

**Decision D0122018 – Published in note form only**

***Re Adam and City of Wanneroo [2018] WAICmr 12***

**Date of Decision: 9 November 2018**

***Freedom of Information Act 1992 (WA): sections 26 and 27(2)(c); Schedule 1, clause 3(1)***

Mr Steven Adam (**the complainant**) applied to the City of Wanneroo (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to documents relating to complaints he had made to the agency regarding building applications lodged with the agency by a third party.

By notice of decision dated 19 December 2017, the agency decided to give the complainant access in full to certain documents; access to edited copies of documents; and to refuse access in full to a document.

On 28 December 2017, the complainant applied for internal review of the agency's decision. By letter dated 23 January 2018, the agency confirmed its initial decision.

By email dated 1 February 2018, the complainant applied to the Acting Information Commissioner (**the A/Commissioner**) for external review of the agency's decision. The complainant disputed the agency's decision to refuse access to documents under section 26 of the FOI Act on the basis that those documents cannot be found or do not exist; the agency's claim for exemption under clause 3(1) of Schedule 1 to the FOI Act; and the decision to provide access by way of inspection to a document on the basis that providing a copy would breach copyright in that document.

The agency was required to provide further information to the A/Commissioner regarding its searches to locate all the documents within the scope of the complainant's access application. Additional documents were identified and released to the complainant.

After considering all of the information before her, on 14 September 2018, the A/Commissioner provided the parties with a letter setting out her preliminary view of the complaint (**preliminary view**). The A/Commissioner was of the preliminary view that the agency's decision to, in effect, refuse access to additional documents under section 26 of the FOI Act was justified. The A/Commissioner was satisfied that the agency had taken all reasonable steps to find the documents the subject of the complainant's access application but that additional documents do not exist or cannot be found.

It was also the A/Commissioner's preliminary view that information deleted from documents under clause 3(1) is exempt; that copyright subsists in a report dated 24 August 2017 authored by a third party (**the Report**), therefore access should be given to the Report only by way of inspection.

In light of the A/Commissioner's preliminary view, the complainant was invited to reconsider his complaint or to provide the A/Commissioner with further submissions relevant to the issues for her determination. The complainant made further submissions with respect to the agency's decision under section 26 of the FOI Act.

Section 26 of the FOI Act provides that an agency may refuse access to a document if the agency is satisfied that all reasonable steps have been taken to find the document, and the agency is satisfied that the document is either in the agency's possession but cannot be found or does not exist. The A/Commissioner considers that, in dealing with section 26, the following questions must be answered. First, whether there are reasonable grounds to expect that the requested documents exist or should exist and second, whether the requested documents are, or should be, held by the agency. Where those questions are answered in the affirmative, the next question is whether the agency has taken all reasonable steps to find those documents.

The A/Commissioner considered that the complainant's further submissions provided no new information to show that the requested documents should exist. Therefore, the A/Commissioner was not dissuaded from her preliminary view in relation to the decision of the agency under section 26 of the FOI Act.

The A/Commissioner was satisfied that the information deleted from the Report would, if disclosed, reveal personal information, as defined in the FOI Act, about individuals other than the complainant. Therefore, the A/Commissioner considered that the deleted information was on its face exempt under clause 3(1). The A/Commissioner considered the application of the limit on the exemption in clause 3(6). In balancing the competing public interests, the A/Commissioner was of the view that the public interest in protecting the privacy of third parties outweighed the public interest in the complainant exercising his right of access in this case.

Therefore, the A/Commissioner was not dissuaded from her preliminary view in relation to the decision of the agency to delete information from documents under the exemption in clause 3(1) of Schedule 1 to the FOI Act.

Section 27(2)(c) of the FOI Act provides that, if an applicant has requested that access to a document be given in a particular way, the agency has to comply with the request unless giving access in that way would involve an infringement of copyright belonging to a person other than the State, in which case access may be given in some other way.

Although copyright belonging to a person other than the State is not an exemption under the FOI Act – nor is it a basis on which access to a document can be refused – it does have an effect in terms of the manner in which access to the document may be given: see *Re City of Subiaco and Subiaco Redevelopment Authority* [2009] WAICmr 23.

In the circumstances of this matter, the A/Commissioner was not dissuaded from her preliminary view that the Report would be subject to copyright.

Having reviewed all of the material before her, the A/Commissioner was not dissuaded from her preliminary view. Therefore, the A/Commissioner confirmed the decision of the agency to refuse access to documents under section 26 of the FOI Act; to delete information from the Report under clause 3(1) of Schedule 1 to the FOI Act; and to give access to the Report by way of inspection only.