

**Decision D0022020 – Published in note form only**

***Re Toodyay Progress Association Inc. and Shire of Toodyay* [2020] WAICmr 02**

**Date of Decision: 12 March 2020**

***Freedom of Information Act 1992 (WA): section 26; Schedule 1, clause 8(1)***

On 28 November 2018, Toodyay Progress Association Inc. (**the complainant**) applied to the Shire of Toodyay (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to information that will enable a determination of the full cost of a particular named legal case (**the legal case**).

By notice of decision dated 20 December 2018, the agency decided that there was no single document that enabled a determination to be made of the full costs of the legal case, but decided to give the complainant access to edited copies of relevant documents together with a spreadsheet of certain costs. Those documents comprised invoices relating to the legal costs of the legal case.

On 8 January 2019, the complainant sought internal review of the agency's decision on the basis that it had requested documents showing not only the legal costs of the legal case, but the total costs of the legal case to the agency.

On 8 February 2019, on internal review, the agency gave the complainant access to an additional document. The agency also informed the complainant that it was not possible to quantify other costs such as the agency's internal employee costs and disbursements (**internal costs**), as these items had not been allocated in the agency's accounts to the individual legal case. Therefore the agency had no additional documents in relation to other costs of the legal case. This was, in effect, a decision by the agency to refuse the complainant access to further documents under section 26 of the FOI Act (**section 26**).

By letter dated 6 March 2019, the complainant sought external review of the agency's decision. In summary, the complainant submitted that the agency had not identified all documents within the scope of the access application.

During the course of the external review the agency identified a deed of settlement (**the Deed**) as an additional document within the scope of the access application. The agency claimed the Deed was exempt under clause 8(1) of Schedule 1 to the FOI Act (**clause 8(1)**).

On 8 January 2020, after considering all the material before her, the Information Commissioner (**Commissioner**) provided the parties with her preliminary view of the matter. It was the Commissioner's preliminary view that the agency's decision to refuse the complainant access to documents on the basis that the documents cannot be found, or do not exist, as described in section 26, was justified. It was also the Commissioner's preliminary view that the Deed was exempt under clause 8(1).

Section 26 provides that an agency may refuse access to a document if all reasonable steps have been taken to locate the document, and it is satisfied that the document is either in the agency's possession but cannot be found, or does not exist. The Commissioner considers that, in dealing with section 26, the following questions must be answered. First, whether

there are reasonable grounds to believe that the requested documents exist or should exist and are, or should be, held by the agency. Where those questions are answered in the affirmative, the next question is whether the agency has taken all reasonable steps to locate those documents.

The agency had initially interpreted the access application to relate to the total legal costs of the legal case. That is, the legal costs either paid or received by the agency. However, after receiving the complainant's request for internal review of its decision, the agency decided that the scope of the application included the agency's internal costs.

The Commissioner was satisfied that the agency would not necessarily keep a separate record of its internal costs in relation to the legal case. Accordingly, on the information before her, the Commissioner was not persuaded that there were reasonable grounds to believe additional documents exist. As the Commissioner did not consider there were reasonable grounds to believe additional documents exist, she did not require the agency to undertake further searches.

In relation to the Deed, clause 8(1) provides that matter is exempt if its disclosure would be a breach of confidence for which a legal remedy could be obtained. The agency provided information to the Commissioner that persuaded her that disclosure of the Deed would have the effect described under clause 8(1). Therefore, the Commissioner was satisfied that the Deed was exempt under clause 8(1).

The complainant was invited to accept the Commissioner's preliminary view or to make further submissions in support of the complainant's claims.

By letter dated 23 January 2020, the complainant provided further submissions in response to the preliminary view. The complainant reiterated submissions previously made in relation to the interpretation of the access application and the application of the *Local Government Act 1995* (WA) (**LG Act**).

The role of the Commissioner is to review decisions of agencies under the FOI Act in relation to access to documents; that role does not extend to the enforcement of the LG Act.

After considering the further submissions of the complainant, the Commissioner was not dissuaded from her preliminary view. The Commissioner found that the agency's decision to refuse access to documents under section 26, on the ground that further documents either cannot be found or do not exist, was justified. In addition, the Commissioner found that the Deed was exempt under clause 8(1). Therefore, the Commissioner varied the decision of the agency.