

Decision D0022023 – Published in note form only

Re ‘M’ and Department of Communities [2023] WAICmr 2

Date of Decision: 14 April 2023

Freedom of Information Act 1992 (WA): section 98(a)

In September 2021, ‘M’ (**the complainant**) applied to the Department of Communities (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to two Child Safety Investigation Review documents relating to the complainant’s children (**the disputed documents**). The complainant stated that the applications were made ‘by the parent of the child under [section] 98 of the FOI Act’. Section 98(a) provides that, without limiting the ability of persons to make applications on behalf of other persons generally, an access application or application for amendment may be made on behalf of a child by the child’s guardian or the person who has custody or care and control of the child.

At the time the access applications were made, the children were aged almost 15 years and 17 years. To protect the identity of the individuals in this matter, the Information Commissioner (**the Commissioner**) decided not to identify the complainant.

By notice of decision dated 15 October 2021, the agency refused to deal with the complainant’s access applications on the basis that they were not validly made under section 98 of the FOI Act. The agency’s reasons for that decision were, in summary, that the disputed documents contained sensitive personal information relating to the children; the children were old enough to make their own access applications; and the complainant had refused to allow the agency to contact the children to test the children’s understanding of the applications purportedly made on their behalf.

The complainant applied for internal review of the agency’s decision and, by notice of decision dated 10 November 2021, the agency confirmed its initial decision.

On 10 November 2021, the complainant applied to the Commissioner for external review of the agency’s decision. The agency provided the Commissioner with its FOI file maintained in respect of the access application, together with a copy of the disputed documents.

On 9 February 2023, the Commissioner provided the parties with her preliminary view of the matter, which was that the agency’s decision to refuse to deal with the complainant’s access applications was justified.

The complainant did not provide any submissions in response to the Commissioner’s preliminary view. As there was no new relevant material before her on which she was required to deliberate, the Commissioner was not dissuaded from her preliminary view.

The Commissioner considered it is well established that the FOI Act provides strong protection for the personal information of individuals and that as children grow older, they have an increasing right to participate in decisions about them and to privacy over their personal information.

The Commissioner did not accept that the reference in section 98(a) to a child's guardian or a person with custody or care and control of a child erases in all circumstances those well-established rights. Nor did she accept that section 98(a) of the FOI Act is 'unfettered.' Rather, in circumstances where a child is mature enough to have meaningful input into an access application relating to their personal information, the general terms in which section 98(a) is expressed needs to be balanced against the specific and strong protection of personal information in the FOI Act. As with any statutory provision, section 98(a) must be read within the context of the entire Act and the general law.

The Commissioner also considered that, as the disputed documents contained sensitive personal information about the complainant's children, and the children were old enough to make an application in their own right, it was proper that the agency seek to satisfy itself that the children consented to the complainant making an application on their behalf and that they understood the consequences of giving consent, including that the complainant may obtain documents containing their sensitive personal information. The Commissioner noted that the complainant refused to allow the agency to contact his children to make those enquiries.

When a person (the agent) makes an access application on behalf of another person (the principal), the first person purports to act as the other person's agent. For an agency relationship to be established, the principal must consent for the agent to act on their behalf, and the agent must consent to acting. The Commissioner considered that, where a child is mature enough to give consent for an access application to be made on their behalf, or to make their own application, and that consent has not been established, an agency relationship has not been created. In those circumstances, the Commissioner was of the view that a valid application under section 98(a) of the FOI Act is not made.

Based on the material before her in this matter, the Commissioner was not persuaded that the requisite consent from the complainant's children for the complainant to make an access application on their behalf had been established. As a result, the Commissioner was of the view that an agency relationship had not been established and therefore a valid application under section 98(a) of the FOI Act had not been made.

The Commissioner noted that the agency's decision that the complainant's applications were not validly made does not interfere with the right of the children to access their personal information because they are able to make their own application under the FOI Act. The Commissioner also considered that the agency's decision was consistent with the well-established operation of clause 3 of Schedule 1 to the FOI Act to robustly protect the privacy of individuals about whom information may be contained in documents held by State and local government agencies.

The Commissioner found that the complainant's access applications were not validly made under section 98 of the FOI Act. Accordingly, the Commissioner confirmed the agency's decision to refuse to deal with the access applications on that basis.