

Decision D0022018 – Published in note form only

Re ‘S’ and Department for Child Protection and Family Support [2018] WAICmr 2

Date of Decision: 19 June 2018

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

‘S’ (**the complainant**) applied to the former Department for Child Protection and Family Support (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to documents about the investigation of a complaint made by the complainant to the agency concerning the complainant’s child.

The agency’s decision included giving access under the FOI Act to copies of edited documents. The disputed matter was the material edited from documents on the basis it was exempt under clause 3(1) of Schedule 1 to the FOI Act (**the disputed matter**). The documents in question were all created by officers of the agency and record the relevant officers’ recollections and understanding of conversations, interviews and meetings with the complainant and others.

The complainant applied to the former Information Commissioner (**former Commissioner**) for external review of the agency’s decision and the former Commissioner in *Re ‘S’ and Department for Child Protection and Family Support [2017] WAICmr 10* confirmed the agency’s decision.

The complainant appealed the former Commissioner’s decision to the Supreme Court of Western Australia. Ground 2(b) of the appeal submitted that the former Commissioner erred in law in ‘determining, for the purpose of clause 3(6)’ of Schedule 1 to the FOI Act (**clause 3(6)**), that ‘the public interest served in granting the appellant’s application for access was outweighed by the public interest in protecting the disclosure of personal information.’

Ground 2(b) of the appeal was allowed and on 18 December 2017 the matter was remitted to the Information Commissioner to be determined in accordance with the Court’s reasons for decision in *S v Department for Child Protection and Family Support [2017] WASC 305 (S)*. Smith AJ found in *S* at [71] that the former Commissioner had erred in failing to have regard to a material consideration, in particular that:

[70] ... where this information (that is a record of oral verbatim statements made by the appellant) is not intertwined the Commissioner erred in failing to have regard to the fact that the person seeking the information is the sole and only source of the information. The character of information of this kind is such that the protection of the privacy of third parties is necessarily rendered substantially irrelevant as the release of this information will not of itself constitute an invasion of their privacy, as it is information known to the person who is the sole and only source of the information. I have used the term ‘only source’ as the information of this class is information that is a record of what the appellant has said and in that sense are statements of perceptions, opinions and other matters stated by her.

Given the findings in *S*, the Acting Information Commissioner (**Commissioner**) was required to determine whether disclosure of the disputed matter would, on balance, be in the public interest, as described in clause 3(6).

Following the appeal, the Commissioner reviewed the disputed matter and considered the additional submissions of the complainant and the agency. The Commissioner also took into account the public interest considerations for and against disclosure noted in the former

Commissioner's letter to the parties of 2 May 2017 setting out his preliminary view of the complaint.

The complainant was not the author of the documents containing the disputed matter. The Commissioner considered that it was not possible on the face of the documents containing the disputed matter to determine where the complainant was the 'sole and only source of information' as opposed to the opinion, recollection or perception of the authors of the documents.

However, even assuming that the complainant was the 'sole and only source' of the disputed matter, the Commissioner was satisfied that, except for a small amount of information, the disputed matter was inextricably intertwined with personal information of other individuals.

Clause 3(1) of Schedule 1 to the FOI Act (**clause 3(1)**) provides that matter is exempt if it would reveal personal information about an individual (whether living or dead). The FOI Act defines personal information as 'information or an opinion ... about an individual ... whose identity is apparent or can reasonable be ascertained from the information or opinion.' The Commissioner considered that, except for a small amount of information, the disputed matter was, on its face, exempt under clause 3(1).

The Commissioner considered that it would not be practicable for the agency to give the complainant access to edited documents because the further editing that would be required to avoid the disclosure of the exempt matter would render those documents unintelligible: *Police Force of Western Australia v Winterton* Unreported, WASC, Library No 970646, 27 November 1997 at page 16 and section 24 of the FOI Act.

Clause 3(6), provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest.

In summary, the complainant submitted that 'refusing to disclose information to the author of the information to be checked for accuracy, when there is no risk of a breach of personal privacy ... obstructs the fulfilment of the objects of the Act thereby preventing the public from participating more effectively in governing the State and rendering the agency 'less accountable to the public.'

In balancing the competing public interests, the Commissioner was of the view that the public interest in protecting the privacy of third parties outweighed the public interest in disclosing personal information about third parties. On balance the Commissioner was of the opinion that it was not in the public interest for sensitive personal information about other individuals to be placed in the public domain by way of the FOI process. The Commissioner noted that, 'it is well-established that disclosure of information under the FOI Act is disclosure to the world at large': *Public Transport Authority* [2018] WASC 47 Smith AJ at [71].

Based on the information before her, the Commissioner did not consider that the public interests in favour of disclosure outweighed the strong public interest in the protection of personal information.

As a result, the Commissioner confirmed the agency's decision and found that the disputed matter was exempt under clause 3(1).