

**Decision D0092020 – Published in note form only**

***Re Brookes and Western Australia Police [2020] WAICmr 9***

**Date of Decision: 2 July 2020**

***Freedom of Information Act 1992 (WA): section 23(2); Schedule 1, clause 3(1), 3(5) and 3(6)***

On 13 May 2019, Sarah Brookes (**the complainant**) applied to Western Australia Police (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to documents released by the agency to a named individual ('A') under the FOI Act. The documents related to the individual's past interactions with the criminal justice system and included a number of photographs.

On 26 June 2019, the agency refused the complainant access to documents under section 23(2) of the FOI Act, on the ground that it is apparent from the nature of the documents as described in the access application that they would all be exempt under clause 3(1) of Schedule 1 to the FOI Act.

By email dated 8 July 2019, the agent of the complainant sought internal review of the agency's decision. The agency confirmed its decision by letter dated 24 July 2019.

By email dated 20 September 2019, the complainant applied to the Information Commissioner (**Commissioner**) for external review of the agency's decision.

Following receipt of the request for external review, the agency was required to produce to the Commissioner its FOI file maintained in respect of the access application.

On 11 June 2020, 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 documents under section 23(2) was justified, as she considered that if documents of the nature described in the complainant's access application exist, they would be exempt under clause 3(1).

Section 23(2) provides that an agency may refuse access to the requested documents without identifying 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 was of the view that the requirement in paragraph (a) of section 23(2) that 'all of the documents are exempt documents' indicates that it is not sufficient that all of the documents would be prima facie exempt. 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, for an agency to find that all documents would be 'exempt documents' under section 23(2) it requires consideration of whether any relevant limits on an exemption apply. As the complainant sought access to documents relating to 'A' the application was a request for access to documents containing personal information about 'A'. The Commissioner was

satisfied that, from the nature of the requested documents as described in the access application, any such documents would be prima facie exempt under clause 3(1) because disclosure would reveal personal information about individuals other than the complainant. The Commissioner considered that the limits that were relevant for her consideration were clauses 3(5) whether 'A' consented to the disclosure, and 3(6), whether disclosure would, on balance, be in the public interest.

The complainant submitted that because 'A' had disclosed certain information to other parties, this was sufficient to show that 'A' consented to the disclosure of the requested documents to her, as described in clause 3(5). The Commissioner did not accept that such actions by 'A' had the effect claimed. Accordingly, she did not consider the limit at 3(5) applied.

The complainant submitted that 'A' was a public figure and that it was in the public interest for her to have the documents to establish whether his claims about his past were exaggerated. The Commissioner considered this was not in the public interest.

Favouring non-disclosure of the requested documents, the Commissioner recognised there is a public interest in maintaining personal privacy and that public interest is a strong one that may only be displaced by some other strong public interest that requires the disclosure of personal information about an individual to another individual.

In weighing the public interest factors for and against disclosure, the Commissioner was not persuaded that the public interests favouring disclosure of the requested documents, should they exist, was sufficient in this matter to outweigh the strong public interest in the protection of the personal privacy of 'A'.

The Commissioner considered whether the agency was obliged under section 24 of the FOI Act to give access to an edited copy of any of the requested documents. As the requested documents were for a named individual, the Commissioner was of the view that it was not possible for any documents to be edited so as not to disclose personal information about that individual: see *Re Ninan and Department of Commerce* [2012] WAICmr 31 at [82].

Accordingly, the Commissioner found that it would not be practicable to edit documents of the kind described in the complainant's access application to give access to an edited copy of any of the requested documents, pursuant to section 24 of the FOI Act.

The complainant was invited to accept the Commissioner's preliminary view or to provide additional submissions for her consideration. The complainant did not accept the Commissioner's preliminary view and responded to that effect with additional submissions. However, the complainant did not make any new submissions relevant to the issue for the Commissioner's determination. Having considered the complainant's additional submissions and reviewed all of the material before her, the Commissioner was not dissuaded from her preliminary view.

The Commissioner confirmed the agency's decision. 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 to give the complainant access to an edited copy of documents, pursuant to section 24 of the FOI.