

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : I -v- DEPARTMENT OF AGRICULTURE AND
FOOD [No 2] [2016] WASC 272

CORAM : CORBOY J

HEARD : 29 JANUARY & 11 APRIL 2016
SUPPLEMENTARY SUBMISSIONS: 2 & 11 MAY
2016

DELIVERED : 26 AUGUST 2016

FILE NO/S : GDA 3 of 2015

BETWEEN : I
Appellant

AND

DEPARTMENT OF AGRICULTURE AND FOOD
Respondent

ON APPEAL FROM:

Jurisdiction : INFORMATION COMMISSIONER OF WESTERN
AUSTRALIA

Coram : INFORMATION COMMISSIONER S BLUEMMEL

Citation : RE I and DEPARTMENT OF AGRICULTURE AND
FOOD [2014] WAICmr 22

Catchwords:

Freedom of information - Whether the appellant was an officer of an agency for the purpose of cl 3(3), sch 1 to the *Freedom of Information Act 1992 (WA)* - Proper construction of cl 3(3) and cl 3(6), sch 1 - Prescribed details - Public interest

Legislation:

Freedom of Information Act 1992 (WA), s 3, s 10-23, cl 3, sch 1

Result:

Appeal allowed

Personal information of the appellant found to be exempt matter

Access denied to the extent that Disputed Documents disclose the personal information of the appellant

Category: B

Representation:

Counsel:

Appellant : In person
Respondent : Ms M J Elliott

Solicitors:

Appellant : In person
Respondent : State Solicitor for Western Australia

Case(s) referred to in judgment(s):

Apache Northwest Pty Ltd v Department of Mines and Petroleum [2011] WASC
187

BGC (Australia) Pty Ltd v Fremantle Port Authority [2003] WASCA 250;
(2003) 28 WAR 187

Collector of Customs v Pozzolanic Enterprises Pty Ltd [1993] FCA 456; (1993)
43 FCR 280

Director of Public Prosecutions v Smith [1991] 1 VR 63

I v Department of Agriculture and Food [2016] WASC 26

Manly v Ministry of Premier and Cabinet (1995) 14 WAR 550

Re I and Department of Agriculture and Food [2014] WAICmr 22

CORBOY J:**The appeal and the result**

1 The background to this appeal was summarised in *I v Department of*
2 *Agriculture and Food* [2016] WASC 26 (*I [No 1]*).

2 Briefly stated, the appellant was an employee of the Royal Society
3 for the Prevention of Cruelty to Animals Western Australia Inc (RSPCA)
4 and a general inspector appointed under the *Animal Welfare Act 2002*
5 (WA). She resigned from those positions in January 2013.

3 The appellant was subsequently advised by the first respondent
4 (DAFWA) that it had received an access application (the Access
5 Application) under the *Freedom of Information Act 1992* (WA) (the FOI
6 Act) and that she had been identified as a third party in documents that
7 apparently came within the scope of the Access Application (the Disputed
8 Documents). The Access Application had been made by the second
9 respondent.

4 The appellant provided a submission to DAFWA contending, among
5 other things, that all her personal information was exempt under cl 3(1),
6 sch 1 of the FOI Act and that some of the Disputed Documents did not
7 come within the scope of the Access Application. DAFWA decided that
8 the appellant's name and 'prescribed details' were not exempt personal
9 information and that the second respondent was entitled to access the
10 Disputed Documents.

5 The appellant requested an internal review of that decision. The
6 review confirmed the initial decision. The appellant then made a
7 complaint to the Office of the Information Commissioner seeking an
8 external review. The Information Commissioner held that DAFWA's
9 decision to grant access to the Disputed Documents was justified and that
10 the documents were not exempt under cl 3(1), sch 1 to the FOI Act (*Re I*
11 *and Department of Agriculture and Food* [2014] WAICmr 22 [73]) (*Re*
12 *I*).

6 The appellant appeals from the Information Commissioner's
7 decision. I have concluded that the appeal should be allowed, the
8 Information Commissioner's decision should be set aside and in
9 substitution, it should be decided that the Disputed Documents contain
10 exempt matter to the extent that the documents would reveal personal
11 information and prescribed details relating to the appellant.

7 It should be noted that the second respondent made no submissions on any of the grounds of appeal.

The FOI Act

The object of the FOI Act

8 The long title to the FOI Act states that it is an Act 'to provide for public access to documents, and to enable the public to ensure that personal information in documents is accurate, complete, up to date and not misleading, and for related purposes'. Section 3(1) of the Act provides that the objects of the Act are to:

enable the public to participate more effectively in governing the State;

make the persons and bodies that are responsible for State and local government more accountable to the public.

9 Section 3(2) provides that the objects of the Act are to be achieved by, among other things, creating a general right of access to State and local government documents and by requiring that certain documents concerning State and local government operations be made available to the public.

Access applications and exempt matter

10 Section 10(1) of the FOI Act provides that a person has a right to be given access to the documents of 'an agency' subject to and in accordance with the Act. The glossary to the FOI Act defines the term 'agency' to mean:

(a) a Minister; or

(b) a public body or office,

and the *agency* means the agency to which an access application ... has been made or to which such an application has been transferred or partly transferred.

11 The glossary further defines the expression 'public body or office' to include 'a body or office that is established for a public purpose under a written law'.

12 Section 11(1) of the FOI Act provides that a person who wishes to obtain access to any one or more documents of an agency may make an application to the agency. Sections 12 - 21 describe the procedure for dealing with an access application.

13 Section 15(1) of the Act provides that if the agency to which an access application has been made (the Application Agency) does not hold the requested documents but knows, or has reasonable grounds to believe, that the documents are held by another agency, the agency has to transfer the access application to the other agency. Section 15(2) further provides that:

If the agency holds the requested documents but the documents originated with or were received from another agency (other than an exempt agency), and are more closely related to the functions of that other agency, the agency may transfer the access application to that other agency together with copies of the documents.

14 Section 22 confers a right on an access applicant to be given access to a document once an agency has decided to grant access. Section 23(1) provides that the agency may refuse access to a document if the document is an 'exempt document'. The expression 'exempt document' is defined by the glossary to mean a document that contains 'exempt matter'. 'Exempt matter' is, in turn, defined to mean matter that is exempt under sch 1 to the FOI Act.

15 Clause 3(1), sch 1 provides that matter is exempt matter if its disclosure would reveal personal information about an individual, whether living or dead. It was not in issue that the Disputed Documents contained personal information concerning the appellant.

16 However, cl 3(2) provides that matter is not exempt matter merely because its disclosure would reveal personal information about the applicant. Further cl 3(3) provides that:

Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to –

- (a) the person; or
- (b) the person's position or functions as an officer; or
- (c) things done by the person in the course of performing functions as an officer.

17 The glossary defines the expression, 'officer of an agency' to include:

- (a) a member of the agency; and
- (b) the principal officer of the agency; and

- (c) any person employed in, by, or for the purposes of, the agency.

18 It is to noted that the definition of an officer of 'an' agency refers to 'the' agency. The glossary also defines the expression 'principal officer' to include 'in relation to an agency that consists of one person ... that person'.

19 Clause 3(5) provides that matter is not exempt matter under cl 3(1) if the applicant provides evidence establishing that the individual concerned consents to the disclosure of the matter to the applicant and cl 3(6) further provides that matter is not exempt matter if its disclosure would, on balance, be in the public interest.

20 Finally, reg 9 of the *Freedom of Information Regulations 1993* (WA) (the Regulations) states:

Prescribed personal details (Act Schedule 1 clause 3)

- (1) In relation to a person who is or has been an officer of an agency, details of –

- (a) the person's name; or
- (b) any qualifications held by the person relevant to the person's position in the agency; or
- (c) the position held by the person in the agency; or
- (d) the functions and duties of the person, as described in any job description document for the position held by the person; or
- (e) anything done by the person in the course of performing or purporting to perform the person's functions or duties as an officer as described in any job description document for the position held by the person,

are prescribed details for the purpose of Schedule 1, clause 3(3) of the Act.

21 Regulation 9 was made pursuant to the power conferred on the Governor by s 112 of the FOI Act. In particular, s 112(1) permits the Governor to make regulations prescribing all matters that are required or permitted by the Act to be prescribed. Clause 3(3), sch 1 refers to prescribed details. Regulation 9 prescribes what details concerning a person who is or was an officer of an agency will be prescribed details for the purpose of the clause.

Appeals, review proceedings and s 90 of the FOI Act

22 Section 85 of the FOI Act provides for an appeal to this court on any question of law 'arising out of any decision' of the Information Commissioner on a complaint relating to an access application. Section 86 specifies that the agency is a party to the appeal even if it is neither the appellant nor the respondent. Section 87(1) provides that this court may confirm, vary or set aside the Information Commissioner's decision. The court may make a decision in substitution for the Information Commissioner's decision or remit the matter for reconsideration if it sets aside the decision.

23 Section 88 of the FOI Act defines 'review proceedings' to include an appeal commenced under s 85. The parties' submissions raised a preliminary issue concerning the meaning and effect of s 90. That section provides that:

- (1) In hearing and determining review proceedings the Court has to avoid the disclosure of -
 - (a) exempt matter; or
 - (b) information as to the existence or non-existence of a document containing matter exempt under clause 1, 2 or 5 of Schedule 1.
- (2) If in the opinion of the Supreme Court it is necessary to do so in order to prevent disclosure of exempt matter or matter of a kind referred to in subsection (1)(b) the Supreme Court may receive evidence and hear argument in the absence of the public and any party or representative of a party.
- (3) The Supreme Court is not to include exempt matter, or information of a kind referred to in subsection (1)(b) in its decision in review proceedings or in reasons given for the decision.
- (4) If the question of whether or not a document is a document of the agency is in issue, subsections (1), (2) and (3) apply to the contents of the document as if those contents were exempt matter.

The Animal Welfare Act

24 Section 3 of the Animal Welfare Act provides that:

- (1) This Act provides for the protection of animals by -
 - (a) regulating the people who may use animals for scientific purposes, and the manner in which they may be used; and

- (b) prohibiting cruelty to, and other inhumane or improper treatment of, animals.
- (2) This Act intends to -
 - (a) promote and protect the welfare, safety and health of animals;
 - (b) ensure the proper and humane care and management of all animals in accordance with generally accepted standards; and
 - (c) reflect the community's expectation that people who are in charge of animals will ensure that they are properly treated and cared for.

25 Section 5 defines the term 'Department' to mean, 'the department of the Public Service principally assisting the Minister in the administration of [the] Act'. DAFWA is currently the department charged with the responsibility of assisting the Minister.

26 Section 33 of the Animal Welfare Act provides that:

- (1) The CEO is to appoint as general inspectors -
 - (a) those members of the staff of the RSPCA nominated by the RSPCA; and
 - (b) in accordance with subsection (2), as many other people whom the CEO considers to be suitably qualified or experienced as the CEO considers necessary for the purposes of the Act.

...

- (3) The terms of appointment of a general inspector are to be determined by the CEO and set out in the instrument of appointment.
- (4) An appointment under subsection (1) remains in force for 5 years unless before then -
 - (a) the inspector (other than an inspector appointed under subsection (2)(b)) ceases to be a member of the staff of the RSPCA or of the department or local government the chief executive officer of which nominated him or her (as the case requires);
 - (b) the inspector resigns by written notice to the CEO; or

(c) the appointment is revoked by the CEO.

27 The reference to the 'CEO' is to the Chief Executive Officer of DAFWA (the CEO).

28 Section 37 of the Animal Welfare Act defines the functions of a general inspector to include enforcing pt 3 of the Act and providing information and assistance to the CEO in relation to matters arising under the Act. Part 3 of the Act creates various offences against animals (see s 19, s 31 and s 32). Sections 38 - 47 confer wide powers on general inspectors in relation to the enforcement of the Act. The powers include the power to enter a place, including by the use of reasonable force; to enter vehicles; to seize animals and other property; to conduct searches and require information to be provided; to provide for, or give directions in respect of, the care of an animal and to humanely destroy animals that are reasonably believed to be suffering. Inspectors may apply for search warrants and for warrants to seize animals and may give infringement notices in respect of offences reasonably suspected of having been committed against the Animal Welfare Act.

The Information Commissioner's decision

29 The Information Commissioner decided that:

- (a) The appellant was, by herself, an agency and an officer of an agency as the principal officer of her agency (*Re I* [53]).
- (b) The appellant was not a member of DAFWA but was employed for the purposes of DAFWA and therefore, she was an officer of an agency – that is, an officer of DAFWA [59].
- (c) The appellant was an officer of an agency within the meaning and for the purpose of cl 3(3), sch 1, read with reg 9 of the Regulations. She was either the principal officer of an agency consisting of one person (herself) or she was employed for the purposes of DAFWA [60].
- (d) The Disputed Documents contained information that disclosed the appellant's name, her title as a general inspector and 'other information relating to [her] role as a general inspector' [61]. The Information Commissioner's reasons did not otherwise describe the information contained in the Disputed Documents, except to state that disclosure of the information 'would do no more than

reveal prescribed details about a person who is or has been an officer of an agency' [61].

- (e) The public interest favoured the disclosure of the information contained in the Disputed Documents [70].
- (f) It was relevant in determining the public interest that 'the complainant stated in [her] submissions dated 27 August 2014 that [she] had no objection to the release of disputed documents and disputed information concerning the performance of [her] office as a general inspector, and that the complainant probably would have agreed to the release of information outside of the FOI process had the complainant been asked' [71].

30 Three further points should be noted about the Information Commissioner's reasons. First, the Information Commissioner considered that cl 3(3) applied even if the appellant was only an officer of an agency because she was the principal officer of an agency constituted by herself; that is, it was not necessary for the appellant to be an officer of DAFWA, as the agency to which the Access Application had been made, for the clause to be engaged.

31 Second, the Information Commissioner referred to a statement on the DAFWA website in finding that the appellant was employed for the purpose of DAFWA. The statement was to the effect that DAFWA's role included 'administering animal welfare legislation, promoting compliance with [the Animal Welfare Act] and appointing General Inspectors under the [Animal Welfare Act]'. Further, the Information Commissioner defined the word 'employed' in this context to include 'using the services of [a] person' [58] - [59].

32 Third, the Information Commissioner cited the decision of the Full Court of the Supreme Court of Victoria in *Director of Public Prosecutions v Smith* [1991] 1 VR 63 on the meaning of the expression 'public interest':

The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals (75).

33 The Information Commissioner recognised that there were competing public interests as reflected in the various provisions of the

FOI Act relating to the grant of access and the maintenance of personal privacy. However, he concluded that the public interest favoured giving the second respondent access to the Disputed Documents as the complainant had stated in her submission that she had no objection to the release of the documents and information concerning the performance of her office as a general inspector.

The grounds of appeal

34 The appeal notice pleads five grounds of appeal:

- (1) the Information Commissioner erred in law by finding that the appellant's personal information contained in the Disputed Documents was prescribed information pursuant to cl 3(3), sch 1 of the FOI Act;
- (2) the Information Commissioner erred in law by finding that the appellant was an officer of DAFWA for the purposes of the FOI Act;
- (3) the Information Commissioner erred in law by finding that it was not relevant to consider which agency (in this instance, DAFWA) had received an access application in determining whether a person was an officer of an agency as defined by the FOI Act;
- (4) the Information Commissioner erred in law by not 'formally' deciding the public interest test pursuant to cl 3(6), sch 1 of the FOI Act; and
- (5) the Information Commissioner erred in law by 'informally' finding the public interest favoured disclosure of the Disputed Documents.

35 The appellant subsequently abandoned ground 4 of her appeal.

The appellant's submissions

36 The appellant's submissions linked each of her grounds of appeal in an argument that incorporated the following steps:

- (a) The term 'agency' means the agency to which an application for access has been made (that is, the Application Agency) - in this instance, DAFWA.
- (b) Section 23(1) of the FOI Act provides that 'the agency' may refuse access to a document that contains exempt matter. DAFWA identified the Disputed Documents as containing matter that would

reveal personal information about the appellant. Subject to cl 3(3) - cl 3(6), the Disputed Documents contain exempt matter and are accordingly, exempt documents.

- (c) Clause 3(3) could only apply if the appellant had been an officer of 'the' agency (that is, the Application Agency) - in this instance, an officer of DAFWA. The appellant was not an officer of DAFWA. Rather, she was either an agency or an officer of an agency other than DAFWA.
- (d) Alternatively, personal information relating to the appellant's role as a general inspector was not information that revealed prescribed details about the appellant as a former officer of an agency. Accordingly, it was not information that came within cl 3(3).
- (e) The Information Commissioner either failed to take into account relevant considerations, or took into account irrelevant considerations, in determining that the public interest favoured disclosure of the exempt matter contained in the Disputed Documents. In particular, the Information Commissioner took into account, or placed undue weight on, the submission supposedly made by the appellant to DAFWA that she did not object to the release of the 'Disputed Documents and disputed information concerning the performance of [her] office as a general inspector' (*Re I* [71]).
- (f) Further or alternatively, the Information Commissioner erred in fact in concluding that the appellant had submitted to DAFWA that she did not object to access being granted to the Disputed Documents and to any exempt matter contained in those documents. The error resulted in the Information Commissioner's decision being 'unreasonable and unjust'.

37 As the appellant recognised, her appeal raised two significant issues concerning her status and the meaning and effect of cl 3(3): whether cl 3(3) could only apply if she had been an officer of DAFWA (that is, whether cl 3(3) could only apply if she was an officer of the Application Agency) and if so, whether she had been an officer of DAFWA. Those issues concern the proper construction of cl 3(3) and the characterisation of the appellant's status as a general inspector under the Animal Welfare Act. They are raised by grounds 2 and 3 of the appeal and it is convenient to commence with those grounds. (The parties' submissions on ground 1 dealt to some extent with matters that were relevant to these issues.

However, I have treated ground 1 as raising the question of whether some of the information apparently disclosed in the Disputed Documents constituted prescribed details on a proper construction of reg 9 of the Regulations.)

The appellant's status as an officer of an agency (ground 2 of the appeal)

38 As has been noted, the term 'agency' is defined by the FOI Act to include a public office; that is, an office that is established for a public purpose under a written law. It was common ground between the appellant and the first respondent that a general inspector appointed under s 33 of the Animal Welfare Act held a public office within the meaning and for the purpose of the FOI Act (appellant's submissions 11 February 2016 [34]; first respondent's submissions 26 February 2016 [44] - [45]). I accept the parties' submissions having regard to the purpose of the Animal Welfare Act, as stated in s 3, and the other provisions of the Act to which I have referred. Plainly, the office of general inspector is created by the Animal Welfare Act for a public purpose.

39 It follows that the appellant was, as the Information Commissioner found, an agency in her own right as the holder of a public office and she was also the principal officer of that agency.

40 The appellant was an employee of the RSPCA during the time that she was a general inspector. Indeed, her membership of the staff of the RSPCA was a precondition to her appointment by the CEO as a general inspector under s 33(1) of the Animal Welfare Act. However, as has been noted, the Information Commissioner also found that the appellant was employed for the purposes of DAFWA and was, therefore, an officer of DAFWA (it was implicitly accepted by the appellant and DAFWA that DAFWA was an 'agency' for the purpose of the FOI Act).

41 Ground 2 of the appeal alleged that the Information Commissioner erred in finding that the appellant was an officer of DAFWA as she was employed for the purposes of the department. DAFWA accepted that the Information Commissioner had erred in making that finding (DAFWA's submissions 26 February 2016 [57] - [65]). As DAFWA submitted, the relationship between the CEO and the appellant was governed entirely by the Animal Welfare Act. The appellant was not subject to the control or direction of the CEO or DAFWA, except to the extent that she may have been required to provide information and assistance to the CEO in relation to matters arising under the Animal Welfare Act in accordance with s 37(1)(d). Otherwise, the appellant, as a general inspector, fulfilled a

statutory function. She was not employed for the purposes of DAFWA but rather, to discharge the statutory duties of a public office.

42 Accordingly, I accept the submissions of the appellant and DAFWA that the Information Commissioner erred in finding that the appellant was an officer of an agency as she was employed for the purposes of DAFWA. The Information Commissioner misconstrued the effect of the provisions of the Animal Welfare Act in characterising the purpose and statutory role of a general inspector and the relationship created by the Act between general inspectors and DAFWA.

43 I consider that the Information Commissioner's finding involved an error of law and that ground 2 raised a question of law of the kind referred to in *Collector of Customs v Pozzolanic Enterprises Pty Ltd* [1993] FCA 456; (1993) 43 FCR 280 – a question as to whether 'facts fully found fall within the provision of a statutory enactment properly construed' (287). The ground raised a question that involved the characterisation of the appellant's status as a general inspector that was to be determined on a proper construction of the Animal Welfare Act.

44 I would allow ground 2 of the appeal.

The proper construction of cl 3(3) (grounds 2 and 3 of the appeal)

45 The appellant linked the issue of whether she was an officer of DAFWA or some other agency to the question of the proper construction of cl 3(3) (appellant's submissions 11 February [81] - [90]). Put simply, she contended that the reference to an officer of an agency in cl 3(3) is to an officer of 'the' agency (that is, an officer of the Application Agency), whereas DAFWA contended that the reference is to an officer of any agency.

46 The definition of the expression 'an officer of an agency' is ambiguous: is 'the agency' in pars (a) - (d) of the definition a reference to the Application Agency, as the appellant contended, or is it merely, as DAFWA contended, a reference back to opening words of the definition so that 'the agency' is whatever agency ('an agency') of which the person concerned was an officer? That ambiguity is reflected in other provisions of the FOI Act: see, for example, s 11(2) and s 11(3), s 34(1) - s (3) and (4), s 39(1), s 45(1) - (4) ('an agency' and 'the agency'), and s 100(1) and cl 4 of the glossary ('an agency' and 'an officer of the agency').

47 Further, it is apparent that the term 'an agency' is used in some sections of the Act to refer to the Application Agency. However, as best

as I have been able to discern, the term 'the agency' is always used to refer to the Application Agency (the expression 'the agency' is used 198 times in the Act). The term 'an agency', on the other hand, appears to be used in a more generic sense – see for example, s 10, s 11, s 12(4) and s 12(5), s 16, s 39(1), s 45, s 54 and more obviously, s 33(3) and s 96. The expression 'an officer of an agency' is used in the body of the Act in conjunction with the term 'an agency' (apart from in s 63(3)): see s 81(2), s 92(2), s 104(1), s 106(1) ('principal officer of an agency') and s 107.

48 This analysis suggests that the expression 'officer of an agency' when used in cl 3(3), sch 1 is intended to refer to an officer of the Application Agency. That is consistent with the meaning of 'the agency' that appears as part of the definition of 'agency'. However, it is also clear that particular attention must be paid to the statutory context in which these expressions appear.

49 Clause 3(3) is to be read with reg 9 of the Regulations. It is apparent, when the clause and the regulation are read together, that the prescribed details of a person will be details that are known to, and recorded in the documents, of the agency of which of the person is or has been an officer. Accordingly, the Application Agency will be in a position to know whether its documents contain matter that, if disclosed, would reveal the prescribed details of a person where the person concerned is or has been an officer of that agency. For example, the Application Agency will have access to any job description document for the purpose of deciding whether any personal information was not exempt under cl 3(3) where the person concerned is or has been an officer of the agency. However, the Application Agency may not be in a position to know if the personal information of a person comes within cl 3(3) if the clause extends to the prescribed details of an officer of any agency. Indeed, the Application Agency may not even know that the personal information concerns someone who is or was an officer of an agency.

50 DAFWA submitted that a wide interpretation of the expression 'an officer of an agency' was consistent with the objects of the FOI Act as specified in s 3. However, the procedures of the FOI Act for access focus on the documents of individual agencies (and the words 'creating a general right of access' that appear in s 3(2) are to be understood in that context). Section 10(1) confers a right of access to the documents *of* an agency and accordingly, s 11 provides for an application to be made to access the documents of the particular agency. That agency is then required to process the application according to the procedures prescribed by div 2 of pt 2 of the Act (the relevant sections of that division refer to 'the agency').

51 The documents of an agency will ordinarily record information about the agency and it will be that agency that is required to determine – and is presumed to be in a position to determine – whether its documents include exempt matter. So, for example, an agency that receives or creates a document recording the prescribed details of an officer of another agency may not be in a position to determine whether the document contains exempt matter under cl 5, sch 1 (matter that is prejudicial to law enforcement, public safety and property security). Further, the agency to which an access application has been made may be required to transfer the application to another agency, including in the circumstances specified by s 15(2) of the FOI Act. In my view, the provisions of that section are consistent with the interpretation of cl 3(3) contended for by the appellant as they draw a connection between the processing of the access application and the functions of the agency to which the documents most closely relate.

52 In my view, the matters of text and context to which I have referred indicate that the expression 'officer of an agency', when used in cl 3(3), was intended to refer to an officer of the Application Agency – the agency to which an application for access has been made. That is hardly a surprising result. An applicant for access will apply to a particular agency for access to the documents of that agency. The applicant will not be seeking, or expecting to have disclosed, matter that concerns the activities and officers of another agency, at least where the application has not been completely or partially transferred to some other agency.

53 Consequently, in my view the Information Commissioner erred in finding that the personal information of the appellant was not exempt matter because cl 3(3) applied. Further, I consider that the ground was on a question of law arising out of the Information Commissioner's decision – the proper construction of cl 3(3). I would allow ground 3 of the appeal.

54 I would add two further observations concerning reg 9. First, it was submitted by the appellant and DAFWA that the regulation was to be construed in the same manner as cl 3(3) – that is, the words 'officer of an agency' meant either an officer of 'the' agency (the appellant's submission) or an officer of 'any' agency (DAFWA's submission). However, reg 9 merely defines what constitutes the prescribed details of an officer of an agency. What is exempt and what may be revealed is to be determined according to cl 3. The reference to an officer of 'an' agency in reg 9 is an example of the use of the expression 'an agency' in a generic sense.

55 Second, there was an issue raised by the appellant concerning the proper construction of the expression 'anything done by the person' in reg 9(1)(e). The appellant contended that expression only referred to the acts of an officer and excluded details of any omission – any failure to act. DAFWA contended to the contrary. In my view, reg 9(1)(e) is intended to encompass all that is done by an officer of an agency in performing his or her functions or duties as described in any job description document. The entirety of what an officer has done may include a failure by the officer to act in particular circumstances.

56 Finally, I would note that it is arguable that the Information Commissioner took into account an irrelevant consideration by having regard to the description of DAFWA's role that appeared on its website. The question of whether the appellant was employed for the purposes of DAFWA was to be determined on a proper construction of the Animal Welfare Act, read with the FOI Act, and not according to how the department chose to publicly describe its role.

57 However, this aspect was not argued before me and accordingly, I will refrain from expressing a final view.

The remaining grounds

58 The conclusion I have reached on grounds 2 and 3 is sufficient to dispose of the appeal. The effect of my findings is that personal information concerning the appellant that may be revealed in the Disputed Documents is exempt matter under cl 3(1), sch 1 to the FOI Act. I consider that the appropriate decision ought to have been to deny the second respondent access to so much of the Dispute Documents that would reveal personal information about the appellant (including information that would have revealed prescribed details relating to the appellant had she been an officer of DAFWA).

59 In the circumstances, I propose to only briefly comment on the remaining grounds of appeal.

Ground 1

60 The appellant's submissions concerning ground 1 of the appeal presented a difficulty that was not entirely of her making. In part, her submissions raised a question concerning the proper construction of cl 3(1) and (3), sch 1 and reg 9. However, her submissions also concerned whether 'other information relating to [her] role as a general inspector' (a reference to the Information Commissioner's description of the

information recorded in the Disputed Documents) was information that would reveal prescribed details concerning her position as a former officer of an agency or whether the 'other information' was properly to be characterised as personal information within the meaning of cl 3(1). As has been noted, the Information Commissioner did not further describe the 'other information' concerning the appellant's role as a general inspector to which his finding referred. Accordingly, it is not possible to fully determine the issue raised by the appellant's submissions on ground 1 of the appeal without reviewing the contents of the Disputed Documents. That was a difficulty that was expressly recognised by the appellant. It was in those circumstances that I gave the parties an opportunity to make further submissions on the meaning and effect of s 90 of the FOI Act.

61 In the circumstances, it has not been necessary to resolve the issue raised by the parties' submissions concerning s 90 nor has it been necessary for me to examine the Disputed Documents. I would only observe that there is nothing in the parties' submissions that has caused me to doubt the effect of a line of authority concerning s 90, commencing with the decision of Owen J in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550; and see *BGC (Australia) Pty Ltd v Fremantle Port Authority* [2003] WASCA 250; (2003) 28 WAR 187 and *Apache Northwest Pty Ltd v Department of Mines and Petroleum* [2011] WASC 187.

62 As to the proper construction of cl 3(1) and cl 3(3), I accept the submission made by DAFWA that the effect of cl 3(3) is to create a 'carve out'. That is, the prescribed details of a person who is or has been an officer of an agency is not exempt matter even though those details would reveal personal information about the person concerned. I also accept DAFWA's submission that s 112 of the FOI Act is the source of power to prescribe what constitutes 'prescribed details' for the purpose of cl 3(3).

63 I do not propose to otherwise determine ground 1 of the appeal.

Ground 5

64 The Information Commissioner stated in his reasons that:

In favour of disclosure I recognise a public interest in individuals such as the access applicant being able to exercise their rights of access under the FOI Act, subject to the exemptions in Schedule 1. This interest is particularly strong where, as here, those functions impact on the rights of individuals.

There is also a strong public interest in the transparency and accountability of government agencies that carry out functions on behalf of the community.

In favour of non-disclosure, I recognise a strong public interest in the maintenance of personal privacy, which interest may only be displaced by some stronger public interest that requires the disclosure of personal information about one person to another person. The protection of a person's privacy is a public interest that is recognised in clause 3. ...

While the personal privacy of individuals who are officers of an agency is limited by the provisions of clause 3(3) and regulation 9 ... I consider in the circumstances that the public interest is best served by disclosing the disputed information.

In particular I also note that the complainant stated in [her] submissions dated 27 August 2014 that [she] had no objection to the release of disputed documents and disputed information concerning the performance of [her] office as a general inspector, and that the complainant probably would have agreed to the release of information outside of the FOI process had the complainant been asked [67] – [71].

65 There are several points to be made about those reasons. First, there is an issue as to whether cl 3(6), sch 1 is to be read as an entirely independent ground for granting access to matter that would otherwise be exempt. In other words, does cl 3(6) only apply where it has been found that the personal information of the person concerned does not record or disclose the prescribed details of an officer of an agency?

66 DAFWA submitted, and I have accepted, that cl 3(3) creates a carve-out so that documents only recording or disclosing the prescribed details of an officer of an agency do not contain personal information that is exempt matter under cl 3(1). If that is correct, then cl 3(6) (which refers back to cl 3(1)) must proceed on the basis that the documents in question contain personal information which, if disclosed, would not reveal the prescribed details of an officer of an agency. As DAFWA correctly submitted, the discretion conferred by cl 3(6) was only enlivened if the provisions of cl 3(2) - (5) did not apply.

67 It is not apparent that the Information Commissioner applied that reasoning in determining the public interest in this matter given his references to the functions performed by government agencies. On the assumption that information that would reveal the prescribed details of an officer of an agency is not exempt matter under cl 3(1), the question posed by cl 3(6) is whether it is in the public interest to disclose the personal information of a person when that information does relate to their position

or functions or things done as an officer of an agency? It does not appear to me that the Information Commissioner addressed that question.

68 Second, there is a circularity of reasoning in recognising the public interest in an applicant being able to exercise the right to access under the FOI Act when considering the public interest in disclosing exempt matter under cl 3(6). The public interest in access is reflected in s 10 and the provisions for granting access. Clause 3(1) recognises that personal information will be exempt from disclosure notwithstanding the general public interest in access to an agency's documents and the objects of the FOI Act. Clause 3(6) then creates a qualification to cl 3(1). The public interest with which cl 3(6) is concerned is particular to the information that is recorded in the documents sought by the access applicant: is it in the public interest that the information be disclosed notwithstanding that it is personal information that would otherwise be exempt? Parliament has already determined that the general public interest in access to an agency's documents ought not to prevail when it provided that personal information was exempt matter, subject to the particular qualifications in cl 3(2) - (6).

69 Third, the Information Commissioner provided no reasons for why he considered that the public interest was best served by disclosing the disputed information, apart from his view of the effect of the appellant's submissions of 27 August 2014 (a matter which was stated to be an additional and confirmatory reason for disclosure).

70 Fourth, with respect, the Information Commissioner has misunderstood the appellant's position in relation to disclosure of information contained in the Disputed Documents. The Information Commissioner considered that the appellant had stated in her submission that she had no objection to the release of the Disputed Documents. The relevant submission was attachment 'A10' to the affidavit made by the appellant on 17 March 2015. The appellant clearly stated in the submission that she considered that the Dispute Documents contained exempt matter and that it was not in the public interest to release the information recorded in the documents.

71 The passage referred to by the Information Commissioner appeared in an opening statement in which the appellant stated that she believed that the second respondent was seeking access to documents that concerned an investigation that the appellant had undertaken as a general inspector. The appellant understood that a complaint had been made to DAFWA concerning the investigation and she was aggrieved by the manner in which the department had dealt with the complaint (the

circumstances are mentioned in *I [No 1]*). Against that background, the appellant stated in her submission that:

In general terms, I have no issue with the release of information concerning the performance of my office as a general inspector. In fact, I probably would have agreed to the release information outside of the FOI process had I been asked. The RSPCA Inspectorate, including myself, strives to be open and transparent [in] the way it performs the office of general inspector. This can clearly be seen in the way in which the RSPCA cooperated with DAFWA in its investigation of the applicant's complaint and provided all requested information to DAFWA without question ... DAFWA officers were invited by the RSPCA to conduct a complete review of its investigation of the applicant, however DAFWA refused. Given this background, and the harmful unsubstantiated opinions formed by DAFWA on the information it had been provided, I have to argue for the non-release of personal information which, had proper and procedurally fair procedures been followed by DAFWA, would not ... have been created in the first place.

72 As I read the submission, the appellant considered that access to the Disputed Documents should be refused because the documents had only been created as a result of DAFWA pursuing an unfair and improper procedure in investigating a complaint that had been made about her conduct as a general inspector. Accordingly, the appellant did not consider that it was in the public interest that access should be granted to information recorded in documents that had been created by what she contended had been an improper internal process. That is quite different to how the Information Commissioner characterised the appellant's submission.

73 In my view, the question of whether the appellant had consented to disclosure of the disputed information was irrelevant to the assessment of the public interest pursuant to cl 3(6). That is a matter that is expressly dealt with under cl 3(5). Accordingly, the Information Commissioner took into account an irrelevant consideration.

74 To the extent that the Information Commissioner only intended in his reasons to indicate that the appellant accepted that the access regime created by the FOI Act was beneficial, her personal views on that matter were irrelevant unless they amounted to evidence that she had consented to access being granted. In that case, cl 3(5) would have applied. Plainly, the appellant did not consent to access being granted.

75 DAFWA submitted that the Information Commissioner had merely made an error of fact if he had misconceived the effect of the appellant's submission. However, he did not merely make a factual finding on a

wrong basis. First, he made a finding for which there was no evidentiary basis and accordingly, he made an error of law. Second, he regarded the appellant's supposed consent as a relevant factor in determining the public interest. If the appellant's consent was relevant to cl 3(6), then the Information Commissioner would have failed to have taken into account a relevant consideration (that the appellant did not consent to disclosure).

76 I would allow ground 5 of the appeal for those reasons. The ground raised a question of law: the meaning and effect of cl 3(6) (what is information to which the clause applies and what factors are relevant to the public interest on a proper construction of the clause). There was also a question of law as to whether the Information Commissioner had provided adequate reasons. However, this ground of appeal would only result in the matter being remitted to the Information Commissioner to consider the question of the public interest in disclosure under cl 3(6) according to law.