

Determination

External review - section 39 *Freedom of Information Act 1991*

| | |
|---------------------|--|
| Applicant | [Applicant] |
| Agency | District Council of the Copper Coast |
| Ombudsman reference | 2013/02553 |
| Agency reference | OLT201377 |
| Determination | The determination of the agency is reversed. |

REASONS

Background

1. By application under the *Freedom of Information Act 1991 (the FOI Act)* dated 22 January 2013, the applicant requested access to:

Building applications for [property address] and relating documents:

- plans
- soil / footing reports
- engineer reports
- surveyor reports (if any)
- permits
- approvals

Any document that was necessary for the planning / approval and building of the home by Trevor Smith Constructions.

2. By email dated 20 February 2013 the agency's FOI officer made a determination that:

We are unable to release the plans to you for your house without consent from Trevor Smith Constructions as they are Copyright [sic] & he has declined to give consent.

3. The applicant requested an internal review of this determination, by application dated 27 February 2013.

4. By email dated 1 March 2013, the agency's FOI officer made an internal review determination (**the agency's determination**). In this email, the FOI officer wrote:

Your internal review application was received on 27/02/2013 & had been processed in accordance with the FOI Act. This agency is obliged to provide you with a determination within 14 calendar days of receipt of your application.

My manager Greg O'Connor & myself have reviewed your application under the Freedom of Information Act under section 29 & 38 for an Internal Review of Determination.

Trevor Smith Constructions has declined to consent to the release of house plans for [property address] so we are unable to change that determination. The disclosure of this

information could reasonably be expected to destroy or diminish the commercial value of the information contained within.

External review

5. By application dated 6 March 2013, the applicant requested my external review of the agency's determination under section 39 of the FOI Act.
6. By letter dated 7 March 2013, I notified the agency of my review. I requested all relevant documents, including additional evidence and argument which the agency considered justified its determination, in light of the provisions of section 48 of the FOI Act.

Provisional determination

7. I provided my tentative view about the agency's determination to the parties by my provisional determination dated 29 April 2013. I informed the parties that subject to my receipt and consideration of submissions from the parties, I proposed to reverse the agency's determination pursuant to section 39(11) of the FOI Act.
8. The agency, applicant and interested parties did not provide submissions in response to my provisional determination.
9. In light of the above, I have decided to move to a final determination in essentially the same terms as my provisional view.

Relevant provisions of the FOI Act

10. The objects of the FOI Act are set out in section 3, to 'promote openness in government and accountability of Ministers of the Crown and other government agencies and thereby to enhance respect for the law and further the good government of the State'; and 'to facilitate more effective participation by members of the public in the processes involved in the making and administration of laws and policies'.
11. It is further stated in section 3(2) that the means by which these objects are intended to be achieved are:
 - (a) ensuring that information concerning the operations of government (including, in particular, information concerning the rules and practices followed by government in its dealings with members of the public) is readily available to members of the public and to Members of Parliament; and
 - (b) conferring on each member of the public and on Members of Parliament a legally enforceable right to be given access to documents held by government, subject only to such restrictions as are consistent with the public interest (including maintenance of the effective conduct of public affairs through the free and frank expression of opinions) and the preservation of personal privacy; ...
12. Section 3A(1) states that the parliament has intended:
 - (a) that this Act should be interpreted and applied so as to further the objects of this Act; and
 - (b) that a person or body exercising an administrative discretion conferred by this Act exercise the discretion, as far as possible, in a way that favours the disclosure of information of a kind that can be disclosed without infringing the right to privacy of individuals.

13. Under section 48 of the FOI Act, the onus is on the agency to justify its determination 'in any proceedings'. In my opinion, this includes the external review process.
14. To justify its determination, the agency must give reasons for its determination and show the findings on any material questions of fact underlying these reasons, together with a reference to the sources of information on which those findings are based. This is a requirement of an agency in the determination process under the FOI Act;¹ and in my opinion, it is equally applicable in an external review.
15. Section 39(11) of the FOI Act provides that I may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

The documents

16. By letter dated 18 March 2013, the agency provided me with copies of the documents relevant to this review. As I understand it, through the initial and internal review determinations, some documents were released to the applicant. My external review will only address the documents to which access has been refused.
17. 'Item 3' of the material provided by the agency appears to be the documents not released to the applicant. I have numbered these documents 1 through 30 and provided the agency with a copy, so as to be clear about which documents I am referring to in my determination below.
18. Document 1 appears to be a site plan for a property at [property address] (**the property**), drawn by Trevor Smith Constructions.
19. Documents 2, 3, and 4 appear to be building plans for the property. It is not clear who drew these plans.
20. Document 5 appears to be a 'contour plan' for the property, which details the site's ground levels.
21. Documents 6, 7, 8, 9, 10, 11, 12, 13 and 14 appear to be detailed building plans for the house situated on the property. As I understand it, the plans were produced by Bruce Mactier Building Designers for its client, Trevor Smith Constructions.
22. Documents 15, 16, 17, 18, 19, 20, 21 and 30 appear to be plans and specifications for the house situated on the property. As I understand it, the plans were produced by Engineering House for its client, Trevor Smith Constructions.
23. Document 22 appears to be a letter from Harmer CLG Building Surveyors to the agency regarding a report submitted to the council under the *Development Act 1993*.
24. Document 23 appears to be an email chain between the agency and Trevor Smith Constructions regarding the development application for property.
25. Document 24 appears to be a copy of the first email in the chain from document 23, as described above.
26. Document 25 appears to be a letter from the agency dated 23 September 2008, engaging Harmer CLG Building Surveyors.

¹ *Freedom of Information Act 1991* s 23(f).

27. Documents 26, 27, 28 and 29 appear to be technical drawings of fixing and tie down requirements taken from the AS1684.2.² As I understand it, the technical information contained within these documents is publically available online at: <http://www.timber.net.au>.

The agency's submissions

28. By letter dated 18 March 2013, the FOI officer informed my office that:

We were unable to release the house plans to the applicant as the builder Trevor Smith Constructions did not give consent for them to be released.

The plans are a copyright [sic] of Trevor Smith Constructions, have a commercial value & are not for public examination.

Consideration of the terms 'exempt documents' 'copyright' and 'consent'

29. Based on its determination and submissions to my office, it appears that the agency has claimed that the documents are exempt from release under the FOI Act and subject to copyright. It is important to note the distinction between the agency's two claims.
30. The FOI Act provides that upon receipt of an application for access to documents, an agency is entitled to make a determination to refuse access where the documents are 'exempt'. The term 'exempt document' is defined as 'a document which is an exempt document by virtue of Schedule 1.'³ Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusal of access. Being subject to copyright is not in and of itself an exemption under Schedule 1.
31. Section 22(2)(c) of the FOI Act provides that:
- (2) If an applicant has requested that access to a document be given in a particular way, access to the document must be given in that way unless giving access as requested—
 - (c) would involve an infringement of copyright in matter contained in the document,
 in which case access may be given in some other way.
32. In light of section 22(2)(c), if providing the applicant with a copy of a document would involve an infringement of copyright, the agency may give access in another way, such as by allowing the applicant to inspect the document.
33. I also note that the agency submitted that 'consent' was not given by Trevor Smith Constructions to release the documents.
34. In cases where the agency is proposing to release a document that concerns the business affairs of someone other than the applicant, the obligation to consult exists under section 27(2) of the FOI Act.
35. Section 27 of the FOI Act provides:

27—Documents affecting business affairs

- (1) This section applies to a document that contains—

² The AS1684.2 is the Australian Standard Residential timber-framed construction Series, specifying the safety requirements for all domestic building work in Australia.

³ See Freedom of Information Act 1991 s 4 and s 20(1)(a).

- (a) information concerning the trade secrets of any person; or
 - (b) information (other than trade secrets) that has a commercial value to any person; or
 - (c) any other information concerning the business, professional, commercial or financial affairs of any person.
- (2) An agency must not give access under this Act to a document to which this section applies (except to the person concerned) unless the agency has taken such steps as are reasonably practicable to obtain the views of the person concerned as to whether or not the document is an exempt document by virtue of clause 7 of Schedule 1.
36. Section 27 of the FOI Act imposes an obligation on the agency to take 'such steps as are reasonably practicable to obtain the views of the person concerned' rather than obtain consent from the person concerned to release the documents. This is an important distinction.

Consideration of the submissions and the agency's determination

37. In light of my comments above, I will first consider whether any of the documents are exempt documents under Schedule 1 to the FOI Act. I will then consider the issue of copyright.
38. Having noted the contents and nature of the documents, in my view, clause 7(1) of Schedule 1 to the FOI Act may be relevant.
39. Clause 7(1) of Schedule 1 to the FOI Act states:
- (1) A document is an exempt document -
 - (a) if it contains matter the disclosure of which would disclose trade secrets of any agency or any other person; or
 - (b) if it contains matter -
 - (i) consisting of information (other than trade secrets) that has a commercial value to any agency or any other person; and
 - (ii) the disclosure of which
 - (A) could reasonably be expected to destroy or diminish the commercial value of the information; and
 - (B) would, on balance, be contrary to public interest; or
 - (c) if it contains matter -
 - (i) consisting of information (other than trade secrets or information referred to in paragraph (b)) concerning the business, professional, commercial or financial affairs of any agency or any other person; and
 - (ii) the disclosure of which -
 - (A) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to the Government or to an agency; and
 - (B) would, on balance, be contrary to the public interest.
40. In light of the nature and contents of the document, clause 7(1)(b) may be the more relevant part of this exemption provision.
41. To justify a claim that a document is exempt pursuant to clause 7(1)(b), it is necessary to demonstrate that:

- a) the document contains information (other than trade secrets) which has a commercial value; and
- b) its disclosure could reasonably be expected destroy or diminish that commercial value;
and
- c) disclosure of the information would, on balance, be contrary to the public interest.
42. The phrase 'could reasonably be expected' means that there must be a reasonable expectation of the destruction or diminution of commercial value that:
- is not fanciful, imaginary or contrived; and
 - is not irrational, absurd or ridiculous.⁴
43. Clause 7(1)(c)(ii)(B) requires a balancing process in considering whether disclosure would be contrary to the public interest.⁵
44. The current legal position is that while the concept of the public interest cannot be clearly defined, the following factors are relevant:⁶
- the age of the document
 - the importance/significance/sensitivity of the issues discussed
 - the continuing relevance of the issues in relation to matters under consideration
 - the extent to which the subject matter of the documents is already in the public domain
 - fulfilling the objects of the FOI Act
 - whether disclosure would contribute to debate on a matter of public interest
 - whether disclosure would enhance scrutiny of government decision making processes and improve accountability and public participation.
45. It has been suggested that the following factors are possibly not relevant to the question of what is contrary to the public interest:⁷
- that disclosure would confuse the public
 - that disclosure would lead to a loss of confidence in government
 - that disclosure might cause the applicant to misinterpret or misunderstand the information contained in the document, or the incomplete or draft nature of the document.
- The strength of these factors will depend on the contents of the documents.
46. In my view, although the documents may contain information concerning the business affairs of a relevant third party, it is not apparent that they satisfy the other requirements of exemption clause 7(1)(b). In particular, that release could reasonably be expected to destroy or diminish the commercial value of the information **and** would, on balance, be contrary to the public interest. Further, the agency and third parties have not provided any submissions to satisfy me that the documents are exempt under Schedule 1.
47. In my view the documents are not exempt documents within the meaning of Schedule 1 to the FOI Act.

⁴ See *Iplex Information Technology Group Pty Ltd v The Department of Information Technology Services South Australia* (1997) 192 LSJS 54, 63-64.

⁵ *Iplex Info Tech v Department of Info Tech Services SA* (decision no. DCCIV-96-1064, 16 June 1997) (Judge Lunn).

⁶ See *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* [1993] QICmr2 (30 June 1993); *Re Lianos and the Department of Social Security* (1985) 7 ALD 475, *Re Hulls and Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

⁷ *Re Chapman & Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 43 ALD 139, 152.

Copyright

48. Although the documents are not exempt under Schedule 1 to the FOI Act, in accordance with section 22(2)(c) of the FOI Act, access may not involve providing the applicant with a copy of the following documents due to issues of copyright:

| | | | | | | | | | |
|----|----|----|----|----|----|----|----|----|----|
| 2 | 3 | 4 | 6 | 7 | 8 | 9 | 10 | 11 | 12 |
| 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 | 21 | 30 |

49. I do not consider that the remainder of the documents are subject to copyright.
50. As I understand it, the agency contacted several interested parties about the potential release of the documents under the FOI Act. By email dated 6 February 2013, apparently in response to consultation by the agency, Bruce Mactier Building Designers wrote:
- I'm replying to your email requesting release of the house plans we drafted for [property address].
- These plans were drafted as per our clients instruction and the design itself was provided to us by the client, Trevor Smith Constructions. Therefore, I don't believe we have authority to release the plans as technically our client has copyright for the design.
51. In my view, copyright does not protect general concepts or ideas, such as the idea for a two storey, four bedroom house with an open plan kitchen/diner and north facing windows. Technical drawings, plans and designs incorporating these features however, would be protected.
52. In my view documents 2, 3 and 4 are subject to copyright; despite the fact that it is not clear on the face of the documents who authored them. I base this view on the technical nature of these documents.
53. Documents 6 through 14 appear to be technical plans drawn by Bruce Mactier Building Designers. In my view, as the author of these works, even if they were commissioned by a client (Trevor Smith Constructions) copyright would lie with Bruce Mactier Building Designers.
54. Documents 15 through 21 and document 30 appear to have been drawn by Engineering House. In my view, as the author of these works, even if they were commissioned by a client (Trevor Smith Constructions) copyright would lie with Engineering House.
55. Having considered the documents described above, I am satisfied that they are subject to copyright. In my view, without the express consent of the owners of the copyright, providing the applicant with a copy of the documents would involve an infringement of copyright.
56. By letters dated 29 April 2013, I consulted the interested parties about my review and the relevant documents. None of the interested parties responded to my consultation, therefore I must proceed on the basis that consent is not given to provide a copy of relevant documents to the applicant.

Determination

57. In my view the documents are not exempt under Schedule 1 to the FOI Act, however, some are subject to copyright.

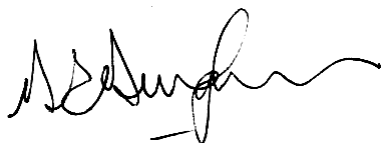
58. In accordance with section 22(2)(c) of the FOI Act, the agency should give access to the following documents by allowing the applicant to inspect documents:

| | | | | | | | | | |
|----|----|----|----|----|----|----|----|----|----|
| 2 | 3 | 4 | 6 | 7 | 8 | 9 | 10 | 11 | 12 |
| 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 | 21 | 30 |

59. Further, a copy of the following documents should be provided to the applicant in full:

| | | | | | | | | | |
|---|---|----|----|----|----|----|----|----|----|
| 1 | 5 | 22 | 23 | 24 | 25 | 26 | 27 | 28 | 29 |
|---|---|----|----|----|----|----|----|----|----|

60. In light of the above, I reverse the agency's determination pursuant to section 39(11) of the FOI Act.



Richard Bingham
SA OMBUDSMAN

30 May 2013