

Attachment 3

Examples of editing and correspondence re FOI application for DIA archival files

Document edited to protect third party information

Please note this page or subsequent pages have been edited to remove the personal information of all third parties named in the document excluding the names and positions of relevant Government Officers. (Total Number of Pages..6...) The contents were deemed to include personal information which following editing left the document unintelligible or meaningless. The Information Commissioner has previously stated that where an agency finds it is not practicable to edit the disputed information and documents, agencies do not have to disclose re-edited copies of said Documents..

Information Commission Decision and Reasons for Decision

FOI Refusal of access – compliant documents clause 3 (1) personal information – clause 3(3) – whether information is prescribed details – clause 3(6) – whether disclosure on balance is in the public interest – section 24 – whether practicable to give access to edited documents.

Re Morton and City of Stirling 1994 WAICmr 17
Kioa v West (1985) 159 CLR 550 at 585

The commissioner's decision in respect to the practicability to give access to substantially edited documents.

66. Similarly if they were edited so as to disclose only the prescribed details about public officers which I have found are not exempt under clause 3(1) the document would be unintelligible and meaningless
67. I therefore find that it is not practicable to edit the disputed information and documents

and further at:

DPP v Smith (1191) 1 VR 63
McKinnon v Secretary, Department of Treasury (2005) FCAFC 142

240. In this instance I am satisfied that the editing required to delete all of the personal information for Documents, would be so substantial as to render the remainder of those mailing lists meaningless, even in the context of this matter. I do not consider that it would be practicable to disclose re-edited copies of said Documents.

Please see reference to Clause 3 of Schedule 1 of the Act, which describes the situation with respect to 'personal information' in the Notice of Decision, which is attached to these documents.

from NDG 33/3/1w
'Social Services - Pensions -
General'

Document edited to protect third party information

Please note this page or subsequent pages have been edited to remove the personal information of all third parties named in the document excluding the names and positions of relevant Government Officers. (Total Number of Pages...2...) The contents were deemed to include personal information which following editing left the document unintelligible or meaningless. The Information Commissioner has previously stated that where an agency finds it is not practicable to edit the disputed information and documents, agencies do not have to disclose re-edited copies of said Documents..

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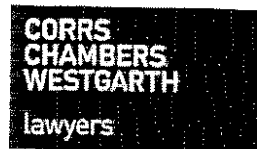
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Please see reference to Clause 3 of Schedule 1 of the Act, which describes the situation with respect to 'personal information' in the Notice of Decision, which is attached to these documents.

Our reference:
JLS/AD/PPPS12315-9033523/1

Woodside Plaza
240 St George's Terrace Perth WA 6000
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Tel (08) 9460 1666
Fax (08) 9460 1667
www.corrs.com.au



FILE COPY

Sydney
Melbourne
Brisbane
Perth
Canberra
Gold Coast

13 December 2006

Ms Amanda Cattermole
Acting Director General
Department of Indigenous Affairs
1st Floor 197 St George's Terrace
Perth WA 6000

Contact
Amanda Dunne (08) 9460 1624
Email: amanda.dunne@corrs.com.au

Partner
Julian Sher

Dear Ms Cattermole

Freedom of Information Decision - Application for review

We act for the Aboriginal Legal Service of Western Australia (ALSWA).

1 FOI application and decision

On 18 November 2006, ALSWA made an application under the *Freedom of Information Act 1992 (WA) (FOI Act)* to obtain access to certain restricted files. Access to the files was required as a matter of urgency for the purposes of conducting research in relation to the Senate Legal and Constitutional Committee Inquiry into Stolen Wages.

We refer to the Notice of Decision given by Andrew Pepper, Freedom of Information Coordinator, dated 6 December 2006 (**decision**). Mr Pepper relied upon clause 3 of Schedule 1 to edit personal information from the files, including all references to third party names and contact details, including those of Aboriginal persons.

2 Application for review of decision

Pursuant to s 39 of the FOI Act, we are instructed to make an application for review of the decision. In particular, we are instructed to seek a review of the decision to provide edited access to the following files:

1. Cons 1724, 1959/0463 – Natives in Possession of Cash and Investments in Trust Lists for Submission to District Officers
2. Cons 1733, 1965/0223 – Native Trust Account, Record of
3. WAS 46, NDG 36/57 – Vol 2 Mt Hart Station
4. WAS 46, NDG 36/56 – Mt Elizabeth Station
5. WAS 46, NDG 36/58 – Vol 2 Mt House Station

Under clause 3(6) of Schedule 1 to the FOI Act, matter is not exempt if its disclosure would, on balance, be in the public interest.

The Senate Committee Inquiry into Stolen Wages released its report on 7 December 2006, a copy of which we **attach**. We draw your attention to Recommendations 1 and 4, at paragraphs 8.23 and 8.26 respectively, which state that:

- (a) State government should facilitate unhindered access to archives for Indigenous people and their representatives for the purposes of researching the Indigenous stolen wages issues as a matter of urgency; and
- (b) a compensation scheme in relation to withholding, underpayment and non-payment of Indigenous wages and welfare entitlements be established.

The editing of the documents has removed nearly all of the information needed by ALSWA to establish the identity of Aboriginal people who suffered financial abuses in relation to the administration of trust accounts and Commonwealth social service entitlements. The editing has also removed information about wages and who received them, and the names of people who complained about unpaid wages. The editing has so far prevented research for the necessary first step in the development of a stolen wages reparations scheme, which is to identify the Aboriginal people affected.

Based upon the recommendations of the Senate Committee, it is clear that it is overwhelmingly in the public interest to provide unhindered access to the archives for research into financial and employment abuses against Aboriginal people. The ALSWA requires the documents not to be edited to the extent that they are of no beneficial use.

3 Address for notices

The address to which notices under the Act can be sent is:

Attention: Julian Sher
Corrs Chambers Westgarth
Level 15, Woodside Plaza
240 St George's Terrace
PERTH WA 6000

If you have any queries, please contact Amanda Dunne on (08) 9460 1624.

Yours faithfully

Corrs Chambers Westgarth

Julian Sher
Partner

attachments

copy: Peter McKerrow, Principal Legal Officer, Department of Indigenous Affairs
Andrew Pepper, Freedom of Information Officer, Department of Indigenous Affairs



Department of Indigenous Affairs
Government of Western Australia



ENQUIRIES: Andrew Pepper 9235 8132

ONS REF: 06.0998

YOUR REF:

Ms Amanda Dunne
GPO Box 9925 WA 6001

Dear Amanda

Acknowledgement of FOI Application for Internal review

I refer to your letter dated 13 December 2006, which was received at this office on 15 December 2006. Pursuant to Section 39 of the *Freedom of Information Act 1992* (FOI Act) you request an application to review the decision of DIA to provide edited access to the documents listed in the table below.

DIA Reference	Consignment	Item	Description	SRO Access
1	1724	1959/0463	Natives in Possession of Cash and Investments in Trust Lists for submission to District Officers	
2	1733	1965/0223	Native Trust Account – record of	
3	3412	WAS 46 NDG 36/57	Vol 2 Mt Hart Station	
4	3412	WAS 46 NDG 36/56	Mt Elizabeth Station	
5	3412	WAS 46 NDG 36/58	Vol 2 Mt House Station	

Please note the agency will undertake a review of the decision to provide only edited access to these documents. The review is to be undertaken by Jacqueline Brienne Senior Legal Officer of the Land Branch at DIA.

If you have any further queries, please don't hesitate to contact me on (08) 9235 8132

Yours sincerely

Andrew Pepper
FREEDOM OF INFORMATION COORDINATOR
5 January 2007

1st Floor, 197 St George's Terrace, Perth, Western Australia 6000
PO Box 7770, Cloisters Square, Perth, Western Australia 6850
Telephone (08) 9235 8000 Facsimile (08) 9235 8088
www.dia.wa.gov.au



Department of Indigenous Affairs
Government of Western Australia



1ST FLOOR, 197 ST GEORGES TERRACE PERTH, WA 6000
PO BOX 7770, CLOISTERS SQ, PERTH, WA 6850
TELEPHONE (08) 9235 8000 FACSIMILE (08) 9235 8088

<tofaxnum:9640 1667> <toname:Julian Sher>

To: Julian Sher

Position:

Organisation: Corrs Chambers Westgarth

Facsimile: 9640 1667

From: Jacqueline Brienne

Position: Senior Legal Officer

Phone: 9235 8076

Facsimile: 9235 8088

SUBJECT: RE FREEDOM OF INFORMATION DECISION - APPLICATION FOR REVIEW

URGENT

CONFIDENTIAL

ORDINARY

Pages: (including coversheet)

Our Ref:

Your Ref:

Date: 16 January 2007

MESSAGE:

The original of this document will will not be sent to you.

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Department of Indigenous Affairs
Government of Western Australia



ENQUIRIES: Jacqueline Brienne 9235 8076
OUR REF: 06/0908 p:\mydocuments\memos\ve freedom of information decision.doc
YOUR REF: jls/ad/ppps12315-9033523/1

Mr Julian Sher
Corrs Chambers Westgarth
Level 15, Woodside Plaza
240 St George's Terrace
PERTH WA 6000

By fax: 9460 1667

Dear Sir

RE FREEDOM OF INFORMATION DECISION - APPLICATION FOR REVIEW

I refer to your application for internal review under section 39 of the *Freedom of Information Act 1992* (FOI Act) in respect of a decision made by the Department of Indigenous Affairs (DIA) on 6 December 2006.

I confirm that I have reviewed that decision and my comments are set out below.

The Application

Your client made an application under the FOI Act dated the 18th October 2006 for access to a number of documents for the purposes of completing submissions to the Senate Legal and Constitutional Committee Inquiry into Stolen Wages, namely:

1. NDG 33/3/1 Consignment 3412 Social Services, Pensions – General
2. NDG 33/3/1 Consignment 312 Social Services, Pensions – General
3. 1950/0151 Bank accounts with district officer as trustee for natives.
4. 1959/0463 Natives in possession of cash and investments trust lists for submission to district officers.
5. 1965/0223 Native trust account, record of.
6. 10.10 Public Trustee estates of deceased natives.
7. 1936/0055 Yampi Sound employment of natives Munja Station.
8. 1939/0138 Natives in lawful employment – enticement to Missions by missionaries.
9. 1965/0244 Pastoral apprentices.
10. 1967/0086 Employment of native youths.
11. NDG 36/57 Vol 2 Mt Hart Station.
12. NDG 36/56 Mt Elizabeth Station.
13. NDG 36/58 Vol 2 Mt House Station.

DIA decided to give edited access to the material, with the names of third parties and identifying information removed, pursuant to Schedule 1 of the FOI Act.

1st Floor 197 St George's Terrace Perth Western Australia 6000
PO Box 7770 Cloisters Square Perth Western Australia 6850
Telephone (08) 9235 8000 Facsimile (08) 9235 8088
www.dia.wa.gov.au

Your client has sought an internal review of DIA's decision, particularly in relation to the following files:

1. 1959/0463 Natives in possession of cash and investments in trust lists for submission to district officers.
2. 1965/0223 Native trust account, record of.
3. NDG 36/57 Vol 2 Mt Hart Station.
4. NDG 36/56 Mt Elizabeth Station.
5. NDG 36/58 Vol 2 Mt House Station.

You submit that release of the unedited material is in the public interest and have referred to the Senate Committee Inquiry into Stolen Wages, which included as recommendations:

- a. *"State Government should facilitate unhindered access to archives for Indigenous people and their representatives for the purposes of researching the Indigenous stolen wages issues as a matter of urgency; and*
- b. *a compensation scheme in relation to withholding, underpayment and non-payment of Indigenous wages and welfare entitlements be established."*

You submit that based upon the recommendations of the Senate Committee, it is in the public interest to provide unhindered access to the archives for research into financial and employment abuses against Aboriginal people.

In relation to the editing of the materials, you have indicated that this has rendered them of no beneficial use - *"the editing of the documents has removed nearly all of the information needed by ALSWA to establish the identity of Aboriginal people who suffered financial abuses in relation to the administration of trust accounts and Commonwealth social service entitlements. The editing has also removed information about wages and who received them, and the names of people who complained about unpaid wages. The editing has so far prevented research for the necessary first step in the development of a stolen wages reparations scheme, which is to identify the Aboriginal people affected."*

My decision

I advise that I have considered your application and reviewed the previous decision dated 6 December 2006 and I confirm that decision. My reasons follow.

a. Personal information

The privacy of individuals is an inherent aspect of the FOI Act. The Act provides that except in certain circumstances personal information about any person (living or dead) is prima facie exempt from disclosure unless the person concerned consents to the release of the information.

"Personal information" is defined in the Act as "*information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead - whose identity is apparent or can reasonably be ascertained from the information or opinion*".

In this case, the documents to which open access is sought include names and identifying information about a large number of third parties (many of whom are deceased), most being Aboriginal people, but a number being non-Aboriginal, and information about their affairs. This information does seem to have the character of "personal information".

I agree with the initial decision of DIA that provision of unedited documents would reveal personal information as defined in the FOI Act about identifiable third parties by way of lists of names and other information concerning those third parties. As such, all the information about those third parties contained in the documents is prima facie exempt under clause 3(1) of Schedule 1 to the FOI Act.

b. Consent

The exemption in clause 3(1) of Schedule 1 to the FOI Act protects the privacy of individuals, unless one of the limits on the exemption applies.

Subclause 3 (6) says that matter is not exempt matter under subclause (1) if the applicant provides evidence establishing that the individual concerned consents to disclosure. This subsection does not apply here, as consents have not been provided. It is noted, however, that obtaining consents may be impossible in this case given the number of individuals mentioned, the fact that many are deceased, the difficulty in establishing who the nearest relatives of the deceased individuals are and that the applicant would need to see the names on the lists before it could know who it needs to obtain consents from.

c. Public Interest

Clause 3 of Schedule 1 to the FOI Act protects the privacy of individuals, however, subclause 3 (7) confirms that material is not exempt if its disclosure would, on balance, be in the public interest. I understand that it is this basis on which your client relies.

"Public Interest" is not defined in the Act, however, decisions by the Information Commissioner indicate that determining whether or not disclosure would, on balance, be in the public interest involves identifying the relevant competing 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.

d. Public Interest in maintaining privacy

The Information Commissioner has stressed that there is a strong public interest in maintaining personal privacy and this public interest can only be

displaced by some other, considerably stronger, public interest that requires the disclosure of private information about another person.

e. Your submission

You have submitted that release of the unedited material is in the public interest and you have referred to the Senate Committee Inquiry into Stolen Wages which included as recommendations that:

a. "State Government should facilitate unhindered access to archives for Indigenous people and their representatives for the purposes of researching the Indigenous stolen wages issues as a matter of urgency; and

b. a compensation scheme in relation to withholding, underpayment and non-payment of Indigenous wages and welfare entitlements be established."

You submit that based upon the recommendations of the Senate Committee, it is in the public interest to provide unhindered access to the archives for research into financial and employment abuses against Aboriginal people.

The Report, however, also recognises concerns about protecting personal information that appears on such files and it mentions that governments should ensure that there are workable mechanisms to support access for researchers.

Disclosure under the FOI Act is disclosure to the world. I understand that DIA offered to provide the unedited materials outside of the FOI Act regime subject to a confidentiality agreement to be negotiated between the parties. It also confirmed that your client would not be precluded from later seeking approval to use the information for other purposes and that any request would be considered in the context of the Department's Archive Access Policy, taking account of the rights and expectations of those whose personal information is in the archives.

That course of action would have satisfied the public interest and the recommendations of the Select Committee report without the need for unconditional disclosure of personal information about private individuals.

f. Public interest in releasing the documents

- There is a public interest in the accountability and transparency of Government in respect of decisions and actions made now or in the past.
- There is a public interest in Government accountability for the use of public funds and for decision making that affects the rights and entitlements of individuals.
- There is a public interest in the release of information in order to allow proper public scrutiny of the facts surrounding Aboriginal workers whose paid labour was controlled by Government.

- There is a public interest in government agencies not withholding material that may be relevant to Aboriginal people being able to investigate the facts surrounding that issue.

Given that this is an application under the FOI Act, do these elements of public interest outweigh the strong public interest in maintaining the privacy of those third parties that is provided for in the Act?

I note that your client seeks information on the Aboriginal people who suffered financial abuses in relation to the administration of trust accounts and social service entitlements and wages and who received them, and the names of people who complained about unpaid wages. I understand that the applicant is not as yet the legal representative for the individuals named in the materials, however, it is an Aboriginal community organisation that represents Aboriginal people on a number of public interest issues and as such it would have a strong interest in the disclosure of the information, as would its constituents.

Given its role, I assume that ALSWA considers that it is acting in the interests of many of the individuals mentioned in the documents, however, information relating to them is intertwined with information about people that will not be represented by it.

The privacy of individuals is an inherent aspect of the FOI Act. The Act provides that except in certain circumstances personal information about *any* person is exempt from disclosure unless the person concerned consents to the release of the information. The public interest in protecting the privacy of the individual is recognised in the Act.

There has been no consultation with any of the individuals named in the materials on the release of their information, although I note that consultation may not be possible in this case.

It is my view that there is a significant public interest in the third party information being released, however, it does not quite outweigh the public interest in maintaining the privacy of the many third parties that are mentioned in the materials. I am thus confirming the decision made by DIA on 6 December 2006.

Deletion of personal information

You have indicated "the editing of the documents has removed nearly all of the information needed by ALSWA to establish the identity of Aboriginal people who suffered financial abuses in relation to the administration of trust accounts and Commonwealth social service entitlements. The editing has also removed information about wages and who received them, and the names of people who complained about unpaid wages. The editing has so far prevented research for the necessary first step in the development of a stolen wages reparations scheme, which is to identify the Aboriginal people affected."

DIA has provided edited access to the documents. The documents include names and identifying information about a large number of third parties and information about their affairs. This information has the character of "personal information". DIA deleted many names and in some cases, any other information that would identify the individuals on the basis that this information is exempt, being personal information about third parties.

In the case of some of the documents sought, the editing of personal information, particularly in the case of a number of lists of names and identifying details, may render the remainder of the documents of little use.

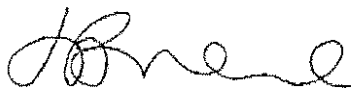
I understand that the Supreme Court has indicated that the obligation to give access to edited copies of documents under section 24 of the FOI Act only arises if it is practicable for an agency to delete exempt information from the documents, which refers also to the notion that the editing of the document should be possible in such a way that the document does not lose either its meaning or its context. If the editing is so substantial that it does not still make sense, the documents should not be disclosed. However, in this case, edited copies have already been provided by DIA.

EXTERNAL REVIEW

If you are dissatisfied with the decision of DIA, you may lodge a complaint with the Information Commissioner. Section 66 of the FOI Act sets out the requirements of such a complaint, which must:

- Be in writing and include your address.
- Give particulars of the decision to be reviewed including details of the part, or parts, of the decision you want the Commissioner to review.
- Include a copy of the notice of decision sent to you by DIA including this decision following the agency's internal review.
- You will need to lodge the application at the Office of the Information Commissioner within 30 days after being given written notice of the internal review decision.

Yours sincerely



Jacqueline Brienne
SENIOR LEGAL OFFICER
15 January 2007