

Decision D0292013 – Published in note form only

Re Hassell and Department of Local Government and Communities [2013] WAICmr 29

Date of Decision: 5 December 2013

Freedom of Information Act 1992: section 74(2); Schedule 1, clauses 3(1), 3(3) and 3(6)
Freedom of Information Regulations 1993: regulation 9(1)

William Hassell (**the complainant**) applied to the Department of Local Government and Communities (**the agency**) under the *Freedom of Information Act 1992* (**the FOI Act**) for access to documents concerning a meeting of the council of the City of Nedlands on 27 November 2012. The agency decided to refuse access to the requested documents on the grounds that the documents were exempt under clauses 5(1)(a) and 5(1)(b) of Schedule 1 to the FOI Act.

The complainant applied to the Information Commissioner for external review of the agency's decision. Following receipt of this complaint the Information Commissioner required the agency to produce the originals of the disputed documents and its FOI file maintained in respect of the complainant's access application. The Information Commissioner invited the agency and the complainant to provide submissions on the matters in dispute. The agency reconsidered its original decision and decided that part of Document 1 (**the disputed document**) was not exempt from disclosure.

The agency consulted with various third parties identified in the disputed document, including 'D' (**the third party**), about the release of the disputed document. In October 2013, the agency advised the third party that it had decided that, except for a small amount of personal information concerning the third party under clause 3(1), the disputed document was not exempt from disclosure (**the agency's decision**).

The complainant agreed with the agency's decision but the third party did not, asserting that the disputed document is exempt under clause 3 of the FOI Act. Therefore, the only issue in dispute is whether the disputed document is exempt under clause 3. In November 2013, after considering the information before him, the Information Commissioner advised the third party of his view of the complaint.

It was the Information Commissioner's view that, except for a small amount of personal information concerning the third party under clause 3(1) (**the edited matter**), the disputed document is not exempt from disclosure because any personal information in the disputed document about the third party amounts to prescribed details under clause 3(3) in relation to the third party's functions as a former local government councillor.

Clause 3(1) provides that matter is exempt if its disclosure would reveal information about an individual (whether living or dead). Clause 3(3) provides that information is not exempt under clause 3(1) merely because its disclosure would reveal prescribed details relating to an officer's or former officer's functions as an officer.

Regulation 9(1)(e) of the *Freedom of Information Regulations 1993* (**the Regulations**) provides that, in relation to an officer of an agency, prescribed details include "anything done by the person in the course of performing or purporting to perform the person's functions or duties as an officer..."

In light of the Information Commissioner's view, the third party was invited to be joined as a party to the complaint and to provide the Information Commissioner with further submissions relevant to the matters for his determination. The third party was joined as a party to the complaint. The third party provided further submissions and maintained that the disputed document was exempt under clause 3(1). The third party also asserted that disclosure of the document was not in the public interest as provided by clause 3(6).

Section 74(2) provides that the Information Commissioner must not include exempt matter in any decision. As the Information Commissioner considers that this obligation extends to matter that is claimed to be exempt, he is constrained from describing the disputed document in detail. However, the Information Commissioner noted that the agency's decision described the disputed document as an email to the agency dated 15 November 2012.

The Information Commissioner considered that the subject matter of the disputed document and the circumstances in which it was created by the third party indicated that the disputed document was written in the third party's former capacity as a local government councillor.

In *Re K and the City of Canning* [2012] WAICmr 3, at [29] the Information Commissioner concluded that a local government councillor was a 'member of an agency' and therefore an 'officer of the agency' where the agency was a local government.

Having examined the disputed document, the Information Commissioner considered that, except for the edited matter, the information in the disputed document would do no more than 'merely' reveal prescribed details about the third party.

In *Re K and the City of Canning*, at [38] the Information Commissioner confirmed that "matter that is not exempt under clause 3(3) – being prescribed details – is not subject to consideration about whether or not disclosure is in the public interest. The public interest referred to in clause 3(6) cannot result in a matter that is otherwise not exempt, becoming exempt." Therefore, it is not necessary to consider whether disclosure is in the public interest.

The Information Commissioner considered all of the material before him and was satisfied that except for the edited matter, personal information about the third party in the disputed document amounted to prescribed details as provided by clause 3(3). Therefore, except for the edited matter, the disputed document was not exempt.

As a result, the Information Commissioner confirmed the agency's decision.