

Participants:

**'A'**  
Complainant  
  
- and -  
  
**City of Albany**  
Respondent  
  
- and -  
  
**Darcy Smith**  
Second Respondent

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

FREEDOM OF INFORMATION - refusal of access - decision to give access - complaint by third party - documents relating to a proposed subdivision - clause 3(1) - personal information about third parties - clause 3(3) and clause 3(4) - prescribed details - clause 3(6) - whether disclosure on balance is in the public interest - clause 4(2) - whether the documents have a commercial value to a person - clause 4(3) - business, professional, commercial or financial affairs - whether disclosure could reasonably be expected to have an adverse effect.

*Freedom of Information Act 1992*: Sections 27(1); 27(2); 32; 33; and 102(3);  
Schedule 1, clauses 3(1) - 3(6), Schedule 2, Glossary

*Freedom of Information Regulations 1993*: Regulations 9(1) and 9(2)

*Planning and Development Act 2005*

*Town Planning and Development (Subdivision) Regulations 2000*

*Transfer of Land Act 1893*

*Re Rogers and Water Corporation and Others* [2004] WAICmr 8

*Re Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft*  
(1986) 10 FCR 180

*Re DPP v Smith* [1991] 1 VR 63

*Re Mossenson and Others and Kimberley Development Commission* [2006] WAICmr 3

*Re Schatz and Department of Treasury and Finance* [2005] WAICmr 8

*Re Shire of Mundaring and Ministry for Planning* [2001] WAICmr 14

*Re Zurich Bay Holdings Pty Ltd and City of Rockingham and Others* [2006] WAICmr  
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## DECISION

The decision of the agency to give the access applicant access to the disputed documents is confirmed.

I find that:

- Documents 4, 5 and 6 are within the scope of the access application.
- The disputed documents are not exempt under clause 4(2) or clause 4(3).
- The information in the disputed documents about the owners of the Property is not exempt under clause 3(1) by reason of the operation of clause 3(6).
- The direct contact details of individual officers of an agency in Documents 1, 2 and 3 are exempt under clause 3(1).
- The plans attached to Documents 1, 4 and 6 are subject to copyright and, in accordance with s.27 of the FOI Act, the agency should give the access applicant access to them by way of inspection only.

JOHN LIGHTOWLERS  
A/INFORMATION COMMISSIONER

4 April 2008

## REASONS FOR DECISION

### BACKGROUND

1. This is an application for external review by the Information Commissioner which arises from a decision made by the City of Albany ('the agency') under the *Freedom of Information Act 1992* ('the FOI Act') to give Darcy Smith ('the access applicant'), access to certain documents. The complainant is a third party – as that term is defined in the FOI Act – who opposes the giving of access to the requested documents. The access applicant has been joined as a party to these proceedings.
2. I have referred to the complainant in my decision and my reasons for decision as 'the complainant'. The complainant has advised me that he/she does not wish his/her identity to be disclosed. As I understand it, the complainant's identity is part of the information that he/she claims is exempt. Under s.74(2) of the FOI Act, I am prohibited from including exempt matter in my decision or reasons for decision. I therefore have decided not to identify the complainant in my decision.
3. The access applicant is the owner of a property located within the boundaries of the agency.
4. On 9 March 2006, the access applicant was informed in a letter from the agency that an application to subdivide an adjoining property ('the Property') into six survey strata lots had been referred to the Council of the agency.
5. By letter dated 2 June 2006, the agency subsequently gave the access applicant a copy of a Proposed Survey Strata dated February 2006 which had been prepared by a consulting surveyor in relation to the Property.
6. On 7 July 2006 (although the application appears to be mistakenly dated 7 June 2006), the access applicant applied to the agency for access under the FOI Act to documents described as follows:

*“Council’s opinion/recommendation to the Dept of Planning & Infrastructure concerning proposed strata subdivision of [the Property] (All documents relating to this).”*
7. Under sections 32 and 33 of the FOI Act, the agency is obliged to consult with third parties before giving access to documents containing personal information or business information about third parties. In response, the complainant objected to the release of the requested documents, on the ground of privacy, which I understand to be a claim that those documents contain personal information about the complainant and are exempt under clause 3(1) of Schedule 1 to the FOI Act.
8. On 16 August 2006, the agency provided the access applicant with its notice of decision which said:

*“On Tuesday 15<sup>th</sup> August 2006, Andrew Hammond the City’s Chief Executive Officer determined that the information contained within the requested documentation was not of an exempt nature and that access would be granted for you to access the documentation.”*

9. The agency advised the complainant that it had decided to give access to the requested documents. As the decision was made by the principal officer of the agency, internal review of that decision was not available to the complainant.
10. On 21 August 2006, the complainant subsequently applied to the Information Commissioner for external review of the agency’s decision.

#### **REVIEW BY THE A/INFORMATION COMMISSIONER**

11. Following receipt of the complainant’s request for external review, the former A/Commissioner required the agency to provide her with the originals of the requested documents and its FOI file maintained in respect of the access application. Since the documents were not listed or described in the agency’s decision, it was not immediately clear which documents were the requested documents. However, following inquiries by my Legal Officer (Research and Investigations) (‘my officer’), the requested documents were identified and I have described them at paragraphs 19 and 20.
12. My officer invited the complainant to make submissions in support of the complainant’s objection to the disclosure of the disputed documents. The complainant has given further reasons as to why the documents are considered to be exempt.
13. My officer also wrote to the access applicant. In response, the access applicant advised that he was not seeking access to personal information about third parties contained in the requested documents which consists of details such as names, addresses, position titles, handwritten signatures, telephone numbers and email addresses, unless that information relates to officers of the agency or other government agencies (except the signatures of officers). The access applicant also advised that he would accept access by way of inspection of any documents the subject of copyright. He was joined as a party to this complaint.
14. On 14 December 2007, I provided the parties with my written preliminary view of this complaint. On the information before me at that time, it was my preliminary view that:
  - Documents 4, 5 and 6, described at paragraph 20 below, are within the scope of the access application.
  - The disputed documents are not exempt under clauses 4(2) or 4(3).
  - The information in the disputed documents about the owners of the Property is not exempt under clause 3(1) by reason of the operation of clause 3(6).
  - With the exception of individual officers’ direct contact details in the disputed documents, which I considered to be exempt under clause 3(1), the personal information about officers of the agency comprises prescribed details and is not exempt, by virtue of the limits on exemption in clauses 3(3) and 3(4).

- The plans attached to Documents 1, 4 and 6 are subject to copyright and, in accordance with s.27 of the FOI Act, the agency should give the access applicant access to them by way of inspection only.
15. The complainant advised my office verbally that he/she did not accept my preliminary view. However, the complainant made no further submissions to me in support of the claim that the documents are exempt. The access applicant made a submission to me in which he provided some additional information concerning the background to this matter and indicated that he accepted my preliminary view. He also advised that he does not seek access to any information in the disputed documents about the business affairs of the surveyor who lodged the subdivision application on the owners' behalf ('the Surveyor'). The agency made no submissions to me in response to my preliminary view.
  16. Having examined the disputed documents, I consider that they contain personal or business information about the complainant and other individuals including officers of the agency and other government agencies. It was not clear to me from the agency's FOI file that it had consulted with all of those individuals, as it is required to do under the FOI Act, if it is considering disclosing documents that contain personal or business information concerning those persons.
  17. Accordingly, my office contacted the officers of the agencies referred to in the disputed documents to obtain their views about the disclosure of the personal information about them contained in the disputed documents. All of those officers consented to the disclosure of their personal information which consists of prescribed details, as described in paragraph 58 of this decision.
  18. My office also contacted the other individuals whose personal or business information is contained in the documents and advised them of my preliminary view of this complaint; their right to make submissions to me; and their right to be joined as parties to this complaint. None of those parties made submissions to me or sought to be joined as a party to this complaint.

## **THE DISPUTED DOCUMENTS**

19. The agency initially identified the following documents as being within the scope of the access application:
  - Document 1     A letter dated 16 March 2006 from the agency to the West Australian Planning Commission ('WAPC'), with an attached document headed "*Proposed Survey Strata*".
  - Document 2     An internal memorandum dated 2 May 2006.
  - Document 3     A letter dated 9 June 2006 from the agency to the WAPC, with two plans attached.
20. However, having examined the documents provided to me by the agency, I consider that the following documents also come within the scope of the access application. I refer to them as Documents 4, 5 and 6:

Document 4 A letter dated 20 February 2006 from the WAPC to the agency, with the following documents attached:

- (a) An A4 page headed “*ADDITIONAL INFORMATION*”.
- (b) Form 1A – Application for Approval of Freehold (green title) Subdivision or Survey-Strata.
- (c) A document headed “*Proposed Strata Survey*” (which is identical to the attachment to Document 1 with the exception of additional handwritten notes).
- (d) An A4 page showing a cross section.
- (e) A plan.

Document 5 A letter dated 5 May 2006 from the WAPC to the agency.

Document 6 A letter dated 30 May 2006 from the WAPC to the agency attaching the following documents:

- (a) A letter dated 29 May 2006 from a third party to the WAPC.
- (b) A document headed “*Proposed Strata Survey*”.

21. Accordingly, I have considered whether Documents 1 to 6 (‘the disputed documents’) are exempt under the FOI Act.

#### **Information outside of the scope of the access application**

22. In light of the access applicant’s advice that he does not seek access to information in the disputed documents consisting of details about other individuals such as names, addresses, position titles, handwritten signatures, telephone numbers and email addresses – unless that information relates to officers of the agency or other government agencies (except the signatures of officers) – or to any information in the disputed documents about the business affairs of the Surveyor, that information is outside the scope of the access application. Accordingly, that information should be deleted from the disputed documents before the agency discloses them. To assist the agency, my officer has highlighted that information on a copy of the disputed documents and provided the copy to the agency.

#### **THE EXEMPTIONS**

##### **Clause 4 – Commercial or business information**

23. As I understand it, the complainant claims that the disputed documents contain information that is exempt under clause 4(2) or 4(3) of Schedule 1 to the FOI Act. Clause 4, so far as is relevant, provides:

“4. *Commercial or business information*

### Exemptions

- (1) ...
- (2) *Matter is exempt matter if its disclosure –*
  - (a) *would reveal information (other than trade secrets) that has a commercial value to a person; and*
  - (b) *could reasonably be expected to destroy or diminish that commercial value.*
- (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) ...
- (5) ...
- (6) ...
- (7) *Matter is not exempt matter under subclause (3) if its disclosure would, on balance, be in the public interest.”*

24. The exemptions in clauses 4(2) and 4(3) are intended to protect different kinds of information from disclosure. The terms of those provisions make it clear that information that is exempt under clause 4(2) cannot also be exempt under clause 4(3), although it is open to a person to make alternative submissions as to which of the exemption clauses applies.

### Burden of proof

25. Section 102(2) of the FOI Act provides that where a third party – in this case, the complainant – opposes the giving of access to a document, the onus lies with that person to establish that access should not be given, or that a decision adverse to the access applicant should be made.

26. Consequently, it is up to the complainant to establish that the disputed documents are exempt under one or other of the exemption provisions in Schedule 1 to the FOI Act and, in order to do that, the complainant must provide

some probative material to support the complainant's claim or claims for exemption.

***Clause 4(2) - consideration***

27. Clause 4(2) is concerned with the protection from disclosure of information which is not a trade secret but which has a "commercial value" to a person. In order to establish an exemption under clause 4(2), the matter for which a claim for exemption is made must be shown to have a commercial value, although I agree with the former Information Commissioner that it is not necessary that the commercial value be quantified or assessed.
28. The exemption consists of two parts and the requirements of both parts (a) and (b) must be satisfied in order to establish a *prima facie* claim under clause 4(2).
29. In previous decisions, the former Information Commissioner and former A/Commissioner consistently held that matter has a commercial value to a person if it is valuable for carrying on the commercial or business activities of that person and, further, it is by reference to the context in which the information is used or exists that the question of whether or not particular information has a commercial value to a person may be determined: see, for example, *Re Rogers and Water Corporation and Others* [2004] WAICmr 8.
30. I have examined the disputed documents. I can identify no information in the documents that would have a commercial value to any person including the complainant and the complainant has provided me with no material in support of that claim. Even if I were satisfied that the disputed documents contain information that has a commercial value to a person, there is nothing before me to demonstrate to the relevant probative standard that it would be reasonable to expect any such value to be destroyed or diminished by disclosure. On the information presently before me, I find that the disputed documents are not exempt under clause 4(2).

***Clause 4(3) - consideration***

31. The exemption in clause 4(3) is more general in its terms than the exemption in clause 4(2). Clause 4(3) deals with information (other than trade secrets or information of the kind referred to in clause 4(2)) about the business, professional, commercial or financial affairs of a person, in circumstances where disclosure 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.
32. This exemption recognises that the business of government (state or local) is frequently mixed with that of the private sector and that such business dealings should not be adversely affected by the operation of the FOI Act.
33. Clause 4(3) comprises two parts and both paragraphs (a) and (b) of clause 4(3) must be satisfied before a *prima facie* claim for exemption is established. If the requirements of paragraphs (a) and (b) are satisfied, the application of the limit on exemption in clause 4(7) must also be considered.



34. Having examined the disputed documents, I consider that all of those documents contain information about the commercial, business or financial affairs of the owners of the Property. All of the documents relate to the subdivision of the Property, which is information about the owners' commercial, business or financial affairs. Accordingly, I am satisfied that the requirements of paragraph (a) of clause 4(3) are satisfied in this case.
35. As previously noted, the requirements of paragraph (b) of clause 4(3) must also be satisfied to establish the exemption in addition to paragraph (a). The question for my consideration is whether the disclosure of the disputed documents could reasonably be expected to have an adverse effect on the commercial, business or financial affairs of the owners of the Property or any other person, or prejudice the future supply of information of the kind in question to the Government or to an agency.
36. The correct approach to the interpretation of the phrase "*could reasonably be expected to*" in clause 4 is that the words should be given their ordinary and natural meaning. They require a judgment to be made as to whether something is reasonable, as distinct from something that is irrational, absurd or ridiculous: see *Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft* (1986) 10 FCR 180 at 190.
37. With regard to the complainant's submission that the disclosure of the disputed documents would have an adverse effect on the complainant's business, commercial or financial affairs, the complainant has provided me with nothing in support of that claim other than the assertion that this would be the case.
38. I understand from the agency's files that there is no provision under the *Planning and Development Act 2005* or the *Town Planning and Development (Subdivision) Regulations 2000* for private landowners, whether adjoining the land proposed for subdivision or not, to comment on – and thus influence the approval or otherwise of – subdivision proposals. In light of that, it is not apparent to me, on the information currently before me, that the disclosure of the disputed documents could reasonably be expected to have an adverse effect on the complainant's commercial, business or financial affairs, even if the disputed documents – once disclosed – were used by any person to lobby the WAPC on this matter.
39. Nor do I accept that the disclosure of those documents could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency. I do not consider it reasonable to expect that the disclosure of the disputed documents would, in future, prevent persons seeking subdivision approval from the State Government or a local government from lodging applications or providing information about a proposed subdivision when requested to do so. It is in their own interests – and often necessary to the success of their applications – that they do so.
40. In light of the above and on the information currently before me, I am not persuaded that the requirements of clause 4(3)(b) have been established.

Accordingly, I find that the disputed documents are not exempt under clause 4(3).

**Clause 3 - personal information**

41. Although the complainant has not claimed exemption under clause 3(1) of Schedule 1 to the FOI Act, I understand that the complainant raised that issue in previous discussions with the agency. Accordingly, I have considered whether clause 3(1) applies in this case.
42. Clause 3 provides as follows:

**“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) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal personal information about the applicant.*
- (3) *Matter is not exempt matter under sub-clause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to -*
  - (a) *the person;*
  - (b) *the person's position or functions as an officer; or*
  - (c) *things done by the person in the course of performing functions as an officer.*
- (4) *Matter is not exempt matter under sub-clause (1) merely because its disclosure would reveal, in relation to a person who performs, or has performed, services for an agency under a contract for services, prescribed details relating to -*
  - (a) *the person;*
  - (b) *the contract; or*
  - (c) *things done by the person in performing services under the contract.*
- (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 sub-clause (1) if its disclosure would, on balance, be in the public interest.*”

43. In the Glossary to the FOI Act, the term ‘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.”*

44. The definition of ‘personal information’ makes it clear that any information or opinion about a person, from which that person can be identified, is exempt under clause 3(1).

45. In my view, the purpose of the exemption in clause 3(1) is to protect the privacy of individuals about whom information may be contained in documents held by State and local government agencies.

### **Consideration**

46. Having examined the disputed documents, I consider that they contain information consisting of names, addresses, lot numbers, job titles, telephone numbers, email addresses and signatures from which the identities of various individuals – including the complainant, other individuals and officers and former officers of government agencies, including the agency, the Department for Planning and Infrastructure (‘the Department’) and the WAPC – are apparent or can reasonably be ascertained. In other words, the disputed documents contain information which identifies those individuals and disclosure of the documents would thus reveal ‘personal information’ for the purposes of clause 3(1) of Schedule 1 to the FOI Act.

47. In this case, the access applicant has advised that he is not seeking access to personal information about private individuals of the kind described in paragraph 13 of this decision (‘the excluded personal information’) but only wants access to the information which identifies officers of agencies, as set out in paragraph 13.

48. However, in my opinion, even after the excluded personal information is deleted from the documents as being outside the scope of this application, the information remaining in the disputed documents would still disclose personal information about those individuals by virtue of the fact that those documents have been confirmed by the agency as relating to the Property and the owners of other properties can be ascertained by title search of the public register held by Landgate.

49. Accordingly, I consider that the disputed documents, whether edited to delete the excluded personal information about private individuals or not, are *prima facie* exempt under clause 3(1).
50. However, the exemption in clause 3(1) is subject to a number of limits. Those limits are set out in clause 3(2)-(6).
51. As the disputed documents do not contain any information about the access applicant, the limit in clause 3(2) does not apply. In addition, there is no evidence before me that any of the individuals whose personal information is contained in the disputed documents, apart from officers of agencies, consents to the disclosure of the information about them. Accordingly, I do not consider that the limit in clause 3(5) applies to the information about those people.
52. I have considered below the application of the limits in clause 3(3), clause 3(4), and clause 3(6).

***Clauses 3(3) and 3(4)***

53. Clauses 3(3) and 3(4) provide that matter is not exempt merely because its disclosure would reveal prescribed details about a person who is or has been an officer of an agency or who performs or has performed services for an agency under a contract for services.
54. The prescribed details for the purposes of clause 3(3) in relation to officers of agencies are listed in regulation 9(1) of the *Freedom of Information Regulations 1993* ('the Regulations') as:
  - (a) the person's name;
  - (b) any qualifications held by the person relevant to the person's position in the agency;
  - (c) the position held by the person in the agency;
  - (d) the functions and duties of the person, as described in any job description document for the position held by the person; or
  - (e) anything done by the person in the course of performing or purporting to perform the person's functions or duties as an officer as described in any job description document for the position held by the person.
55. The prescribed details for the purposes of clause 3(4) in relation to persons who perform or have performed services for an agency under a contract for services are set out in regulation 9(2) of the Regulations as:
  - (a) the person's name;
  - (b) any qualifications held by the person relevant to the person's position or the services provided or to be provided pursuant to the contract;
  - (c) the title of the position set out in the contract;
  - (d) the nature of services to be provided and described in the contract;
  - (e) the functions and duties of the position or the details of the services to be provided under the contract, as described in the contract or otherwise conveyed to the person pursuant to the contract;

- (f) anything done by the person in the course of performing or purporting to perform the person's functions or duties or services, as described in the contract or otherwise conveyed to the person pursuant to the contract; or
  - (g) anything done by the person in the course of performing or purporting to perform the person's functions or duties or services as described in the contract or otherwise conveyed to the person pursuant to the contract.
56. It follows that the information described in regulations 9(1) and 9(2) ("prescribed details") will not be exempt under clause 3(1) even though it is 'personal information' as defined in the FOI Act.
57. The prescribed details covered by the limits include the names and titles of officers or former officers of any government agency – not just the agency – and of private individuals contracted by an agency, and the actions undertaken by those individuals in the course of carrying out their functions or duties. Such actions would include, for example, requesting information or conducting a site visit. Information of that nature in the disputed documents is not exempt, pursuant to clauses 3(3) and 3(4) of Schedule 1 to the FOI Act.
58. Having examined the disputed documents, I note that all of them contain prescribed details about officers or contractors (and/or former officers or contractors) of the agency. In my view, most of that information consists of no more than their names, job titles and things done in the course of performing or purporting to perform their duties, which are prescribed details for the purposes of clauses 3(3) and 3(4).
59. My office has contacted the officers and former officers of government agencies about the release of the personal information about them which consists of prescribed details. All of those officers consented to the release of the personal information about them which consists of prescribed details. Accordingly, the limit on exemption in clause 3(5) also applies to that information and it is not exempt under clause 3(1).
60. However, in respect of the work email addresses and direct work telephone numbers of officers of agencies which appear in Documents 1, 2 and 3, although they are information relating to the work of those officers rather than their personal lives, they are nonetheless personal information as defined in the FOI Act and, in my view, they are not prescribed details for the purposes of the limit in clause 3(3).
61. Therefore, I consider that the email addresses and telephone numbers of the individual officers in Documents 1, 2 and 3 are not subject to the limits in clause 3(3) and (4).

***Clause 3(6)***

62. Clause 3(6) provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. Pursuant to section 102(3) of the

FOI Act, the onus is on the access applicant, to persuade me that the disclosure of the disputed documents would, on balance, be in the public interest.

63. The term ‘public interest’ is not defined in the FOI Act. In my view, it is best described in the decision by the Supreme Court of Victoria in *DPP v Smith* [1991] 1 VR 63, at page 75, where the Court said:
- “The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals...”*
64. Determining whether or not disclosure would, on balance, be in the public interest involves identifying the relevant competing public interests – those favouring disclosure and those favouring non-disclosure – weighing them against each other and making a judgment as to where the balance lies in the circumstances of the particular case.
65. In this case, I have considered whether the limit in clause 3(6) applies to the direct contact details of officers of agencies and also to the personal information which can be identified in the context of the disputed documents – even after the excluded personal information about private individuals has been deleted.
66. In respect of the work email addresses and direct work telephone numbers of officers of agencies, the former A/Commissioner considered the question of whether or not there is a public interest in the disclosure of that kind of information in her decision in *Re Mossenson and Others and Kimberley Development Commission* [2006] WAICmr 3 at paragraphs 38-39. In that case, the former A/Commissioner noted that – in favour of disclosure – there clearly is a public interest in members of the public – and, in particular, members of the public transacting business of some kind with the government – being able to contact agencies and relevant officers. However, the former A/Commissioner did not consider that public interest to require that members of the public have the direct contact details of officers, unless those officers – or the agency concerned as a matter of policy – choose to provide them. I agree with the former A/Commissioner.
67. Given that the telephone directory, both in hard copy and online, provides telephone numbers and a website address for the agency, and given that its website contains a form by which people can contact the agency by email, I do not consider that the public interest in the accessibility of agencies and their officers requires the disclosure of officers’ individual work telephone numbers and email addresses. Therefore, I do not consider that the limit in clause 3(6) applies to that information.
68. In this case, in respect of the contents of the documents generally, I understand the access applicant to submit that there is a public interest in adjoining landowners being given information concerning proposed developments on neighbouring land. I also understand the complainant to submit that the strong

public interest in protecting personal privacy outweighs any countervailing interest in the disclosure of the disputed documents.

69. Weighing against disclosure, I consider that there is a strong public interest in maintaining personal privacy. The significance of that public interest is recognised by the inclusion in the legislation of the clause 3 exemption and that public interest may only be displaced by some other stronger and more persuasive public interest that requires the disclosure of personal information about one person to another person. As the former A/Commissioner noted in *Re Schatz and Department of Treasury and Finance* [2005] WAICmr 8 at paragraph 30: “[t]he FOI Act is intended to make governments, its agencies and officers more accountable, not to call to account or unnecessarily intrude upon the privacy of private individuals”.
70. Having examined the disputed documents, I consider that once the information which is outside of the scope of the access application is deleted, most of the information remaining in those documents relates to the proposed subdivision of the Property. It concerns the kind of works proposed to be carried out on the Property. If the subdivision proposal proceeds then, ultimately, these works (for example, survey markers and pegs) will be open to the inspection of any passerby and the details of the new lots will be recorded on new certificates of title, which information will be in the public domain (through the Landgate register).
71. In brief, I understand that the subdivision approval process commences when an application for subdivision approval is submitted to the WAPC. The WAPC is required to determine the application within 90 days from the date of lodgment. Any approval must comply with the provisions of the local planning scheme in relation to any relevant environmental conditions. If the WAPC considers that a subdivision plan may affect the functions of a local government, a public authority or a utility service provider, it must forward a copy of the plan to those bodies, which then have 42 days to return it to the WAPC with any objections or recommendations. After considering the latter, the WAPC approves – with or without conditions – or refuses the application.
72. If the plan is approved, the person receiving that approval submits a diagram or plan of survey of the subdivision, together with a fee, to the WAPC for approval of that diagram or plan. That request for approval of a diagram or plan of survey must take place within a prescribed period which, under section 145(2) of the *Planning and Development Act 2005*, is four years where more than 5 lots are created and three years in any other case. If the WAPC is satisfied that the diagram or plan of survey is in accordance with the approved plan of subdivision and that any conditions imposed have been satisfied, the WAPC will endorse its approval on the diagram or plan of survey. Once that endorsement takes place, the Registrar of Titles may create or register a certificate of title under the *Transfer of Land Act 1893* for the land the subject of the plan of subdivision.
73. In this case, I understand that the agency was consulted by the WAPC and provided information and comments to it. The agency advises me that this was done under delegated authority and, consequently, no information concerning

the proposed subdivision appears in the Council minutes or as part of the public records of the agency.

74. The agency confirms that there is no requirement to consult with affected members of the community, including adjoining neighbours, under the relevant legislation and that it holds no public information concerning the relevant subdivision. On the other hand, I understand that, if anyone were to approach the agency and ask if certain land were proposed to be subdivided, the agency would confirm whether or not it was, since that information is not regarded as confidential.
75. Given the nature of the information in the disputed documents; the fact the proposal to subdivide is not considered confidential; and the likelihood that much of it – if the subdivision goes ahead – will be known to the neighbours of the owners of the Property, it does not appear to me that disclosure of the information about the owners of the Property would involve any real impingement on their personal privacy and, therefore, the public interest in maintaining personal privacy is not as strong in this instance as I would usually consider it to be. Similarly, anyone can undertake a search through the public register of Landgate using only the street address of the Property to access the certificates of title to the Property, which would identify the owners as the registered owners of the Property.
76. Weighing in favour of disclosure, there is a public interest in access applicants being able to exercise their rights of access to documents under the FOI Act. I also consider there to be a public interest in people whose interests have been affected by a decision or action of a government agency being as fully informed as possible of the reasons for the decision or action and the material on which it was based, in furtherance of the public interests in, among others:
- the transparency of the decision-making processes of government agencies;
  - the accountability of agencies for their actions;
  - private individuals being – and being seen to be – fairly dealt with by government; and
  - the maintenance of the public's trust in its government and agencies.
77. In my view, an agency's accountability includes informing the public, where possible, of the basis for decision-making and the material considered relevant to the decision-making process, notwithstanding the procedures and policies of any particular government agency with regard to subdivision or any other matter. I consider that the public interest is served by the disclosure of information that would enable members of the community to have input into a planning process that directly affects or could affect that community.
78. One of the stated objects of the FOI Act in section 3(1) is to enable the public to participate more effectively in governing the State. In *Re Shire of Mundaring and Ministry for Planning* [2001] WAICmr 14, the former Information Commissioner said, at paragraph 35, that, if public participation in the planning



process is to have any meaning, it should allow input into the planning process well before a decision is made. I agree with that statement. In this case, although there appears to be no formal process of public consultation, the disclosure of the information leading up to the planning decision could assist the access applicant or any other member of the community to seek to have input into the decision-making process, if they consider that their interests are or may be affected by the proposed subdivision.

79. In that regard, I note that the access applicant has been provided with some information about the proposed subdivision, including a copy of a Proposed Survey Strata, as described at paragraph 5. However, I do not consider that the information given to the access applicant sufficiently satisfies the particular public interest in accountability in this case.
80. The question for my determination is whether the disclosure of documents such as the disputed documents would be of some benefit to the public generally and whether such public benefit is sufficient to outweigh any public interest in maintaining the personal privacy of individuals. On the information presently before me, I consider that, in the circumstances of this case, the public interest in persons who may be affected by a proposed subdivision being given details of what is proposed outweighs, on balance, the rights to privacy of the owners of the Property.
81. I find therefore, that the disputed documents, edited to delete the excluded personal information about private individuals but including the prescribed details and the information which – from the general context of the documents – would identify the owners, are not exempt under clause 3(1) because of the application of the limit on exemption in clause 3(6).

### **Copyright**

82. Documents 1, 4 and 6 have plans attached to them, which appear to have been prepared by the Surveyor. In my opinion, those plans may be subject to copyright, belonging either to the owners or to the Surveyor.
83. Although copyright belonging to a person other than the State is not a ground of exemption under the FOI Act – nor is it a basis on which access to a document can be refused – it does have an effect in terms of the manner in which access to the document may be given: see paragraph 109 of the former A/Commissioner's decision in *Re Zurich Bay Holdings Pty Ltd and City of Rockingham and Others* [2006] WAICmr 12.
84. Section 27(2)(c) of the FOI Act provides that, if an applicant has requested that access to a document be given in a particular way, the agency has to comply with the request unless giving access in that way would involve an infringement of copyright belonging to a person other than the State, in which case access may be given in some other way.
85. Section 27(1) sets out the ways in which access can be given, which includes allowing an applicant to inspect a relevant document. If giving access to a copy of the document would be an infringement of copyright belonging to the

copyright owners, then access can be given by allowing the applicant to inspect the document rather than by giving the applicant a copy of the document.

86. Therefore, although I consider that the plans attached to Documents 1, 4 and 6 are not exempt, the agency should give access to those plans by way of inspection only, rather than by providing the access applicant with copies of them.

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