

Decision D0132018 – Published in note form only

Re Palermo and Legal Profession Complaints Committee [2018] WAICmr 13

Date of Decision: 28 December 2018

Freedom of Information Act 1992 (WA): Sections 23(2) and 24; Schedule 1, clauses 3(1) and 3(6)

Anthony Palermo (**the complainant**) applied to the Legal Profession Complaints Committee (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to documents submitted to the agency by a named legal practitioner and members of her family following a complaint made to the agency by the complainant.

The agency refused the complainant access to the requested documents under section 23(2) of the FOI Act, on the ground that it is apparent from the nature of the documents as described in his access application that they would all be exempt under clause 3(1) Schedule 1 to the FOI Act (**clause 3(1)**). The agency confirmed its decision on internal review.

The complainant applied to the Office of the Information Commissioner for external review of the agency's decision. On 9 November 2018, after considering the material then before her, the Acting Information Commissioner (**the A/Commissioner**) provided the parties with her preliminary view of the matter. It was the A/Commissioner's preliminary view that the agency's decision to refuse the complainant access to the requested documents under section 23(2) of the FOI Act was justified.

Section 23(2) provides that an agency may refuse access to the requested documents without identifying any or all of them and without specifying the reason why matter in any particular document is claimed to be exempt matter if (a) it is apparent, from the nature of the documents as described in the access application, that all of the documents are exempt documents; and (b) there is no obligation under section 24 of the FOI Act to give access to an edited copy of any of the documents.

The A/Commissioner was of the view that the requirement in paragraph (a) of section 23(2) that 'all of the documents are exempt documents' indicates that it is not sufficient that all of the documents would be prima facie exempt. The wording of section 23(2)(a) is intended to ensure that it is apparent that all of the documents of the nature described in the access application are unconditionally exempt. This means that where an exemption clause has limits on the exemption, for an agency to find that all documents would be 'exempt documents' under section 23(2), requires a consideration of whether any relevant limits on an exemption apply.

The A/Commissioner observed that, by his access application, the complainant sought access to specific kinds of documents relating to a particular named individual and that the application was, in effect, a request for access to documents containing personal information about that named individual. The A/Commissioner was satisfied that, from the nature of the requested documents as described in the access application, any such documents would be prima facie exempt under clause 3(1) because disclosure would reveal personal information about individuals other than the complainant.

Noting that the documents must be unconditionally exempt for section 23(2)(a) to apply, the A/Commissioner considered whether any of the limits on the exemption in clauses 3(2)-3(6) would apply. The A/Commissioner considered that the only limit that could apply is clause 3(6); that is, whether disclosure would, on balance, be in the public interest.

In favour of disclosure, the A/Commissioner recognised a public interest in complainants having access to information explaining the basis of agencies' decision-making and in agencies' accountability for the manner in which they discharge their functions. However, on the material before her, the A/Commissioner was not persuaded that disclosure of the requested documents would further those interests, particularly where the agency had provided detailed information about its decision in its letters to the complainant.

The complainant submitted that he required the requested documents to continue with proceedings in the State Administrative Tribunal. However, on the facts in this case, the A/Commissioner considered that was a private interest rather than a public interest: see *Re 'V' and Legal Profession Complaints Committee* [2012] WAICmr 36 at [81]-[82].

Favouring non-disclosure of the requested documents, the A/Commissioner recognised there was a strong public interest in maintaining personal privacy and that public interest is a strong one that may only be displaced by some other strong public interest that requires the disclosure of personal information about an individual to another individual.

In weighing the public interest factors for and against disclosure, the A/Commissioner was not persuaded that the public interests favouring disclosure of the requested documents, should they exist, was sufficient to outweigh the strong public interest in the protection of the personal privacy of other individuals.

In considering the next question of whether the agency was obliged under section 24 of the FOI Act to give access to an edited copy of any of the requested documents, the A/Commissioner considered that when applicants apply for information about named individuals, it is generally not possible for any documents to be edited in a way so as not to disclose personal information about those individuals: see *Re Ninan and Department of Commerce* [2012] WAICmr 31 at [82]. The A/Commissioner considered that it would not be practicable to edit any documents of the kind described in the complainant's access application to delete exempt matter and that there was no obligation on the agency under section 24 to give access to an edited copy of any of the requested documents.

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 submissions made by the complainant did not raise any matters that were relevant to the issue for the A/Commissioner's determination in this matter. Having considered the complainant's submissions and reviewed all of the material before her, the A/Commissioner was not dissuaded from her preliminary view.

The A/Commissioner found that it is apparent from the nature of the documents as described in the complainant's access application that, if any such documents exist, they would be exempt under clause 3(1) and that there is no obligation on the agency under section 24 of the FOI Act to give access to an edited copy of any of those documents.

The A/Commissioner confirmed the agency's decision to refuse access to the requested documents under section 23(2) of the FOI Act.