

**Decision D0172017 – Published in note form only**

***Re Park and City of Nedlands [2017] WAICmr 17***

**Date of Decision: 30 June 2017**

***Freedom of Information Act 1992 (WA): Schedule 1, clause 6(1)***

On 5 August 2016 Mr Alan Park (**the complainant**) applied to the City of Nedlands (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to a copy of certain documents relating to the agency's draft Town Planning Scheme 3 (**TPS 3**) and draft Local Planning Strategy (**draft LPS**). Following email communications between the parties, the complainant agreed to amend the scope of his access application to certain categories of documents and to the deletion of all 'third party' information from the requested documents.

By notice of decision dated 19 September 2016 the agency identified 99 documents within the scope of the complainant's access application and decided to give the complainant access to 91 of those documents, edited to delete personal information about third parties as agreed by the complainant. The agency decided to refuse the complainant access to five documents on the ground they are exempt under clause 6 of Schedule 1 to the FOI Act (**the disputed documents**). The agency also refused the complainant access to one document under clause 7 of Schedule 1 to the FOI Act (**the clause 7 document**) and gave the complainant access to an edited copy of two documents on the ground the information deleted is outside the scope of the complainant's access application (**the edited documents**).

On 7 October 2016 the complainant applied for internal review of the agency's decision. By letter dated 24 October 2016 the agency confirmed its decision in respect of the disputed documents and the edited documents. The agency varied its decision to refuse access to the clause 7 document and instead gave him an edited copy of that document.

On 21 December 2016 the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision to refuse him access to the disputed documents and to give him access to an edited copy of the edited documents (together **the disputed matter**).

Following receipt of the complaint, the Commissioner obtained the disputed matter from the agency, together with the FOI file maintained by the agency in respect of the complainant's access application. After discussions with one of the Commissioner's officers, the complainant withdrew his complaint in respect of the edited documents, leaving only the agency's clause 6 exemption claims remaining in dispute.

Clause 6 provides that matter is exempt if its disclosure would reveal any opinion, advice or recommendation that has been obtained, prepared or recorded; or any consultation or deliberation that has taken place, in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency and would, on balance, be contrary to the public interest. Unlike the other exemption clauses set out in Schedule 1 to the FOI Act that are limited by a public interest test, in the case of a claim for exemption under clause 6(1), an access applicant is not required to demonstrate that disclosure of the requested matter would be in the public interest. Instead, the onus of establishing that its disclosure would, on

balance, be contrary to the public interest rests with the agency: see *Health Department of Western Australia v Australian Medical Association Ltd* [1999] WASCA 269 at [18].

On 19 May 2017, after considering the information before him, the Commissioner provided the parties with a letter setting out his preliminary view of the complaint. It was the Commissioner's preliminary view that the disputed documents – which consist of four internal agency emails and one email between the agency and the Department of Planning – are not exempt under clause 6(1) of Schedule 1 to the FOI Act.

Having examined the disputed documents, the Commissioner accepted that they contain opinion, advice or recommendations that has been obtained, prepared or recorded in the course of, or for the purpose of, the deliberative processes of the agency, the relevant deliberative processes being the agency's consideration of the draft TPS 3 and the draft LPS. However, the Commissioner was of the view that the agency had not established that the disclosure of the disputed documents would, on balance, be contrary to the public interest.

In light of the Commissioner's preliminary view, the agency was invited to withdraw its claims for exemption or, alternatively, to provide the Commissioner with further submissions to support its claim that the disputed documents are exempt under clause 6. The agency maintained its exemption claim and provided the Commissioner with further submissions in support of its position.

After considering all of the information before him, including the agency's further submissions, the Commissioner was not dissuaded from his preliminary view.

The Commissioner considered that the public interest in the transparency of the agency and accountability to its ratepayers for draft TPS 3 and draft LPS, which have both been adopted by the Council of the agency and forwarded to the Western Australian Planning Commission (WAPC), would be furthered by the disclosure of the disputed documents.

The Commissioner was of the view that, in favour of disclosure, there is a public interest in the community being informed of the opinions, advice and/or recommendations that have been obtained, prepared or recorded for the purposes of the deliberative processes of the agency in considering the draft TPS 3 and draft LPS.

The Commissioner was not persuaded on the material before him that the disclosure of any of the disputed documents would adversely affect the deliberative processes of the agency or the WAPC or that any other public interest would be harmed or adversely affected by disclosure of those documents such that it would, on balance, be contrary to the public interest to disclose them.

Accordingly, the Commissioner set aside the agency's decision and, in substitution, found that the disputed documents are not exempt under clause 6(1) of Schedule 1 to the FOI Act. The Commissioner also found that the agency was entitled to delete the names, job titles and email addresses of officers of an agency, wherever they appear in the disputed documents, as well as a small amount of other information in one of the documents, before releasing the disputed documents to the complainant, on the basis that that information is outside the scope of the complainant's access application.