

Decision D0272008 - Published in note form only

Re Elphick and Department of Fisheries [2008] WAICmr 27

Date of Decision: 16 July 2008

Freedom of Information Act 1992: Section 26; Schedule 1, clause 3(1)
Fish Resources Management Act 1994: Section 250

The complainant applied to the Department of Fisheries ('the agency') for access under the *Freedom of Information Act 1992* ('the FOI Act') to documents relating to his fishing company.

In two notices of decision in September and November of 2007, the agency granted access in full to certain documents; access to edited copies of other documents; refused access to information in some documents under s.250 of the *Fish Resources Management Act 1994* ('the FRMA'); and refused access to some documents under s.26 of the FOI Act. On internal review, the agency refused the complainant access to documents under clause 3(1) (personal information), 4(3) (commercial or business information) and 7 (legal professional privilege) of Schedule 1 to the FOI Act; and confirmed its decision in relation to s.26 of the FOI Act and s.250 of the FRMA. In March 2008, the complainant applied to the A/Information Commissioner ('the A/Commissioner') for an external review of the agency's decision.

The A/Commissioner required the agency to produce its FOI file and the disputed documents. One of the A/Commissioner's officers made further inquiries with the agency in relation to the searches it had undertaken to locate the documents the subject of the access application and the agency's decision in relation to s.250 of the FRMA.

The officer advised the complainant that in her view, the decision of the agency to refuse access to certain documents under clause 7 of Schedule 1 to the FOI Act appeared to be justified. The complainant accepted that view and withdrew his complaint with respect to those documents.

In May 2008, the officer advised the complainant that it was her view that the decision of the agency to refuse access to certain information under clause 3(1) of Schedule 1 to the FOI Act; to refuse access to documents under s.26 of the FOI Act; and the decision of the agency in relation to s.250 of the FRMA; appeared justified.

In response, the complainant did not withdraw his complaint.

The A/Commissioner considered the complainant's further submissions. He found that the information deleted from the disputed documents would reveal personal information about third parties, if disclosed, and would therefore be *prima facie* exempt information under clause 3(1) of Schedule 1 to the FOI Act. It is well established that the FOI Act protects the privacy, rights and interests of third parties, and that a strong public interest would need to be demonstrated by the complainant to override the privacy interests of third parties. The complainant had not established such a strong countervailing public interest.

The A/Commissioner considered whether disclosure would, on balance, be in the public interest but was of the view that the complainant's interest in accessing the documents was primarily a personal interest; the complainant did not identify any public interests favouring disclosure; and the very strong public interest in protecting personal privacy was not outweighed by the public interests favouring disclosure in this instance.

The A/Commissioner concluded that the public interest in maintaining the privacy of third parties should prevail in this instance. Therefore, the agency was justified in refusing access to the deleted information. The A/Commissioner therefore confirmed the agency's decision in that regard.

The A/Commissioner also considered that the agency had taken all reasonable steps to find the requested documents and was satisfied that the documents could not be found or did not exist. The A/Commissioner confirmed the agency's decision to refuse access under s.26 of the FOI Act because the requested documents could not be found or do not exist.

Further, s.8(1) of the FOI Act expressly provides that access to documents is to be given under Parts 2 and 4 of the FOI Act despite any prohibitions or restrictions imposed by other enactments on the communication or divulging of information, whether enacted before or after the commencement of the FOI Act, unless there is an express statement in the enactment to the contrary. The A/Commissioner found an express statement to the contrary in s.250 of the FRMA.

The A/Commissioner considered the information provided by the agency and accepted that certain of the disputed documents contain information of the kind referred to in s.250 of the FRMA. The A/Commissioner was satisfied, therefore, that the provisions of the FOI Act do not apply to those documents. The A/Commissioner confirmed the agency's decision that the access provisions of the FOI Act do not apply to certain of the disputed documents by virtue of s.250 of the FRMA.