

Decision D0112013 - Published in note form only

***Re Hyde and Minister for Planning* [2013] WAICmr 11**

Date of Decision: 30 April 2013

Freedom of Information Act 1992: Schedule 1, clause 12(c)

In April 2012, Mr John Hyde ('the complainant') applied to the Minister for Planning ('the Minister') under the *Freedom of Information Act 1992* ('the FOI Act') for access to all documents sent between the Minister and his ministerial office relating to a particular rezoning of land in the City of Nedlands and information relating to a property owned by the Minister.

By notice of decision dated 28 May 2012, the Minister gave the complainant access to 82 documents, in full and edited form, but refused access to four documents on the ground that those documents were exempt under clause 12(c) of Schedule 1 to the FOI Act. Clause 12(c) provides, in brief, that matter is exempt matter if its public disclosure would infringe the privileges of Parliament.

Parliamentary privilege comprises certain powers, privileges and immunities conferred on both Houses of Parliament, its committees, members and officers. The justification for the privilege is that, to work effectively, Parliament must have certain freedoms. These include the freedom to control its own proceedings so that it can operate independently and protect the integrity of its processes without interference from external sources.

As the decision was made by a Minister – who is effectively the principal officer of an agency that consists of one person – no internal review was available pursuant to s.39(3)(a) of the FOI Act. On 4 July 2012, the complainant applied to the Information Commissioner for external review of the Minister's decision to refuse access to one document, Document 14(a), which is an undated single-page document ('the disputed document').

On receipt of the complaint, the Commissioner obtained the original of the disputed document together with the Minister's FOI file maintained in relation to the complainant's access application. On 8 April 2013, the Commissioner wrote to the parties setting out his preliminary view of the complaint. It was the Commissioner's view that the disputed document was exempt under clause 12(c). In light of that, the complainant was invited to withdraw his complaint or provide submissions to support his contention that the disputed document was not exempt.

The complainant did not withdraw his complaint but made further submissions. In particular, the complainant claimed that the disputed document was not exempt because it was not prepared 'solely' for the Minister's use in Parliament. The complainant submitted that, as the Minister subsequently provided the disputed document to a staff member, the document was foreseen "*to have a life beyond (or before) parliament*" and therefore was not exempt under clause 12(c).

The Commissioner reviewed all of the information before him but was not dissuaded from his preliminary view. The Commissioner considered that in order to determine whether a document was subject to Parliamentary privilege, it was necessary to consider whether it was

prepared in the course of, or for the purposes of or incidental to, the transacting of business of a House or of a committee of Parliament: see *Re Saffioti and the Minister for Transport; Housing* [2012] WAICmr 10 at [26]-[34]. The Commissioner did not accept that consideration incorporated a 'sole purpose' test. In the present case, the Commissioner noted that there was evidence before him to establish that the disputed document was prepared to assist the Minister in responding to questions during proceedings in the Legislative Assembly. Therefore, the Commissioner was satisfied that the disputed document was prepared for the purposes of, or incidental to, the transacting of parliamentary business. The Commissioner considered the fact that the Minister also subsequently provided the disputed document to a staff member for information did not change the original purpose for which the disputed document was prepared.

The Commissioner considered that the public disclosure of the disputed document would infringe the privileges of Parliament because it would encroach on Parliament's right to control the publication of documents and information incidental to transacting the business of Parliament. Consequently, the Commissioner was satisfied that the disputed document was exempt under clause 12(c). In light of that, the Commissioner confirmed the Minister's decision to refuse access to the disputed document on the ground that it was exempt under clause 12(c) of Schedule 1 to the FOI Act.