

Decision D0102016 – Published in note form only

Re ‘O’ and Housing Authority [2016] WAICmr 10

Date of Decision: 16 June 2016

Freedom of Information Act 1992 (WA): section 26; Schedule 1, clause 5(1)(e)

On 6 May 2015, ‘O’ (**the complainant**) applied to the Housing Authority (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to documents.

For the time period 16 January 2015 from 11.50 am to about 12.30 pm, specifically CCTV recording of the complainant’s meeting with the Disruptive Behaviour Unit, NEM Region, Department of Housing, 8 Sudbury Street, Mirrabooka.

The agency identified one document within the scope of the application and refused the complainant access to the requested document on the ground that it was exempt under clause 5(1)(e) of Schedule 1 to the FOI Act. Clause 5(1)(e) provides that a document will be exempt if its disclosure could reasonably be expected to endanger the life or physical safety of a person.

However, the agency provided the complainant with the opportunity to view the requested document at the agency’s Head Office, which the complainant did on Monday 15 June 2015.

By letter dated 8 July 2015 the complainant applied for internal review of the agency’s decision and also claimed that additional documents within scope should exist. By letter dated 14 July 2015 the agency confirmed its initial decision and also stated that it had conducted further searches and pursuant to section 26 additional documents either could not be found or do not exist.

On 18 August 2015 the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency’s decision.

The agency’s file shows that an officer expressed concern to senior staff of the agency on two occasions about their personal safety when consulted regarding release of the disputed document.

Further, the footage disclosed that in the interview, the complainant raised his fists in threatening gestures, aggressively pointed his finger at the agency officers and generally comported himself in a manner likely to be perceived as threatening by any reasonable person. The Commissioner considered that the officers concerned showed considerable restraint in their dealings with the complainant. Their restraint however does not diminish a reasonable person’s natural apprehension after such an encounter.

The agency advised the Commissioner that the complainant had been advised to communicate with the agency only in writing or, in cases of disruptive behaviour being experienced, by contacting the agency’s reporting line on 1300 597 076. By letter to the complainant dated 20 January 2015 the agency stated in part ‘the behaviour displayed towards departmental staff during your recent visit to the Mirrabooka office, is unacceptable and of concern’. And further:

'To ensure that any further matters are managed appropriately and there is no possibility of miscommunication, you are required to direct any further inquiries in writing only to the Disruptive Behaviour Management Unit.'

By letter dated 19 February 2016 the complainant made further submissions to the Commissioner contending that other documents within scope should exist.

On 28 March 2016, the complainant wrote to the agency. The content of the letter is broadly that the agency failed to respond to points the complainant made in a letter to the agency dated 21 January 2016. The complainant indicated in the letter that he intended to commence legal action 'to recover [his] losses.' The second page of the letter was a full colour screen shot of an agency's officer's Facebook homepage clearly displaying photographs of the officer.

The Commissioner considered that this was not a neutral communication between the complainant and the agency but one which was intended to have an adverse or disquieting effect on the reader or the officer concerned.

Based on all the information before him, the Commissioner was satisfied that disclosure of the disputed document could reasonably be expected to endanger the physical safety of a person and therefore the document is exempt under clause 5(1)(e).

The Commissioner also considered whether the agency has satisfied its obligations under section 26 of the FOI Act.

Section 26 provides that an agency may refuse access to a document if it is satisfied that 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 considered 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 find the documents.

On 27 May 2016, after considering all the information then before him, the Commissioner advised the parties in writing that it was the Commissioner's preliminary view that the agency's decision to, in effect, refuse access to additional documents under section 26 of the FOI Act was justified. That is, the Commissioner was satisfied that all reasonable steps had been taken by the agency to locate the documents and that any additional documents are either in the agency's possession but cannot be found, or do not exist.

The complainant made further submissions in response to the Commissioner's preliminary view. However, after considering all the material before him, including those submissions, the Commissioner was not persuaded from his preliminary view.

Accordingly, the Commissioner confirmed the agency's decision that the requested document was exempt under clause 5(1)(e) of Schedule 1 to the FOI Act and its decision to refuse access to documents under section 26 of the FOI Act on the basis that those documents either cannot be found or do not exist.