') by Mr Borthwick ('the complainant').
2. The background to this complaint is an acrimonious building dispute between the complainant and a builder engaged by the complainant to build his house ('the builder'). In 2000, the complainant complained to the former Building Disputes Committee ('the BDC') about the builder, alleging, among other things, faulty or unsatisfactory building work on the part of the builder, due to colour variations in the bricks used in the boundary retaining walls and the external wall of the house then being built for the complainant. The BDC decided that the complainant's complaint against the builder should fail, but it cautioned the builder to supervise the completion of the building works closely, so that a satisfactory overall result was achieved.
3. Following the BDC's findings, I understand that relations between the complainant and the builder deteriorated. In April 2001, the builder purportedly issued a Notice of Termination of the building contract, at which date the complainant's house was only partially completed. Since mid-2001, the complainant has written to the agency, on several occasions, complaining about matters relating to the building of his house. In late November 2001, he wrote to the Mayor of the agency, expressing concern about several matters relating to the construction of his house. I understand that the agency conveyed the substance of those concerns to the builder. The builder responded to the agency, by letter dated 21 January 2002 ('the builder's letter'). The builder's letter is the document containing the information the subject of this complaint.
4. On 19 April 2002, the complainant applied to the agency, under the FOI Act, for the amendment of certain personal information ('the disputed information') about him, which is contained in the builder's letter. In particular, the complainant applied for the deletion of "...all and any reference to the builder's statement and all and every record and by and (sic) whatsoever means stored" relating to the builder's letter. The disputed information indicates that a representative of the company that supplied the bricks used by the builder in the construction of the complainant's house had purportedly contacted the police, on behalf of the brick supplier, in relation to the complainant.
5. On 24 April 2002, the agency advised the complainant that it was not satisfied that the disputed information was inaccurate, incomplete, out of date or misleading and refused his application for amendment. However, the agency also notified him of his right, under s.49(5)(c) of the FOI Act, to request that a notation or attachment be made to the disputed information, in accordance with s.50 of the FOI Act. The agency's decision was confirmed on internal review. On 15 May 2002, the complainant lodged a complaint with the Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

6. When he lodged this complaint, the complainant claimed that the disputed information was a false statement. His letter to the Commissioner identified several third parties who may have had some knowledge of, or information relevant to, his complaint. After accepting the complaint, the Commissioner obtained the builder's letter from the agency, together with the FOI file maintained by the agency in respect of the complainant's amendment application. The Commissioner made inquiries into the complainant's claims and sought additional information from the complainant, the agency, the builder, the brick supplier to the builder and several other third parties. During the external review proceedings, the complainant advised the Commissioner that he seeks the obliteration, rather than the deletion, by striking out, of the disputed information and, further, that he is not prepared to exercise his right under s.50 of the FOI Act and request the agency to place a notation or attachment to the disputed information.
7. Following inquiries into the complainant's claim that the disputed information is inaccurate and misleading, on 5 July 2002, the Commissioner informed the parties, in writing, of her preliminary view of this complaint, including her reasons. It was the Commissioner's preliminary view that the disputed information is inaccurate and misleading. However, the Commissioner was also of the preliminary view, on the evidence then before her, that the complainant had not established that the continued existence of the disputed information could reasonably be expected to cause him such prejudice or disadvantage such that it would outweigh the public interest in the agency's retaining a complete record of the builder's letter.
8. The Commissioner was of the preliminary view that the matter was not one which warranted certification under s.48(3) of the FOI Act and that the appropriate remedy, under Part 3 of the FOI Act, was for the agency to strike out or delete the disputed information and make a notation to the disputed information, setting out the details as to why the disputed information is inaccurate and misleading and also for the agency to attach a copy of the Commissioner's preliminary view letter to its file, next to the builder's letter.
9. Both parties accepted the Commissioner's preliminary view that the disputed information was inaccurate and misleading. However, the complainant did not accept the Commissioner's preliminary view about the appropriate form of amendment and he made several further submissions, dated 9, 11 and 12 July 2002, in support of his claims. The agency was provided with copies of the complainant's submissions and invited to respond. The agency's submissions were, in turn, provided to the complainant for his response. On 30 July 2002, the complainant provided the Commissioner with further information and comments in response to the agency's submissions, but he did not withdraw his complaint.

AMENDMENT OF PERSONAL INFORMATION

10. Part 3 of the FOI Act deals with the right of a person to apply to an agency for the amendment of personal information about the person contained in a document of an agency and it prescribes the procedures to be followed by an agency in dealing with an application for amendment. Section 45(1) provides that an individual has the right to

apply for amendment of personal information about the person contained in a document of the agency, if the information is inaccurate, incomplete, out of date or misleading. Section 46(1) provides that the person seeking amendment of personal information must, among other things, give details of the matters in relation to which the person believes the information is inaccurate, incomplete, out of date or misleading and the person must also give reasons for holding that belief.

11. If an agency decides to amend the information, s.48(1) provides that it may do so by altering information; by striking out or deleting information; by inserting information; or by inserting a note in relation to the information or in two or more of those ways. However, s.48(3) further provides that an agency is not to amend information under s.48(1) in a way that obliterates or removes the information, or that results in the destruction of a document containing the information, unless the Commissioner has certified in writing that it is impracticable to retain the information or that, in the opinion of the Commissioner, the prejudice or disadvantage that the continued existence of the information would cause to the person outweighs the public interest in maintaining a complete record of information.

First question - Does the builder's letter contain personal information about the complainant?

12. 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".*
13. I have examined the builder's letter, which is located on the agency's files. It is dated 21 January 2002 and it is addressed to the Director of Building Services at the agency. It states, at paragraph 1, that it is written in response to the complaint made to the agency, by the complainant, about the builder. The disputed information comprises all of paragraph 2 on page 2 of the builder's letter and, in my view, it clearly refers to the complainant. Having examined the builder's letter, I am satisfied that the disputed information consists of personal information, as that term is defined in the FOI Act, about the complainant because, in context, it consists of information and opinion about the complainant. Accordingly, I am satisfied that the builder's letter, which is a document of the agency, contains personal information about the complainant and that that information may, therefore, be the subject of an application for amendment under s.45(1) of the FOI Act.

Second question – Is the disputed information inaccurate, incomplete, out of date or misleading?

14. During the external review process, the Commissioner directed that inquiries be made into the complainant's claims that the disputed information is inaccurate and misleading. The Commissioner's inquiries established that the builder had been advised, by a third person, that a representative of the brick supplier had apparently contacted the police in relation to its dealings with the complainant. The builder confirmed that the disputed information reflected the builder's belief in that regard.
15. A number of the persons interviewed directed the Commissioner's Legal Officer to the person whom they thought had actually contacted the police, but each of those persons stated that he was not the person who had purportedly contacted the police, on behalf of the brick supplier. In addition, those inquiries did not locate any documentary material containing a record of any contact, by any person, with the police. As a result, the Commissioner was satisfied that there was no objective evidence to indicate that anyone had actually contacted the police.
16. It was the Commissioner's preliminary view that the disputed information is inaccurate and misleading, for the reasons given to the parties. Based upon my consideration of all of the material obtained during the external review process, I agree with the Commissioner's preliminary finding on that point. In my view, no objective evidence was discovered or put before the Commissioner, during the external review process to establish that the disputed information is accurate. As I concur with the Commissioner's preliminary finding that the disputed information is inaccurate and misleading, I consider that the complainant's application for amendment, in some form, is justified.

Third question – Is certification under s.48(3) warranted?

17. The obliteration, removal or destruction of a document by an agency is only authorised in the circumstances outlined in s.48(3) of the FOI Act. Information may only be amended by an agency in any of those ways, if the Commissioner has certified, in writing, that it is impracticable to retain the information or that, in the opinion of the Commissioner, the prejudice or disadvantage that the continued existence of the information would cause to the person outweighs the public interest in maintaining a complete record of information.
18. Section 48(4) of the FOI Act further provides that, before information is amended in one of the ways described in s.48(3), the Commissioner shall provide the State Records Commission with a copy of the certificate issued by the Commissioner under s.48(3).
19. In this instance, I do not consider that it is impracticable to retain the disputed information. The builder's letter is filed on one of the agency's files and an electronic copy is also retained in the agency's computerised document record system. In my view, there is no practical impediment to the retention of the disputed information. The question is, therefore, whether the continued existence of the disputed information would cause any prejudice or disadvantage to the complainant and, if it would, whether that prejudice or disadvantage is enough to outweigh the public interest in maintaining a complete record of information.

The complainant's submissions

20. When the complainant lodged this complaint, he claimed that the continued existence of the disputed information would severely impact upon, amongst other things, his good name and reputation; his future income earning potential; his reputation in his chosen profession and his good name and his standing in the community because, in his opinion, any hint or rumour of alleged wrong-doing or misconduct on his part will have a severe adverse effect on his future employment prospects and his income earning potential.
21. He also claimed that, before it received the builder's letter, the agency, its Executive staff and the Council of the agency ('the Council') had treated him most unfairly, with prejudice and bias. He further claimed that, after receiving the builder's letter, the agency has treated him as though he is a criminal. He claimed that the agency's treatment of him, and its actions to date, show a propensity on the part of the agency to protect the builder and to give the builder a distinct commercial advantage over him. I have summarised below, the purported instances of bias, prejudice or disadvantage which the complainant claims to have suffered in his dealings with the agency, both before and after the agency received the builder's letter:
 - (a) Executive staff and Councillors deliberately chose to pass the decision on a most crucial issue affecting him, to administration staff, when all along the agency had previously advised him that the decision would be made by full Council;
 - (b) Councillors did not want to meet with him and had been instructed by Executive staff not to meet with him;
 - (c) Councillors and agency staff refuse to respond adequately to his letters or address important issues of legal significance; the Mayor of the agency continues to claim that he has not seen the builder's letter; and the agency claims that key correspondence, hand delivered to the agency by him, was not received;
 - (d) despite circulating the builder's letter to every Councillor, the agency refused to circulate correspondence from him, in rebuttal;
 - (e) a senior officer of the agency acted in an intimidating way towards him at a site meeting;
 - (f) the agency deliberately chose not to require the builder to substantiate any of the claims made in the builder's letter when, in the complainant's opinion, the onus lay on the builder to do so; and
 - (g) the agency's notices of decision, in response to his application for amendment, indicate, in his opinion, a most serious prejudgment on the part of the agency's decision makers, of wrongdoing on his part. Moreover, the complainant claims that the agency's reasons for refusing to amend the disputed information, in accordance with his application, were not based on the fact that it had no legal power to do so but, rather, were based on the fact that the agency's decision makers had already prejudged the matter, on the basis of the disputed information.

22. In response to the Commissioner's preliminary view and the agency's submissions, the complainant repeated the claims set out in paragraph 21 above. He also submitted that the information previously provided to the Commissioner clearly demonstrated, in his view, that the disputed information has caused the agency to deal with him in a prejudiced and biased manner and that it has provided the builder with a distinct commercial advantage over him; that Councillors of the agency were clearly influenced by the builder's letter and, consequently, had relinquished all responsibility for dealing with his complaints (claiming that they were an administrative matter, when they had dealt with other, less significant, non-compliance matters forwarded to them by the administration staff of the agency); that the agency should not have dealt with a matter of such importance to him so hastily, because he needed time to be fully informed; and that he had had to defer his attendance before Councillors on two occasions, for genuine reasons.
23. Finally, the complainant submits that the continued existence of the disputed information will cause him prejudice and disadvantage, but that it is difficult to quantify the future damage that the retention of the disputed information might cause him. He observes that it is human nature not to trust, and to refrain from dealing with, a person who may have transgressed the law. He also submits that it is not in the interests of the general public for the disputed information to remain on the record and that no individual can benefit from its remaining and it can only be used to harm him, his company and his future prospects. He further states that he values his honesty and integrity highly; has never been in trouble with the law and cannot afford the agency to think that he has committed some illegal act.

The agency's submission

24. In its response to the complainant's submissions, the agency denies that its administrative staff and Councillors have been influenced by the disputed information when dealing with the non-complying issues of the complainant's partly constructed house. The agency submits that its officers have taken action in accordance with the relevant legislation and advice sought from the agency's solicitors, in relation to those matters.
25. The agency says that it has advised the complainant that the issues of concern to him could have been dealt with by delegated authority but, because of the unusual circumstances of the matter, it had intended to report the matter to Council, which would have given the complainant an opportunity to make a formal presentation to Councillors. However, the agency says that the complainant twice requested that the matter be deferred, with the result that the Councillors decided that the matter had gone on long enough and advised staff to remove the item from its agenda and deal with it under delegated authority.

Consideration

26. In order to ascertain whether there are any grounds for the complainant's claims that he has been treated unfairly, with prejudice and bias, by the agency, I have examined his correspondence to the agency, copies of which he previously provided to the Commissioner, and I have considered his submissions. I have also examined copies of the agency's correspondence to the complainant, some of which he provided to the Commissioner and some of which I obtained from the agency and I have considered the agency's submissions in response to the complainant's claims.
27. Having examined and considered all of that material, I am not persuaded that the complainant has established that he has been treated unfairly by the agency, with prejudice and bias, or that agency has acted in a manner intended to provide the builder with a commercial advantage over him, either before or after the builder's letter was received by the agency. To the contrary, in my opinion, the agency's correspondence to the complainant, in response to his various complaints and allegations, clearly contradicts his claims against the agency.
28. The complainant informs me it was, and is, his clear understanding, based upon advice given to him by officers of the agency and by the Deputy Mayor, that matters placed before an Elected Members' Briefing Session (EMBS) are for decisions to be made by Councillors, who take into consideration recommendations of agency staff and the parties invited to the EMBS meeting. He provided me with certain documents, which he says support his claims on this point.
29. However, having examined those documents and the material before me, I have been unable to identify any correspondence from the agency to the complainant, advising him that a decision on any aspect of his complaints to the agency was to be made by full Council. To the contrary, the EMBS information sheet he provided to me clearly states that no decisions are made at EMBS briefing sessions and he has not been able to provide me with copies of any correspondence from the agency advising him that a decision on the matter was to be made by the full Council of the agency. Thus, in my view, there is no objective evidence to support his claims on this point.
30. Similarly, despite his request that his various complaints be put before, and dealt with by Councillors, the complainant was advised, in writing, of the reasons why the agency considered it unnecessary for Councillors to be involved in the matter. Among other things, the agency was of the view that, due to the administrative nature of the matter, it was more appropriate for him to meet with senior Executive staff of the agency and discuss his concerns with them. In my view, having examined the agency's correspondence to the complainant, the agency has dealt with and replied to all of his correspondence with professionalism and objectivity, addressing his requests for information, within reason. On that point, I note that, on 8 April 2002, the Mayor of the agency wrote to him in response to several of his concerns, advising him that the Mayor considered the agency was treating him fairly and responding to him in a manner that it can reasonably do, within its powers to resolve the issues. Whilst the complainant may not be satisfied with the replies he received from the agency, in my view, there is no substance to his claims that the agency has refused to respond adequately to his letters.

31. I also consider that there is little substance to the complainant's claim that Councillors did not want to meet with him, and had been instructed not to meet with him, because of the information contained in the builder's letter. The agency has provided me with a copy of a memorandum sent to the Mayor and Councillors on 6 December 2001, some two months before the builder's letter was received by the agency. It advised Councillors that the agency had received the complainant's letter of 26 November 2001; that the issues set out in that letter were complicated, but that the complainant's concerns were under consideration by the agency and, finally, it asked Councillors, in view of the complexity of the matter, to refrain from discussing the matter with the complainant, until the agency had reached a position on the matter.
32. Further, in late December 2001, about one month before the builder's letter was received by the agency, a member of the senior Executive staff of the agency wrote to the complainant, offering to arrange a meeting between him and senior Executive staff, in order to discuss his concerns with him. In accepting that offer, the complainant requested the agency to arrange for the majority of Councillors to attend the proposed meeting. When the arrangements for the proposed meeting were discussed by telephone on 21 January 2002, and subsequently confirmed in writing, the complainant was advised that he could discuss his concerns with Councillors, at an EMBS to be held at the agency on 5 February 2002.
33. On 3 February 2002, the complainant advised the agency that, for personal reasons, he was unable to attend the EMBS set down for 5 February 2002. He requested the agency to postpone the matter, until such time as he could advise of his next availability. The complainant was subsequently invited to make his presentation to the next available EMBS, on 5 March 2002. On 4 March 2002, he notified the agency that he was not available to attend that EMBS, for the reasons given. The complainant's letter of 4 March 2002 was tabled at that EMBS and considered. However, Councillors agreed that the matter be dealt with by the agency's administration, under delegated authority.
34. The agency provided me with copies of correspondence to the complainant, in response to the complainant's claims in paragraph 21(c)-(f) above. Among other things, that correspondence indicates that the Mayor of the agency wrote to the complainant, refuting and dismissing the allegation set out in paragraph 21(d); that the Mayor and the agency responded to, and advised him of the outcome of its inquiries into the "missing" correspondence and the other claims made in paragraph 21(c), (d) and (f) and also explained to him, in detail, how the agency had dealt with the various matters raised in his correspondence.
35. Finally, I have examined the agency's FOI file and its notices of decision, in order to determine whether there is any substance to the complainant's claims that the agency's reasons for refusing to amend the disputed information were based on the fact that the agency's decision makers had already prejudged the matter. Having examined the agency's FOI file and the notices of decision, I consider that the agency dealt with the complainant's application for amendment in accordance with its statutory responsibilities and obligations under the FOI Act. Nothing on the face of either notice of decision provides any objective evidence in support the complainant's claims that the agency's decision makers had already prejudged the matter and I reject that claim.

36. It is clear from the foregoing, that I do not consider the complainant has established that he has been treated in a biased or prejudiced manner, by the Councillors or by the staff of the agency nor do I consider that the complainant has established that the disputed information has had any impact on their attitude or behaviour towards the complainant, as he alleges.
37. Further, I am not satisfied that the continued existence of disputed information would have the deleterious effects claimed by the complainant, as set out in paragraphs 21-23. I agree with the Commissioner's preliminary view that the complainant's claims in that regard are exaggerated and speculative and I am not persuaded that the continued existence of the disputed information, in the context of an acrimonious building dispute, would severely or adversely affect the complainant's professional reputation or good standing in the community or that it would damage his future employment prospects or income-earning ability. I consider that the complainant's claims in this regard are speculative and mere assertions only.
38. Finally, I do not accept the complainant's submission that it is not in the public interest to retain the disputed information. Section 48(3) of the FOI Act recognises the public interest in an agency retaining a complete record of information. That public interest is also evidenced by s.78(3) of the *State Records Act 2000*, which provides that it is an offence for a government organisation employee to destroy a record created or received by, amongst others, a local government under the *Local Government Act 1995*, unless the destruction is authorized by the record keeping plan of the organization.
39. In summary, I do not consider that there is any objective evidence before me, which persuades me that the continued existence of the disputed information would prejudice or disadvantage the complainant. Clearly, therefore, I do not consider that the prejudice or disadvantage that the continued existence of the disputed information would cause the complainant outweighs the public interest in maintaining a complete record of information. Accordingly, I do not consider that there are grounds for me to so certify and authorise the obliteration, removal or destruction of the disputed information. For the reasons given, I confirm the agency's decision not to amend the information in the manner requested by the complainant.
40. However, as I have said, I accept that the disputed information is misleading and inaccurate and, therefore, the complainant's application for amendment, in some form, is justified. Accordingly, I decide that the disputed information in the builder's letter is to be amended, in the original and in all copies of that letter (including the electronic copy) in accordance with s.48(1)(b) of the FOI, by ruling a single line through the disputed information and by inserting the following note, immediately after the disputed information, in accordance with ss.48(1)(d) and 48(2) of the FOI Act:

“The information recorded in this paragraph is misleading and inaccurate, in that it implies that the company referred to requested police intervention. For the reasons given at paragraphs 14-16 of the Acting Information Commissioner's decision of 13 August 2002, (D0292002), no objective evidence exists to substantiate that statement.”
