

**Decision D0062020 – Published in note form only**

***Re Dickens and Water Corporation* [2020] WAICmr 06**

**Date of Decision: 28 May 2020**

***Freedom of Information Act 1992 (WA): Schedule 1, clause 8(2)***

On 29 July 2019, Peter Glen Dickens (**the complainant**) applied to the Water Corporation (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to the notes taken by an officer of the agency at the conciliation conference conducted by the Office of the Information Commissioner, held on 24 July 2019 (**the disputed documents**).

By notice of decision dated 8 August 2019, the agency refused the complainant access to the disputed documents on the ground they were confidential and therefore exempt under clause 8(2) of Schedule 1 to the FOI Act (**clause 8(2)**). The complainant applied for internal review of the agency's decision, and the agency confirmed its decision.

On 23 October 2019, the complainant applied to the Information Commissioner (**Commissioner**) for external review of the agency's decision. On 9 April 2020, after considering the material then before her, the Commissioner provided the parties with her preliminary view. It was her preliminary view that the disputed documents were exempt under clause 8(2).

The complainant provided further submissions to the Commissioner in response to her preliminary view. The complainant submitted that as the conciliation conference is a unique meeting, disclosure of the disputed documents cannot prejudice the future supply of information, as described in clause 8(2)(b). The complainant also submitted that the confidentiality of the disputed documents was nullified by an officer of the agency removing them from the conciliation conference. The complainant further submitted that as the notes were taken while he was speaking, the disputed documents comprised the complainant's personal information and he consented to its disclosure. After considering all of the information before her, including the complainant's further submissions, the Commissioner was not dissuaded from her preliminary view.

For the exemption in clause 8(2) to apply to the disputed documents the agency must establish that their disclosure would reveal information of a confidential nature that was obtained in confidence and that disclosure could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency. In this case, the relevant agency is the Information Commissioner. If both of those requirements are established, then the onus shifts to the complainant, under section 102(3) of the FOI Act, to persuade the Commissioner that disclosure of the disputed documents would, on balance, be in the public interest.

From the parties' submissions, the Commissioner considered it was clear that both parties considered the conciliation process to be confidential. Additionally, the fact sheets provided to parties before the conciliation conference stress the confidentiality of the conciliation conference and this is reiterated by the conciliator at the conciliation conference. The Commissioner considered that any information recorded during the conciliation conference would comprise information of a confidential nature, obtained in confidence. Additionally,

matters discussed at the conciliation conference are not recorded by the Office of the Information Commissioner, except for the discussion points provided by the parties prior to the conciliation conference, and the certificate of outcome agreed by the parties.

In relation to clause 8(2)(b) the Commissioner referred to *Re Askew and City of Gosnells* [2003] WAICmr 19 at [16], that confirmed that clause 8(2)(b) is directed at the ability of the Government or an agency to obtain the relevant kind of information from the sources generally available to it in the future. It is not concerned with the question of whether a particular source would refuse to supply that particular information to the Government or to the agency, in the future.

In this matter, the relevant information is the information provided by parties at a conciliation conference, held under the FOI Act, at the direction of the Commissioner. The Commissioner considered that, if parties believed that any information shared during the conciliation conference could be disclosed to the world at large, then those parties would not volunteer information to try to resolve the matters between them.

Accordingly the Commissioner considered that disclosure of the disputed documents could reasonably be expected to prejudice the future supply of information, of that kind.

The Commissioner was not persuaded that the removal of the disputed documents from the conciliation conference nullified any confidentiality. The salient point was that the information was obtained and given at the conciliation conference on the understanding that it was confidential. Clause 8(2) is not limited by any consent by another party at the conciliation conference to disclose any personal information about them.

Although the complainant made no submissions about the public interest, the Commissioner considered that the public interest in maintaining the integrity of the conciliation process outweighed any public interest in disclosing confidential notes outside the conciliation conference.

Accordingly, the Commissioner confirmed the agency's decision and found that the disputed documents are exempt under clause 8(2) of Schedule 1 to the FOI Act.