

Decision D0252013 - Published in note form only

***Re McLerie and City of Melville* [2013] WAICmr25**

Date of Decision: 18 October 2013

Freedom of Information Act 1992: sections 27(1)(a) and (2)(c); Schedule 1, clause 3(1)

In December 2012 Mark McLerie and Margo Zimmer (**the complainants**) applied to the City of Melville (**the agency**) under the *Freedom of Information Act 1992* (**the FOI Act**) for access to documents relating to a dividing fence between their and a neighbour's property.

The agency gave the complainants access to edited copies of four documents. The agency refused the complainants access to four further documents (**the disputed documents**), that it claimed were subject to copyright. The complainants applied for internal review of the agency's decision and the agency confirmed its decision.

The complainants subsequently requested access to the disputed documents by inspection and the agency provided the complainants with access to the documents by inspection pursuant to s.27(1)(a) of the FOI Act.

In February 2013 the complainants applied to the Information 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 FOI file maintained by the agency in respect of the complainant's access application.

The Commissioner decided to deal with the matter in the first instance by requesting that the parties attend a conciliation conference. The conciliator heard submissions from both parties.

Following the conference the only matter in dispute was the way in which access to the disputed documents can be given. The agency had given the complainants a reasonable opportunity to inspect the disputed documents pursuant to s.27(1)(a) of the FOI Act. The complainants claimed to have the consent of the copyright holder to be given copies of the disputed documents.

After considering the information before him, the Commissioner provided the parties with his preliminary view of the complaint, which was that, without express written permission from the copyright holder, and since the complainants had been given a reasonable opportunity to inspect the documents, it was unlikely that he would be persuaded that the complainants should be given access to copies of the documents.

Although copyright belonging to a person other than the State is not a ground of exemption under the FOI Act – nor is it a basis on which access to a document can be refused – it does have an effect in terms of the manner in which access to the document may be given: see *re Zurich Bay Holdings Pty Ltd and City of Rockingham and Others* [2006] WAICmr 12 at [109].

The complainants submitted that the copyright holder consented to disclosure of the disputed documents. However the evidence provided by the complainants to establish this relied on old and ambiguous communications. The Commissioner was not persuaded that this amounted to effective consent.

The Commissioner found that the agency had given the complainants a reasonable opportunity to inspect the documents under s.27(1)(a) of the FOI Act and confirmed the agency's decision.