

Decision D0172023 – Published in note form only

Re WA Justice Association and Mental Health Commission [2023] WAICmr 17

Date of Decision: 30 November 2023

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

In March 2022, the WA Justice Association (**the complainant**) applied to the Mental Health Commission (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to reports relating to the evaluation of the Mental Health Court diversion program (**the disputed documents**).

By decision dated 10 June 2022, the agency refused the complainant access to the disputed documents on the basis that they were exempt under clause 1(1)(b) of Schedule 1 to the FOI Act (**clause 1(1)(b)**).

The complainant applied for internal review of the agency’s decision and the agency confirmed its initial decision.

On 11 July 2022, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency’s decision. The agency provided the Commissioner with its FOI file maintained in respect of the access application, together with a copy of the disputed documents. Inquiries were made with the agency, which resulted in the agency providing the Commissioner with further documents in support of its decision.

On 10 August 2023, one of the Commissioner’s officers provided the complainant with an initial assessment of the matter, which was that the Commissioner was likely to be of the view, based on the information then before this office, that the disputed documents are exempt under clause 1(1)(b) as claimed by the agency.

The complainant did not accept the initial assessment and provided further submissions in response to the initial assessment, asserting that the terms ‘matter’ and ‘document’ had been conflated, when considering whether the disputed documents, as a whole, are exempt. The complainant submitted that the matter which is considered exempt under clause 1(1)(b) could be edited and the remainder of the disputed documents could be released.

Clause 1(1)(b) provides that matter is exempt matter if it contains policy options or recommendations prepared for possible submission to an Executive body. The term ‘Executive body’ is defined in clause 1(6) and includes Cabinet and a committee of Cabinet. The Expenditure Review Committee (**the ERC**) is a committee of Cabinet.

The Commissioner examined the disputed documents and was satisfied that they contain policy options or recommendations that were prepared for possible submission to the ERC.

In *Re Watson and Minister for Forestry* [2011] WAICmr 8, the former Information Commissioner considered that the reference in clause 1(1)(b) to ‘exempt matter’ is a reference to the document that contains policy options or recommendations prepared for possible submission to an Executive body: see [24] and [25]. The Commissioner agreed with that view and considered that, in this case, the entirety of the disputed documents is the

exempt matter and not just those parts of the documents which comprise the policy options or recommendations.

Therefore, the Commissioner was not persuaded by the complainant's submissions that the terms 'matter' and 'document' were conflated and found that the disputed documents are exempt in their entirety pursuant to clause 1(1)(b). As a result, the Commissioner considered it was not possible for the agency to give the complainant access to an edited copy of the disputed documents, pursuant to section 24 of the FOI Act.

The Commissioner considered whether the limit on the exemption in clause 1(5) applied to the disputed documents. The Commissioner was satisfied that the disputed documents were brought into existence for the purpose of submission for consideration by an Executive body, namely the ERC, and therefore that the limit on the exemption in clause 1(5) did not apply.

Accordingly, the Commissioner confirmed the agency's decision and found that the disputed documents were exempt under clause 1(1)(b) of Schedule 1 to the FOI Act.