



Decision and Reasons for Decision

Application Number: 210422

Applicant: Stevens

Respondent: Environmental Protection Agency

Decision Date: 3 July 2008

Catchwords: **FREEDOM OF INFORMATION – section 44(1) of the *Freedom of Information Act 1992 (Qld)* – personal affairs – nomination of property for inclusion on cultural heritage register – whether name of nominator is personal affairs information – whether release of information in the public interest**

Contents

REASONS FOR DECISION	2
Summary	2
Decision under review	3
Steps taken in the external review process.....	3
Matter in Issue	4
Findings	4
Section 44(1) of the FOI Act.....	4
What are personal affairs?	4
Is a person’s name their personal affairs?	5
Public interest balancing test.....	7
Public interest considerations favouring disclosure	7
1. Declaration on nomination form	7
2. Allegation of nominator’s dishonesty and improper motive.....	8
3. The applicant’s right to pursue a legal remedy	9
4. Accountability/transparency of government	11
5. No written EPA policy regarding disclosure	13
6. Application of section 44(2) of the FOI Act.....	14
7. Justifiable ‘need to know’	15
Public interest considerations favouring non disclosure	15
Summary – Public interest considerations.....	19
DECISION	19

REASONS FOR DECISION

Summary

1. In summary, I find that:
 - the relevant name (**Nominator's Name**) is that person's personal affairs information as it reveals not only their name, but also the fact that they nominated the property XYZ for cultural heritage significance
 - on balance, disclosure of the Nominator's Name is not in the public interest as the public interest considerations favouring disclosure do not outweigh those favouring non disclosure
 - the Nominator's Name is exempt from disclosure under section 44(1) of the Freedom of Information Act 1992 (Qld) (**FOI Act**).

Background

2. By application dated 9 November 2007, the applicant lodged a freedom of information application with the Environmental Protection Agency (**EPA**) seeking access to the relevant nomination form and documentation received by the EPA in support of the nomination of XYZ for cultural heritage significance.
3. By letter dated 21 November 2007, the EPA advised the applicant of its initial decision that it:
 - had located 12 responsive folios
 - would release 8 folios in their entirety
 - had decided to partially release 4 folios as it considered that some information in these documents was exempt from disclosure under section 44(1) of the FOI Act.
4. The information which the EPA claims is exempt from disclosure reveals details including the Nominator's Name, signature, address and date of birth.
5. By email dated 22 November 2007, the applicant advised Mr L Clarke of the EPA of her dissatisfaction with the initial decision. This email was taken by the EPA to constitute a request for internal review. By email dated 25 November 2007, the applicant confirmed her wish to have the initial decision internally reviewed and provided further submissions in support of her case.
6. By email dated 26 November 2007, the applicant made further submissions to the EPA and confirmed that she seeks access only to the Nominator's Name.
7. By letter dated 12 December 2007, the EPA advised the applicant of its internal review decision affirming the initial decision (**Internal Review Decision**).
8. By letter dated 8 January 2008, the applicant applied to this Office for external review of the Internal Review Decision.

Decision under review

9. The decision under review is the EPA's Internal Review Decision dated 12 December 2007 affirming its initial decision that the Nominator's Name is exempt from disclosure under section 44(1) of the FOI Act.

Steps taken in the external review process

10. By email dated 18 January 2008, this Office advised the applicant that it had received her application for external review and was making preliminary enquiries with the EPA.
11. By letter dated 24 January 2008, I wrote to the applicant advising her that the EPA's Internal Review Decision would be externally reviewed. I also advised the EPA of this and requested copies of the relevant documents.
12. By emails dated 14 February 2008, 11 March 2008 and 19 March 2008, the applicant provided further submissions to this Office in support of her case.
13. By letter dated 27 March 2008 to the applicant, I conveyed the preliminary view that:
 - the Nominator's Name is that person's personal affairs information as it reveals not only their name, but also the fact that they nominated the XYZ for cultural heritage significance
 - disclosure of the Nominator's Name is not in the public interest as the public interest considerations favouring disclosure do not outweigh those favouring non disclosure
 - the Matter in Issue is exempt from disclosure under section 44(1) of the FOI Act.
14. By letter dated 30 March 2007 the applicant contested the preliminary view and made further submissions in support of her case that the Nominator's Name is not exempt from disclosure.
15. In making this decision I have taken the following into account:
 - the applicant's FOI application dated 9 November 2007
 - the EPA's initial decision dated 21 November 2007
 - the applicant's application for internal review dated 22 November 2007
 - the EPA's Internal Review Decision dated 12 December 2007
 - the applicant's application for external review dated 8 January 2008 along with the documents accompanying that application
 - all submissions made by the applicant including those dated 4 February 2008, 14 February 2008, 11 March 2008, 19 March 2008 (which I note attaches emails which relate to the applicant's meeting with the relevant Minister) and 30 March 2008
 - the Matter in Issue
 - relevant sections of the Queensland Heritage Act 1992 (Qld) (**Heritage Act**) and the Queensland Heritage and Other Legislation Amendment Act 2007 (Qld) (**Amending Act**)
 - explanatory notes to the Queensland Heritage and Other Legislation Amendment Bill 2007 (**Explanatory Notes**)
 - relevant sections of the FOI Act, case law and decisions of this Office.

Matter in Issue

16. The Nominator's Name constitutes the matter in issue in this review (**Matter in Issue**).

Findings

Section 44(1) of the FOI Act

17. Section 44(1) of the FOI Act provides:

44 Matter affecting personal affairs

(1) *Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.*

18. In applying section 44(1) of the FOI Act, I must assess whether disclosure of the Matter in Issue would disclose information concerning the personal affairs of a person other than the applicant for access.
19. If this is the case, a public interest consideration favouring non-disclosure is established, and the matter in issue will be exempt unless there are public interest considerations favouring disclosure which outweigh all public interest considerations favouring non-disclosure.

What are personal affairs?

20. In *Stewart and Department of Transport*¹ (**Stewart**), the Information Commissioner discussed in detail² the meaning of the phrase 'personal affairs of a person' as it appears in the FOI Act. In particular, the Information Commissioner found that information concerns the 'personal affairs of a person' if it concerns the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase 'personal affairs', that phrase has a well accepted core meaning which includes:

- family and marital relationships
- health or ill health
- relationships and emotional ties with other people
- domestic responsibilities or financial obligations.

21. Whether or not matter contained in a document comprises information concerning an individual's personal affairs is a question of fact, to be determined according to the proper characterisation of the information in question.
22. Here, the applicant seeks access only to the Nominator's Name.
23. I note that the Information Commissioner has previously considered whether a person's name constitutes their personal affairs.

¹ (1993) 1 QAR 227.

² at pages 256-267, paragraphs 79-114.

Is a person's name their personal affairs?

24. In *Pearce and Qld Rural Adjustment Authority*³, the Information Commissioner stated that:

21. *A person's name, in isolation, does not ordinarily constitute information concerning that person's personal affairs. In Commissioner of Police v the District Court of New South Wales and Perrin (1993) 31 NSWLR 606, Mahoney JA said (at p.638):*

A person's name would not, I think, ordinarily be, as such, part of his personal affairs. It is that by which, not merely privately but generally, he is known.

Likewise, in State of Queensland v Albietz [1996] 1 Qd R 215, de Jersey J said (at p.221):

I do not think that the name by which a person is known ordinarily forms part of that person's "personal affairs".

22. ***However, a person's name almost invariably appears in a document in the context of surrounding information. It is the characterisation of a person's name, in the context of the information which surrounds it, which may give rise to difficulties.*** Thus, Lockhart J, sitting as a member of a Full Court of the Federal Court of Australia, in *Colakovski v Australian Telecommunications Corporation (1991) 100 ALR 111*, said (at page 119):

*There is a real question as to whether the name and telephone number can answer the description of 'information relating to the personal affairs' of that person under s.41(1)⁴. Viewed as an abstract conception I would be inclined to the view that it could not, **but such questions are not considered by Courts in the abstract.***

23. *Thus, while disclosure of a person's name, in the abstract, would not ordinarily be a disclosure of information concerning that person's personal affairs, **disclosure of that name in the context in which it appears may disclose information concerning the person's personal affairs.***

[my emphasis]

25. Further, in *Stewart*⁵ the Information Commissioner noted that:

- a person's name, address and telephone number were matters falling into the 'grey area' rather than within the 'core meaning' of the phrase 'personal affairs of a person'
- such matter must be characterised according to the context in which it appears.

26. In accordance with the decisions set out above, it is clear that a person's name may be their personal affairs in some circumstances.

27. In the present case, the Nominator's Name appears in a particular context. It identifies not just a person, but the person who nominated XYZ for inclusion on the cultural heritage register.

³ S186/98, 4 Nov 1999.

⁴ This case refers to section 41(1) of the *Freedom of Information Act 1982* (Cth), which is a similar provision to section 44(1) of the FOI Act.

⁵ at pages 259-261 (paragraphs 86-90).

28. In *Stewart*⁶, the Information Commissioner decided that the fact that the applicants in that matter had lodged complaints with a government department (and with the Parliamentary Commissioner for Administrative Investigations) was a matter concerning their personal affairs.
29. In *Byrne and Gold Coast City Council (Byrne)*, the Information Commissioner decided that the fact that a person made a complaint to an elected representative about a matter of concern was information concerning that person's personal affairs. In coming to this conclusion, the Information Commissioner stated that:

*In my opinion the making of that complaint was a personal affair of the third party ... [who] was acting in the capacity of a private citizen exercising a citizen's privilege to make a private approach to an elected representative about a matter of concern.*⁷

30. More specifically in *Byrne*, the Information Commissioner decided that the fact of making a complaint is to be distinguished from the substance of the complaint, which may or may not itself comprise information concerning the personal affairs of the complainant so as to qualify for exemption under section 44(1) of the FOI Act.⁸

31. I note the applicant's submissions that:

- a person's name is not their personal affairs
- section 44(1) does not apply in this instance and therefore, the public interest balancing test does not need to be considered
- the nomination was simply correspondence with government
- there is no evidence that the nomination was a complaint
- the information sought is from the EPA, "*not Queensland Health or Queensland Corrective Services, which may imply a personal matter ... [eg] that the person has psychiatric issues or ... a criminal record.*"
- if the nomination was made from a business email address, the fact of nomination cannot constitute the nominator's personal affairs as it is made in an organisational, rather than personal, capacity.

32. The applicant also submits that inclusion of her property on the cultural heritage register may have resulted in serious and adverse consequences for her as owner and developer of the property. I acknowledge that the applicant remains upset about the fact of nomination.

33. I also acknowledge that a nominator acting in a personal capacity may object to release of information which would enable them to be identified.

34. After carefully considering all of the information available to me (including all of the applicant's submissions) and in accordance with the decisions set out above, I find that:

- there is no evidence to suggest that the nominator acted on behalf of an organisation or in anything other than a personal capacity
- in the present circumstances, release of the Nominator's Name would reveal not only their name, but also the fact that they lodged the relevant nomination
- the nomination of another's property for inclusion on the State's cultural heritage register is analogous or can be likened to the making of a complaint to a

⁶ at page 268, paragraph 119.

⁷ (1994) 1 QAR 477 at paragraph 33.

⁸ *Byrne* at page 489, paragraphs 34-35.

government agency because in both instances a person is exercising a private right to bring an issue or matter to the attention of government

- in circumstances such as these where there is no evidence that the nominator acted in anything other than a personal capacity, the fact of nominating a property for inclusion on the cultural heritage register is that person's personal affairs
- the Nominator's Name is the nominator's personal affairs information which is prima facie exempt from disclosure.

35. Accordingly, a public interest consideration favouring non-disclosure is established, and the Matter in Issue will be exempt unless there are public interest considerations favouring disclosure which outweigh all public interest considerations favouring non-disclosure. In other words, I must now determine whether disclosure of the Nominator's Name would, on balance, be in the public interest.

Public interest balancing test

36. Because of the way that section 44(1) of the FOI Act is structured, the mere finding that information concerns the personal affairs of a person other than the applicant for access must always tip the scales against disclosure of that information.

37. The extent to which 'the scales will tip' varies from case to case depending on:

- the weight of relevant privacy interests (which favour non-disclosure) attaching to the information
- the particular circumstances of the case.

38. The scales must decisively tip against disclosure if there are no public interest considerations which favour release of the Matter in Issue.

39. Accordingly, it is necessary to examine whether there are public interest considerations favouring disclosure, and if there are, whether they outweigh all public interest considerations favouring non-disclosure.

Public interest considerations favouring disclosure

40. I have carefully considered the submissions made by the applicant in respect of public interest considerations.

41. I will examine each relevant public interest consideration in turn.

1. Declaration on nomination form

42. The applicant states in her FOI application that:

I would also like to note that your application form has a declaration for the applicant where they understand that the information may be disclosed in accordance with the Freedom of Information Act 1992.

43. She also states in her email dated 22 November 2007 to L Clarke that:

After all, the nominator signed that they understood their information may be disclosed.

44. Further, in her application for external review dated 8 January 2008, the applicant submits:

This person has also signed the nomination form understanding that all information may be disclosed under the Freedom of Information Act 1992 and the Evidence Act 1977.

45. I also note that in response to the preliminary view dated 27 March 2008, the applicant reiterated her view that:

The nominator has given written permission by signing the nomination /application form. They have now been allowed to overturn this permission.

46. I note that page four of the relevant nomination/application form includes the following declaration:

I understand that all information supplied on or with this application form may be disclosed publicly in accordance with the Freedom of Information Act 1992.

47. After carefully considering all of the information available to me including all of the applicant's submissions, I find that:

- the purpose of the declaration referred to above is to inform the reader that relevant information may be disclosed publicly in accordance with the FOI Act
- this general right of access to information under the FOI Act is always subject to the application of specific exemption provisions of the FOI Act
- if an exemption provision of the FOI Act applies, it will override the general right of access and the relevant information will be exempt from disclosure under the FOI Act.

48. On the basis of the matters set out above, I consider that this public interest consideration (concerning the effect of the declaration on the nomination form which the applicant submits weighs in favour of disclosure) should be afforded little weight in the circumstances.

2. Allegation of nominator's dishonesty and improper motive

49. In her application for external review dated 8 January 2008, the applicant submits that:

The nominator has supplied the information and has declared it to be true and correct by virtue of the Oaths Act 1867... It is apparent from the nomination that the nominator was intentionally dishonest in their content.

50. The applicant also submits that the EPA should prosecute the nominator, because she believes that the nomination was intentionally false and misleading:

As I have had suspicions since I received notification of the nomination, I requested that the EPA provide me with a copy of their policy with regards to what steps they take to ensure that a nomination has not been provided vexatiously or in a sinister manner.

...

I was also advised on the 7th December 2007, that the EPA or Heritage Council do not have a policy to investigate the nominator and/or their motives for nomination. Although I requested an investigation, it appears that the only action taken by the agency was a phone call where the nominator was asked if they nominated the XYZ vexatiously. This is simply a joke that this is the extent of the investigation when so much was at stake and also no investigation has been compiled even once it was ascertained that the nominator provided misleading information...If this is a malicious nomination then I could very well have been and still am the victim of anti-competitive behaviour with the EPA taking away my rights to the law.

51. In summary, the applicant submits that the nomination was made ‘vexatiously or in a sinister manner’ on the basis of:

- the timing of the nomination
- the inaccuracy of some information contained within the nomination and supporting material
- the applicant’s belief that the nomination was made by a business competitor or an associate of a business competitor.

52. I note the Initial Decision dated 21 November 2007 which states that:

I have spoken with the nominator regarding their nomination and the possible release of their identity under the [FOI Act] . During this conversation, the nominator advised me that they regularly walk past [XYZ] and do not wish to see, what they consider to be a building of historical value, to be lost and this is the reason for their nomination.

53. I also note the Internal Review Decision dated 12 December 2007 which states that:

I asked them if either they or any family member or friend was in the development business or could be classified as a business competitor of XYZ. They answered in the negative.

54. After carefully considering all of the information available to me including all of the applicant’s submissions and the relevant case law, I find that:

- the nomination of a property for cultural heritage significance is a lawful act
- there is no evidence before me which supports the applicant’s allegation that the:
 - nominator behaved in a ‘vexatious’ or ‘sinister manner’ by nominating XYZ for inclusion on the cultural heritage register
 - nomination was lodged by a business competitor of the applicant (or an associate of a business competitor) or that the nomination amounted to anti-competitive conduct.

55. On the basis of the matters set out above, I consider that this public interest consideration (regarding the applicant’s allegations as to the nominator’s motive which the applicant submits weighs in favour of disclosure) should be afforded little or no weight in the circumstances.

3. The applicant’s right to pursue a legal remedy

56. I note the applicant’s submission that information should be released if it would assist a person to pursue, or assess whether to pursue a legal remedy.

57. I also note that in some circumstances there may be a strong public interest in allowing a person access to matter which would otherwise be exempt, to allow them to assess whether to pursue a legal remedy. In this regard, the applicant refers me to the decision of *Willsford and Brisbane City Council*⁹ (***Willsford***).

58. In *Willsford* the Information Commissioner stated that:

16. I consider that, in an appropriate case, there may be a public interest in a person who has suffered, or may have suffered, an actionable wrong, being permitted to obtain

⁹ (1996) 3 QAR 368 at paragraphs 16-18.

access to information which would assist the person to pursue any remedy which the law affords in those circumstances... The public interest necessarily comprehends an element of justice to the individual... Although the public interest I have described is one which would apply so as to benefit particular individuals in particular cases, I consider that it is nevertheless an interest common to all members of the community and for their benefit.

17. The mere assertion by an applicant that information is required to enable pursuit of a legal remedy will not be sufficient to give rise to a public interest consideration that ought to be taken into account in the application of a public interest balancing test incorporated into an exemption provision in the FOI Act... On the other hand, it should not be necessary for an applicant to prove the likelihood of a successful pursuit of a legal remedy in the event of obtaining access to information in issue. It should be sufficient to found the existence of a public interest consideration favouring disclosure of information held by an agency if an applicant can demonstrate that –

(a) loss or damage or some kind of wrong has been suffered, in respect of which a remedy is, or may be, available under the law;

b) the applicant has a reasonable basis for seeking to pursue the remedy; and

(c) disclosure of the information held by the agency would assist the applicant to pursue the remedy, or to evaluate whether a remedy is available, or worth pursuing.

18. The existence of a public interest consideration of this kind would not necessarily be determinative - it would represent one consideration to be taken into account in the weighing process along with any other relevant public interest considerations (whether weighing for or against disclosure) which are identifiable in a particular case. On the other hand, it would ordinarily be true to say (to the extent that a decision-maker under the FOI Act is able to make an objective assessment of these matters from the material put forward by an applicant to establish (a), (b) and (c) above) that the greater the magnitude of the loss, damage or wrong, and/or the stronger the prospects of successfully pursuing an available remedy in respect of the loss, damage or wrong, then the stronger would be the weight of the public interest consideration favouring disclosure which is to be taken into account in the application of a public interest balancing test incorporated in an exemption provision of the FOI Act.

[my emphasis]

59. In accordance with the test set out by the Information Commissioner in *Willsford*, the applicant must be able to demonstrate the following in order to establish this public interest consideration:

- a) loss or damage or some kind of wrong has been suffered, in respect of which a remedy is, or may be, available under the law;
- b) the applicant has a reasonable basis for seeking to pursue the remedy; and
- c) disclosure of the information held by the agency would assist the applicant to pursue the remedy, or to evaluate whether a remedy is available, or worth pursuing.

60. I have carefully considered the applicant's submissions including that:

- *"The simple fact ... is that I have a legal right to assess and investigate this, even if you consider that there is no evidence to support this and I ... again refer to the ... statement "Information that would assist a person to pursue , or assess whether to pursue, a legal remedy."*

- *"With all due respect, I have not engaged your services of legal representation to assess or pursue a legal remedy with regards to anti-competitive behavior. This limited information was provided to make the point that I have the right to pursue legal avenues. Without this person's name, my assessment to pursue a legal remedy is being hindered and my right for justice given little or no weight."*

61. On the information available to me (including all of the applicant's submissions) and in accordance with the decisions set out above, I consider that:

- the nomination of a property for cultural heritage significance is a lawful act
- the applicant has not established that loss, damage or an actionable wrong has been suffered on account of the nomination of XYZ for inclusion on the cultural heritage register
- the applicant has not established a reasonable basis for seeking to pursue a remedy against the alleged anti-competitive conduct
- the applicant has not satisfied the elements necessary to establish this public interest consideration
- this public interest consideration (regarding the applicant's right to pursue a legal remedy which the applicant submits weighs in favour of disclosure) should be afforded little or no weight in the circumstances.

4. Accountability/Transparency of government

62. Disclosure of information about the way in which government functions are conducted can enhance the accountability of both agencies and individual agency officers in the performance of official functions.

63. For this reason, it is in the public interest that a party affected or potentially affected by a decision or process of government should be entitled to access the information upon which that decision is made.

64. I note that in this instance, the applicant was :

- provided with the substance of the nomination of XYZ for inclusion on the cultural heritage register which enabled the applicant to understand the basis upon which XYZ was nominated
- given an opportunity to respond to the points raised in the nomination and participate in the cultural heritage assessment process conducted by the EPA (which I note resulted in the finding that XYZ is not of cultural heritage significance and is not to be added to the cultural heritage register).

65. Further, in this regard, I note that the Internal Review Decision dated 12 December 2007 states that:

*It is clear that all of the information provided by the applicant must go into the public domain for whatever evaluation and comment the public may wish to make, but **what is being assessed is the information provided by the applicant, not the applicant himself/herself.** It seems that the context in which the applicants name, address, date of birth, phone number and email address appear in this situation, shows that this information is purely personal and does not effect in any way the validity or outcome of the application. The applicant is not applying to government for anything that would warrant public scrutiny of the applicant's identity, **The applicant is merely offering information to the Council who may in turn pass it on to the owner and public, who should assess the matter in an objective and impartial sense without any reference to the name of the person who lodged the application.** The information about the*

place in question supplied by the applicant constitutes the content of his/her application and the name address and phone number of the applicant; are merely his/her personal details.

[my emphasis]

66. I also note the applicant's submissions that:

- *"...there has not been any evidence provided that the nominator desired, at the time of nomination, to keep their identity confidential"*
- *"Previous correspondence from the EPA indicates that the EPA contacted the nominator, therefore this could be seen that the EPA may have given this person guidance in this matter."*

67. Again I refer to the Internal Review Decision dated 12 December 2007 which states that:

I telephoned the applicant and asked if they had an objection to releasing their name and they indicated that they did object. They indicated that if their name was released it would lead to their address and phone number being quickly known. I asked them if either they or any family member or friend was in the development business or could be classified as a business competitor of XYZ. They answered in the negative.

It seems clear from section 35 [of the Heritage Act], that Parliament intended that nominations for places in the Heritage Register should not be left entirely for the Council. Express provision is made for any person acting in a private capacity to nominate a place. Where the Council is of the opinion that a place should be entered provisionally in the Register, the Council must give written notice to the owner and the local government and must also give public notice. There is no requirement, even when a place is entered provisionally in the Register, to notify anyone of the name of the applicant under section 35(1) [of the Heritage Act].

68. I also note the Initial Decision dated 21 November 2007 which states that:

I have spoken with the nominator regarding their nomination and the possible release of their identity under the [FOI Act] . During this conversation, the nominator advised me that they regularly walk past [XYZ] and do not wish to see, what they consider to be a building of historical value, to be lost and this is the reason for their nomination.

69. On the basis of the matters set out above and all of the information available to me including the applicant's submissions, I find that:

- the EPA has released the majority of the information on the nomination form (that is, all information with the exception of the Nominators' Name, address, phone number, date of birth and email address) to the applicant informing her of:
 - the substance of the nomination
 - the information upon which the EPA's subsequent decision not to include XYZ on the cultural heritage register was based
- the public interest would not be further served by revealing the Nominator's Name
- this public interest consideration should be afforded little or no weight in the circumstances as:
 - the applicant was given access to the information upon which the relevant decision was made and participated in the cultural heritage assessment process conducted by the EPA

- there is no evidence that the EPA influenced or sought to influence the nominator in the course of inquiring whether the nominator agreed to the disclosure of their name to the applicant
- this public interest consideration (regarding accountability and transparency of government which the applicant submits weighs in favour of disclosure) should be afforded little or no weight in the circumstances.

5. No written EPA policy regarding disclosure

70. In summary, the applicant submits that:

- the EPA failed to provide her with consistent information regarding whether it has a policy dealing with treatment of a nominator's name
- the EPA initially told her the matter in issue is exempt because of its policy
- the Internal Review Decision states that there is no such policy
- if there is no policy prohibiting disclosure, then the Nominator's Name should be released.

71. I note that the EPA has:

- no relevant written policy
- a longstanding practice of classifying a nominator's name as information concerning their personal affairs which is exempt from disclosure under section 44(1) of the FOI Act.

72. I also note the applicant's email of 19 March 2008 in which she submits that:

As you are aware, I have been advised previously on a number of occasions that it is the policy/practice for the EPA to withhold information on the persons name, however [an EPA Officer] denied there was such a policy in his Internal Review Decision.

73. Further, in her letter dated 30 March 2008, the applicant submits that:

- "I have researched case law, information and documentation of the EPA, OIC, FOI and have not found a case similar to this one where someone has applied for the name of a nominator through the EPA in relation ... to the Heritage Act. If you have such case law, I respectfully ask that you provide reference for me."
- even if the EPA has a policy or long standing procedure of not releasing the names of nominators, "[t]his does not mean that the policy or long standing procedure is lawful."
- "... [the practice of not identifying nominators on the basis that] *past nominators have been harassed, and the commissioner has supported this approach when earlier FOI decisions were challenged ... makes very little sense. If the practice has been not to identify nominators since the Heritage Act commenced in 1992, and as nominators have not been identified, how were the unidentified nominators harassed and how did the commissioner come to the conclusion to support this policy when there is obviously no evidence to support such a decision*"
- "... *the EPA's long standing procedure is operating outside the confines of the law by not ascertaining whether there is real (not fanciful) risk of harassment*" before declining to release the name of a nominator
- "... [has] *this ... been orchestrated to create time delays to allow the new laws to commence, as it is very clear that my request does not relate to section 44(1) of the FOI [Act].*"

74. On the information available to me, I find that:

- the EPA has no relevant written policy
- the applicant was initially given conflicting advice as to whether a relevant EPA policy existed
- the applicant was subsequently advised that the EPA has a longstanding practice of not revealing nominator's names as this information is considered their personal affairs and in the absence of public interest considerations favouring disclosure which outweigh privacy interests favouring non-disclosure of that information, it is considered exempt from disclosure under section 44(1) of the FOI Act
- I am unaware of any decision of this Office dealing with an application for access to the name of a person nominating a property for inclusion on the cultural heritage register
- there is no evidence before me which supports the applicant's allegation that the EPA's practice is unlawful
- there is no evidence before me which supports the applicant's allegation that time delays have been orchestrated to allow new laws to commence. In this respect I note that by letter dated 27 March 2008 (that is, before relevant amendments to the Heritage Act commenced), I advised the applicant of my preliminary view that the Nominator's Name was exempt from disclosure under section 44(1) of the FOI Act
- while not directly relevant to this matter, I note that the EPA's long standing practice is consistent with recent changes to the Heritage Act which commenced on 31 March 2008
- this public interest consideration (regarding the EPA's lack of a written policy which the applicant submits weighs in favour of disclosure) should be afforded little or no weight in the circumstances.

6. Application of section 44(2) of the FOI Act

75. In her email to the EPA dated 25 November 2007, the applicant submits that:

- section 44(2) of the FOI Act is relevant to this external review
- the relevant information is not exempt merely because it appears in an agency's policy document.

76. Section 44 of the FOI Act provides that:

44 Matter affecting personal affairs

- (1) *Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.*
- (2) *Matter is not exempt under subsection (1) merely because it relates to information concerning the personal affairs of the person by whom, or on whose behalf, an application for access to a document containing the matter is being made.*

77. I assume that the section to which the applicant refers is actually section 43(2) of the FOI Act which is relevant to documents which are exempt from disclosure on the basis of legal professional privilege rather than personal affairs.

78. By letter dated 27 March 2008, I advised the applicant of this assumption and view that as section 43(2) of the FOI Act is not relevant to this external review, this consideration should be afforded no weight in the circumstances.

7. Justifiable 'need to know'

79. This public interest consideration recognises that in certain cases, matter in issue may affect or concern an applicant to such a degree that it gives rise to a public interest in the applicant having a justifiable need to know that information that is more compelling than for other members of the public.¹⁰

80. This public interest consideration has been recognised by the Information Commissioner in situations including where applicants' interests in the information is more compelling than that of other persons.¹¹

81. In her letter dated 30 March 2008, the applicant submits that:

"As a sole director of [a company], this has personally affected me as an individual. [A company] is not a large corporation, but merely a company that was formed, at the time, for the purchase of an investment property and the possible future development of the ...[relevant] site. As a guarantor of this company, I believe I have the rights as an individual, as decisions made for or imposed upon this company have a direct consequence to my personal position in many aspects of my life. Therefore I believe my individual rights have not been considered throughout this process as I am writing this letter in my capacity as a citizen (member of the public), as an individual (guarantor) and as a company director."

82. Again, I acknowledge that the applicant remains upset about the fact of nomination. However, on the information available to me and in accordance with the decisions set out above, I find that:

- the applicant does not have a 'need to know' the Nominator's Name in circumstances where the applicant has been provided with the substance of the relevant nomination and participated in the process run by the EPA which resulted in the decision that XYZ should not be included on the cultural heritage register
- this public interest consideration (which in the applicant's submission favours disclosure) should be afforded little or no weight in the circumstances.

Public interest considerations favouring non disclosure

83. As set out above, against those public interest considerations which favour disclosure of the Nominator's Name, I must assess and weigh public interest considerations favouring non-disclosure.

84. This assessment of public interest considerations favouring non-disclosure requires me to assess the relative weight or strength of:

- privacy interests attaching to the Nominator's Name in the circumstances
- the proposition that disclosure of nominators' names will lead to a decreased number of nominations from private individuals which will adversely affect the

¹⁰ *Pemberton and The University of Queensland* (1994) 2 QAR 293 at paragraphs 164-193.

¹¹ *KBN and Department of Families, Youth and Community Care* (Unreported, Queensland Information Commissioner, 30 June 1998) which involved an applicant seeking the name of their putative father.

protection of Queensland's heritage, or put conversely, the public interest in encouraging private individuals to nominate culturally significant properties so that these properties can be assessed in an open and objective manner as to whether they warrant inclusion on the cultural heritage register.

85. I note the applicant's submission that because the relevant provision of the Heritage Act¹² (which requires the nominator's written consent to release of their name) was not in force at the date of the initial FOI application, it does not apply in respect of the Nominator's Name and this information should therefore be disclosed.
86. I confirm that the Amending Act amended the Heritage Act and the provision to which the applicant refers commenced on 31 March 2008.
87. I note that the Heritage Act now relevantly provides that:

37 Initial notice of application

- (1) *The chief executive must, within 10 business days after receiving an application for a place—*
- (a) *give notice of its receipt to the applicant; and*
- (b) *if the applicant is not the local government for the area in which the place is situated—give the local government a copy of the application; and*
- (c) *if the applicant is not the owner of the place—give the owner a copy of the application and a notice stating each of the following—*
- ...
- (3) *A copy of an application given to a local government or owner of a place under subsection (1)(b) or (c) **must not include the applicant's personal information, unless the applicant has given written consent to its inclusion.***

[my emphasis]

88. I agree with the applicant that the law to be applied is the law as it stood at the date of the applicant's FOI application.¹³
89. However, I remain of the view (as advised to the applicant in my letter of 27 March 2008) that while the EPA's longstanding practice and the amendments to the Heritage Act are not in themselves determinative of this matter, they provide useful guidance to the consideration of relevant public interest issues and should properly be taken into account in determining whether the public interest favours release or non-disclosure of a nominator's name.
90. In this respect, I note that the Explanatory Notes which led to the introduction of the Amending Act relevantly state that:

... to ensure that a person can nominate a place without fear of harassment, this section also provides for the applicant's details not to be included in a copy of the application given to the owner or local government without the applicant's permission.

¹² section 37.

¹³ *Woodyatt and Minister for Corrective Services* (1995) 2 QAR 383 – This is because it is arguable that the applicant has an accrued right under the law as it stood prior to amendment of the Heritage Act, in that written consent was not then required prior to release of a nominator's name.

91. In my view, the Explanatory Notes demonstrate that parliament considers that the nomination of a property may open a person up to harassment or recrimination on account of the nomination.

92. I note that the nominator of XYZ has advised the EPA that they do not wish their name to be disclosed.

93. I also note the applicant's submissions including that:

- *I am merely wishing this person's name so I can investigate if this nomination was submitted for unjust reasons. As stated previously, the EPA has not investigated this matter, and it seems apparent that the EPA have no interest in completing a thorough and proper investigation, and therefore by not providing me with the persons name the EPA is also hindering my ability to investigate*
- *There is not a real risk of harassment. I am a business person in this community and it would be detrimental to my business if I were to be branded as a harasser or be seen to harass someone. As previously discussed, I want this information to investigate and assess my legal rights with regards to anti-competitive behaviour of which as a member of the general public and citizen (sic) should be allowed the right to assess if I have been a target of unlawful activity. The view that there is a real risk of harassment is clearly fanciful. Again, it would appear that the EPA's long standing procedure is operating outside the confines of the law, by not ascertaining whether there is a real (not fanciful) risk of harassment.*

94. Further, I note the applicant's email dated 19 March 2008 which attaches a copy of an intergovernmental email of the same date. Paragraph 2 of that email states:

Past practice since the Heritage Act commenced in 1992 has been not to identify nominators. In the past nominators have been harassed, and the Commissioner has supported this approach when earlier FOI decisions were challenged.

95. Relevant to the assessment of the strength or weight of the privacy interests which attach to the Nominator's Name, I note the following statements in the Internal Review Decision dated 12 December 2007:

... The [nominator] is not applying to government for anything which would warrant public scrutiny of the applicant's identity. The applicant is merely offering information to the Council who may in turn pass it on to the owner and public, who should then assess the matter in an objective and impartial sense without any reference to the name of the person who lodged the application.

...

People who choose to submit in good faith an application for a property to be entered in the Heritage Register should not, as a result of their action, risk having to be put at odds with an organisation which is far more powerful, in terms of access to resources, than they are. This can be achieved if the Heritage Council respects their request not to divulge their name to the owner. In this way the will of the Parliament in having people submit applications under section 35(1) will be facilitated. If names of applicants are released, nominations from private persons may fall away, and if this occurs, the heritage of Queensland will suffer, and the public interest will be adversely affected.

In this case, there is nothing in the applicant's submission which suggests that it has not been made in good faith. The submission contains direct knowledge of the property. It contains no evidence of impropriety or improper motive.

... It is understandable that when [the FOI applicant] was advised ... that XYZ had been nominated ... that you should request the name of the person who made the nomination. ... However, the point needs to be recognised that it is not the action of the applicant which may affect the value of the property, or even affect the decision to enter the property in the Register. The action of the applicant is merely to ask the Council to consider for entry in the Register a place ... The identity of the applicant can have no bearing on the decision made regarding entry in the Register.

While there is no suggestion that a person may not have a prima facie entitlement under the FOI Act to obtain certain information held by the government, it must be recognised that when faced with the task of balancing the public interest considerations with respect to both disclosure and non-disclosure, the satisfying of a person's curiosity as to the name of the applicant does not seem to provide as much weight in this regard as the need to preserve the identity of an applicant ... so that people may know that they can make bona fide nominations without subjecting themselves to the risk of being the recipient of any ill feeling from the owner of the property concerned, irrespective of whether or not the property is subsequently entered in the Heritage Register.

96. In this regard, I also note that the EPA website states in relation to nominating a property for cultural heritage significance that:

Nominating a place is easy

[and]

If you find something of cultural heritage significance enjoy it. But most importantly, help protect it. If you find a significant place, you could nominate it to the Queensland Heritage Register.

97. On the information available to me, I find that it is reasonable to conclude that:

- protection of culturally significant properties is in the public interest
- it is also in the public interest that private individuals feel able to nominate a property without fear of harassment or recrimination which may result from the disclosure of their identity in the context of making a nomination
- a nominator may feel harassed by an FOI applicant's 'investigation'
- this form of 'investigation' may potentially lead to the harassment or victimisation of a person who has nominated a property for cultural heritage significance which is:
 - the behaviour which the EPA's longstanding practice (of not disclosing a nominators' names) seeks to limit
 - the harm which parliament seeks to avoid by its amendments to the Heritage Act as explained in the relevant Explanatory Notes
- section 37 of the Heritage Act and the Explanatory Notes to the Amending Act provide useful guidance to the consideration of relevant public interest issues and should properly be taken into account in assessing whether the public interest favours release or non-disclosure of a nominator's name
- given the matters set out above, I find that
 - significant privacy interests attach to the Nominator's Name in the circumstances
 - significant weight should be given to the public interest in encouraging private individuals to nominate culturally significant properties so that these properties can be assessed in an open and objective manner as to whether they warrant inclusion on the cultural heritage register, or put conversely, it is not in the public interest to disclose the Nominator's Name as this may lead to a decreased number of nominations from private individuals which in turn may adversely affect the protection of Queensland's heritage.

Summary – Public interest considerations

On the basis of all of the matters set out above including all of the submissions made by the applicant, I find that on balance, the public interest considerations favouring disclosure of the Nominator's Name do not outweigh public interest considerations favouring non-disclosure.

DECISION

98. I affirm the decision under review that the Matter in Issue is exempt from disclosure under section 44(1) of the FOI Act.
99. I have made this decision as a delegate of the Information Commissioner, under section 90 of the Freedom of Information Act 1992 (Qld).

Assistant Commissioner Henry

Date: 3 July 2008