

**OFFICE OF THE INFORMATION
COMMISSIONER (W.A.)**

**File Ref: F2015357
Decision Ref: D0092016**

Participants:

Nick Helm
Complainant

- and -

Department of Planning
Agency

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – briefing note – clause 14(1)(c) – matter of a kind mentioned in section 23(1) of the *Parliamentary Commissioner Act 1971* (WA)

Freedom of Information Act 1992 (WA): sections 3, 10(1), 15(8), 76(1) and 76(4); Schedule 1, clauses 3(1), 7(1) and 14(1)(c); Schedule 2

Interpretation Act 1984 (WA): section 18

Parliamentary Commissioner Act 1971 (WA): section 23(1)

Director of Public Prosecutions Reference Under Section 693A of the Criminal Code; Re Y and Others (1998) 19 WAR 47

Re Neilson and City of Swan [2002] WAICmr 11

Van Heerden v Hawkins [2016] WASCA 42

DECISION

The agency's decision is varied. I find that the disputed information is exempt under clause 14(1)(c) of Schedule 1 to the *Freedom of Information Act 1992* (WA).

Sven Bluemmel
INFORMATION COMMISSIONER

3 June 2016

REASONS FOR DECISION

1. This complaint arises from a decision made by the Department of Planning (**the agency**) to give Mr Nick Helm (**the complainant**) access to an edited copy of a document under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**).

BACKGROUND

2. On 23 June 2015, the complainant applied to the agency under the FOI Act for access to certain documents referred to in a letter to the complainant from the Parliamentary Commissioner for Administrative Investigations (**the Ombudsman**). The requested documents included a copy of a particular briefing note from the agency to the Minister for Planning.
3. By decision dated 10 August 2015, the agency decided to grant the complainant access to an edited copy of the briefing note, deleting information on the basis it is exempt under clauses 3(1) and 7(1) of Schedule 1 to the FOI Act. The agency also identified three other documents within the scope of the complainant's access application and gave him an edited copy of one of those documents and refused access to two documents. The agency also advised the complainant that one of the requested documents did not exist.
4. The complainant sought internal review of the agency's decision to give him an edited copy of the briefing note as well as two other aspects of the agency's decision. Relevantly, the agency confirmed its decision to give the complainant an edited copy of the briefing note on the ground that the deleted information is exempt under clauses 3(1) and 7(1) of Schedule 1 to the FOI Act.
5. By letter dated 19 November 2015, the complainant applied to me for external review of the agency's decision to grant him access to an edited copy of the briefing note.

REVIEW BY THE INFORMATION COMMISSIONER

6. Following receipt of this complaint, the agency produced to me the briefing note (**the disputed document**) together with its FOI file maintained in respect of the complainant's access application. In addition, my office made inquiries of the agency in order to obtain further information in relation to this matter.
7. Section 76(1) of the FOI Act gives me, as Information Commissioner, the power to review any decision made by an agency and to make any decision in relation to an access application that could have been decided by the agency. Further, section 76(4) of the FOI Act provides that I do not have the power to make a decision to the effect that access is to be given to a document, if it is established that the document is exempt.
8. On 15 January 2016, after considering the information before me, I informed the parties in writing, of my preliminary view of this complaint including my reasons. It was my preliminary view that the information deleted from the disputed document (**the disputed information**) is exempt under clause 14(1)(c) of Schedule 1 to the FOI Act.

9. The complainant did not accept my preliminary view and provided further submissions by letter dated 4 February 2016 claiming that the disputed information is not exempt under clause 14(1)(c). On 11 February 2016 the agency advised my office that it accepted my preliminary view and withdrew its claims for exemption under clauses 3(1) and 7(1) of Schedule 1 to the FOI Act. The agency did not make any submissions in relation to clause 14(1)(c).

THE DISPUTED DOCUMENT AND THE DISPUTED INFORMATION

10. The disputed document is a briefing note dated 15 September 2014 from the agency to the Minister for Planning. The disputed information consists of the information deleted from the edited copy of that document given to the complainant, namely the last sentence in the paragraph under the heading 'Key Message' and all of the second and third pages.

CLAUSE 14 – INFORMATION PROTECTED BY CERTAIN STATUTORY PROVISIONS

11. Clause 14(1)(c) provides that matter is exempt if it is 'matter of a kind mentioned in...section 23(1) of the *Parliamentary Commissioner Act 1971*' (**the PC Act**). Section 23(1) of the PC Act provides:
- (1) *Information obtained by the Commissioner, the Deputy Commissioner or a member of the Commissioner's staff in the course of, or for the purpose of, an investigation under this Act, shall not be disclosed except –*
- (a) *for the purposes of the investigation and of an report or recommendations to be made thereon under this Act;*
- (b) *for the purposes of any proceedings for any perjury or any offence under the Royal Commissions Act 1968, or under this Act alleged to have been committed in any proceedings upon such an investigation; or*
- (c) *as authorised by section 22A or 22B.*
12. Accordingly, section 23(1) of the PC Act contains a prohibition on the disclosure of certain information. It describes the kind of information that the prohibition applies to – that is, information obtained by the Ombudsman, the Deputy Ombudsman or a member of the Ombudsman's staff (**the Ombudsman or his officers**) in the course of, or for the purpose of, an investigation under the PC Act – and sets out the exceptions to that prohibition.
13. Clause 14(1)(c) of Schedule 1 to the FOI Act provides that matter is exempt if it is matter of a kind mentioned in section 23(1) of the PC Act. Therefore, clause 14(1)(c) is only concerned with the type of information described in section 23(1) – that is, information obtained by the Ombudsman or his officers in the course of, or for the purpose of, an investigation under the PC Act – not with the issue of who is prohibited from disclosing that information under section 23(1).

The complainant's submissions

14. By his letter to my office dated 4 February 2016, the complainant submits, in summary, that:
- The approach taken in my preliminary view to the construction of clause 14(1)(c) of Schedule 1 to the FOI Act and section 23(1) of the PC Act is incorrect.
 - Neither the briefing note nor the information in it is matter of a kind mentioned in section 23(1) of the PC Act because section 23(1) only applies to the production of documents by the Ombudsman and his officers. Therefore, the briefing note in the hands of the agency is not matter of the kind mentioned in section 23(1) of the PC Act.
 - The approach advocated by the complainant is not the approach taken by the former Commissioner in *Re Neilson and City of Swan* [2002] WAICmr 11 (*Re Neilson*). The approach taken in *Re Neilson* is inconsistent with the decision of the Court of Appeal (WA) in *Director of Public Prosecutions Reference Under Section 693A of the Criminal Code; Re Y and Others* (1998) 19 WAR 47 (*Re Y*) and is incorrect. The correct approach is that favoured by the Court in *Re Y*, that is, that section 23(1) only applies to the production of documents by the Ombudsman. This approach is supported by the existence of section 23(1a) of the PC Act, which would have no operation if section 23(1) of the PC Act applied to all persons, and not just the Ombudsman and his officers.
 - The approach taken in my preliminary view means that any document provided by an agency to the Ombudsman in the course of an investigation will be exempt under clause 14(1)(c).
 - Section 18 of the *Interpretation Act 1984* (WA) (**the Interpretation Act**) requires that a statutory provision be given a construction that would promote the purpose or object underlying the written law. [G]iving section 23(1) of the PC Act a construction whereby it applies to the production of documents by anyone (and not just the [Ombudsman] creates the absurd situation that [an agency] could evade producing a document [requested under FOI], which would otherwise be subject to disclosure, simply by giving it to the Ombudsman upon review. This does not promote the objects of the FOI Act, quite the contrary.
 - The proper construction of section 23(1) of the PC Act is that it only applies to the Ombudsman and his officers and therefore the briefing note is not matter of a kind mentioned in section 23(1) of the PC Act. Therefore, the briefing note cannot be exempt under clause 14(1)(c) of Schedule 1 to the FOI Act.

Consideration

15. In *Re Neilson* the former Commissioner was of the view that a claim for exemption under clause 14(1)(c) will be satisfied once it is established that a document contains information or matter of the kind described in section 23(1) of the PC Act, that is, information obtained by the Ombudsman or his officers in the course of, or for the purpose of, an investigation under the PC Act: see [19]. I agree.

16. As I understand it, the basis of the complainant's claim that the disputed information is not matter of a kind mentioned in section 23(1) of the PC Act is his contention that section 23(1) only applies to 'the production of documents' by the Ombudsman or his officers. With respect, I consider that the complainant's submissions in this regard are misconceived.
17. The complainant appears to be relying on the decision of the Court of Appeal in *Re Y* and submits that the former Commissioner's 'disregard [in *Re Neilson*] for the Court of Appeal's decision in *Re Y* was in error' and that I should not follow *Re Neilson*.
18. In *Re Neilson*, the complainant in that matter contended that the prohibition on disclosure under section 23(1) only applies to the Ombudsman and also referred the former Commissioner to *Re Y* in support of that contention. The Commissioner said at [26]:

I have considered the decision in Re Y and Ors, which includes some comments on the interpretation of s.23(1). That case involved several questions of law referred to the Supreme Court by the Director of Public Prosecutions. The decision in Re Y and Ors is not a decision concerning the interpretation or application of clause 14 of Schedule 1 to the FOI Act. In my opinion, Re Y and Ors is distinguishable from the matter presently before me and I do not accept this part of the complainant's submissions.

19. I agree with the former Commissioner's above comments.
20. I accept the complainant's submission, summarised at the third bullet point of [14], that the Court in *Re Y* considered it was arguable that the prohibition on disclosure in section 23(1) only applies to the disclosure of information by the Ombudsman or his officers and may not extend to the disclosure of that information by other persons. However, the comments in *Re Y* on the interpretation of section 23(1) of the PC Act related to the issue of who the prohibition on disclosure in that section applies to. As noted at [13], that issue is not relevant to the application of clause 14(1)(c) of Schedule 1 to the FOI Act.
21. Even if the prohibition on disclosure of information of the type described in section 23(1) does only apply to the Ombudsman or his officers and not to other persons including the agency, that issue is not relevant to the question for my determination. Clause 14(1)(c) does not provide that matter is exempt if it is prohibited from disclosure under section 23(1) of the PC Act. Rather, it provides that matter is exempt if it is matter of a kind mentioned in section 23(1). Matter of the kind mentioned in section 23(1) of the PC Act is information obtained by the Ombudsman or his officers in the course of, or for the purpose of, an investigation under the PC Act. As a result, if the information in question was obtained by the Ombudsman or his officers in the course of, or for the purpose of, an investigation under the PC Act, it will be exempt under clause 14(1)(c). As noted at [7], section 76(4) of the FOI Act expressly prohibits me from making a decision to the effect that access is to be given to a document if it is established that the document is an exempt document.
22. I understand that the complainant also submits that if matter of a kind mentioned in section 23(1) of the PC Act is not limited to information 'in the hands of' the

Ombudsman and includes information ‘in the hands of’ an agency (other than the Ombudsman) it would allow agencies to give documents to the Ombudsman to invoke the application of clause 14(1)(c) of the FOI Act. In this regard, the complainant submits that:

[O]n the approach taken in your preliminary view, any document provided to the Ombudsman in the course of his/her investigation will become an exempt document. This cannot be correct. If it was, it would mean that a Minister or Department from whom a document has been requested could refuse production under FOI, and then provide the requested document to the Ombudsman upon review, hence making it an exempt document and not subject to production. This also means that no application for review by the Ombudsman could ever succeed where the Minister or Department has provided the requested document to the Ombudsman (which is likely to be in all cases where the document exists). This completely undermines the supervisory role of the Ombudsman in respect of FOI applications.

23. In my view, the extension of the complainant’s argument is that clause 14(1)(c) can only apply to a document held by the Ombudsman. The Ombudsman is listed in Schedule 2 to the FOI Act as an exempt agency. Therefore, as the general right of access in section 10(1) of the FOI Act does not apply to documents in the possession or under the control of an exempt agency, documents held by the Ombudsman are not accessible under the FOI Act. Consequently, if the complainant’s argument is correct, the inclusion of clause 14(1)(c) in the FOI Act would be superfluous.
24. I do not accept the complainant’s submission that my approach allows agencies to provide documents requested under the FOI Act to the Ombudsman to ‘avoid production of the document’. I consider it is far-fetched to suggest that an agency would give the Ombudsman a document following receipt of an FOI application in an attempt to render it exempt under clause 14(1)(c). In any event, a document will not be exempt under clause 14(1)(c) simply because an agency has given it to the Ombudsman. As I have already said, matter is only exempt under clause 14(1)(c) if it consists of information obtained by the Ombudsman or his officers in the course of, or for the purpose of, an investigation under the PC Act.
25. I also consider that the complainant’s submissions about the role of the Ombudsman under the FOI Act and in relation to access applications made under the FOI Act are misconceived. While an agency is obliged to notify the Ombudsman as an exempt agency that an access application has been made to it in the limited circumstances described in section 15(8) – that is, if an agency holds the requested documents but the documents originated with or were received from the Ombudsman – the Ombudsman does not have a supervisory role in respect of access applications made under the FOI Act or any role in reviewing decisions made under the FOI Act.
26. The complainant also submits that my approach to the construction of clause 14(1)(c) of Schedule 1 to the FOI Act and section 23(1) of the PC Act does not promote the objects of the FOI Act, and ‘should not be the approach adopted in accordance with the Interpretation Act’.

27. Section 18 of the Interpretation Act provides that:

In the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object.

28. The objects of the FOI Act, as set out in section 3, are to enable the public to participate more effectively in governing the State and to make the persons and bodies that are responsible for State and local government more accountable to the public.

29. The Court of Appeal (WA) recently discussed the application of section 18 of the Interpretation Act in *Van Heerden v Hawkins* [2016] WASCA 42, at [100]:

*The requirement in s 18 that one construction be preferred to another can apply only where two constructions are otherwise open. If the ordinary meaning conveyed by the text of a provision is to be modified by reference to the purposes or objects underlying the written law, the modification must be able to be identified precisely as that which is necessary to give effect to those purposes or objects and it must be consistent with the text otherwise adopted by the draftsman. Section 18 requires a court to construe a written law, and not rewrite it by reference to its purposes or objects. See *Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214, 235 (Dawson J).*

30. Clause 14(1)(c) provides that matter is exempt if it is matter of the kind mentioned in section 23(1) of the PC Act. The kind of matter mentioned in section 23(1) is information obtained by the Ombudsman or his officers in the course of, or for the purpose of, an investigation under the PC Act. In my view, it is clear that there is no other construction open for me to consider and apply. Therefore, I do not consider that the requirement in section 18 of the Interpretation Act applies in this case.

31. I have examined the disputed document and the disputed information, being the information deleted from the edited copy of the disputed document given to the complainant. The agency has provided me with material to establish that the agency provided the disputed document to the Ombudsman's office for the purposes of an investigation under the PC Act. Consequently, I am satisfied on the information before me that the disputed information consists of information obtained by the Ombudsman or his officers during the course of, or for the purposes of, an investigation under the PC Act. Accordingly, I find that the disputed information is matter of a kind mentioned in section 23(1) of the PC Act and is therefore exempt under clause 14(1)(c) of Schedule 1 to the FOI Act.
