

Decision D0112023 – Published in note form only

Re McLerie and City of Melville [2023] WAICmr 11

Date of Decision: 21 September 2023

Freedom of Information Act 1992 (WA): Schedule 1, clause 14(1)(c)

In an access application dated 20 December 2019, Mark McLerie (**the complainant**) applied to the City of Melville (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to documents relating to a property owned by other individuals.

Following a series of subsequent events, including the identification of additional documents by the agency relating to the complainant’s access application, and arrangements agreed between the parties, the agency gave the complainant a notice of decision dated 15 September 2021. Among other things, the agency refused the complainant access to four documents under clause 14(1)(c) of Schedule 1 to the FOI Act (**clause 14(1)(c)**). Those four documents, consisting of email communications between the agency and the office of the Parliamentary Commissioner for Administrative Investigations (**the Ombudsman**), are the disputed documents in this matter.

The complainant sought internal review of the agency’s decision. By internal review decision dated 23 November 2021, the agency confirmed its initial decision to refuse the complainant access to the disputed documents under clause 14(1)(c).

On 28 November 2021, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency’s decision. Following further communications with the complainant and assessment of the matter, the Commissioner notified the parties on 14 September 2022 that she had decided to deal with the complainant’s application for external review as a complaint made under section 65 of the FOI Act.

On 13 July 2023, one of the Commissioner’s officers provided the complainant with her initial assessment of the matter. It was the officer’s assessment that the Commissioner was likely to consider, on the information then before this office, that the disputed documents are exempt under clause 14(1)(c). The complainant was invited to accept the assessment, or to provide submissions to the Commissioner. The complainant did not accept the officer’s assessment and made further submissions.

Clause 14(1)(c) provides that matter is exempt matter if it is matter of a kind mentioned in section 23(1) of the *Parliamentary Commissioner Act 1971 (WA)* (**PC Act**). Section 23(1) of the PC Act provides that:

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 by the Commissioner under this Act, shall not be disclosed, except —

- (a) for the purposes of the investigation and of any report or recommendations to be made thereon under this Act; or
- (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 Division 3B or section 22A, 22AA, 22B or 22C(2).

A claim for exemption under clause 14(1)(c) is satisfied once it is established that a document contains information of the kind described in section 23(1) of the PC Act: see *Re Helm and Department of Planning* [2016] WAICmr 9 (*Re Helm*) at [15].

The Acting Information Commissioner (**the A/Commissioner**) examined the disputed documents and considered all of the material before this office including the submissions made by the parties.

From her examination of the disputed documents, the A/Commissioner considered that it was evident from their content that the disputed documents relate to an investigation under the PC Act. On the material before her, the A/Commissioner was satisfied that the disputed documents consist of information obtained by the Ombudsman or his officers in the course of, or for the purpose of, an investigation under the PC Act. Therefore, the A/Commissioner was satisfied that the disputed documents consist of information of the kind described in section 23(1) of the PC Act and, as a result, that the disputed documents are exempt under clause 14(1)(c).

In his further submissions, the complainant asserted that the agency may have given the disputed documents to the Ombudsman to be able to claim exemption under clause 14(1)(c). As the disputed documents consist of communications between the agency and the Ombudsman's office, the A/Commissioner considered this allegation was misconceived and, in any event, was far-fetched. In this regard, the A/Commissioner referred to the comments of the former Commissioner at [24] in *Re Helm*, where he stated:

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.

The complainant also claimed that disclosure of the disputed documents is in the public interest. However, as there is no public interest limit on the exemption in clause 14(1)(c), the A/Commissioner noted that it was not open to her consider the complainant's submissions in this regard.

The complainant also made a number of other submissions that were not relevant to the issue of whether the disputed documents were exempt under clause 14(1)(c). As a result, the A/Commissioner did not consider those submissions.

The A/Commissioner confirmed the agency's decision and found that the disputed documents were exempt under clause 14(1)(c) of Schedule 1 to the FOI Act.