

Decision D0012026 – Published in note form only

Re ‘E’ and Department of Justice – [2026] WAICmr 1

Date of Decision: 6 March 2026

Freedom of Information Act 1992 (WA): Schedule 1, clause 3(1); section 23(2)

For the reasons given to the parties and summarised below, the Information Commissioner (**the Commissioner**) set aside the decision of the Department of Justice (**the agency**) to refuse ‘E’ (**the complainant**) access to the requested documents under section 23(2) of the *Freedom of Information Act 1992 (FOI Act)*. In substitution, the Commissioner found the requested document is exempt in full under clause 3(1) of Schedule 1 to the FOI Act (**clause 3(1)**). The Commissioner decided not to identify the complainant by name to protect their privacy in the circumstances of this matter.

On 1 March 2024 the complainant applied to the agency under the FOI Act for access to certain documents (emails or complaints from any third party) containing their personal information. The complainant agreed to the removal of third-party personal information from the documents.

As the agency did not give the complainant a notice of decision within the ‘permitted period’ under section 13(3) of the FOI Act, it was deemed to have refused access to the requested documents. The complainant sought internal review of the agency’s deemed refusal decision. The agency did not give the complainant an internal review decision within the period allowed by section 43(2) of the FOI Act and was therefore taken to have confirmed the deemed decision to refuse access.

On 29 May 2024 the complainant applied to the former Information Commissioner (**the former Commissioner**) for external review of the agency’s deemed refusal decision. The former Commissioner required the agency to complete the decision-making process and provide the complainant with its decision on access to the requested documents.

By decision dated 19 June 2024, the agency refused access to the requested documents under section 23(2) of the FOI Act. That section permits an agency to refuse access to requested documents without having identified any of them and without specifying the reason why matter in those documents is exempt if certain requirements are met. The agency relied on section 23(2) to refuse access on the basis:

- it was apparent from the nature of the documents as described in the access application that they contained the personal information of third parties, which is exempt under clause 3(1); and
- the agency was not obliged under section 24 of the FOI Act to give the complainant copies of any documents edited to remove the exempt information.

On 14 September 2024 the complainant confirmed they sought external review of the agency's decision.

Section 76(1) of the FOI Act provides the Commissioner may decide any matter relating to an access application that the agency could have decided. After considering the information then before her, the Acting Information Access Deputy Commissioner (**the A/FOI Deputy Commissioner**) formed the preliminary view the requested documents are exempt under clause 3(1). The complainant did not accept the A/FOI Deputy Commissioner's view and made further submissions.

The Commissioner then considered the material before her including the agency's and complainant's submissions. The Commissioner was not satisfied the agency's claim under section 23(2) was supported as it was not apparent from the nature of the requested documents as described in the access application that the documents are exempt under clause 3(1).

After examining the documents the agency had produced to her office, the Commissioner considered there was only one document within the scope of the access application (**the requested document**).

The Commissioner examined the requested document and was satisfied it contained, on its face, exempt matter under clause 3(1). Clause 3(1) provides matter is exempt if its disclosure would reveal personal information about an individual (including the complainant and third parties). The Commissioner considered the only relevant limits on the clause 3(1) exemption that may apply to the requested document were clauses 3(2) and 3(6).

Under clause 3(2), matter is not exempt under clause 3(1) merely because its disclosure would reveal personal information about the applicant (that is, the complainant). In this case, the Commissioner considered it was not possible to separate the personal information of the complainant from the personal information of others contained in the requested document. As a result, the disclosure of the complainant's personal information would do more than 'merely' reveal personal information about the complainant. Accordingly, clause 3(2) did not apply.

Under clause 3(6), matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest.

In weighing the public interest factors for and against disclosure, the Commissioner considered the public interest in people accessing the personal information a government agency holds about them, as recognised in section 21 of the FOI Act, favoured disclosure.

The complainant submitted they required the requested document for a tribunal proceeding to which they were a party in order to demonstrate the opposing party is in contempt of the tribunal. The complainant submitted it is in the public interest for the requested document to be disclosed to them to allow the fair and just determination of their tribunal matter and for the maintenance of confidence in the administration of justice.

The Commissioner was of the view the submission was misconceived. She considered the public interest in courts and tribunals having access to the material required to fairly and justly determine matters is met by the powers and procedures available to courts and tribunals. For example, they can issue subpoenas to require the production of documents or the attendance of witnesses.

The Commissioner noted it is well established disclosure of information under the FOI Act is disclosure to the world at large (see *Public Transport Authority* [2018] WASC 47 at [71]), rather than only to the particular access applicant.

Weighing against disclosure, the Commissioner recognised the strong public interest in upholding privacy. The Commissioner noted this public interest is recognised by the inclusion in the FOI Act of the exemption in clause 3(1) and expressed the view it may only be displaced by some other strong or compelling public interest or interests that require the disclosure of personal information about one person to another person.

Having weighed the competing public interests, the Commissioner did not consider those favouring disclosure outweighed the public interests against disclosure. Therefore, the Commissioner was not persuaded disclosure of the requested document would, on balance, be in the public interest and found clause 3(6) did not apply.

Accordingly, the Commissioner found the requested document is exempt under clause 3(1) of Schedule 1 to the FOI Act because its disclosure would reveal personal information, and no limitations apply to that exemption.