

Decision D0332010 – Published in note form only

Re Audio Visual Image’Nation Pty Ltd and Department of the Attorney General and Another
[2010] WAICmr 33

Date of decision: 14 December 2010

Freedom of Information Act 1992: sections 26 and 69; Schedule 1, clauses 3(1), 4(2) and 4(3)

In December 2008, the agency publicly advertised a request for suitable companies to tender for a contract to install an audiovisual system in the Central Law Courts in Perth. At the end of the tender process, the contract was awarded to Rutledge Engineering (QNW) Pty Ltd (‘Rutledge’). In April 2009, Audio Visual Image’Nation Pty Ltd (‘the complainant’) applied to the Department of the Attorney General (‘the agency’) under the *Freedom of Information Act 1992* (‘the FOI Act’) for access to certain documents relating to the tender process. In particular, the complainant sought access to the tender submitted by Rutledge (‘the Tender’), certain working papers relating to the assessment of the Tender (‘the Working Papers’) and the evaluation of the Tender (‘the Evaluation’).

The agency refused access to the Tender under clause 4(2) of Schedule 1 to the FOI Act; refused access to the Working Papers under s.26 of the FOI Act, on the ground that the documents could not be found or did not exist; and refused access to the Evaluation under clause 4(3) of Schedule 1 to the FOI Act. The agency’s decision was confirmed on internal review. Subsequently, on 28 July 2009, the complainant applied to the Information Commissioner for external review of the agency’s decision. In doing so, the complainant confirmed that it did not seek access to, among other things, information about Rutledge’s employees.

The Commissioner obtained the disputed documents from the agency, as well as the FOI file maintained by the agency for the purpose of the complainant’s access application. Rutledge objected to the disclosure of the disputed documents and was joined as a party to the complaint, in accordance with s.69(2) of the FOI Act. Rutledge also made submissions to the Commissioner claiming that the Tender is exempt under clauses 4(2) and 4(3) of Schedule 1 to the FOI Act. Following negotiations conducted by the Commissioner’s office, Rutledge consented to the agency disclosing an edited copy of the Tender to the complainant. After receiving that edited document, the complainant confirmed that it sought access to some but not all of the information deleted from the Tender (‘the disputed information’).

On 2 July 2010, after considering all of the material then before him, including further submissions made by the agency, the Commissioner provided the parties with a letter setting out his preliminary view of the matter, which was that the agency’s decision to refuse the complainant access to the Working Papers under s.26 of the FOI Act was justified; the Evaluation was not exempt under clause 4(3); the disputed information was not exempt under clause 4(2) or clause 4(3); some of the disputed information (including information about Rutledge’s employees) was outside the scope of the complaint and, in any event, would be exempt under clause 3(1) of Schedule 1 to the FOI Act; and the remainder of the disputed information was not exempt under clause 4(2) or clause 4(3).

The parties were invited to accept the Commissioner's preliminary view or provide him with further submissions in support of their respective positions before the matter was finalised by way of a formal determination.

The complainant accepted the Commissioner's preliminary view in respect of the Working Papers and withdrew that aspect of its complaint. However, the complainant submitted that certain information in the Tender about Rutledge's employees was not exempt under clause 3(1) because it was in the public interest to disclose it, for the reasons provided.

The agency accepted the Commissioner's preliminary view and withdrew its exemption claims. Rutledge made no further submissions. Although the complainant claimed that disclosure of certain information about Rutledge's employees was in the public interest, the complainant had expressly excluded information of that type from the scope of its application for external review. Accordingly, the Commissioner considered that information was outside the scope of the complaint and, consequently, he was not required to deal with it further by considering whether its disclosure was in the public interest.

As there was no new evidence before the Commissioner to cause him to reconsider his preliminary view, the Commissioner was not dissuaded from his preliminary view. On the information before him, the Commissioner was not persuaded that the disputed information has any commercial value in the sense contemplated by clause 4(2) or, even if it does, that it could be diminished or destroyed by its disclosure. Further, although the Commissioner was satisfied that the disclosure of the disputed information and the Evaluation would reveal information about Rutledge's business affairs – and therefore that the requirements of clause 4(3)(a) were satisfied – the Commissioner was not satisfied on the information before him that the disclosure of any of that information could reasonably be expected to have an adverse effect on Rutledge's business affairs or prejudice the future supply of information of the kind in question to the Government or to an agency as required by clause 4(3)(b). Accordingly, the Commissioner found that the disputed information was not exempt under either clause 4(2) or clause 4(3) and that the Evaluation was not exempt under clause 4(3) and set aside the agency's decision.