

**Decision D0212017 – Published in note form only**

***Re Farina and Minister for Environment* [2017] WAICmr 21**

**Date of Decision: 30 November 2017**

***Freedom of Information Act 1992 (WA): section 76(1); Schedule 1, clauses 1(1) and 12(c); Glossary, clause 4(2).***

On 4 February 2016, Adele Farina MLC (**the complainant**) applied to the former Minister for Environment (**the former Minister**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to ‘documents relating to the new offices of the Department of Parks and Wildlife to be built on Koombana Drive in Bunbury.’

In a notice of decision dated 19 April 2016, the former Minister decided to grant the complainant access in full to 36 documents. The former Minister also relied on the exemptions in clauses 1(1) and 12(c) of Schedule 1 to the FOI Act to refuse access in full or in part to the other documents identified as falling within the scope of the complainant’s access application.

On 15 June 2016, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the former Minister’s decision to refuse access under clauses 1(1) and 12(c) (**the disputed information**); and, in effect, to refuse access to documents under section 26 of the FOI Act on the basis that those documents cannot be found or do not exist.

Following receipt of this complaint, the former Commissioner considered the information before him and requested further information from the former Minister to support his decision under clauses 1(1) and 12(c) and section 26 of the FOI Act. The complainant advised the former Commissioner that she no longer wished to pursue her complaint in relation to the decision of the former Minister to refuse access to documents under section 26 of the FOI Act.

On 11 March 2017, there was a change of government after a State Government election (**the election**). On 8 June 2017, the former Commissioner wrote to the complainant and the Minister for Environment (**the Minister**) setting out his preliminary view of the complaint, which was that the disputed information was exempt under clauses 1(1) and 12(c).

In the preliminary view, the Commissioner also noted that clause 4(2) of the Glossary to the FOI Act defines the documents of an agency where the agency is a Minister, as being documents ‘in the possession or under the control of the Minister in the Minister’s official capacity.’

The former Commissioner observed that section 12 of the *Interpretation Act 1984 (WA)*, defines the ‘Minister’ as follows:

*A reference in a written law to the Minister shall be construed – in the case of a reference in an Act, as a reference to the Minister of the Crown to whom the*

*administration of the Act, or the provision of the Act, in which or in respect of which the term is used, is for the time being committed by the Governor.*

The former Commissioner concluded that, following the election, it was likely that the documents requested by the complainant are no longer documents of the Minister, and so the FOI Act no longer applies to them.

The complainant did not accept the former Commissioner's preliminary view and made further submissions to support her position.

The A/Information Commissioner (**the A/Commissioner**) considered the complainant's submissions in response to the preliminary view and reviewed the matter. At the request of the A/Commissioner, the Minister advised that:

*[a]s the incumbent Minister for Environment I am not entitled to access documents from the previous government. I confirm that none of the documents within the scope of the complaint or listed in the schedule of documents are in my possession or control and I was not involved in the original FOI decision.*

For the reasons set out in the former Commissioner's preliminary view, the A/Commissioner agreed with the former Commissioner that the disputed information was exempt under clauses 1(1) and 12(c).

The A/Commissioner also considered that the FOI Act no longer applies to the requested documents. In particular, the A/Commissioner considered the decision of the Australian Freedom of Information Commissioner (**the FOI Commissioner**) in *Philip Morris Ltd and Treasurer* [2013] AICmr 88 (**PML**) which concerned the application of the *Freedom of Information Act 1982* (Cth) to documents where there is a change of Minister. In **PML** at [14] the FOI Commissioner concluded that an external review 'does not cease just because there is a change of Minister ... the review continues and the new Minister is the respondent':

*[15] But an FOI request cannot continue to be processed, and an IC review cannot continue to be undertaken, if (for some reason), the FOI Act no longer applies to the documents that are the subject of that request or that review.*

*[16] In this case, the documents that PML requested are no longer in the possession of the new Minister – the person (to adopt the words of the Acts Interpretation Act) who holds for the time being, and performs for the time being, the duties of the office (Treasurer) to which the FOI request was made. The documents requested are no longer 'official documents of a Minister.'*

*[17] It is not just that the new Treasurer cannot give PML access, under section 11A(3) of the FOI Act, to the requested documents because they are not in his possession. The documents are no longer subject to the FOI Act, so section 11A(3) does not apply.*

The A/Commissioner considered that decision, whilst not binding, was relevant and that those findings were persuasive.

Section 76(1)(b) of the FOI Act, provides that the Information Commissioner has, in addition to any other power, the power to decide any matter in relation to the access application or application for amendment that could, under this Act, have been decided by the agency.

Given the change of Government following the election, and that the Minister at the time of the complainant's access application and the application for external review is now no longer the Minister, the A/Commissioner found that the requested documents are no longer documents of the agency, being the Minister. As a result, the FOI Act did not apply to the requested documents.

Therefore, the A/Commissioner set aside the former Minister's decision. In substitution, the A/Commissioner found that the requested documents are not documents of the Minister. Therefore, the FOI Act did not apply to those documents.