

Decision D0172016 – Published in note form only

Re John Holland Pty Ltd and Department of Treasury [2016] WAICmr 17

Date of Decision: 2 December 2016

Freedom of Information Act 1992 (WA): Schedule 1, clauses 4(2), 5(1)(e), 5(1)(f) and 8(2)

On 8 March 2016 the Hon Mark McGowan MLA (**the access applicant**) applied to the Department of Treasury (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to documents relating to the commissioning and opening of the Perth Children's Hospital.

Some of the documents (**the disputed documents**) identified by the agency contained information about John Holland Pty Ltd (**the complainant**). On 10 June 2016 the agency sought the views of the complainant in relation to the information in the disputed documents about the complainant, to which the agency proposed to give the access applicant access (**the disputed information**). The complainant objected to the disclosure of the disputed information, as well as further information which was not about the complainant, on the ground that it is exempt under clauses 4(2), 5(1)(e), 5(1)(f) and 8(2) of Schedule 1 to the FOI Act.

On 30 June 2016 the agency decided to give the access applicant access to edited copies of the disputed documents. The agency provided the complainant with a complete schedule of the documents to which it had decided to give access, including those documents that did not contain information about the complainant. The agency additionally provided the complainant with a second tranche of documents that contained information about the complainant and to which the agency had decided to give the access applicant edited access.

The agency confirmed that it would give immediate access to those documents that did not contain information about the complainant to the access applicant.

As the decision was made by the agency's principal officer, internal review was not available under section 39(3) of the FOI Act.

By letter dated 29 July 2016 the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision.

Following receipt of the complaint, the Commissioner obtained the disputed documents from the agency together with the agency's FOI file maintained in respect of the access application.

As the complainant had not made submissions in relation to the additional documents provided to it with the agency's notice of decision, the complainant was invited to make submissions to the Commissioner on those documents. The complainant was also invited to make further submissions in relation to its claims that the initial documents provided by the agency are exempt. The complainant declined to do so.

In the course of the Commissioner's office dealing with the matter, the access applicant was joined as a party to the complaint.

On 27 October 2016, after considering the information before him, the Commissioner provided the parties with a letter setting out his preliminary view of the complaint. The Commissioner was of the view that the disputed information is not exempt under clauses 4(2), 5(1)(e), 5(1)(f) or clause 8(2) of Schedule 1 to the FOI Act.

Clause 4(2) provides that information is exempt if its disclosure would reveal information (other than trade secrets) that has a commercial value to a person and could reasonably be expected to destroy or diminish that commercial value.

The complainant did not provide sufficient information to persuade the Commissioner that the disputed information has a commercial value, despite repeated invitations for it to do so. Further, the Commissioner considered that even if the complainant were able to persuade him that the information did have a commercial value, the complainant had not provided sufficient information to show that disclosure of that information could reasonably be expected to destroy or diminish its value.

As the agency sought the views of the complainant as a third party pursuant to section 33 of the FOI Act, the Commissioner was not obliged to consider submissions in relation to clauses 5(1)(e), 5(1)(f) and 8(2). The Commissioner did, however, consider the submissions made by the complainant and decided that disclosure of the information could not be reasonably expected to endanger the life or physical safety of any person or the security of any property, as provided by clauses 5(1)(e) and 5(1)(f).

The Commissioner further considered that the agency had given the complainant no reason to believe that the information it provided to the agency was provided on a confidential basis, as provided by clause 8(2); additionally the Commissioner did not consider that disclosure of the disputed information could be reasonably expected to prejudice the future supply of information of that kind to the Government or to an agency.

The complainant was invited to withdraw its complaint or to provide the Commissioner with further submissions relevant to the matter for the Commissioner's determination. The complainant made no further submissions to the Commissioner other than to request the matter be suspended and the parties directed to conciliate the matter between themselves.

The Commissioner was of the view that the additional delay in giving effect to the complainant's request would prejudice the access applicant. Having reviewed all of the material before him, the Commissioner was not dissuaded from his preliminary view that the disputed information is not exempt under clauses 4(2), 5(1)(e), 5(1)(f) or 8(2) of Schedule 1 to the FOI Act. Accordingly the Commissioner confirmed the decision of the agency to give edited access to the documents.