

Decision D0072022 – Published in note form only

Re McLerie and Western Australia Police [2022] WAICmr 7

Date of Decision: 30 June 2022

Freedom of Information Act 1992 (WA): section 23(2) and 24; Schedule 1, clause 3(1)

On 19 August 2020, Mark McLerie (**the complainant**) applied to Western Australia Police (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to certain documents relating to the agency's interactions with a named third party, and the third party's lawyer, in relation to the agency's investigation of the complainant's complaint against the third party, as well as access to specified documents relating to charges against the third party.

On 22 September 2020, the agency requested an extension of time to deal with the access application, advising the complainant that it was unlikely that the agency would deal with his application within the permitted period under the FOI Act. The agency informed the complainant that, in the event that it was unable to deal with the access application within the permitted period, the agency was taken to have refused access to the documents under section 13(2) of the FOI Act. At that stage, the complainant did not respond to the agency's request for an extension and did not seek review of the agency's deemed decision to refuse him access to the requested documents.

In May 2021, the complainant contacted the agency about the progress of his access application and the agency proceeded to deal with it.

Subsequently, by notice of decision dated 2 June 2021, the agency informed the complainant that it had decided to refuse access to the requested documents under section 23(2) of the FOI Act, on the ground that it was apparent from the nature of the documents as described in the complainant's access application that they would all be exempt under clause 3(1) of Schedule 1 to the FOI Act and that the agency was not obliged under section 24 to give the complainant access to an edited copy of the requested documents.

On 7 June 2021, the complainant applied to the agency for an internal review of its decision, which the agency subsequently confirmed. On 27 June 2021, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision.

On 10 May 2022, after considering the material before her, the Commissioner provided the parties with her preliminary view of the matter. It was the Commissioner's view that the agency's decision to refuse the complainant access to the requested documents under section 23(2) was justified.

The complainant did not accept the Commissioner's preliminary view and made further submissions. Having considered the complainant's further submissions and all of the material before her, the Commissioner was not dissuaded from her preliminary view.

Section 23(2) provides that an agency may refuse access to the requested documents without having identified any or all of them and without specifying the reason why matter in any particular document is claimed to be exempt matter if (a) it is apparent, from the nature of the

documents as described in the access application, that all of the documents are exempt documents, and (b) there is no obligation under section 24 of the FOI Act to give access to an edited copy of any of the documents.

The Commissioner expressed the view that, having considered the words of section 23(2)(a), the requirement in paragraph (a) that ‘all of the documents are exempt documents’ indicates that it is not sufficient that all of the documents would be prima facie exempt. In her view, the wording of section 23(2)(a) is intended to ensure that it is apparent that all of the documents of the nature described in the access application are unconditionally exempt. This means that, where an exemption clause has limits on the exemption, before an agency can find that all documents would be ‘exempt documents’ under section 23(2), it must consider whether any relevant limits on the exemption apply.

Clause 3(1) of Schedule 1 to the FOI Act provides that matter is exempt matter if its disclosure would reveal ‘personal information’ about an individual (whether living or dead). The Commissioner was satisfied that, as the access application requested documents relating to two named third parties, any such documents would be, on their face, exempt under clause 3(1) because their disclosure would reveal personal information about individuals other than the complainant.

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). In the circumstances of this matter, the Commissioner considered that the limits in clauses 3(2), 3(3) and 3(6) were relevant.

Although the Commissioner considered that the requested documents would likely contain personal information about the complainant, she considered that disclosure would not merely reveal personal information about the complainant, because that personal information would likely be interwoven with personal information about other individuals. Accordingly, the Commissioner was satisfied that the limit in clause 3(2) did not apply.

In relation to the limit in clause 3(3), the Commissioner’s view was that, although the personal information about officers of the agency would likely consist of prescribed details, that information would also be inextricably intertwined with personal information about third parties such that disclosure would not merely reveal prescribed details about officers of the agency. Accordingly, the Commissioner considered that the limit in clause 3(3) did not apply.

Clause 3(6) provides that matter is not exempt matter under clause 3(1) if its disclosure would, on balance, be in the public interest. In favour of disclosure, the Commissioner recognised that there is a public interest in an access applicant being given access to documents that contain personal information about them, as recognised in section 21 of the FOI Act, and a public interest in the accountability of government, its agencies and officers for the performance of their functions.

The complainant submitted that he required the requested documents to pursue a complaint with the Legal Profession Complaints Committee (LPCC) against a named legal practitioner and that, in favour of disclosure, there was a public interest in the accountability of lawyers for their professional conduct in court.

The Commissioner observed that, on the facts in this case, the complainant's pursuit of a complaint against a legal practitioner was a private interest rather than a public interest. The Commissioner noted that the public interest is not primarily concerned with the personal interests of the particular access applicant or with public curiosity – rather, the public interest is a matter in which the public at large has an interest as distinct from the interest of a particular individual or individuals.

The Commissioner also noted that the objects of the FOI Act are to make the persons and bodies that are responsible for the State and local government more accountable to the public, not to call to account or unnecessarily intrude upon the privacy of private individuals, where there is no demonstrable benefit to the public interest in doing so.

The Commissioner was of the view that there are other mechanisms available to the public to hold lawyers to account, including through the regulation of the conduct of legal practitioners under the *Legal Profession Act 2008* and the *Legal Profession Conduct Rules 2010* and through complaints to the LPCC. Accordingly, the Commissioner did not consider that any public interest in the accountability of legal practitioners required the disclosure of personal information about third parties to the complainant, or potentially to the world at large, under the FOI Act in this case.

In favour of non-disclosure, the Commissioner recognised a strong public interest in maintaining personal privacy and that that public interest 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 weighing the public interests for and against disclosure, the Commissioner was not persuaded that the public interests favouring disclosure of the requested documents, should they exist, were sufficient to outweigh the public interest in favour of non-disclosure.

In considering the next question of whether the agency was obliged under section 24 to give access to an edited copy of any of the requested documents, the Commissioner noted that, when applicants apply for documents relating to named individuals, it is generally not possible to edit the documents in a way so as not to disclose personal information about those individuals: see *Re Ninan and Department of Commerce* [2012] WAICmr 31 at [82].

Therefore, the Commissioner considered that it would not be practicable for the agency to edit any documents of the kind described in the complainant's access application to delete matter that was exempt under clause 3(1).

Accordingly, the Commissioner found that it is apparent from the nature of the documents as described in the complainant's access application that, if any such documents exist, they would be exempt under clause 3(1) and that there is no obligation on the agency under section 24 of the FOI Act to give access to an edited copy of any of those documents.

The Commissioner confirmed the agency's decision to refuse access to the requested documents under section 23(2).