

**OFFICE OF THE INFORMATION
COMMISSIONER (W.A.)**

**File Refs: F2009007
Decision Ref: D0122009**

Participants:

J
Complainant

- and -

**Office of the Public Sector Standards
Commissioner**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to disclosures under the *Public Interest Disclosure Act 2003* – clause 14(5) – whether disclosure would reveal or tend to reveal the identity of a person who has made a disclosure under the *Public Interest Disclosure Act 2003* – whether disclosure would reveal or tend to reveal the identity of a person in respect of whom a disclosure of public interest information has been made under the *Public Interest Disclosure Act 2003*.

Freedom of Information Act 1992: ss. 3(3), 28, 74(1), 74(2); Schedule 1 clauses 8, 14(5).
Public Interest Disclosure Act 2003
Whistleblowers Protection Bill 2002
Public Interest Disclosure Bill 2002
Interpretation Act 1984

Manly v Minister of Premier and Cabinet (1995) 14 WAR 550
BGC Australia) Pty Ltd Fremantle Port Authority and Another 2003 WASCA 250
Australian Securities & Investment Commission v P Dawson Nominees Pty Ltd [2008] FCAFC 123
P Dawson Nominees Pty Ltd v Multiplex Limited [2007] FCA 1044
Harms v Qld Parole Board [2008] QSC 163
Rogers v Home Secretary [1993] AC 388
Police Force of Western Australia v Kelly and Anor (1997) 17 WAR 9

DECISION

The decision of the agency is varied. The disputed documents are exempt under both clauses 14(5)(a) and 14(5)(b) of Schedule 1 to the *Freedom of Information Act 1992*.

JOHN LIGHTOWLERS
A/INFORMATION COMMISSIONER

13 May 2009

REASONS FOR DECISION

1. This complaint arises from a decision made by the Office of the Public Sector Standards Commissioner ('the agency') on 8 December 2008 to refuse the complainant access to documents under clause 14(5) of Schedule 1 to the *Freedom of Information Act 1992* ('the FOI Act'). Because of the terms of the exemption clause and my obligations under s.74(1) of the FOI Act, I have decided not to identify the complainant by name in these reasons for decision.

BACKGROUND

2. In a letter dated 6 July 2008, the complainant applied to the agency under the FOI Act for access to:
 - “ 1. Any documentation, letters, records, notes, files, etc. relating to the breach of standards claims I have made.
 2. Any documentation, letters, records, notes, files, etc. relating to the Public Interest Disclosures I have made.
 3. Any documentation, records, notes, files, etc. relating to the arrangements reached with [a named agency] and the Parliamentary Inspector concerning the processes for dealing with breach of standards claims and/or public interest disclosures.
 4. Any documentation, letters, correspondence, records, notes, files, etc. relating to [a specific report].
 5. Any documentation, letters, correspondence, records, notes, files, etc. held at the OPSSC that contain reference to, or are concerned with, myself or my circumstances.”
3. On 30 July 2008, Ms Helen Shurven, Director of Public Sector Practice Improvement of the agency decided to grant the complainant access to certain documents in relation to the first point of the access application; refused the complainant access to the documents described in points 2 and 4 under clause 14(5)(b) of Schedule 1 to the FOI Act; refused the complainant access to documents in relation to point 3 on the basis that the agency does not have in its possession any documents of that type; and requested further information from the complainant with respect to the particular documents to which the complainant sought access under point 5.
4. By letter dated 14 August 2008, the complainant applied for internal review of the agency's decision with respect to points 1, 2, 4 and 5 of the access application.
5. On 8 December 2008, Dr Ruth Shean, Commissioner for Public Sector Standards, varied the initial decision, and decided to give the complainant access to some additional documents but to refuse access to the other requested documents under clause 14(5) of Schedule 1 to the FOI Act.

6. Thereafter on 1 January 2009, the complainant applied to the Information Commissioner for external review of Dr Shean's decision dated 8 December 2008 to refuse access to documents under clause 14(5).

REVIEW BY THE INFORMATION COMMISSIONER

7. Following the receipt of this complaint, I required the agency to produce to me the documents in dispute in this matter and the agency's FOI file maintained in respect of the complainant's access application.
8. Having examined the material provided to me, my Investigations Officer obtained further information from the agency to support its claims for exemption, and attended at the offices of the agency to examine all of the relevant files of the agency including the disputed documents and interview staff about record keeping processes.
9. On 18 March 2009, I provided the parties to this complaint with a detailed letter setting out my preliminary view of this complaint, and my reasons. My preliminary view was that the disputed documents are exempt under either or both clauses 14(5)(a) and 14(5)(b) of Schedule 1 to the FOI Act.

THE DISPUTED DOCUMENTS

10. Section 74(1) of the FOI Act directs the Information Commissioner to ensure that exempt matter is not disclosed during the course of dealing with a complaint. Further, s.74(2) places an obligation on the Information Commissioner "*...not to include exempt matter ... in a decision on a complaint or in reasons given for the decision.*" Therefore, I am constrained from describing the disputed documents, because to do so would be a breach of my obligations under s.74(2) of the FOI Act.
11. I appreciate the difficulty that this obligation places on the complainant as it limits the opportunity the complainant has to make submissions. That is a matter that has been considered by Justice Owen in *Manly v Minister of Premier and Cabinet* (1995) 14 WAR 550 at 556-557. In that case, which concerned an access application under the FOI Act, Owen J concluded that the Supreme Court "*...has no discretion to give access to the document and, whether during the hearing or in its reasons for decision, must not disclose exempt information to any person, including a qualified legal practitioner.*"
12. In addition, the legislation seeks to ensure that the terms and effect of matter which is asserted to be exempt from disclosure may be scrutinised and examined by an officer or body quite independent of the agency claiming the exemption - namely, the Information Commissioner, or on appeal, the Supreme Court. As Justice Heenan in the Western Australian Supreme Court said in *BGC (Australia) Pty Ltd v Fremantle Port Authority and Another* 2003 WASCA 250 at 16, in a matter concerning clause 8(1) of the FOI Act:

"That this scrutiny and examination, in order to protect the confidentiality of the material, if the claim is justified, must be conducted without

disclosure to the applicant, its counsel or solicitors is one example of these rare instances in which a party to litigation is deprived of full access to all material documents. However, this is not an isolated exception, and policy considerations which have prompted its acceptance, have been recognised in other areas of the law such as the power of a court to inspect documents in respect of which a claim for legal professional privilege has been made, or to scrutinise material relied upon for the issue of a search warrant, or to inspect documents for which a claim of public interest immunity has been asserted, without disclosing them to the party seeking inspection - see Sankey v Whitlam (1978) 142 CLR 1 at 46 and 110. None of these examples constitutes any denial of natural justice because, if the claim for privilege, confidentiality or public interest immunity is justifiably made, the party seeking to inspect the documents has no right of any kind to do so. Justice is achieved and the law applied in these situations by an examination of the documents by an independent officer or court acting on settled principles ...”

THE EXEMPTION

13. Clause 14, as far as is relevant, provides:

“14. Information protected by certain statutory provisions

Exemptions

- (1) ...
- (2) ...
- (3) ...
- (4) ...
- (5) *Matter is exempt matter if its disclosure would reveal or tend to reveal the identity of anyone as –*
 - (a) *a person who has made an appropriate disclosure of public interest information under the Public Interest Disclosure Act 2003; or*
 - (b) *a person in respect of whom a disclosure of public interest information has been made under the Public Interest Disclosure Act 2003.*
 - (c) ...
 - (d) ...
 - (e) ...”

THE COMPLAINANT’S SUBMISSIONS

14. In the complainant’s application for external review, the complainant submits that as “...*the person who made the disclosures under the PID Act, and who named persons employed at the [named agency] in connection with the disclosures, it is not possible to ‘reveal’ these identities to me, as I am already in possession of the knowledge. These identities are not concealed from me,*

they are not hidden from me and they are not secret from me, and hence they cannot be revealed to me. As such, I maintain that Clause 14(5)(b) has no application.”

15. In response to my preliminary view, the complainant submits that it is possible to describe the disputed documents in general terms, including the dates, authors and recipients of the documents and a general description of the nature of the documents. The complainant also submits that it should be possible to provide access to edited copies of the disputed documents: *“it should be possible to redact names such that persons the subject of the disclosure are not identified.”*
16. Further, the complainant submits that:
 - *“In respect of documents that concern me in particular, should there be any, it is an absolute nonsense and farcical to deny me access to such documents on the basis that it may tend to identify myself to myself. This situation would clearly be contrary to the intent of the Freedom of Information Act 1992.”*
 - The cases referred to in my letter of 18 March 2009 are irrelevant, particularly given that the agency did release to the complainant one document regarding the public interest disclosures, being a report.
 - If the agency can release a copy of that report then it cannot be contrary to the FOI Act for it to release the documents which support that report.

CONSIDERATION

17. In order for the exemptions in clause 14(5) to apply in this case, it must be shown that disclosure of the disputed documents would “reveal or tend to reveal” the identity of a person of the type described in clause 14(5)(a) or clause 14(5)(b) respectively.
18. I note that those clauses were added to the exemptions in Schedule 1 to the FOI Act by s.28 of the *Public Interest Disclosure Act 2003* (‘the PID Act’). It is apparent from the wording of clauses 14(5)(a) and (b) that matter is exempt if it would reveal or tend to reveal the identity of anyone referred to in those paragraphs.
19. To assist me to determine the scope and intention of the exemption, I have had regard to the debates of Parliament when the exemption was introduced, as recorded in *Hansard*.
20. On 20 March 2002, during the Second Reading of the *Whistleblowers Protection Bill 2002* (‘the Bill’) in the Legislative Assembly – as the Bill forming the basis of the PID Act was called before its title was changed to the *Public Interest Disclosure Bill 2002* – the then Attorney General discussed the various measures in the Bill to protect ‘whistleblowers’. At page 8608 of *Hansard* volume 7 (2002), the Attorney General is recorded as having said:

“The Bill will amend the [FOI Act], so that freedom of information laws cannot be used to identify the whistleblower or the person about whom the disclosure was made”.

21. An identical comment was also made by the former Leader of the House, on 14 May 2002, during the Second Reading of the Bill in the Legislative Council following the Bill’s name change: see p.10273 of *Hansard*, volume 8 (2002).
22. Accordingly, in my view, Parliament clearly intended that the exemption should be interpreted in a way that ensures that the FOI Act cannot be used to identify any persons of the kind described in paragraphs (a) or (b) of clause 14(5) and in a way that ensures that the identity of those persons is protected from disclosure under the FOI Act.
23. Relevantly, I also note that clause 14(5) is the only exemption in the FOI Act which uses the phrase ‘reveal or tend to reveal’, (compared, for example, to clauses 1, 2, 3, 4, 6, 8(2),10, 13, and 15, which all speak of matter being exempt if its disclosure would ‘reveal’ certain things). Consequently, the exemption in clauses 14(5)(a) and 14(5)(b) extends beyond matter that would in fact ‘reveal’ the identity of a person of a kind described in paragraph (a) or (b). On its face the exemptions extend to matter that would ‘tend to reveal’ the identity of such a person. In other words, actual disclosure of the relevant identity is not necessarily required for the exemptions in clauses 14(5)(a) or 14(5)(b) to apply, and it is sufficient that the relevant identity would tend to be revealed by that disclosure.
24. I have considered the meaning of the word ‘tend’ in the context of the phrase ‘tend to reveal’ as used in clause 14(5).
25. The word ‘tend’ is not defined in the FOI Act or the *Interpretation Act 1984*. The fundamental rule of statutory interpretation is that plain words must be given their plain and ordinary meaning. The *Australian Concise Oxford Dictionary* (Fourth Edition 2004) defines the word ‘tend’ to mean “*be apt or inclined*”. The word ‘incline’ is defined to mean “*be disposed*” and ‘apt’ is defined to mean as “*having a tendency*”. In the same source the term ‘tendency’ is defined as meaning “*a leaning or inclination, a way of tending*”.
26. Therefore, according to its ordinary dictionary meaning, the disclosure of matter would ‘tend’ to reveal the identity of a person described in paragraphs (a) and (b) of clause 14(5) if its disclosure would be inclined to or would have a tendency to reveal the identity of those persons.
27. Because the dictionary definition provides only limited assistance to me, I have also had regard to decisions in other jurisdictions which, while not binding or determinant of the correct interpretation, I consider are a useful guide to the interpretation of similar language as used in the exemption in clause 14(5). In *Australian Securities & Investment Commission v P Dawson Nominees Pty Ltd* [2008] FCAFC 123, the Full Court of the Federal Court considered an appeal against a decision of Goldberg J of the Federal Court (in *P Dawson Nominees*

Pty Ltd v Multiplex Limited [2007] FCA 1044) to reject the objection of the Australian Securities and Investment Commission to the production of certain documents on the ground of public interest privilege because the documents would ‘tend to reveal’ the identity of an informer.

28. In considering whether the documents in question would ‘tend’ to identify the informer, the Full Court of the Federal Court said at [40]:

“...we think an appropriate test is whether there is, in the words of Hunt J in Attorney-General v Stewart (1994) 34 NSWLR 667 at 674, any material by which a shrewd idea might be conveyed as to the identity of the informer. Documents taken together may convey information which each by itself could not: Zarro v Australian Securities Commission (1992) 36 FCR 40 at 60”.

29. In referring to the judgement of Goldberg J, the Court then said at [41]:

“His Honour at one stage of the judgment, at [38], spoke of documents which "reveal, or could reveal, or tend to reveal" the fact that the informer provided information to ASIC. Elsewhere, however, his Honour applied a test of whether documents "disclose the identity of" the informer(s) (at [45]) or "identify" the informer(s) as such (at [55]) or whether his or her connection is "disclosed" (at [56]). If actual disclosure or identification is taken as the standard, we think the bar is set too high. Consistently with the underlying public policy of public interest immunity, the benefit of the doubt should be in favour of non-disclosure. There is always the risk that seemingly innocuous information in a particular document, when combined with information in another document or the reader’s background knowledge, may reveal the identity of an informer, or at least give rise to strong suspicion”.

30. In *Harms v Qld Parole Board* [2008] QSC 163, Douglas J of the Queensland Supreme Court considered whether the test of whether the disclosure of certain documents to the applicant would reveal the identity of an informant covered *“...any material by which a shrewd idea might be conveyed as to the identity of the informer: Rogers v Home Secretary [[1973] AC 388](at 401).”*

31. Douglas J said at [19]:

“On my perusal of the documents in question there is a real risk that disclosure of their contents would reveal the identity of the informer or informers or at least give the applicant what was described by Lord Reid in Rogers v Home Secretary as a “very shrewd idea” from whom the information had come”.

And at [24]:

“It is also my view that, were the applicant to be provided with the gist of the information contained in the documents, beyond the inference drawn by him that it contains allegations he intends to harm someone, then, in

this case, it would be information that could give him a shrewd idea of the identity of the informant... ”.

32. I consider the above comments to be of some limited usefulness in this matter, although I acknowledge that they have been decided according to a different legislative framework and where different standards of proof and evidential presumptions apply.
33. Having considered the intention of Parliament, the ordinary dictionary meaning of the word ‘tend’ and the general approach taken in the above cases, I am of the view having regard to the objects and intent of the FOI Act and the context of clause 14(5), documents will be exempt under clause 14(5)(a) or clause 14(5)(b) if there is a real risk, as distinct from just a remote or fanciful risk or possibility, that their disclosure would identify a person of the kind described in clauses 14(5)(a) or clause 14(5)(b).
34. With the benefit of having examined the disputed documents, I am satisfied that it is more likely than not there is a real risk the identity of a person mentioned in clauses 14(5)(a) and (b) would be revealed by the disclosure of the disputed documents. In my view, the documents contain matter that would reveal or tend to reveal the identity of a person or persons of a kind described in both clauses 14(5)(a) and 14(5)(b) in the sense I have described above. Therefore, I find that the disputed documents are exempt under both clauses 14(5)(a) and 14(5)(b) of Schedule 1 to the FOI Act.
35. The fact that a complainant may know or claim to know the identity of the relevant persons from other sources is not, in my view, determinant of the question as to whether the disputed documents would, if disclosed, reveal or tend to reveal the identities of the relevant persons. There is nothing in the wording of clause 14(5) which would suggest that any limitation on the exemption exists in favour of disclosure of matter to an applicant whose own identity may be referred to in paragraphs (a) or (b) of clause 14(5).
36. In *Police Force of Western Australia v Kelly and Anor* (1997) 17 WAR 9, Anderson J of the Supreme Court of WA, said, at p.14, in relation to a claim for exemption under clause 5(1)(b) of the FOI Act :

“... what is under consideration is the right of access to the particular documents of an agency. One would not expect the character of the documents as exempt documents to depend on whether, by some means, the subject matter of the documents, or some of it, had already got out...I think it would be a very inconvenient construction of the Act, as it would mean that an applicant could overcome a claim of exemption by showing or claiming that he already knew something of the matter from other sources. I do not think it could have been intended that exemption should depend on how much the applicant already knows or claims to know of the matter.”

37. I agree with Anderson J’s view. Whilst an agency may consider and take into account the state of knowledge that an access applicant might have about a

particular matter, before making a decision to exercise its discretion under s.3(3) of the FOI Act to disclose documents outside the FOI process, the Information Commissioner does not have that discretion.

38. As there is no public interest test in clause 14(5), I am not required to consider the public interest factors for and against disclosure of the disputed documents.
