

Decision D0132023 – Published in note form only

***Re Wren and WorkCover Western Australia Authority* [2023] WAICmr 13**

Date of Decision: 24 October 2023

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

On 6 June 2023, Nicholas Wren (**the complainant**) applied to the WorkCover Western Australia Authority, known as ‘WorkCover WA’ (**the agency**), under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to certain documents related to an investigation conducted by the agency into allegations against an officer of the agency (**the officer**) made by the complainant (**the disputed documents**).

By notice of decision dated 16 June 2023, the agency refused the complainant access to the disputed documents on the basis that they were exempt under clause 6(1) of Schedule 1 to the FOI Act (**clause 6(1)**).

As the decision was made by the agency’s principal officer, internal review was not available to the complainant, pursuant to section 39(3) of the FOI Act. On 31 July 2023, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency’s decision.

The Commissioner obtained the disputed documents from the agency, together with the FOI file maintained in respect of the access application. After considering the material then before the Commissioner, one of the Commissioner’s officers provided the complainant with her initial assessment of the matter, which was that the Commissioner was likely to consider that the disputed documents were exempt under clause 3(1) of Schedule 1 to the FOI Act (**clause 3(1)**).

The complainant did not accept the officer’s initial assessment and made further submissions. In particular, the complainant submitted that the Commissioner’s consideration should be limited to whether the disputed documents are exempt under clause 6(1), as claimed by the agency. The Commissioner was satisfied, having regard to the provisions in the FOI Act, including sections 76(1) and 76(2), that she was empowered to ‘stand in the shoes’ of the agency’s decision-maker and that her review was not constrained in the manner argued by the complainant. The Commissioner also noted that the Supreme Court of Western Australia concluded, in *Pearlman v WA A/ Information Commissioner* [2019] WASC 257, that the Commissioner is not bound to determine an external review application by having regard only to the reasons given by the original decision-maker: see [75] and [76].

The complainant submitted that the exemption in clause 3(1) did not apply to the disputed documents in light of the information the agency had already given him about its investigation of his complaint. However, the Commissioner observed that the right of access to documents under the FOI Act does not depend on ‘how much the applicant already knows or claims to know of the matter.’: *Police Force of Western Australia v Kelly and Anor* (1996) 17 WAR 9, at page 14.

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).

The Commissioner was satisfied that the disputed documents contain personal information about the complainant and officers of the agency, including specific information connected with the allegations made by the complainant against the officer. Therefore, the Commissioner accepted that the disputed documents were, on their face, exempt under clause 3(1). The Commissioner considered that the relevant limits on the exemption were clauses 3(2), 3(3) and 3(6).

The Commissioner was not persuaded that clause 3(2) applied because the personal information about the complainant in the disputed documents was inextricably intertwined with personal information about the officer. The Commissioner did not consider that the limit in clause 3(3) applied because the prescribed details of the officers of the agency who were responsible for investigating the complaint were inextricably intertwined with personal information about the officer. The Commissioner considered that the personal information about the officer, which related to the investigation of a complaint against the officer, went beyond things done by the officer in the course of performing or purporting to perform their functions or duties as an officer. Therefore, the Commissioner considered that disclosure of the personal information about the officer would reveal more than the prescribed details about the officer. The Commissioner found that the limit on the exemption in clause 3(3) did not apply to the disputed documents.

In weighing the public interest factors for and against disclosure pursuant to clause 3(6), the Commissioner considered that the public interest in people being able to access personal information about them held by a government agency, as recognised in section 21 of the FOI Act, operated in favour of disclosure. The Commissioner also recognised the public interest in ensuring the accountability of government agencies for the manner in which they deal with complaints, including the accountability and transparency of the agency in this case for the way in which it dealt with the complainant's complaint against an agency staff member. The Commissioner considered that this public interest had been satisfied by the information the agency had already provided to the complainant about the investigation of his complaint.

Weighing against disclosure, the Commissioner recognised the strong public interest in maintaining personal privacy, which may only be displaced by some other strong or compelling public interest or interests that require the disclosure of personal information about one person to another person. The Commissioner was not persuaded that the public interests favouring disclosure of the disputed documents to the complainant were sufficient to outweigh the strong public interest in the protection of the personal privacy of other individuals and, therefore, found that the limit on exemption in clause 3(6) did not apply.

The complainant submitted that the agency should have provided him with access to edited copies of the disputed documents with the personal information of the officer deleted. The Commissioner observed that the complainant had requested access to documents that, by their nature, contain a substantial amount of personal information about the officer. As the Commissioner found that all of that personal information is exempt under clause 3(1), she considered that the substantial editing required to delete the exempt information would render the disputed documents meaningless. Therefore, the Commissioner found that the agency was not obliged to give the complainant an edited copy of the disputed documents pursuant to section 24 of the FOI Act.

The Commissioner set aside the agency's decision and, in substitution, found that the disputed documents are exempt in full under clause 3(1) of Schedule 1 to the FOI Act.