

**Decision D0032017 – Published in note form only**

***Re Appleton and Public Sector Commission [2017] WAICmr 3***

**Date of Decision: 27 January 2017**

***Freedom of Information Act 1992 (WA): section 26; Schedule 1, clauses 3 and 7***

On 21 December 2015, Mr Paul Appleton (**the complainant**) applied to the Public Sector Commission (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to certain types of documents that refer to him.

By notice of decision dated 3 February 2016 the agency decided to refuse the complainant access to three documents on the basis that they are exempt under clause 7 and to give the complainant access to edited copies of 23 documents, deleting information it claimed is exempt under clauses 3(1) and 7(1).

By letter dated 3 March 2016 and received by the agency on 10 March 2016, the complainant applied for internal review of the agency's decision. By letter dated 23 March 2016 the agency confirmed its initial decision, however it also identified seven additional documents. The agency provided the complainant with edited copies of the further seven documents, deleting information that it claims is exempt under clauses 3(1) and 7(1).

By letter dated 14 May 2016 the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision. Following receipt of the complaint, the Commissioner obtained copies of the disputed documents from the agency together with the agency's FOI file maintained in respect of the complainant's access application.

During the external review the complainant confirmed that he does not seek access to direct addresses or direct telephone numbers of third parties. The agency also withdrew its claim for exemption over the complainant's personal information; personal information of third parties that was previously sent to, or received by, the complainant; and the agency's generic facsimile number.

The agency was required to provide further information to the Commissioner regarding its searches to locate all documents within scope of the complainant's access application.

After considering the information before him, on 22 November 2016, the Commissioner provided the parties with a letter setting out his preliminary view of the complaint. It was the Commissioner's preliminary view that the agency's decision to refuse access to certain matter on the basis that it is exempt under clause 7 is justified. The Commissioner considered that three documents are correspondence from the agency to a third party giving or obtaining legal advice or assistance and the remaining deleted information in dispute records privileged communication between the agency and its legal advisers. The Commissioner considered this matter would be privileged from production in legal proceedings on the ground of legal professional privilege and is exempt under clause 7.

The Commissioner was also of the preliminary view that the agency's decision to refuse access to documents under section 26 of the FOI Act, on the basis that they cannot be

found or do not exist, was justified.

Section 26 of the FOI Act provides that an agency may refuse access to a document if all reasonable steps have been taken to locate the document, and it is satisfied that the document is either in the agency's possession but cannot be found, or does not exist. The Commissioner considers that, in dealing with section 26, the following questions must be answered. First, whether there are reasonable grounds to believe that the requested documents exist or should exist and are, or should be, held by the agency. Where those questions are answered in the affirmative, the next question is whether the agency has taken all reasonable steps to locate those documents.

After considering all of the information before him, the Commissioner was of the view that the agency had taken all reasonable steps to identify all documents of the kind requested by the complainant. The Commissioner did not require the agency to make any further inquiries or conduct any further searches.

The complainant was invited to withdraw his complaint or to provide the Commissioner with further submissions relevant to the matter for the Commissioner's determination. On 1 December 2016 the complainant did not withdraw his complaint and made further submissions. However, those submissions did not dissuade the Commissioner from his preliminary view. Having reviewed all of the material before him, including the complainant's further submissions, the Commissioner was not dissuaded from his preliminary view that the agency's decision was justified.

The Commissioner found that the disputed matter was exempt under clause 7 of Schedule 1 to the FOI Act, the agency's decision to refuse access to documents under section 26 of the FOI Act was justified, and confirmed the agency's decision.