

Decision D0142022 – Published in note form only

Re Vos and Western Australian Institute of Sport [2022] WAICmr 14

Date of Decision: 22 December 2022

Freedom of Information Act 1992 (WA): section 26; Schedule 1, clause 7(1)

On 15 February 2021, Lachlan Vos (**the complainant**) applied to the Western Australian Institute of Sport (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to a particular report (**Document 1**) and minutes from meetings of the agency's board (**the Board**) held on 3 February 2020 (**Document 3**), 22 June 2020 (**Document 4**) and 21 September 2020.

By notice of decision dated 1 April 2021, the agency refused access to Document 1 under clause 7(1) of Schedule 1 to the FOI Act (**clause 7(1)**) and gave the complainant access to edited copies of Documents 3 and 4 with information deleted under clauses 3(1), 7(1), 10(4) and 11(1)(d) of Schedule 1 to the FOI Act. The agency also gave the complainant access to an edited copy of emails containing a record of discussion that took place at the Board meeting held on 21 September 2020 and the out of session resolution following that meeting.

On 28 April 2021, the complainant applied to the agency for internal review of its decision. By letter dated 13 May 2021, the agency confirmed its initial decision.

On 31 May 2021, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision to refuse access to Document 1, give edited access to parts of Documents 3 and 4, and, in effect, refuse access to the minutes from the Board meeting held on 21 September 2020 (**Board Minutes**) under section 26 of the FOI Act. In particular, the complainant claimed that Document 1 was not exempt under clause 7(1) because the dominant purpose of the creation of that document was not a privileged purpose.

The Commissioner obtained the disputed documents from the agency, together with the FOI file maintained by the agency in respect of the access application. The Commissioner's office made further inquiries with the parties and attempted to resolve the matter informally.

On 6 October 2022, after considering the information then before her, the Commissioner provided the parties with her preliminary view of this matter. It was the Commissioner's preliminary view that Document 1 is exempt in full under clause 7(1) and that some, but not all, of the disputed information in Documents 3 and 4 is exempt under clause 7(1). The Commissioner was also of the preliminary view that the agency's decision to refuse access to the Board Minutes under section 26 is justified on the basis that the document was not created and therefore does not exist.

The parties were invited to accept the Commissioner's preliminary view or to provide additional submissions for her consideration. Both parties provided submissions in response to the preliminary view.

The agency made further submissions in support of its position that some of the disputed information in Document 3 is exempt under clause 7(1). The agency also advised that it

accepted the Commissioner's preliminary view that some of the disputed information in Document 4 was not exempt. As a result, the agency was invited to give the complainant access to that information as it was no longer in dispute.

Apart from advising that he did not accept the Commissioner's preliminary view, the complainant did not make any submissions regarding the matter that the Commissioner considered is exempt under clause 7(1) in Documents 1, 3 and 4.

With respect to the preliminary view that the Board Minutes do not exist, the complainant rejected the agency's claim that the Board Minutes do not exist, citing the agency's constitution, which requires that minutes of Board meetings should be recorded.

After considering all of the information before her, including the parties' further submissions, the Acting Commissioner (**A/Commissioner**) was not dissuaded from the Commissioner's preliminary view.

Clause 7(1) provides that matter is exempt if it would be privileged from production in legal proceeding on the grounds of legal professional privilege. Legal professional privilege protects from disclosure confidential communications between clients and their legal advisers, if those communications were made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in proceedings in a court: *Esso Australia Resources Ltd v The Commissioner of Taxation* (1999) 168 ALR 123.

Legal professional privilege also extends to other categories of documents including documents that contain a record of privileged communications between an agency and its legal advisers: *Trade Practices Commission v Sterling* (1979) 36 FLR 244 (***Sterling***).

The A/Commissioner was satisfied on the material before her, which included correspondence between the agency and its legal advisers, that the dominant purpose of the creation of Document 1 was to give or obtain legal advice and, therefore, that Document 1 was exempt under clause 7(1). In relation to the disputed information in Documents 3 and 4, the A/Commissioner considered that most of that information contained a record of privileged communications between the agency and its legal advisers and that it was therefore privileged in accordance with *Sterling*. Accordingly, the A/Commissioner considered that that information was exempt under clause 7(1).

As noted above, the agency maintained that some of the disputed information in Document 3 was exempt under clause 7(1). The A/Commissioner was not persuaded by the agency's claim that disclosure of that information would reveal a request for advice or the scope of the request for advice from a lawyer and found that it was not exempt under clause 7(1).

Section 26 of the FOI Act provides that an agency may refuse access to a document if all reasonable steps have been taken to find the document, and it is satisfied that the document is either in the agency's possession, but cannot be found or does not exist.

The agency advised the Commissioner's office that the Board meeting held on 21 September 2020 was not minuted, because there were no officers of the agency present at the meeting. The agency further advised that the emails it had provided to the complainant contained a record of the discussion at the meeting and the out of session resolution that followed. The A/Commissioner accepted the agency's advice and was satisfied that the Board Minutes were

not created and therefore do not exist. Although the complainant contended that the Commissioner's office should make further inquiries with the agency in relation to the Board Minutes, the A/Commissioner did not require the agency to undertake any further searches for the document because she accepted that it does not exist.

The Commissioner observed in her preliminary view letter that good record-keeping underpins the right of access to documents under the FOI Act. However, the Commissioner noted that it is not her role to examine in detail an agency's record-keeping practices, but rather to ensure that agencies are aware of their responsibilities under the FOI Act. That includes highlighting deficiencies in an agency's recordkeeping practices that may impact upon the proper functioning of the FOI Act, where such deficiencies are uncovered in the course of an external review: see *Re Cox and Town of Claremont* [2009] WAICmr 36 at [33]. Although such deficiencies were identified in this matter, the A/Commissioner was satisfied that this matter was not indicative of inadequate record-keeping practices at the agency generally.

The A/Commissioner set aside the agency's decision. In substitution, the A/Commissioner found that Document 1 is exempt in full under clause 7(1), and that some, but not all, of the disputed information in Documents 3 and 4 is exempt under clause 7(1). The A/Commissioner also found that the agency's decision to refuse access to the Board Minutes under section 26 of the FOI Act, on the ground that the Board Minutes do not exist, is justified.