

**Decision D0082020 – Published in note form only**

***‘X’ and Legal Aid Western Australia [2020] WAICmr 8***

**Date of Decision: 26 June 2020**

***Freedom of Information Act 1992 (WA): sections 23(2) and 23(4); Schedule 1, clauses 3(1) and 3(6)***

On 5 July 2019, ‘X’ (**the complainant**) applied to Legal Aid Western Australia (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to a copy of the Independent Children’s Lawyer (**ICL**) correspondence, written and electronic records (including phone records) in relation to an identified legal file. The file comprised documents arising from the ICL’s representation of a child. In the particular circumstances of this matter, the Information Commissioner (**the Commissioner**) decided not to identify the complainant by name.

By notice of decision dated 19 July 2019, the agency decided to refuse the complainant access to the requested documents pursuant to section 23(4) of the FOI Act, on the basis that it was not in the best interests of the child to disclose the documents. The agency attached a copy of the notice of decision it had provided to the complainant in response to a similar application made by the complainant, in 2015. As the decision-maker was the principal officer of the agency, internal review of the agency’s decision was not available to the complainant.

On 26 July 2019 the complainant sought external review of the agency’s decision. The agency provided the Commissioner with its FOI file maintained in respect of the access application. The agency did not provide the Commissioner with the requested documents as it claimed that it was apparent from the nature of the documents as described in the access application, that all of the documents are exempt documents pursuant to section 23(2) of the FOI Act.

On 15 May 2020, after considering the material then before her, the Commissioner provided the parties with her preliminary view of the matter. It was her preliminary view that the agency’s decision to refuse the complainant access to the requested documents on the basis that it was not in the best interests of the child to disclose the documents was justified.

In considering section 23(2) of the FOI Act, the Commissioner accepted that it was apparent from the nature of the documents as described in the access application that all of the documents are exempt documents. The Commissioner considered that as the requested documents are about an individual other than the complainant, they contained personal information as described in the Glossary to the FOI Act about that individual, as set out in the exemption at clause 3(1) of Schedule 1 to the FOI Act. Given the nature of the documents, the Commissioner did not consider there was a public interest in disclosing the personal information about another individual to the complainant, pursuant to clause 3(6) of Schedule 1 to the FOI Act.

Additionally, the Commissioner considered that it would not be practicable for the agency to give access to an edited copy of the requested documents because the severe editing that would be required to avoid disclosure of the exempt matter would render the requested

documents unintelligible, as described in *Police Force of Western Australia v Winterton* (Unreported, Supreme Court of WA, Library No 970646, 27 November 1997).

Section 23(4) provides as follows:

- (4) *If a document contains personal information and the applicant, or the person to whom the information relates, is a child who has not turned 16, the agency may refuse access to the document if it is satisfied that access would not be in the best interests of the child and that the child does not have the capacity to appreciate the circumstances and make a mature judgment as to what might be in his or her best interests.*

In reviewing a decision of an agency to refuse access in accordance with section 23(4) of the FOI Act, first, the Commissioner must be satisfied that the requested documents contain personal information about a child who has not turned 16. Second, the Commissioner must be satisfied that the decision-maker, at the relevant time, held the view that giving access would not be in the best interests of the child. Third, the Commissioner must be satisfied that the decision-maker, at the relevant time, held the view that the child did not have the capacity to appreciate the circumstances and make a mature judgement as to what might be in his or her best interests. Finally, the Commissioner must be satisfied that the view of the decision-maker on the three issues described above was held on reasonable grounds.

As the access application sought access to records relating to a particular individual, the Commissioner was satisfied that the requested documents could reasonably be expected to contain personal information about that individual. The child is now aged 11, accordingly the Commissioner was satisfied that the requested documents contain personal information about a child who has not turned 16.

At the time the agency made its decision the child was aged 10; the Commissioner accepted that the agency was likely to consider the child did not have the capacity to appreciate the circumstances and make a judgement as to what might be in his or her interests. The agency provided copies of Orders made by the Family Court (**the Orders**) in relation to the child, which the agency took into account when making its decision. Having examined the Orders the Commissioner was satisfied that the decision-maker held the view that giving access would not be in the best interests of the child.

In considering whether the view of the decision-maker was held on reasonable grounds the Commissioner took into account the content of the Orders. In light of the content of the Orders, the Commissioner considered it was reasonable for the decision-maker to consider that it would not be in the best interests of the child to give the complainant access to the requested documents.

The complainant was invited to accept the Commissioner's preliminary view or to provide further submissions relevant to the matter, for her consideration. The complainant did not accept the Commissioner's preliminary view, but did not make any new submissions that dissuaded the Commissioner from her preliminary view.

Accordingly, the Commissioner confirmed the agency's decision to refuse access to the documents in accordance with sections 23(2) and 23(4) of the FOI Act.