

Decision D0152013 - Published in note form only

***Re Corr and City of Joondalup* [2013] WAICmr 15**

Date of Decision: 30 May 2013

Freedom of Information Act 1992: Schedule 1: clause 7(1); Glossary: clause 1

In April 2011, Mr Brian Corr ('the complainant') applied to the City of Joondalup ('the agency') under the *Freedom of Information Act 1992* ('the FOI Act') for access to specific documents relating to a dispute between the agency and a contractor.

After the complainant paid a requested deposit, in June 2011 the agency advised the complainant of its decision in relation to 121 documents that it had identified as coming within the scope of the access application. The agency gave the complainant access in full to 34 documents, access to edited copies of 47 documents and refused access to 40 documents ('the disputed documents'), citing exemptions under clauses 3(1), 4(2), 7(1) and 8(1) of Schedule 1 to the FOI Act and also claiming that some of the matter deleted was outside the scope of the access application. Following internal review, in July 2011 the agency confirmed its original decision.

In September 2011, the complainant applied to the Information Commissioner ('Commissioner') for external review of the agency's decision. Following receipt of the complaint, the Commissioner obtained the disputed documents from the agency, together with the FOI file maintained by the agency in respect of the complainant's access application.

In February 2012, January 2013 and May 2013, after considering the submissions by the parties, the disputed documents and the information before him at those times, the Commissioner advised the parties in writing of his preliminary and supplementary preliminary views of the complaint. Following the receipt of each letter from the Commissioner, the parties respectively withdrew some claims for exemption and some parts of the complaint which resulted in a reduced number of documents in dispute. Through that process and the progressive communications undertaken between staff at the Commissioner's office and the parties, the agency gave access in full and access to edited copies of documents which it had previously claimed were exempt or did not exist, including the metadata sought by the complainant. In addition, 28 further documents were located by the agency (following further searches required by the Commissioner and the discovery by the agency of a technical limitation within the search function of the agency's electronic document management system) that came within the scope of the access application. Access in full and access to edited copies of those documents was given to the complainant.

In March and April 2013 the Commissioner sought to schedule a case review meeting with the parties to determine whether or not the resolution of the remaining issues was possible. The agency failed to provide the Commissioner with the agency's available dates for attendance at such a meeting and the complainant later withdrew his agreement to attend a case review meeting.

As a result of the extensive enquiries and communications between the staff of the Commissioner's office, the Commissioner and the parties, the issues which remained in dispute for the Commissioner's determination related to the agency's decision to give access

to edited copies of 15 documents on the basis that the deleted matter was outside the scope of the access application and to refuse access in full to 20 documents under clause 7(1) of Schedule 1 to the FOI Act.

The Commissioner considered all the complainant's submissions and reviewed all of the information before him but was not dissuaded from his preliminary view that the matter deleted from the 15 documents was not within the scope of the access application and the 20 documents were exempt in full under clause 7(1) of Schedule 1 to the FOI Act.

The Commissioner considered the definition of 'document' in clause 1 of the Glossary to the FOI Act and found that a document which comes within the scope of an access application may only consist of part of a larger record. The remainder of the record could be deleted as outside the scope of the access application and it was not necessary for an agency to claim that the remainder of the record was exempt matter in order to justify its deletion. Accordingly, the Commissioner considered that, depending upon the particular description of the requested documents contained in an access application, an agency was entitled to delete part of a record which is outside the scope of the access application without relying on section 24 of the FOI Act.

The Commissioner reviewed the exact words used to describe the requested documents in the access application (which distinguished different locations from which the complainant requested the agency to obtain the requested documents) and found that the matter deleted from the 15 documents was not within the scope of the access application. As a result, the Commissioner confirmed the agency's decision to delete that matter as outside the scope of the access application.

Clause 7(1) provides that matter is exempt if it would be privileged from production in legal proceedings on the ground of legal professional privilege. The privilege does not attach to a piece of paper but to the communication itself: *Esso Australia Resources Ltd v The Commissioner of Taxation* (1999) 201 CLR 49; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) CLR 501.

The Commissioner was satisfied that the communications in the 20 documents would be privileged from production in legal proceedings on the ground of legal professional privilege. Consequently, the Commissioner confirmed the agency's decision to refuse access to those documents in full pursuant to clause 7(1) of Schedule 1 to the FOI Act.