

Decision D0122024 – Published in note form only

Re Malik and Main Roads Western Australia [2024] WAICmr 12

Date of Decision: 30 August 2024

Freedom of Information Act 1992 (WA): Schedule 1, clause 3

On 7 November 2022, Dalbir Singh Malik (**the complainant**) applied to Main Roads Western Australia (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to documents relating to the investigation of allegations the complainant made to the agency. Relevantly, the investigation was carried out by an external organisation and found that all but one of the complaints were not substantiated.

By notice of decision dated 23 November 2022, the agency refused the complainant access to two documents, referred to as the Draft Report and the Final Report, pursuant to clauses 11(1)(c) and 8(2) of Schedule 1 to the FOI Act. The complainant applied for internal review of the agency's decision and claimed that there were additional documents within the scope of his access application. On 13 December 2022, the agency confirmed its decision to refuse access to the Draft Report and the Final Report. The agency also refused access to additional documents, under section 26 of the FOI Act, on the basis that they did not exist.

The complainant contested the agency's internal review decision that no additional documents exist. On 25 January 2023, the agency purported to provide the complainant with an amended internal review decision. The agency's purported decision confirmed the decision to refuse access to the Draft Report and the Final Report and located one additional document, referred to as the Engagement Agreement (together, **the disputed documents**). The agency refused access to the Engagement Agreement, pursuant to clauses 11(1)(c), 3(1) and 4(2) of Schedule 1 to the FOI Act.

On 30 January 2023, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision to refuse access to the disputed documents. The Commissioner obtained the disputed documents from the agency, together with the FOI file maintained in respect of the access application.

During the external review, the agency gave the complainant edited access to the Engagement Agreement and informed the complainant that it considered that the Draft Report and Final Report are also exempt under clause 3(1) of Schedule 1 to the FOI Act (**clause 3(1)**).

The complainant was not satisfied with the access provided. The complainant claimed that the Draft Report and the Final Report were not exempt as claimed by the agency and that there was an additional document within the scope of his access application.

On 3 July 2024, the Acting Information Commissioner (**A/Commissioner**) considered all of the material before her and provided the parties with her preliminary view. In addition to providing her preliminary view as to whether there were further documents within the scope of the access application, the A/Commissioner was of the preliminary view that the Final Report is exempt under clause 3(1). In light of her view, it was not necessary to consider whether the Final Report was also exempt under clause 11(1)(c) and 8(2) as claimed by the agency.

The complainant did not accept the preliminary view that the Final Report (**the disputed document**) is exempt under clause 3(1) and provided further submissions. The complainant submitted that disclosure of the disputed document was in the public interest.

After considering all of the material before her, including the complainant's further submissions, the Commissioner agreed with the A/Commissioner's preliminary view.

Clause 3(1) provides that matter is exempt if its disclosure would reveal personal information about an individual (whether living or dead). Personal information is exempt under clause 3(1) subject to the application of the limits on the exemption set out in clauses 3(2) to 3(6). Relevantly, clause 3(6) provides that personal information will not be exempt if its disclosure would, on balance, be in the public interest. Under section 102(3) of the FOI Act, the complainant bears the onus of establishing that it would, on balance, be in the public interest to disclose personal information about other individuals.

Having examined the disputed document, the Commissioner was satisfied that it contained personal information, as defined in the FOI Act, and that the disputed document was on its face, exempt in its entirety under clause 3(1).

In considering whether disclosure of the personal information in the disputed document would, on balance, be in the public interest pursuant to clause 3(6), the Commissioner did not accept the complainant's submission that personal privacy is not applicable to individuals who are officers of government agencies. The Commissioner considered that, in circumstances where the personal information about an officer of an agency is not prescribed details under clauses 3(3) or 3(4), as was the case here, it is necessary to consider whether disclosure of the personal information would, on balance, be in the public interest.

The Commissioner considered the public interest in maintaining personal privacy is a strong one and may only be displaced by some other, strong public interest that requires the disclosure of personal information about one person to another. Further, in cases such as this, where allegations have been made to a government agency and the ensuing investigations have not resulted in formal findings in relation to those allegations, the Commissioner noted that there is a strong public interest in protecting the privacy of the persons the subject of the complaint: see *Re Ninan and Department of Commerce* [2012] WAICmr 31 at [80]; and *Re 'K' and Legal Practice Board* [2024] WAICmr 10.

In balancing the competing public interests, the Commissioner was not persuaded that the public interests favouring disclosure of the disputed document outweighed the strong public interest in the protection of personal privacy. The Commissioner therefore found that the limit on the exemption in clause 3(6) did not apply to the disputed document.

Accordingly, the Commissioner found that the disputed document is exempt under clause 3(1) of Schedule 1 to the FOI Act and varied the agency's decision.