

Decision D0142024 – Published in note form only

***Re Wong and Department of Local Government, Sport and Cultural Industries [2024]*
WAICmr 14**

Date of Decision: 30 October 2024

Freedom of Information Act 1992 (WA): Schedule 1, clause 8(2)

On 1 September 2022, Mr Stephen Wong (**the complainant**) applied to the Department of Local Government, Sport and Cultural Industries (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to documents relating to the data for the weigh-in weights for competitors in combat sports, including the secondary weigh-in weights.

By notice of decision dated 13 October 2022, the agency decided to give the complainant access to edited copies of two documents (**the disputed documents**) deleting information under clauses 3(1) and 5(1)(e) of Schedule 1 to the FOI Act. The agency claimed the deleted information was exempt under clause 3(1) because it was personal information about people other than the complainant; and under clause 5(1)(e), because the agency considered that disclosure of the deleted information could reasonably be expected to endanger the life or physical safety of any person.

The complainant sought internal review of the agency's decision to delete the secondary weigh-in weights of each individual competitor (**the disputed information**) on the ground that information was exempt under clause 5(1)(e). By internal review decision dated 7 November 2022, the agency confirmed its initial decision.

On 15 November 2022, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision. The Commissioner obtained the disputed documents from the agency, together with the FOI file maintained by the agency in respect of the access application.

The Commissioner's office made inquiries with the agency, obtaining further information. As a result of those inquiries, the agency withdrew its claim for exemption under clause 5(1)(e). However, the agency instead claimed that the disputed information is exempt under clauses 3(1), 8(1), 8(2) and 10(4) of Schedule 1 to the FOI Act.

On 20 June 2024, one of the Commissioner's officers provided the parties with their assessment of the matter. It was the officer's assessment that the Commissioner was likely to be of the view, based on the information before her, that the disputed information is exempt under clause 8(2) of Schedule 1 to the FOI Act (**clause 8(2)**).

The complainant did not accept the officer's assessment and provided further submissions. The Commissioner reviewed all the material before her and agreed with her officer's assessment.

The complainant submitted that it was not possible to identify individual competitors by the disclosure of the disputed information, being the second weigh-in weight of an individual competitor. The complainant also submitted that, as individual competitors already disclose

their official weigh-in weights to the ‘world at large’, disclosure of the disputed information would not impact the ability to obtain such information in the future.

In summary, the agency submitted the disputed information was obtained in confidence, pursuant to an assurance it would be kept in confidence, and disclosing the disputed information would have a chilling effect on information of that kind being able to be collected in the future. The agency also submitted, in effect, that given the disputed information was collected for the purpose of understanding and deterring the dangerous practice of ‘weight cutting’ in combat sports, it was not in the public interest for people to be deterred from providing information of that kind to an agency.

Clause 8, insofar as it is relevant, provides as follows:

- (2) Matter is exempt matter if its disclosure –
 - (a) would reveal information of a confidential nature obtained in confidence; and
 - (b) could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.
- ...
- (4) Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest.

Clause 8(2)(a)

Information is inherently confidential if it is not in the public domain: *Re Read and Public Service Commission* [1994] WAICmr 1 at [28]. To have been ‘obtained in confidence’, the disputed information must have been both given and received on the basis of either an express or implied understanding of confidence: *Re Kimberley Diamond Company NL and Department for Resources Development and Another* [2000] WAICmr 51.

From her examination of the disputed documents, the Commissioner was satisfied the disputed information comprised the weights of competitors prior to combat sports competitions and that this information was inherently confidential. The Commissioner also accepted the agency’s submissions that competitors were given an assurance of confidence prior to agreeing to provide the disputed information. The Commissioner was therefore satisfied that disclosure of the disputed information would reveal confidential information obtained in confidence.

Clause 8(2)(b)

The Commissioner then considered whether disclosure of the disputed information could reasonably be expected to prejudice the future supply of information of that kind to the Government or the agency.

The Commissioner observed that the phrase ‘could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency’ applies not to whether, in this case, competitors could reasonably be expected to refuse to supply secondary weigh-in weights in the future but to whether disclosure could reasonably be expected generally to prejudice the future supply of such information to the Government or to an

agency: *Re Apache Northwest Pty Ltd and Department of Mines and Petroleum and Anor* [2010] WAICmr 35 at [123]; *Gahan v City of Stirling, Re* [1994] WAICmr 19 at [23].

The Commissioner accepted that the collection of the disputed information is inherently sensitive and that contestants may be reluctant to provide secondary weigh-in data if they were not confident it would be kept confidential. After examining all of the information before her, the Commissioner accepted that the future supply of similarly sensitive information, particularly where the information can only be obtained by voluntary supply, would be compromised by the disclosure of the disputed information. The Commissioner was therefore satisfied that disclosure of the disputed information could reasonably be expected generally to prejudice the future supply of such information to the Government or to an agency.

Clause 8(4)

The Commissioner then considered the limit on the exemption in clause 8(4), which provides matter is not exempt under clause 8(2) if its disclosure would, on balance, be in the public interest. Under section 102(3) of the FOI Act, the onus was on the complainant, as the access applicant, to establish that disclosure of the disputed information would, on balance, be in the public interest.

It is well established that disclosure of information under the FOI Act is disclosure to the world at large as no restrictions or conditions can be placed upon the release of documents under the FOI Act: see *Public Transport Authority* [2018] WASC 47 at [71]. Accordingly, when considering whether or not to disclose documents under the FOI Act, the effects of disclosure are generally considered as though disclosure were to the world at large, rather than only to the particular access applicant.

In favour of disclosure, the Commissioner recognised the public interest in the accountability of agencies for the manner in which they discharge their functions and obligations. The Commissioner also recognised public interests in the actions and decisions of agencies being as transparent as possible and in the public having confidence that agencies properly perform their functions including, in this case, regulatory functions.

Weighing against disclosure, the Commissioner recognised there is a public interest in upholding agencies' assurances of confidentiality, if they are reasonably and properly made. The Commissioner also considered there is a public interest in agencies being able to collect sensitive information in a confidential manner, including where that may only be done voluntarily and particularly where the purpose of collection is to use that information to address issues of health and safety.

In balancing the competing public interests for and against disclosure, the Commissioner was not persuaded that disclosure of the disputed information would, on balance, be in the public interest and found that the limit on the exemption in clause 8(4) did not apply.

Accordingly, the Commissioner found that the disputed information is exempt under clause 8(2) of Schedule 1 to the FOI Act and varied the agency's decision. In light of that finding, it was not necessary for the Commissioner to consider whether the disputed information is also exempt under any of the other exemption clauses claimed by the agency and she did not do so.