

Decision D0102022 – Published in note form only

Re ‘D’ and Legal Aid Western Australia [2022] WAICmr 10

Date of Decision: 9 August 2022

Freedom of Information Act 1992 (WA): Schedule 1, clause 5(1)(e)

On 29 April 2021, ‘D’ (**the complainant**) applied to Legal Aid Western Australia (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to correspondence between a named private legal practitioner and the agency regarding the complainant’s meeting with the legal practitioner in 2019 regarding the complainant’s Family Court issue. To protect the identity of the individuals in this matter, the Information Commissioner (**the Commissioner**) decided not to identify the complainant.

By notice of decision dated 11 June 2021, the agency refused access to the requested document (**the disputed document**) without confirming or denying the existence of any such document, under section 31 of the FOI Act, on the basis that, if such document did exist, it would be exempt under clauses 3(1) and 5(1)(e) of Schedule 1 to the FOI Act.

The complainant applied for internal review of the agency’s decision. The agency stated that it confirmed its initial decision but, instead of relying on section 31 as its basis for refusing access, claimed that the disputed document was exempt under clauses 3(1) and 5(1)(e).

On 27 June 2021, the complainant applied to the Commissioner for external review of the agency’s decision. The agency provided the Commissioner with its FOI file maintained in respect of the access application, together with a copy of the disputed document.

One of the Commissioner’s officers made some preliminary inquiries with the agency regarding its decision.

On 14 July 2022, the Commissioner provided the parties with her preliminary view of the matter, which was that the disputed document was exempt under clause 5(1)(e). In light of that view, it was not necessary for the Commissioner to consider whether the disputed document was also exempt under clause 3(1) as claimed by the agency.

The Commissioner acknowledged that the limited amount of information she could provide to the complainant about the material on which her view was based – due to her obligation under section 74 of the FOI Act to not disclose exempt matter – may place the complainant at a disadvantage in endeavouring to make meaningful submissions to her. The Supreme Court in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at 556-557 recognised the difficulties faced by complainants and the constraints placed on the Commissioner by such provisions in the FOI Act but took the view that those provisions should be construed strictly according to their tenor.

The complainant did not accept the Commissioner’s preliminary view and provided further submissions. The complainant maintained that they were legally entitled to receive a copy of the disputed document but did not make any submissions that were relevant to the Commissioner’s consideration of whether the disputed document was exempt under clause

5(1)(e). After considering all of the information before her, including the complainant's further submissions, the Commissioner was not dissuaded from her preliminary view.

Clause 5(1)(e) provides that matter is exempt if its disclosure could reasonably be expected to endanger the life or physical safety of any person.

In *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 the Full Federal Court of Australia said, at page 190, that the words 'could reasonably be expected to' in the Commonwealth FOI Act were intended to receive their ordinary meaning. That is, they require a judgment to be made by the decision maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect the relevant outcome. The Commissioner observed that this was accepted as the correct approach in *Apache Northwest Pty Ltd v Department of Mines and Petroleum* [2012] WASCA 167.

Based on her examination of the disputed document, and taking all of the material before her into account – which included material provided by the agency that supported the agency's exemption claims – the Commissioner was satisfied that disclosure of the disputed document could reasonably be expected to endanger the life or physical safety of a person.

During the external review, the complainant made submissions claiming that disclosure of the disputed document was in the public interest. The exemption in clause 5(1)(e) is not subject to a public interest test, except in the very limited circumstances in which clause 5(4) applies. The Commissioner observed that, as the disputed document does not contain information of the kind described in clause 5(4)(a), it was not open to her to consider whether or not disclosure of the disputed document was in the public interest.

The Commissioner found that the disputed document was exempt under clause 5(1)(e) of Schedule 1 to the FOI Act and confirmed the agency's decision.