

TRACEY AND GOSNELLS

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

**File Ref: 96012
Decision Ref: D03496**

Participants:

William Kenneth Tracey
Complainant

- and -

City of Gosnells
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - application for truck parking submitted to Council and letters of support - clause 3 - personal information - public interest for and against disclosure - public interest in maintaining privacy of third parties - public interest in being informed of the reasons for decisions made by local government authorities - section 26 - documents either in the possession of the agency but can not be found or do not exist - sufficiency of search - whether an agency has taken reasonable steps to find documents - role of the Information Commissioner.

Freedom of Information Act 1992 (WA) ss. 26, 72(1)(b), 75(1), 102(3); Schedule 1 clause 3(1); Glossary in Schedule 2.

DECISION

The decision of the agency to refuse access to documents on the ground that those documents either do not exist or cannot be found is confirmed. Further, the decision of the agency to refuse access to other documents on the ground that those documents are exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992* is also confirmed.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

13th June 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 Gosnells ('the agency') to refuse Mr Tracey ('the complainant') access to documents and parts of documents requested by the complainant under the *Freedom of Information Act 1992* ('the FOI Act').
2. The background to this matter is as follows. For some time the complainant has complained to the agency about trucks being parked in the Beckenham area. In particular, the complainant is concerned about a decision of the agency to allow a truck to be parked on a property adjacent to the complainant's own property. In respect of that decision, it appears that the agency received an application from the truck owner, supported by several letters from neighbouring properties, for approval to park a truck on his own residential property. As the request did not comply with the agency's truck parking policy the matter was referred to the Council of the agency for a decision. Only one objection, from the complainant, was made to the proposal. Based upon the apparent support from neighbouring properties, the Council of the agency decided to allow the truck to be parked on the property.
3. On 30 November 1995, the complainant lodged with the agency an application under the FOI Act seeking access to documents associated with the agency's decision. In particular, the complainant sought access to copies of the logs of inspections carried out in respect of the property concerned; copies of letters of support from neighbouring properties; a copy of the application to the agency made by the truck owner and documents accompanying that application; and a copy of the conditions associated with the granting of approval for the parking of a truck on another property in the area. The complainant also directed a series of questions to the agency and sought answers from it in respect of those matters.
4. On 19 December 1995, the agency provided the complainant with full access to 8 documents it had identified as falling within the ambit of his access application. The decision on access was made by the principal officer of the agency, the Town Clerk, and internal review of the agency's decision was not available. However, following the complainant's dissatisfaction with the agency's response, on 29 December 1995, an "internal review" was conducted by the Acting Town Clerk. The Acting Town Clerk attempted to answer the questions posed by the complainant and varied the original decision by providing him with access to 3 additional documents.

5. In respect of the complainant's request for access to the letters of support from neighbouring properties, the agency refused the complainant access to those documents. However, in keeping with the spirit of the FOI Act, the agency provided the complainant with a typed transcript of the text of each of those letters with matter claimed to be exempt matter deleted. Following consultation with the owner of the truck ('the third party'), the agency refused the complainant access to a letter submitted by the third party in support of his application. The agency also refused the complainant access to the requested logs of inspection on the ground that those documents either did not exist in the agency or could not be found.
6. On 3 January 1996, the complainant wrote another letter to the agency pointing out that, in his opinion, he had not been provided with the information that he had requested. In that letter the complainant also disputed the agency's claim that certain requested documents did not exist or could not be found.
7. On 18 January 1996, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision. In addition, the complainant requested me to review the information provided to him by the agency in response to the questions asked of it.

REVIEW BY THE INFORMATION COMMISSIONER

8. On 24 January 1996, I notified the agency that this complaint had been made. Pursuant to my powers under s.75(1) and s.72(1)(b) of the FOI Act, I sought the production to me of the documents in dispute, together with the FOI file maintained by the agency in respect of this matter. My Investigations Officer met with representatives of the agency and with the complainant on separate occasions to clarify the matters in dispute between the parties and to attempt conciliation of this matter. The agency was also visited by my Investigations Officer and an inspection made of its record-keeping facilities. A report was provided to me on the results of those meetings and visits.
9. After examining the documents in dispute and considering the material before me, on 27 May 1996, I informed the parties of my preliminary view of this matter and detailed my reasons for that view. In respect of the agency's decision to refuse access to certain documents on the ground that those documents do not exist or cannot be found, it was my preliminary view that the searches conducted by the agency to locate those documents were, in all circumstances, reasonable. Consequently, I did not require further searches to be conducted. In respect of the agency's decision to refuse access to other documents, it was my preliminary view that those documents contain matter that is, *prima facie*, exempt matter under clause 3(1) of Schedule 1 to the FOI Act. Accordingly, pursuant to s.102(3) of the FOI Act, the onus is on the complainant to persuade me that disclosure of those documents would, on balance, be in the public interest.

10. Following the issue of my preliminary view, on 6 June 1996, I received a further submission from the complainant. Although the complainant remains dissatisfied with the explanations provided to him by the agency and with the basis for the decisions taken by the agency with respect to the approval given to the third party, those issues are not matters within my jurisdiction as Information Commissioner. There are only two matters requiring a decision by me in this instance. Those matters concern the sufficiency of the searches conducted by the agency to locate documents falling within the ambit of the complainant's access application, and the decision to refuse access to documents on the ground that those documents are exempt under clause 3(1) of Schedule 1 to the FOI Act.

Refusal of access - The sufficiency of the searches

11. Section 26 of the FOI Act deals with the requirements of an agency in circumstances in which it is unable to locate the documents sought by an access applicant. That section provides as follows:

"26. (1) The agency may advise the applicant, by written notice, that it is not possible to give access to a document if -

(a) all reasonable steps have been taken to find the document; and

(b) the agency is satisfied that the document -

(i) is in the agency's possession but cannot be found;

or

(ii) does not exist.

(2) For the purposes of this Act the sending of a notice under subsection (1) in relation to a document is to be regarded as a decision to refuse access to the document, and on a review or appeal under Part 4 the agency may be required to conduct further searches for the document."

12. As I have said before, there are two questions that must be answered whenever allegations are made concerning "missing" documents. Firstly, are there reasonable grounds to believe that the documents exist or should exist? Secondly, in circumstances in which the first question is answered in the affirmative, were the searches conducted by the agency to locate the documents reasonable in all the circumstances?
13. If I am satisfied that the particular documents sought exist, or might exist, in an agency, it is my responsibility to inquire into the adequacy of the searches conducted by an agency to locate them and to require further searches, if

necessary, to satisfy myself that the agency has acted according to its obligations under the FOI Act. I do not consider that it is my function to physically search for the requested documents on behalf of an applicant.

14. To a large extent, applicants requesting access to documents must rely on the integrity of the searches conducted by the relevant agency. In some instances there may be justification for an applicant's belief that further documents should exist, particularly when additional searches uncover documents which were not identified initially. I do not consider that the FOI Act requires agencies to guarantee that their record-keeping systems are infallible. That would be requiring the impossible. Documents may not be found for a number of reasons including the fact that they may have been misfiled or they may simply not exist.
15. However, when an agency is unable to locate a requested document, in my view, the minimum requirement to reassure a sceptical applicant that the agency has acted in compliance with the requirements of the FOI Act will usually be a brief explanation of the steps taken by the agency to satisfy the request, including the locations searched, why those locations were chosen and a description of how the search was conducted (for example: computer search, manual search of file series, card index checked).
16. The first part of the complainant's access application relates to documents described as "logs of inspection" relating to visits made by officers of the agency to a certain property, such visits being referred to in a letter dated 7 July 1992 from the agency to the complainant. The agency informed my office that there are no such documents in existence which record those inspections of the property in question by either planning officers or rangers. The complainant disputes the agency's claim that no such documents exist because, in his view, much of the work carried out by such officers involves breaches of by-laws and regulations. It is the complainant's contention that without such information recorded the agency could not make sound decisions.
17. The agency described, for my benefit, the manner in which it had searched for documents within the ambit of the complainant's access application. The agency had searched for relevant documents in its general correspondence files pertaining to the street and property in question and checks were made with various staff members in its planning section. My Investigations Officer also inspected the agency's general correspondence files.
18. My Investigations Officer was informed by the agency that rangers employed in the agency maintain daily logs in respect of their activities, but that planning inspectors do not keep such logs. My Investigations Officer was further informed that planning inspectors may record in their work diaries that they have visited certain properties, but they are not required to make such records. Following a site visit, file notes may be made in respect of that visit, but those records are only created on a needs basis. File notes are sent to the central record area of the agency and placed onto the file relating to the address visited. It appears that the agency does not maintain control over the work diaries of its staff and it does not have in its possession or under its control the work diary of a

former planning inspector who, I understand, had previously been involved with the issue of truck parking on the property concerned.

19. During an inspection of the agency's record-keeping systems, my Investigations Officer discovered one document which appeared to be within the ambit of the complainant's access application. The agency provided the complainant with a copy of that document. Based on the information before me, I am not satisfied that other documents described as "logs of inspection" as described by the complainant actually exist in the agency. Even if they do exist, and there are some indications that such documents may exist or may have existed at some time, I am satisfied that the searches conducted by the agency to locate such documents have been, in all the circumstances, reasonable, and that no such documents can be found.
20. In respect of that part of the access application in which access is sought to documents relating to the agency's definition of various types of trucks (other than those documented in the agency's truck parking policy which has been provided to the complainant), I am not satisfied from the information before me, that documents of that description actually exist. Accordingly, I confirm the decision of the agency to refuse access to such documents and to logs of inspection on the ground that those documents either do not exist or cannot be found.

THE DISPUTED DOCUMENTS

21. There are 13 documents remaining in dispute between the parties. Twelve documents are letters to the agency written by residents in support of the third party's application to the agency. I shall refer to those letters as Documents 12-23 for consistency with previous dealings with the parties to this complaint. The remaining document which I shall refer to as Document 24 is a letter which accompanied the third party's application to the agency. The agency claims that the disputed documents in their original form are exempt under clause 3(1) of Schedule 1 to the FOI Act.

THE EXEMPTION

22. Clause 3, so far as is relevant, provides:

“Exemption

(1) Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).”

Limits on exemption

(2) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal personal information about the applicant.

(3)...

(4)...

(5) *Matter is not exempt matter under subclause (1) if the applicant provides evidence establishing that the individual concerned consents to the disclosure of the matter to the applicant.*

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

23. 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."*

24. As I have stated previously in my formal decisions, I consider that the purpose of the exemption in clause 3 is to protect the privacy of individuals. In my view, the exemption is a recognition by Parliament of the fact that all government agencies collect and hold a vast amount of important and sensitive private information about citizens and that information of that kind should not generally be accessible by other persons without good cause.

25. It is clear, from the terms of clause 3(1) and the definition of "personal information", that the exemption protects from disclosure under the FOI Act, matter in documents which reveals the identity of an individual to whom the information relates or matter from which the identity of a person could reasonably be ascertained.

26. When an agency decides that a document contains personal information and that document is the subject of an access application by some other person, the agency may provide access to the document with personal information deleted. The agency should delete so much of the information as reveals the identity of the individual or from which the person's identity can reasonably be ascertained. In some instances, that will require deletion of all of the personal information, including the person's name, if the name appears; in others, deletion of the name only will be required, if the remaining information is not information from which the identity of the person could reasonably be ascertained. If the person's identity is not apparent, or cannot be reasonably ascertained from what remains, then that is not personal information, as defined in the FOI Act, and is not exempt under clause 3.

27. I have examined Documents 12-23. All of those documents, except two, are hand written; one is partly typed and partly hand-written; and one is typed and signed by its author. Each document contains personal information about its author, including his or her name and address and other information that would enable the identity of the person to reasonably be ascertained such as details about the length of time that person has resided in the street in question, occupation and other family details. I am satisfied that that information is, *prima facie*, exempt matter under clause 3(1) of Schedule 1 to the FOI Act.
28. Document 24 is also a hand written letter to the agency that contains personal information about the third party and his family as well as other persons. I am satisfied that that information is, *prima facie*, exempt matter under clause 3(1). The exemption provided by clause 3(1) is subject to a number of limitations, contained in subclauses (2) to (6) of clause 3. Of those, I consider only the limits in subclauses (2), (5) and (6), reproduced in paragraph 22 above, to have any potential relevance to this matter.
29. Only one of the documents, discussed further at paragraph 34 below, contains any matter that may be characterised personal information about the complainant. However, as disclosure of that matter would necessarily, in my view, also disclose personal information about a person other than the complainant, I consider that the limit provided by subclause (2) does not apply. As the complainant has produced no evidence that any other individual consents to the disclosure of personal information about him or her, the limit in subclause (5) does not apply.
30. Subclause (6), however, provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. Section 102(3) of the FOI Act provides that, in those circumstances, the onus is on the access applicant to establish that disclosure would, on balance, be in the public interest. Accordingly, the complainant bears the onus of persuading me that disclosure of the disputed documents would, on balance, be in the public interest.

The Public Interest

31. The complainant submits, *inter alia*, that the agency is trying to stifle investigations into his complaints knowing that it has erred in not applying its own policies evenly to all residents and ratepayers. He claims that the residents who supported the third party's application to the agency were never fully informed of their rights nor of the consequences of the proposal being approved by the agency. The complainant also contends that as Document 24 contains personal information about him, it is in the public interest that he, as a member of the public, have access to that personal information about him contained in the document.
32. I recognise that there is a public interest in a person being able to exercise his or her right of access under the FOI Act. I also recognise a public interest in people being informed of the reasons for decisions made by State and local government

authorities, particularly when those decisions directly affect the particular person and, more broadly, in ensuring the accountability of State and local government agencies through access to documents. Balanced against those is a public interest in maintaining the privacy of persons about whom personal information is contained in documents held by State and local government agencies.

33. In weighing those competing interests, I am of the view that the agency has gone some way towards satisfying the public interest with respect to Documents 12-23 by creating a new document and providing the complainant with a typed transcript of the text of each of those documents. I am also satisfied that the reasons for the agency's decision with respect to the third party's application for parking permission have been disclosed to the complainant in other documents provided to him by the agency. Taking all of that into consideration, I am not satisfied that there is any other public interest that outweighs the public interest in maintaining the privacy of third parties.
34. Whilst I note that Document 24 contains a small amount of personal information about the complainant and I have taken that into account, I consider that that information is intertwined with exempt personal information about other persons such that access to an edited copy of the document is not an option. The document contains a considerable amount of personal information about other people. For the reasons I have given, I consider that the public interest in the protection of the privacy of those other persons in this instance outweighs any public interest in disclosure of the document.
35. Accordingly, I find Documents 12-23 and 24 are exempt under clause 3(1) of Schedule 1 to the FOI Act and I confirm the decision of the agency to refuse access to those documents.
