



## **Decision and Reasons for Decision**

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**Application Number:** 210036

**Applicant:** NK and DK

**Respondent:** Pine Rivers Shire Council

**Third Party:** Enric Pty Ltd t/a Markcon Homes

**Decision Date:** 6 June 2007

**Catchwords:** **FREEDOM OF INFORMATION** – section 42(1)(c) and section 42(1)(g) of the *Freedom of Information Act 1992* (Qld) – whether disclosing house plans to the world at large could reasonably be expected to endanger a person’s life or physical safety – whether disclosing house plans to the world at large could reasonably be expected to endanger the security of a building

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## Reasons for Decision

### Background

1. The external review applicants seek review of the Pine Rivers Shire Council (Council) decision to release to the third party, being the original Freedom of Information access applicant, a copy of the external review applicant's house plans subject to the deletion of their names and address under section 44(1) of the *Freedom of Information Act 1992* (Qld) (FOI Act).
2. On 11 May 2006 the third party applied to the Council for access to the applicant's residential house plans approved by Council.
3. By letter dated 18 May 2006 the Council sought the views of the applicants and their architect on the release of the information pursuant to third party consultation under section 51 of the FOI Act.
4. On 22 May 2006 the applicant's architect advised its consent to release the information to the third party.
5. By letter dated 8 June 2006 the applicant's solicitors objected to the release of the information on the basis that it was exempt from disclosure under section 45 of the FOI Act.
6. In a letter dated 16 June 2006, Mr R Garske, Decision Maker, of the Council, advised the applicants of his decision that the matter in issue was not exempt under section 45 of the FOI Act and that he had decided to allow the third party full access to the information.
7. On 30 June 2006 the applicant's solicitors applied for internal review of the Council's decision.
8. On 8 August 2006, Mr MJ McBride, Legal Officer, of the Council, advised the applicants of his internal review decision that the matter in issue was not exempt under section 45 of the FOI Act, however he found that the applicant's names and address contained in the matter in issue were exempt under section 44(1) of the FOI Act.
9. By letter dated 1 September 2006 the applicant's solicitor applied for external review of Mr McBride's decision dated 8 August 2006.

### Steps taken in the external review process

10. The matter in issue was obtained and examined. On 26 September 2006 the third party requested participation in the review process.
11. From November 2006 to January 2007 this Office sought further clarifying information from the applicant's solicitors in relation to this review.
12. In February 2007 the third party confirmed that he was only pursuing access to the house plan drawings that fell within the matter in issue.
13. In April 2007 this Office sought further information from the third party concerning issues that he had raised in his submissions regarding the application of the public interest in section 44(1) of the FOI Act during the course of the review.

14. By letter dated 15 May 2007 I advised the Council and the third party that it was my preliminary view that the matter in issue is exempt under section 42(1)(g) of the FOI Act. I also advised that unless I received a response by 29 May 2007 I would proceed on the basis that they accepted my preliminary view.
15. By letter dated 25 May 2007 the Council advised this office that it accepted my preliminary view. The third party did not respond by the due date and has not provided any response to my preliminary view as at the date of my decision.

### **Matter in issue**

16. As set out in paragraph 12 above, the third party has confirmed that the house plan drawings are the only part of the matter in issue that he continues to pursue access to in relation to his application. The matter remaining in issue in this review is therefore the applicant's house plans held by Council (Plans).

### **Findings**

17. The applicants have claimed that the Plans are exempt from release under section 45 of the FOI Act. The Council claimed that the applicant's names and address are exempt under section 44(1) of the FOI Act. However, an external review is a full merits review and I have jurisdiction to consider the matter in issue in light of any exemption provisions under the FOI Act that I consider are relevant to the facts of a case. In this respect, I have formed my decision on the application of section 42(1)(c) and (g) of the FOI Act to the matter in issue.

#### ***Section 42(1) of the FOI Act***

18. Section 42(1) of the FOI Act relevantly provides:

*(1) Matter is exempt matter if its disclosure could reasonably be expected to -*

*(c) endanger a person's life or physical safety; or*

*(g) endanger the security of a building, structure or vehicle...*

19. The Information Commissioner in *Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 at paragraphs 62-63 explained the approach to the phrase 'could reasonably be expected to'. He said the words call for a decision-maker to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (eg merely speculative/conjectural expectations) and expectations that are reasonably based, ie expectations for the occurrence of which real and substantial grounds exist.
20. In *Herbert and Ministry of Housing* [2000] WAICmr 41 (*Herbert*), an applicant under the *Freedom of Information Act 1992* (WA) (WA FOI Act) sought access to a copy of a house plan for the purpose of pursuing legal proceedings. The Western Australian Information Commissioner considered the agency's claims that the plans were exempt from release under clause 5(1)(e) and (f) in Schedule 1 of the WA FOI Act:

#### ***Exemptions***

*(1) Matter is exempt matter if its disclosure could reasonably be expected to -*

*...*

*(e) endanger the life or physical safety of any person;*

*(f) endanger the security of any property.*

21. The WA Information Commissioner found that the house plans were not exempt under clause 5(1)(e) because in his view the likelihood of endangerment to life or physical safety is a possibility only and too remote to amount to a reasonable expectation. He said such endangerment would be dependent upon a number of pre-conditions, for example, that the plans be used for the "*purpose of facilitating a burglary, that a burglary should actually occur, that the tenant be in the property at the time, and so forth*" (at paragraph 17).
22. In considering the application of clause 5(1)(f) of the WA FOI Act, the Information Commissioner accepted that the applicant sought access to the document for a legitimate purpose (ie legal proceedings) and that there was no evidence that disclosure of the document to the applicant could reasonably be expected to pose any risk of endangerment to the security of the property from the complainant.
23. However, the Information Commissioner noted that disclosure under the WA FOI Act is considered to be 'disclosure to the world at large' because no restrictions or conditions can be attached to the disclosure of documents, or their further dissemination by a successful access applicant. Therefore it was necessary to take into account the effects of disclosure to the world at large rather than to the applicant only.
24. At paragraph 24 the WA Information Commissioner said:

*I accept that a plan of a house contains information that would be useful if any person was inclined to consider breaking into the property or otherwise causing a mischief to it. For example, a house plan would indicate relevant access points to the property and the interior rooms served by, or adjacent to, each of those access points. That information would assist a potential burglar to determine the best access point to facilitate the quickest and easiest access and egress to the property. In that basis, I am satisfied that the security of the property to which the disputed document relates could reasonably be expected to be endangered by its disclosure. Accordingly, I find that the document is exempt under clause 5(1)(f).*
25. In this case, I agree with the reasoning of the WA Information Commissioner in *Herbert* and I am satisfied that the likelihood of endangerment to life or physical safety is a mere possibility rather than a reasonable expectation. Therefore, in my view the Plans are not exempt under section 42(1)(c) of the FOI Act.
26. However, on the material available to me, I am satisfied that the Plans are exempt matter under section 42(1)(g) of the FOI Act. I consider that the term 'building' in section 42(1)(g) should be given its plain meaning and a residential building would fall within the meaning of the section.
27. I acknowledge that the third party wishes to obtain access to the Plans for a legitimate purpose that does not of itself 'endanger the security of a building'. However, as is the case in relation to the WA FOI Act, I must consider disclosure of material as if disclosure were to the 'world at large': see *Pemberton and The University of Queensland* (1994) 2 QAR 293, at paragraphs 152-154.
28. I am satisfied that there are real and substantial grounds that disclosure of the Plans to the world at large would assist a person to determine the best access points for entry into the residence and therefore endanger the security of the building in issue.

29. There is no public interest test incorporated into section 42(1)(g) of the FOI Act unless one of the exceptions referred to in section 42(2) applies. There is nothing in the circumstances of this case, nor any material before me, that would indicate that section 42(2) applies.
30. As I have found that the matter is exempt under section 42(1)(g) of the FOI Act, it is unnecessary for me to consider whether the matter is exempt under sections 44(1) or 45 of the FOI Act.

## **Conclusion**

31. I find that the matter remaining in issue in this review is not exempt matter under section 42(1)(c) of the FOI Act as its disclosure could not reasonably be expected to endanger a person's life or physical safety.
32. I find that the matter remaining in issue in this review is exempt matter under section 42(1)(g) of the FOI Act as its disclosure could reasonably be expected to endanger the security of a building.

## **Decision**

33. I set aside the decision under review (being the decision dated 8 August 2006 by MJ McBride) by finding that the matter in issue is exempt from disclosure under section 42(1)(g) of the FOI Act.
34. I have made this decision as a delegate of the Information Commissioner, under section 90 of the FOI Act.

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**R Rangihaeata**  
**First Assistant Commissioner**

**Date: 6 June 2007**