

**Decision D0062024 – Published in note form only**

***Re Pearlman and University of Western Australia* [2024] WAICmr 6**

**Date of decision: 28 March 2024**

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

In 2016, Patrick Pearlman (**the complainant**) applied to the University of Western Australia (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to documents between 1 January 2015 and 30 June 2016 related to communications or correspondence between a named individual employed by the agency (**the third party**) and certain other named individuals about matters related to an incorporated association for which the third party worked in a voluntary capacity (**the incorporated association**).

Some preliminary issues related to this matter were determined in two appeals to the Supreme Court of Western Australia, being *Pearlman v University of Western Australia* [2018] WASC 245 (**the first appeal**) and *Pearlman v WA A/Information Commissioner* [2019] WASC 257 (**the second appeal**). By decision on the second appeal, the court remitted the matter to the Information Commissioner (**the Commissioner**) for determination.

Of the 414 documents originally identified by the agency as coming within the scope of the complainant's access application, 161 documents remained in dispute (**the disputed documents**). The disputed documents had no direct relationship to the agency. Rather, they were stored on the agency's email server as a result of the third party using their agency email address in relation to their voluntary work for the incorporated association.

The agency's ultimate position was that only certain matter in the disputed documents was exempt under clause 3(1) of Schedule 1 to the FOI Act (**clause 3(1)**). The agency additionally claimed that certain documents were exempt in their entirety under clause 7(1) of Schedule 1 to the FOI Act and that certain matter in the latter documents is also exempt under clause 3(1).

The third party was joined as a party to the matter, pursuant to section 69(2) of the FOI Act, and made submissions to the Commissioner claiming that the disputed documents were exempt in their entirety under clause 3(1).

Under section 76(1)(b) of the FOI Act, the Commissioner has the power to decide any matter in relation to an access application that could, under the FOI Act, have been decided by the agency. On 16 October 2020, after considering the material then before her, the Commissioner provided the parties with her preliminary view of the matter (**preliminary view letter**). It was her preliminary view that the disputed documents were exempt in their entirety under clause 3(1).

The complainant did not accept the Commissioner's preliminary view. The complainant and the third party subsequently made numerous submissions to the Commissioner. In particular, the complainant made detailed submissions contending that the limits on the exemption in clauses 3(3) of Schedule 1 of the FOI Act (**clause 3(3)**) and 3(6) of Schedule 1 of the FOI Act (**clause 3(6)**) applied to the disputed documents. After considering the parties' further

submissions and all of the material before her, the Commissioner was not dissuaded from her preliminary view.

Clause 3(1) provides that matter is exempt matter if its disclosure would reveal ‘personal information’ about an individual (whether living or dead). The definition of ‘personal information’ in the Glossary of the FOI Act makes it clear that any information or opinion about a person, from which that person can be identified, is *prima facie* exempt matter under clause 3(1). Personal information is exempt under clause 3(1) subject to the application of the limits on the exemption set out in clauses 3(2)-3(6).

Based on her examination of the disputed documents, the Commissioner was satisfied that the disputed documents contain personal information about individuals which is, on its face, exempt under clause 3(1).

Clause 3(3) provides that matter is not exempt matter under clause 3(1) merely because its disclosure would reveal prescribed details in relation to an officer, or former officer, of an agency. The details that are ‘prescribed details’ are set out in regulation 9(1) of the *Freedom of Information Regulations 1993* (WA). They include, at paragraph (e), ‘anything done by the person in the course of performing or purporting to perform the person’s functions or duties as an officer as described in any job description document for the position held by the person’.

The Commissioner considered that, in order to determine whether the disputed documents contain prescribed details relating to the third party, it was necessary to determine the following issues: What are the relevant job description documents? What were the third party’s functions or duties, as described in any relevant job description documents, when they were employed at the agency at the relevant time; and, in their role with the incorporated association, was the third party performing or purporting to perform their functions or duties as an officer of an agency as described in any job description document?

After considering all of the material before her, the Commissioner determined, for the reasons provided to the parties, which documents comprised the job description documents and what the functions or duties of the third party were, as described in the job description documents, at the relevant time. Further, for the reasons provided to the parties, the Commissioner was not persuaded by the complainant’s arguments that the third party’s voluntary work with the incorporated association was undertaken by the third party in the course of performing or purporting to perform their functions or duties as an officer of the agency.

The Commissioner concluded that the disclosure of the personal information of the third party in the disputed documents would not ‘merely’ reveal prescribed details about the third party and found that the limit on the exemption in clause 3(3) did not apply to the disputed documents.

The complainant contended that disclosure of the personal information contained in the disputed documents was in the public interest and that the limit on the exemption in clause 3(6) therefore applied. Under section 102(3), the onus was on the complainant, as the access applicant, to establish that disclosure would, on balance, be in the public interest.

The Commissioner observed that the public interest is not primarily concerned with the personal interests of the particular access applicant. Rather, the question is whether disclosure of the disputed documents would be of some benefit to the public generally, and whether that public benefit is sufficient to outweigh the public interest in the maintenance of the privacy of other individuals.

It is well established that disclosure of information under the FOI Act is disclosure to the world at large as no restrictions or conditions can be placed upon the release of documents under the FOI Act: see *Public Transport Authority* [2018] WASC 47 at [71]. Accordingly, when considering whether or not to disclose documents under the FOI Act, the effects of disclosure are generally considered as though disclosure were to the world at large, rather than only to the particular access applicant.

The complainant submitted that the privacy interests of the third party do not outweigh the extremely strong public interest the complainant had in gaining access to documents which contained personal information about him, citing section 21 of the FOI Act (**section 21**) in support of this submission. Section 21 provides that, if the applicant has requested access to a document containing personal information about the applicant, the fact that matter is personal information about the applicant must be considered as a factor in favour of disclosure. The Commissioner noted that section 21 is but one factor she must take into account in weighing the competing public interests in disclosure of the disputed documents, and that she had expressly done so in her preliminary view.

The complainant also submitted that the personal information of the third party was already known to him and that this lessened the public interest in keeping that personal information private. In this regard, the Commissioner observed that whether the disputed matter in a document is known, or claimed to be known, by a complainant is not determinative of whether a document, or part of it, is exempt under the FOI Act: *Police Force of Western Australia v Kelly* (1997) 17 WAR 9.

The complainant submitted that the disputed documents may contain material about him which is defamatory and that this is a public interest factor in favour of disclosing the disputed documents to him. The Commissioner considered that defamation is a private legal action and does not accord with the general concept of the public interest referred to in cases such as *DPP v Smith* [1991] 1 VR 63, where the court held that the relevant interest is the interest of the public as distinct from the interest of an individual or individuals.

Weighing against disclosure, the Commissioner recognised that the public interest in maintaining personal privacy is a strong one and may only be displaced by some other, strong or compelling public interest or interests that require the disclosure of personal information about one person to another person.

In balancing the competing public interests, the Commissioner was not persuaded that the public interests favouring disclosure of the disputed documents outweighed the strong public interest in the protection of personal privacy. The Commissioner therefore found that the limit on the exemption in clause 3(6) did not apply to the disputed documents.

The Commissioner set aside the agency's decision and, in substitution, found that the disputed documents are exempt under clause 3(1) of Schedule 1 to the FOI Act.