

**OFFICE OF THE INFORMATION  
COMMISSIONER (W.A.)**

**File Ref: F2018292  
Decision Ref: D0022019**

Participants:

**Patrick Pearlman**  
Complainant  
  
- and -  
  
**University of Western Australia**  
Agency

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal to deal with application – section 20 – diversion of a substantial and unreasonable portion of agency’s resources – agency agreed to deal with application – section 67(1)(b) – decision to stop dealing with complaint – complaint lacking in substance

*Freedom of Information Act 1992 (WA)*: sections 20, 23, 67(1)(b), 76, and 85(1);  
Schedule 1, clause 4(3)

*Pearlman v The University of Western Australia* [2018] WASC 245

## **DECISION**

I find that the complaint is now lacking in substance and I have decided to stop dealing with it pursuant to section 67(1)(b) of the *Freedom of Information Act 1992* (WA).

Catherine Fletcher  
ACTING INFORMATION COMMISSIONER

8 February 2019

## REASONS FOR DECISION

1. This complaint arises from a decision made by The University of Western Australia (**the agency**) to refuse to deal with an access application made by Patrick Pearlman (**the complainant**) under the *Freedom of Information Act 1992* (WA) (**the FOI Act**) on the grounds that to do so would divert a substantial and unreasonable portion of its resources away from its other operations, as described in section 20 of the FOI Act.

### BACKGROUND

2. On 30 June 2016, the complainant applied to the agency under the FOI Act for access to documents, including correspondence between a number of named and unnamed individuals.
3. By notice of decision dated 26 August 2016 the agency decided to refuse access to the 414 documents it had identified as coming within the scope of the application, under clause 4(3) of Schedule 1 to the FOI Act. The agency also referred to various other grounds on which it claimed those documents were exempt under the FOI Act.
4. On 19 September 2016, the complainant applied for internal review of the agency's decision.
5. On 3 October 2016, the agency varied its decision and claimed that the requested documents were not documents of an agency. Therefore, the agency refused access to the documents in accordance with section 23(1)(b) of the FOI Act.
6. On 1 December 2016, the complainant applied to the former Information Commissioner (**former Commissioner**) for external review of the agency's decision.
7. During the course of the external review, the agency accepted that the requested documents were documents of the agency. However, the agency then formed the view that dealing with the documents in dispute would divert a substantial and unreasonable portion of the agency's resources away from its other operations. Therefore the agency refused to deal with the access application pursuant to section 20 of the FOI Act.
8. After a period of negotiation the parties were not able to resolve the matter. Accordingly, on 14 June 2017 the former Commissioner provided the parties with a letter setting out his preliminary view that the agency's decision under section 20 was justified.
9. The parties provided further submissions after the preliminary view. As a result, the agency agreed to deal with the complainant's access application by making a decision on a reduced number of documents identified by the complainant in his submissions dated 29 June 2017 (**the reduced scope**).
10. On 15 September 2017, as the agency had agreed to deal with complainant's reduced scope, the former Commissioner informed the complainant that he considered that the matter had been resolved by conciliation. Therefore, the former Commissioner decided to stop dealing with the matter.

11. In October 2017, the complainant filed an appeal to the Supreme Court from the ‘decision’ of the former Commissioner described in [10] above.
12. On 15 August 2018, in *Pearlman v The University of Western Australia* [2018] WASC 245 (*Pearlman*), Smith J set aside the former Commissioner’s ‘decision’ of 15 September 2017, and remitted the matter to me ‘for further proceedings on the appellant’s 1 December 2016 complaint for external review, consistent with the reasons of the Court’.
13. *Pearlman* at [1]-[29] outlines the background to the appeal. This is summarised in [2]-[10] above.
14. As noted in [10] above, on 15 September 2017, as a result of the agency’s decision to agree to deal with the reduced scope, the former Commissioner informed the complainant that he considered that the matter had been resolved by conciliation and decided to stop dealing with the matter.
15. In considering whether an appeal was permitted against a decision of the former Commissioner under section 85(1) of the FOI Act, Smith J in *Pearlman* held that the words ‘any decision’ in that section should be construed to mean a decision that affects rights in a substantive way: [79]-[80].
16. Her Honour found that the former Commissioner’s decision to stop dealing with the matter and to not issue a final decision on grounds that an application for external review had been disposed of by an agreement through conciliation, could be characterised as a ‘substantive and final decision as such a decision irrevocably disposes of the external review access complaint’ and as such it was a decision within the meaning of section 85(1) of the FOI Act: [81]-[82].
17. Her Honour also found that the complainant’s external review complaint had not been resolved by conciliation or negotiation at the time the former Commissioner decided to stop dealing with the matter and accordingly, in the absence of a concluded agreement between the parties, the Commissioner was not empowered to make a decision not to issue a final decision that complied with section 76 of the FOI Act: [91].
18. Finally, Her Honour found that the former Commissioner erred in making a decision not to issue a final decision that complied with section 76 of the FOI Act and that an error of law arose from the decision made by the Commissioner on 15 September 2017: [91]-[92].

#### **FURTHER REVIEW BY THE ACTING INFORMATION COMMISSIONER**

19. In remitting the matter to me for further consideration, Smith J, in *Pearlman*, noted the large number of documents in relation to which access is sought and described some of the powers available to me in determining the complaint: [100]-[111].
20. At paras [100]-[102] Her Honour observed that:

*100. Given the large number of documents in relation to which access is sought and the willingness of the respondent to further review a large number of*

*documents within the scope of the access complaint, I am of the opinion that once the matter is remitted by the court it will be open to the Commissioner to consider whether further conciliation or negotiation between the parties would be availing.*

*101. Whilst it is not strictly necessary to determine the point in this appeal, I do not, however, agree that if conciliation or negotiation between the parties is exhausted the Commissioner would then, in making the decision pursuant to s 76 of the Act, be bound to determine the external review complaint without regard to s 20 of the FOI Act, if that was an issue the respondent indicated through further conciliation or negotiations it still wished to press as an objection to the access application.*

*102. Pursuant to s 76(1)(b) of the FOI Act, the Commissioner is empowered to decide any matter in relation to the access application that could, under the FOI Act, have been decided by the agency. Further, under s 76(2) the Commissioner has to make a decision in writing whereby the Commissioner is expressly empowered, amongst other powers, to vary the agency's decision to which the complaint relates or to set aside the agency's decision to which the complaint relates and to make a decision in substitution for that decision.*

21. Further, at [111], Smith J observed that:

*In the matter before me, leaving aside the issue of whether, as a matter of fact the respondent would be justified to refuse access under s 20 of the FOI Act (that is, the merits of whether s 20 could be relied upon) given the large number of documents covered by the scope of the appellant's request for access, clearly it would have been open for the respondent to rely upon s 20 in making its decision on the initial decision, and on internal review. In these circumstances, it would be open to the Commissioner to consider whether access should be denied under s 20.*

22. Following the appeal, on 23 August 2018, the complainant confirmed that he wished to pursue his complaint on the basis of the scope proposed in his letter dated 29 June 2018, excluding the documents to which access had been given during the appeal process.

### **Scope of the Application**

23. The reduced scope of the application proposed by the complainant was as follows:

#### Schedule of Documents

Documents 18, 27, 33, 36, 38, 51-52, 54, 65-70, 72-73, 79, 89-90, 92-94, 96, 99, 102, 105, 109-111, 113, 115-116, 123-124, 129, 131, 133-135, 137-140, 142-146, 148-150, 155, 157, 160-164, 166-168, 179, 182, 187, 189, 192, 194, 200-203, 205-208, 216, 220-222, 227, 229-231, 234, 238-242, 244-246, 250-251, 253, 259, 261, 264, 270-271, 273, 275-277, 281-282, 285, 287, 291, 294-295, 304, 310, 314-318, 323, 326, 329-334, 339-

340, 342, 347-350, 356-357, 359-360, 367-371, 380-381, 386-387, 389 and 391 (156 documents in total).

### Screenshots

4s-6s, 8s, 13s-17s.

24. On 10 September 2018, the agency informed me that it had considered the reduced scope of the application and withdrew its claim under section 20. Therefore, the agency agreed to deal with the application with a reduced scope and to make a decision on access to those documents.
25. By letter dated 13 September 2018, I informed the complainant that the agency had withdrawn its claim under section 20 and agreed to deal with the application with the reduced scope by no later than 45 days from the date of my letter. Therefore, for the reasons set out in my letter, I considered that there were no matters remaining in dispute for me to determine. However, at that stage I had not made a decision to stop dealing with the matter.
26. In particular, I informed the complainant that the decision under review was the decision of the agency to refuse to deal with the application on the grounds set out in section 20. I referred to *Pearlman* at [111], which confirmed that, in the circumstances, 'it would be open to the Commissioner to consider whether access should be denied under s 20.'
27. Further, I informed the complainant that once the agency had made a decision in relation to the application, he would have the right under the FOI Act to request internal and external review of the agency's decision.
28. By letter dated 27 September 2018 and by email of 8 October 2018, the complainant informed me that he did not accept my proposed course of action and provided submissions as to how the matter should proceed.

### **The complainant's submissions**

29. The complainant's submissions, insofar as they are relevant, are as follows:
  - The decision under review is not a section 20 decision, as the agency has never made a decision to refuse to deal with the application.
  - I should continue to deal with the matter and consider whether the complainant should be given access to documents. Further, the complainant proposed that I should deal with the documents referred to in his letter of 27 September 2018 in tranches and make a preliminary determination on each tranche within 30 days.
  - The only course available to me is to issue a decision required by section 76(2) of the FOI Act.
30. The complainant also submitted that I should recuse myself from 'further participation in my external review proceeding on grounds of reasonable apprehension of bias.' That

submission was based on contentions made by the complainant about my connection to the agency.

31. By letter dated 26 October 2018, after considering the complainant's submissions, I informed the complainant that, for the reasons set out in that letter and in my letter of 13 September 2018, I remained of the view that the issue I was required to determine was whether the agency's decision to refuse to deal with the access application under section 20 was justified.
32. In relation to the claim of apprehension of bias, my letter of 26 October 2018 set out my consideration of the complainant's submissions. In summary, my letter set out:
  - my understanding of the complainant's submissions;
  - my connections to the agency;
  - the established legal principles in relation to bias; and
  - my decision not to recuse myself.
33. On 6 November 2018, the complainant filed a second appeal in the Supreme Court.
34. When the second appeal was filed, I had not made a decision under section 76(2), as set out at [25] above.
35. On 7 December 2018, in accordance with its agreement to deal with the access application, the agency provided the complainant with a notice of decision in relation to access to the requested documents.

## ISSUE FOR MY DETERMINATION

36. Notwithstanding the agency's decision on 10 September 2018 to withdraw its claim under section 20 it had, at an earlier stage of the proceedings, refused to deal with the complainant's access application pursuant to section 20 of the FOI Act. That section provides as follows:
  - (1) *If the agency considers that the work involved in dealing with the access application would divert a substantial and unreasonable portion of the agency's resources away from its other operations, the agency has to take reasonable steps to help the applicant to change the application to reduce the amount of work needed to deal with it.*
  - (2) *If after help has been given to change the access application the agency still considers that the work involved in dealing with the application would divert a substantial and unreasonable portion of the agency's resources away from its other operations, the agency may refuse to deal with the access application.*

## Consideration

37. In considering a claim under section 20, it is necessary to decide whether an agency's decision to refuse to deal with a matter is justified. In doing so, I am required to

consider information about the amount of work involved in dealing with the application and the resources of the agency required to deal with the application.

38. Given the number of documents in dispute and the resources the agency requires to deal with the access application, I consider that the agency could have decided to refuse to deal with the access application under section 20.
39. However, given the complainant's reduction in the scope of his access application, the agency withdrew its claim under section 20 that to deal with the application would divert a substantial and unreasonable portion of its resources from its other operations and has now agreed to deal with the application.
40. As the agency agreed to deal with the application, there is nothing remaining in dispute in relation to section 20 for me to determine.
41. Under section 67(1)(b), I may decide to stop dealing with a complaint, as follows:

*The Commissioner may, at any time after receiving a complaint, decide not to deal with the complaint, or to stop dealing with the complaint, because –*

*(b) it is frivolous, vexatious, misconceived or lacking in substance.*

## CONCLUSION

42. Given the matters set out above, I find that the complaint is now lacking in substance and I have decided to stop dealing with it pursuant to section 67(1)(b) of the FOI Act.

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