

Decision D0162014 – Published in note form only

Re Walley and Department of Aboriginal Affairs [2014] WAICmr 16

Date of Decision: 13 August 2014

Freedom of Information Act 1992: Schedule 1, clause 3

On 2 April 2013, Trevor Lewis Walley (**the complainant**) applied to the Department of Aboriginal Affairs, formerly known as the Department of Indigenous Affairs (**the agency**), under the *Freedom of Information Act 1992* (**the FOI Act**) for access to the Aboriginal Heritage Survey Report of the Keralup Landholdings (**the report**).

By notice of decision dated 1 May 2013, the agency advised the complainant that it had identified two versions of the report. It gave the complainant access by way of inspection to one version of the report – the open report – on the basis that it was subject to copyright. The agency refused the complainant access to the other version of the report (**the restricted report**) on the basis that it was exempt under clause 8(2) of Schedule 1 to the FOI Act. The complainant applied for internal review of the agency's decision to refuse him access to the restricted report. The agency confirmed its decision on internal review.

On 11 June 2013, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision. Following receipt of the complaint, the Commissioner obtained the restricted report from the agency, together with the FOI file maintained by the agency in respect of the complainant's access application.

Following discussions with one of the Commissioner's officers, the agency withdrew its claim that the restricted report was exempt under clause 8(2) and proposed to give the complainant access to it in full. The Commissioner invited the agency to give effect to its amended position subject to sections 32 and 33 of the FOI Act, which required the agency to take such steps as are reasonably practicable to obtain the views of third parties before giving access to personal or business information about those third parties contained in the restricted report. As a result, a number of third parties made submissions to the Commissioner objecting to the disclosure of the restricted report (**the third parties**). However, none of them sought to be joined as parties to the complaint, which they were entitled to do under section 69(2) of the FOI Act.

In April 2014, after considering the information before him, including submissions made by the agency during the external review process that the restricted report was subject to copyright, the Commissioner provided the complainant, the agency and the third parties with a letter setting out his preliminary view of the complaint. It was the Commissioner's preliminary view that the restricted report contained some information that is exempt under clause 3(1) of the FOI Act (**the disputed information**); that the remainder of the restricted report was not exempt under either clause 3 or clause 8(2); and that giving the complainant access to an edited copy of the restricted report would not infringe copyright belonging to a person other than the State.

The agency, the complainant and the third parties were invited to accept the Commissioner's preliminary view or to make further submissions. The agency accepted the Commissioner's preliminary view. None of the third parties made submissions in response to the preliminary

view nor did any of them seek to be joined as a party to the complaint. The complainant did not accept the Commissioner's preliminary view that the disputed information is exempt under clause 3. On that basis the only information remaining in dispute for the Commissioner's determination was whether the disputed information was exempt under clause 3(1) of Schedule 1 to the FOI Act.

The complainant made a number of submissions that the disputed information was not exempt under clause 3 on the basis that it did not consist of personal information. However, the Commissioner considered that those submissions did not relate to the definition of 'personal information' as set out in the Glossary to the FOI Act. In this case, the disputed information consisted of descriptions of a number of individuals, their relationship to other individuals and information about those individuals provided to the writers of the restricted report. The Commissioner was satisfied that disclosure of the disputed information would reveal information or opinion from which the identities of those individuals could reasonably be ascertained. Accordingly, the Commissioner was satisfied that the disputed information consisted of personal information that is prima facie exempt under clause 3(1).

The Commissioner considered the complainant's submissions about the public interests in favour of disclosure of the disputed information and the application of the limit on the exemption in clause 3(6). The Commissioner considered that the public interests identified by the complainant, including the accountability of the agency for its decision making, would be substantially satisfied by the disclosure of an edited copy of the restricted report with the disputed information deleted. The Commissioner recognised a strong public interest in maintaining the privacy of individuals. In balancing the competing public interests for and against disclosure of the disputed information, the Commissioner found that the public interests against disclosure of the disputed information outweighed those in favour of disclosure.

Accordingly, the Commissioner found that the disputed information contained in the restricted report was exempt under clause 3(1) of Schedule 1 to the FOI Act and varied the agency's decision.