

Decision D0012023 – Published in note form only

Re Brook and University of Western Australia [2023] WAICmr 1

Date of Decision: 13 April 2023

Freedom of Information Act 1992 (WA): Schedule 1, clauses 3(1), 3(3) and 3(6)

On 28 July 2020, Chris Brook (**the complainant**) applied to the University of Western Australia (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**FOI Act**) for access to certain emails relating to an article he authored (**the article**) which had been published and subsequently retracted by an academic journal (**the journal**). The emails sought were between the editor of the journal, who was also an officer of the agency (**the officer**), and employees of the publisher of the journal.

By notice of decision dated 11 September 2020, the agency granted the complainant edited access to 45 documents and refused access to four documents (**the disputed documents**) on the basis that they were exempt under clause 4(3) of Schedule 1 to the FOI Act (**clause 4**). The complainant sought internal review of the agency's decision to refuse access to the disputed documents and the agency confirmed its initial decision. On 14 October 2020, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision.

Section 76(1)(b) of the FOI Act provides that the Commissioner may decide any matter in relation to an access application that could have been decided by the agency. On 29 September 2021, after considering the material then before her, the Commissioner provided the parties with her preliminary view, which was that the disputed documents are exempt under clause 3(1) of Schedule 1 to the FOI Act (**clause 3(1)**).

Clause 3(1) provides that matter is exempt if its disclosure would reveal personal information about an individual (whether living or dead). Personal information is exempt under clause 3(1) subject to the application of the limits on the exemption set out in clauses 3(2) to 3(6).

The complainant did not accept the Commissioner's preliminary view and made further submissions. In particular, the complainant made detailed submissions contending that the limits on the exemption in clauses 3(3) and 3(6) applied to the disputed documents. After considering all of the material before her, including the complainant's further submissions, the Commissioner was not dissuaded from her preliminary view.

The Commissioner was not persuaded by the complainant's arguments that the tasks or actions performed by the officer for the journal, including the communications comprising the disputed documents, were undertaken by the officer in the course of performing or purporting to perform their functions or duties as an officer of the agency.

The Commissioner concluded that the disclosure of the personal information of the officer in the disputed documents would not 'merely' reveal prescribed details about the officer and found that the limit on the exemption in clause 3(3) did not apply to the disputed documents.

The complainant contended that disclosure of the personal information contained in the disputed documents was in the public interest and that the limit on the exemption in

clause 3(6) therefore applied. Under section 102(3) of the FOI Act, the complainant bears the onus, as the access applicant, of establishing that it would, on balance, be in the public interest to disclose personal information about other individuals.

The Commissioner observed that she is required to consider the public interest in the disclosure of the particular information sought by the complainant: *I v Department of Agriculture and Food [No 2]* [2016] WASC 272 at [68]. She further observed that the relevant question is whether disclosure of the disputed information would be of some benefit to the public generally: *Re Seven Network (Operations) Limited and Western Australia Police* [2015] WAICmr 14 at [43].

The Commissioner accepted the complainant's submission that there is a public interest in academic research and publishing being ethical and conducted with integrity. However, after examining the disputed documents, she was not persuaded that the release of the personal information in the disputed documents would satisfy that public interest.

The Commissioner observed that the objects of the FOI Act - including enabling the public to participate more effectively in governing the State and to make those responsible for State and local government decisions more accountable to the public - reflect the public interest in the accountability of agencies and their officers for the manner in which they discharge their functions.

The Commissioner recognised that there are public interests in the actions and decisions of agencies and their officers being as transparent as possible and in informing the public of the basis for government decision-making. However, the Commissioner was of the view that, although the resources of the agency were used to facilitate the communications comprising the disputed documents, the decision making process that the complainant sought documents about was not a decision of the agency or a decision made by the officer in their capacity as an officer of the agency. As a result, the Commissioner did not consider that disclosure of the disputed documents would further the public interest in the agency or its officers being more accountable for its actions and decisions or that disclosure would otherwise promote the objects of the FOI Act.

The complainant claimed that the public interest in the protection of third party privacy was lower in this matter than in other cases because the editor and publisher of the journal were publicly known and had 'publicly taken responsibility for the decision' to retract the article. In this regard, the Commissioner observed that whether the disputed matter in a document is known, or claimed to be known, by a complainant is not determinative of whether a document, or part of it, is exempt under the FOI Act: *Police Force of Western Australia v Kelly* (1997) 17 WAR 9.

In balancing the competing public interests, the Commissioner was not persuaded that the public interests favouring disclosure of the disputed documents outweighed the strong public interest in the protection of personal privacy. The Commissioner therefore found that the limit on the exemption in clause 3(6) did not apply to the disputed documents.

The Commissioner varied the agency's decision and found that the disputed documents are exempt under clause 3(1) of Schedule 1 to the FOI Act.