

Decision D0152024 – Published in note form only

***Re Khuu and City of Vincent* [2024] WAICmr 15**

Date of Decision: 19 December 2024

Freedom of Information Act 1992 (WA): Schedule 1, clause 3(1)

On 12 May 2023, Minh Khuu (**the complainant**) applied to the City of Vincent (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to various building applications, certificates, plans and approvals relating to a neighbouring property.

By notice of decision dated 24 May 2023, the agency decided to refuse access to the documents identified within the scope of the access application (**the disputed documents**), on the basis they are exempt under clause 3(1) of Schedule 1 to the FOI Act (**clause 3(1)**). The agency also advised the complainant that some of the requested documents do not exist and that, having taken all reasonable steps to find those documents, access was refused under section 26 of the FOI Act.

The complainant applied for internal review of the agency's decision to refuse access to the disputed documents and the agency confirmed its decision.

On 3 July 2023, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision. The Commissioner obtained the disputed documents from the agency, together with the FOI file maintained by the agency in respect of the access application.

On 12 April 2024, one of the Commissioner's officers provided the parties with their assessment of the matter (**assessment**). It was the officer's assessment that the Commissioner was likely to be of the view, based on the information before her, that the disputed documents are exempt under clause 3(1).

The complainant did not accept the officer's assessment and provided further submissions. After considering all of the material before her, including the disputed documents, the officer's assessment and the complainant's further submissions, the Commissioner agreed that the disputed documents were exempt under clause 3(1).

Clause 3(1) provides that matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead). Personal information is exempt under clause 3(1) subject to the application of the limits on the exemption set out in clauses 3(2) to 3(6).

The Commissioner was satisfied that disclosure of the disputed documents would reveal personal information about individuals and that they were therefore, on their face, exempt under clause 3(1).

The complainant asserted that the owner of the neighbouring property consented to the disclosure of their name, address and signature and that the limit on the exemption in clause 3(5) applied. However, there was no information before the Commissioner to support that

assertion and in, any event, the disputed documents contained more than that type of personal information. The Commissioner found that the limit in clause 3(5) did not apply.

The Commissioner considered the only limit on the exemption that may apply to the disputed documents was clause 3(6). Clause 3(6) provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. Under section 102(3), the onus was on the complainant, as the access applicant, to establish that disclosure of the disputed documents would, on balance, be in the public interest.

As no restrictions or conditions can be placed upon the release of documents under the FOI Act, it is well established that disclosure of information under the FOI Act is disclosure to the world at large: see *Public Transport Authority* [2018] WASC 47 at [71]. Accordingly, when considering whether or not to disclose documents under the FOI Act, the effects of disclosure are generally considered as though disclosure were to the world, rather than only to the particular access applicant.

Determining whether or not disclosure would, on balance, be in the public interest involves identifying the relevant competing public interests for and against disclosure, weighing them against each other and making a judgment as to where the balance lies in the circumstances of each particular case.

In favour of disclosure, the Commissioner recognised the public interest in the accountability of agencies for the manner in which they discharge their functions and obligations. The Commissioner also recognised public interests in the actions and decisions of agencies being as transparent as possible and in the public having confidence that agencies properly perform their functions including, in this case, any regulatory functions performed by the agency. However, having regard to the contents of the disputed documents and the information the complainant had already been provided, the Commissioner was not persuaded that disclosure of the disputed documents would further those public interests.

Weighing against disclosure, the Commissioner recognised a strong public interest in maintaining personal privacy and noted that this public interest may only be displaced by some other strong or compelling public interest or interests that require the disclosure of personal information about one person to another person.

The Commissioner noted that the objects of the FOI Act are to make the persons and bodies that are responsible for State and local government more accountable to the public, not to call to account or unnecessarily intrude upon the privacy of private individuals, where there is no demonstrable benefit to the public interest in doing so.

The complainant contended that, in this case, the public interest in the protection of personal privacy was outweighed by other public interests and, in support of his arguments, referred to decisions of the former Information Commissioner (**the former Commissioner**) in *Re 'R' and City of Greater Geraldton and 'S'* [2012] WAICmr 25 (**Re 'R'**) and *Re Shuttleworth and Town of Victoria Park* [2016] WAICmr 13 (**Re Shuttleworth**).

In *Re 'R'*, the personal information in question consisted of an address, the name of an individual, and the size and certain external features of the building on a property. The former Commissioner considered the personal information was not of a particularly private or

sensitive nature and was not persuaded that the public interest in the protection of the third party's privacy outweighed the public interests in favour of disclosure.

In contrast to *Re 'R'*, the Commissioner considered that disclosure of the disputed documents in this case, which relate to a private home, would reveal personal information of a private nature and that the public interest in the protection of privacy was strong.

In *Re Shuttleworth*, the disputed document was a statutory declaration, executed under the *Oaths, Affidavits and Statutory Declarations Act 2005* (WA), that had been provided to an agency to verify that certain work had been carried out on a block prior to its subdivision and sale as a strata titled block. The complainant in that case had acted in reliance on the statutory declaration and suffered a detriment in doing so. The former Commissioner considered there was a strong public interest in a person who had suffered a detriment in reliance on a statutory declaration being able to seek redress or compensation.

The Commissioner noted that this matter did not involve documents executed under the same legal framework as *Re Shuttleworth*. Consequently, the Commissioner considered the context and basis of the documents in each case were different, and did not consider that the comparison made by the complainant was applicable or persuasive.

The Commissioner considered the circumstances of this matter were very different from those in *Re 'R'* and *Re Shuttleworth* and gave different weight to the competing public interest factors in this case.

In balancing the competing public interests, the Commissioner concluded that the public interests favouring disclosure of the disputed documents were not sufficient to outweigh the strong public interest in the protection of the personal privacy of other individuals. Therefore, the Commissioner was not persuaded that disclosure of the disputed documents would, on balance, be in the public interest and found that the limit on the exemption in clause 3(6) did not apply.

Accordingly, the Commissioner found that the disputed documents are exempt under clause 3(1) of Schedule 1 to the FOI Act and confirmed the agency's decision.