

Decision D0102018 – Published in note form only

***Re King and Minister for Transport; Planning; Lands* [2018] WAICmr 10**

Date of Decision: 23 October 2018

Freedom of Information Act 1992 (WA): Section 76; Schedule 1, clauses 1(1), 1(1)(d)(i) and 1(2)

In January 2018, Stephen King (**the complainant**) applied to the Minister for Transport; Planning; Lands (**the Minister**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for various documents relating to the town of Yarloop, Alcoa Wagerup and buffer areas around Alcoa Wagerup. The complainant agreed to the deletion of personal information from the requested documents.

By notice of decision dated 30 May 2018, the Minister gave the complainant access to most of the documents located within the scope of his access application. However, the Minister refused access to an email to the Minister's office from the Department of Planning, Lands and Heritage and to the briefing note attached to the email on the ground that they are both exempt under clause 1(1) of Schedule 1 to the FOI Act.

In June 2018, the complainant applied to the Office of the Information Commissioner for external review of the Minister's decision to refuse him access to the email and to the attached briefing note.

During the external review process, one of the Commissioner's officers informed the Minister's office that, in her view, there was insufficient information before the Acting Information Commissioner (**the A/Commissioner**) to establish that the email and attached briefing note are exempt under clause 1(1) as claimed by the Minister. Consequently, the Minister amended her exemption claim and instead claimed that both documents were exempt under clause 1(1)(d)(i) of Schedule 1 to the FOI Act. The Minister subsequently withdrew her exemption claim for the email and gave the complainant a copy of it, after deleting personal information on the basis it was outside the scope of his application. As a result, the briefing note attached to the email was the only document remaining in dispute (**the disputed document**).

Clause 1(1) of Schedule 1 to the FOI Act protects from disclosure the deliberations and decisions of Cabinet and other Executive bodies as defined in clause 1(6). It also protects from disclosure matter of the kind described in paragraphs (a)-(f) of clause 1(1). In effect, clause 1(1) contains seven separate and stand-alone exemptions: see *Re Johnston and Department of State Development* [2017] WAICmr 1 at [109].

In order for the exemption in clause 1(1)(d)(i) to apply, it must be shown that the disputed document was prepared to brief a Minister. In addition to that, it must be shown that it was prepared to brief a Minister in relation to matters of a certain kind, being matters prepared for possible submission to an Executive body. Clause 1(6) defines 'Executive body' to include Cabinet. The exemptions in clause 1(1) are limited by clauses 1(2)-1(5).

On 5 October 2018, after considering the disputed document and the parties' submissions, the A/Commissioner provided the parties with her preliminary view of the matter. The A/Commissioner was satisfied, on the material before her, that the disputed document was prepared to brief a Minister in relation to a matter prepared for possible submission to Cabinet. Accordingly, it was her preliminary view that the disputed document is exempt

under clause 1(1)(d)(i). The A/Commissioner was also of the view that none of the limits on the exemption set out in clauses 1(2)-1(5) applied.

The complainant was invited to accept the preliminary view or to provide the A/Commissioner with further submissions.

The complainant did not accept the A/Commissioner's preliminary view and made further submissions. The complainant queried the legislative basis upon which the Minister could amend her exemption claim during the external review process. In addition, the complainant submitted that the limit on the exemption in clause 1(2) applied to the disputed document.

In considering the complainant's further submissions, the A/Commissioner noted that, while there are no provisions in the FOI Act that either expressly permit an agency to amend, or prevent an agency from amending, its exemption claim during the external review process, section 76(1) of the FOI Act provides that in dealing with a complaint, the Commissioner has the power to review any decision that has been made by an agency in respect of an access application and to decide any matter in relation to an access application that could, under the FOI Act, have been decided by the agency. Further, the A/Commissioner observed that section 76(4) of the FOI Act provides that, if it is established that a document is an exempt document, the Commissioner does not have power to make a decision to the effect that access is to be given to the document.

In considering whether the limit on the exemption in clause 1(2) had potential application, the A/Commissioner noted that this limit cannot apply if the matter in the disputed document is not 'merely factual, statistical, scientific or technical'. Based on her examination of the disputed document, the A/Commissioner considered that most of the matter in it comprises analysis and opinion and that it is not merely factual, statistical, scientific or technical matter for the purposes of clause 1(2). Accordingly, the A/Commissioner was satisfied that the limit on the exemption in clause 1(2) could not apply to the disputed document.

Having considered the complainant's further submissions and reviewed all of the material before her, the A/Commissioner was not dissuaded from her preliminary view. The A/Commissioner confirmed the Minister's decision to refuse access to the disputed document on the ground that it is exempt under clause 1(1)(d)(i) of Schedule 1 to the FOI Act.