

Decision D0022024 – Published in note form only

Re Macnish and City of Busselton [2024] WAICmr 2

Date of Decision: 14 February 2024

Freedom of Information Act 1992 (WA): Schedule 1, clauses 5(1)(c) and 7(1)

In February 2022, Andrew Macnish (**the complainant**) applied to the City of Busselton (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to documents relating to legal advice sought and received by the agency and the creation of an excerpt of a specific document, which the agency previously provided to him.

By decision dated 19 April 2022, the agency refused the complainant access to four documents (**the disputed documents**) on the basis that Documents 1 and 2 were exempt under clause 7(1) of Schedule 1 to the FOI Act (**clause 7(1)**) and Documents 3 and 4 were exempt under clause 5(1)(c) of Schedule 1 to the FOI Act (**clause 5(1)(c)**).

The complainant applied for internal review of the agency's decision and the agency confirmed its initial decision.

On 19 May 2022, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision. The agency provided the Commissioner with its FOI file maintained in respect of the access application, together with a copy of the disputed documents.

On 1 December 2023, the Commissioner provided the parties with her preliminary view of the matter, which was that, based on the information then before this office, Documents 1 and 2 were exempt under clause 7(1) and Documents 3 and 4 were exempt under clause 5(1)(c), as claimed by the agency.

The complainant did not accept the Commissioner's preliminary view and provided further submissions. Those submissions did not materially address the application of the exemptions in clause 7(1) and clause 5(1)(c) to the disputed documents. After considering all of the material before her, the Commissioner was not dissuaded from her preliminary view.

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 grounds upon which a document is subject to legal professional privilege are fairly well settled in Australian common law. In brief, legal professional privilege protects from disclosure confidential communications between clients and their legal advisers, if those communications were made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in proceedings in a court: *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 (***Esso***).

Document 1 consisted of an email from the agency to an external legal adviser with attachments and Document 2 consisted of a letter from the agency's external legal adviser to the agency. The Commissioner was satisfied that Documents 1 and 2 were confidential communications between the agency and its external legal adviser made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, as described in

Esso. As a result, the Commissioner was satisfied that Documents 1 and 2 would be privileged from production in legal proceedings on the ground of legal professional privilege and found that they were, therefore, exempt under clause 7(1).

Clause 5(1)(c) provides that matter is exempt if its disclosure could reasonably be expected to enable the existence, or non-existence, or identity of any confidential source of information, in relation to the enforcement or administration of the law, to be discovered. For a document to be exempt under clause 5(1)(c), there are three requirements that must be established: the source of information must be confidential; the information given must relate to the enforcement or the administration of the law; and it must be shown that disclosure could reasonably be expected to enable the existence or identity of that confidential source to be discovered: *Re Styles and the City of Gosnells* [1996] WAICmr 54 at [15].

The Commissioner observed that the requirement of confidentiality in clause 5(1)(c) relates to the nature of the source, rather than the nature of the information and that the information supplied from a confidential source need not be confidential: see *Re Bennett & Philp Pty Ltd and Gold Corporation* [2019] WAICmr 1 at [126]. The Commissioner noted that the possibility that a confidential source may, at some time in the future, lose its confidentiality does not render that source any less confidential at the time the information is provided: *Re C and Department for Community Development* [1994] WAICmr 18 at [47].

Document 3 was the original document of which the agency had previously provided the complainant an excerpt (in response to an earlier access application) and Document 4 was an email attaching a copy of Document 3. On the material before her, the Commissioner was satisfied that the disclosure of Documents 3 and 4 could reasonably be expected to enable the identity of a confidential source of information in relation to the enforcement or administration of the law to be discovered. Therefore, the Commissioner found that those documents were exempt under clause 5(1)(c). The Commissioner's obligations under section 74 of the FOI Act not to disclose exempt matter limited the detail she could provide for her reasons for this finding.

In response to the Commissioner's preliminary view, the complainant queried the number of documents identified by the agency within the scope of his access application. The Commissioner's office subsequently made further inquiries with the agency, which resulted in the agency undertaking additional searches and providing the Commissioner with further documents related to Document 3 (**the further documents**).

After considering the further documents, and the scope of the complainant's access application, the Commissioner concluded that the further documents were outside the scope of the complainant's access application and therefore did not consider those documents further.

The Commissioner found that Documents 1 and 2 were exempt under clause 7(1) of Schedule 1 to the FOI Act and that Documents 3 and 4 were exempt under clause 5(1)(c) of Schedule 1 to the FOI Act. Accordingly, the Commissioner confirmed the agency's decision.