

Participants:

Peter Hans Weygers
Complainant

- and -

**Department of Education and
Training**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - complaint documents - clause 7(1) - legal professional privilege - clause 3(1) - personal information - information that is allegedly known by an access applicant - the application of the limits on the exemption in clauses 3(2), 3(3) and 3(4) - clause 3(6) - whether disclosure would, on balance, be in the public interest - section 24 - editing - meaning of 'practicable'.

Freedom of Information Act 1992: sections 24, 68(2), 102(3); Schedule 1, clauses 3(1), 3(6), 7(1); Schedule 2, Glossary

Freedom of Information Regulations 1993: regulations 9(1) and 9(2).

Esso Australia Resources Ltd v The Commissioner of Taxation (1999) 168 ALR 123.

Re Police Force of Western Australia v Kelly and Another (1996) 17 WAR 9.

Kanda v Government of the Federation of Malaya [1962] AC 322.

DPP v Smith [1991] 1 VR 63.

Kioa v West (1985) 159 CLR 550.

Re Viatores cum Christo Inc and Department of Consumer and Employment Protection [2006] WAICmr 16.

Re Winterton and Police Force of Western Australia [1997] WAICmr 15.

Police Force of Western Australia and Winterton (Supreme Court of Western Australia, 27 November 1997, unreported, Library No. 970646).

DECISION

The decision of the agency to refuse the complainant access to certain of the disputed documents is varied. I find that:

- Document 1A, folios 69-71 are exempt under clause 7(1);
- Documents 1-4; Document 2A folio 16; and Document 3A folios 17-18 are exempt under clause 3(1);
- the information in Documents 5 and 6; Document 1A, folios 33-34, 38, 48-49, 115, 117, 118-119 and 120; Document 2A, folios 24-25, 82 and 91-96; and Document 3A, folios 59, 73, 74-76, 80-83 and 86-89, as set out in the appendix to these reasons for decision, is exempt under clause 3(1).

D A WOOKEY
A/INFORMATION COMMISSIONER

31 October 2007

REASONS FOR DECISION

BACKGROUND

1. I understand that the complainant is employed by the agency as a school psychologist. In 2004, the agency notified the complainant that three complaints had been made against him by a number of individuals. I understand that the agency's Complaints Management Unit has now finalised all but one of those matters which is the subject of an appeal. The other two complaints were dismissed.
2. On 18 March 2005, the complainant applied to the agency under the *Freedom of Information Act 1992* ('the FOI Act') for:

"... copies of all documents kept by the Department of Education and Training in relation to: -
 - (i) *Complaints made by [certain teachers] against me which were outlined in the Department's letter dated 22nd March 2004.*
 - (ii) *A Complaint by [a] District Director of [the agency] against me which was outlined in the Department's letter dated 10th May 2004; and*
 - (iii) *A further Complaint by the Department against me which was outlined in the Department's letter dated 14th June 2004."*
3. On 30 May 2005, the agency notified the complainant that it had identified 8 pages (7 documents) within the scope of his application but refused him access to those documents on the ground that they were exempt under clause 3(1) of Schedule 1 to the FOI Act. Following an internal review, the agency confirmed its decision on 19 July 2005. On 15 September 2005, the complainant applied to me for external review of the agency's decision.

REVIEW BY A/INFORMATION COMMISSIONER

4. Following the receipt of this complaint, I required the agency to produce to me, for my examination, the originals of the disputed documents and the agency's FOI file maintained in respect of the complainant's access application.
5. In accordance with its obligation under section 68(2) of the FOI Act, the agency contacted all relevant third parties to notify each of this complaint. On 9 November 2005, in response to discussions with this office and the third parties, the agency gave the complainant access to a copy of one document, in full, and copies of two documents from which personal information about third parties had been deleted. The complainant was invited to withdraw his complaint in respect of the two edited documents but did not do so.

6. In the course of dealing with this complaint, it became apparent to me that there were a number of other documents held by the agency which had been created or obtained between the date that the agency had received the complainant's access application and the date that the agency's decision on internal review was made. Following further discussions with this office, the agency agreed to deal with those documents as documents within the scope of the complainant's access application and, subsequently, gave the complainant a document schedule that listed 203 additional documents.
7. On 20 March 2006, the complainant advised my office that he sought access to 101 documents from that schedule. Thereafter, the agency gave the complainant full access to 46 of those documents (98 pages). On 9 June 2006, the agency advised the complainant that it had reviewed the remaining documents and was prepared to give him access to a further 48 pages in full and 24 pages in edited form. The agency refused the complainant access to the remainder of the requested documents claiming exemptions under clauses 3(1), 5(1)(b) and 7(1) of Schedule 1 to the FOI Act. Thereafter, a significant delay ensued as a result of my office having to make inquiries with, and ultimately query the information provided by, an exempt agency. As a result of those inquiries, the agency withdrew its claim for exemption under clause 5(1)(b).
8. On 3 August 2007, I provided the parties with a letter setting out my preliminary view of this complaint. It was my preliminary view that certain documents and information were exempt but that other documents were not exempt and that a number of the requested documents could be released to the complainant in edited form.
9. The agency accepted my preliminary view and disclosed to the complainant the additional documents and information that, in my preliminary view, were not exempt. The complainant did not accept my preliminary view and, consequently, this complaint could not be conciliated. On 28 August 2007, the complainant provided me with additional information and further submissions in relation to the application of clause 3(6).
10. Following consultation with the parties, the documents and information remaining in dispute were clarified and agreed upon and, on 23 October 2007, the complainant advised me that he withdrew his claim for information which consisted of the signatures or initials of officers of agencies, provided that those officers' names were printed next to their signatures or initials.

THE DISPUTED DOCUMENTS AND INFORMATION

11. The following documents and information remain in dispute:

The documents initially identified as within the scope of the application:

1. A statement dated 17 February 2004.
2. A letter to the agency dated 18 February 2004.

3. An email to the agency dated 18 February 2004.
4. A letter to the agency dated 15 March 2004.
5. A file note dated 27 April 2004.
6. A letter to the agency dated 28 April 2004.

The agency claims that Documents 1-4 are exempt in full under clause 3(1). The agency has given the complainant edited copies of Documents 5 and 6 and claims that the information deleted from those documents is exempt under clause 3(1).

The additional documents identified as within scope:

With regard to the following additional documents, the agency's schedule refers to them as three "documents" and lists them by their folio numbers taken from the three files on which they appear. To avoid confusion with Documents 1-6, I refer to them collectively as Documents 1A, 2A and 3A:

Document 1A (File no. 0291162F4)

Folio no. Description

33-34	A letter dated 14 June 2004.
38	An internal e-mail dated 18 June 2004.
48-49	A coversheet attaching a letter dated 30 June 2004.
58	An undated file note.
59	An internal e-mail dated 13 October 2004.
69-71	A facsimile coversheet dated 7 December 2004 attaching a letter dated 7 December 2004.
115	Two e-mails dated 9 May 2005.
117	Two e-mails dated 27 May 2005.
118-119	Two e-mails dated 23 June 2005.
120	An e-mail dated 27 May 2005.

The agency has given the complainant access to edited copies of Document 1A, folios 33-34, 38, 48-49, 58, 59, 115, 117, 118-119 and 120. The agency claims that the information deleted from those folios is exempt under clause 3(1) and that Document 1A, folios 69-71 are exempt in full under clause 7(1).

Document 2A (File no. 0291162F3)

Folio no. Description

16	A letter dated 10 May 2004.
24-25	A coversheet attaching a letter dated 17 May 2004.
80-85	A report dated 7 June 2005.
91-96	A letter dated 23 June 2005 attaching a report.

The agency has given the complainant access to edited copies of Document 2A, folios 24-25, 80-85 and 91-96. The agency claims that the information deleted from those folios is exempt under clause 3(1) and that Document 2A, folio 16 is exempt in full under clause 3(1).

Document 3A (File no. 0291162F2)

<i>Folio no.</i>	<i>Description</i>
17-18	A letter dated 22 May 2004.
59	Two emails dated 2 and 3 September 2004.
73	A letter dated 14 January 2005.
74-76	A coversheet attaching a letter dated 15 November 2004.
80-83	Cover sheets attaching correspondence dated 18 and 27 September 2004.
86-89	Cover sheets attaching correspondence dated 21 December 2004 and 5 January 2005.

The agency has given the complainant access to edited copies of Document 3A, folios 59, 73, 74-76, 80-83 and 86-89. The agency claims that the information deleted from those folios is exempt under clause 3(1) and that Document 3A, folios 17-18 are exempt in full under clause 3(1).

Clause 7 – legal professional privilege

12. The agency claims that folios 69-71 of Document 1A are exempt under clause 7(1) of Schedule 1 to the FOI Act. Clause 7(1) provides:

“Matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege.”

13. Legal professional privilege protects from disclosure confidential communications between clients and their legal advisers which are made or brought into existence for the dominant purpose of giving or seeking legal advice or for use in existing or anticipated legal proceedings: *Esso Australia Resources Ltd v The Commissioner of Taxation* (1999) 168 ALR 123 at 132.
14. I have examined Document 1A, folios 69-71. It is a facsimile from the agency’s legal advisers to the agency. Both the coversheet and the attached letter, which contains legal advice, are marked “Confidential”. On its face, that document is a confidential communication between a client and its legal adviser which was made for the dominant purpose of giving legal advice.
15. My preliminary view was that Document 1A, folios 69-71 would be privileged from production in legal proceedings on the ground of legal professional privilege. Following the receipt of my letter of 3 August 2007, setting out my preliminary view, the complainant made no further submissions to me in relation to this document but did not withdraw his request for access to it. Accordingly, I am not persuaded to change my preliminary view on this aspect

of the matter and I find that folios 69-71 of Document 1A are exempt under clause 7(1) of Schedule 1 to the FOI Act.

Clause 3 - personal information

16. The agency claims that Documents 1, 2, 3 and 4; Document 2A, folio 16; and Document 3A, folios 17-18 are exempt, in full, under clause 3(1) of Schedule 1 to the FOI Act.
17. The agency also claims that the information deleted from Documents 5 and 6; Document 1A, folios 33-34, 38, 48-49, 58, 59, 69-71, 115, 117, 118-119 and 120; Document 2A, folios 24-25, 80-85 and 91-96; and Document 3A, folios 59, 73, 74-76, 80-83 and 86-89 is exempt under clause 3(1) of Schedule 1 to the FOI Act.

Clause 3 provides:

“3. **Personal information**

Exemption

- (1) *Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).*

Limits on exemption

- (2) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal personal information about the applicant.*
- (3) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to -*
 - (a) *the person;*
 - (b) *the person’s position or functions as an officer; or*
 - (c) *things done by the person in the course of performing functions as an officer.*
- (4) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who performs, or has performed services for an agency under a contract for services, prescribed details relating to -*
 - (a) *the person;*
 - (b) *the contract; or*

- (c) *things done by the person in performing services under the contract.*
 - (5) *Matter is not exempt matter under subclause (1) if the applicant provides evidence establishing that the individual concerned consents to the disclosure of the matter to the complainant.*
 - (6) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.”*
- 18. In the Glossary in Schedule 2 to the FOI Act, the term ‘personal information’ is defined to mean:
 - “...information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead -*
 - (a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or*
 - (b) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample.”*
- 19. Clearly, the purpose of the exemption in clause 3(1) is to protect the privacy of individuals about whom information may be contained in documents held by State and local government agencies.

The agency’s submissions

- 20. In its notice of decision dated 19 July 2005, the agency advised the complainant that the disputed documents contained information about third parties which would identify them and, consequently, that information was exempt under clause 3(1).

The complainant’s submissions

- 21. The complainant made submissions to me in relation to the public interest and the editing of the disputed documents. I have set out those submissions in paragraphs 37-39 and 58-63 below in relation to those particular issues.

Consideration

- 22. It is clear from the complainant’s access application that the complainant is aware of the identities of most of the persons who had made complaints to the agency. However, I refer to the decision of the Supreme Court of Western Australia in *Police Force of Western Australia v Kelly and Another* (1996) 17 WAR 9 at 14 which dealt with a similar situation. Although that case dealt with a claim for exemption under clause 5(1)(b) of Schedule 1 to the FOI Act, I consider that the comments relating to the question of what is known by an access applicant are also relevant to this case. In *Kelly’s* case, Anderson J said:

“In considering the question of whether exemption is lost once the matter has found its way into the hands of the applicant or into public hands, I think it must be remembered that 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...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. Also the Act plainly contemplates that, as regards exempt material, the agency may give access to some documents or parts of documents but refuse access to others dealing with the same subject (see ss.3(3), 23(1)).”

23. I agree with those comments. Nonetheless, the question of what is known by the complainant may be relevant to the application of the limit on exemption in clause 3(6).
24. In my view, the disclosure of Documents 1, 2, 3, 4; Document 2A, folio 16; Document 3A, folios 17-18; and the information deleted from Documents 5 and 6; Document 1A, folios 33-34, 38, 48-49, 58, 59, 69-71, 115, 117, 118-119 and 120; Document 2A, folios 24-25, 80-85 and 91-96; and Document 3A, folios 59, 73, 74-76, 80-83 and 86-89 would reveal identifying information including initials, names of third parties (who are not officers of the agency or persons employed by the agency under a contract for services) and other information from which those persons could be identified; private addresses and private telephone numbers.
25. Disclosure would therefore reveal ‘personal information’, as defined, about a number of individuals, including – in the case of Documents 1, 2, 3, 4; Document 1A, folio 38; Document 2A, folio 16; and Document 3A, folios 17-18 – the complainant in this matter. The definition of ‘personal information’ in the Glossary makes it clear that any information or opinion about a person from which that person can be identified is, on its face, exempt under clause 3(1). Consequently, I consider that the disputed documents and the disputed information are *prima facie* exempt under clause 3(1).
26. The next question is whether any of the limits on the exemption applies. Since the complainant has not provided evidence to the agency or to my office that any of the third parties referred to in the disputed documents has consented to the disclosure of personal information about themselves to the complainant, I consider that the limit in clause 3(5) does not apply in this case.

Clause 3(2)

27. Clause 3(2) provides that information is not exempt under clause 3(1) merely because its disclosure would reveal personal information about the applicant (in this case, the complainant). In my view, the use of the term ‘merely’ in clause

3(2), according to its ordinary dictionary meaning, means ‘solely’ or ‘no more than’ personal information about the applicant.

28. I have examined Documents 1, 2, 3 and 4; Document 2A, folio 16; Document 3A, folios 17-18; and the information deleted from Document 1A, folio 38. In my opinion, the disclosure of those documents and that information would reveal information or an opinion about the complainant and his identity is apparent, or can reasonably be ascertained, from that information or opinion. In other words, disclosure of those documents or deleted information would reveal personal information, as defined in the FOI Act, about the access applicant who is the complainant in this case.
29. However, the personal information about the complainant in Documents 1, 2, 3 and 4; Document 2A, folio 16; Document 3A, folios 17-18; and the information deleted from Document 1A, folio 38 is interwoven with personal information about third parties in such a way that it would not be possible for the agency to give the complainant access to the information about him without also disclosing the personal information about the third parties. In my view, the disclosure of the personal information about third parties would not therefore ‘merely’ reveal personal information about the complainant and, therefore, the limit in clause 3(2) does not apply to that information.

Clauses 3(3) and 3(4)

30. The limit in clause 3(3) provides that matter is not exempt matter under clause 3(1) merely because its disclosure would reveal prescribed details about a person who is or has been an officer of an agency. Clause 3(4) is similar in scope but relates to a person who performs or has performed services for an agency under a contract for services.
31. The ‘prescribed details’ are listed in regulations 9(1) and 9(2) of the *Freedom of Information Regulations 1993* (‘the Regulations’), as follows:

“9(1) *In relation to a person who is or has been an officer of an agency, details of –*

- (a) *the person’s name;*
- (b) *any qualifications held by the person relevant to the person’s position in the agency;*
- (c) *the position held by the person in the agency;*
- (d) *the functions and duties of the person, as described in any job description document for the position held by the person; or*
- (e) *anything done by the person in the course of performing or purporting to perform the person’s functions or duties as an officer as described in any job description document for the position held by the person;*

...

(2) *In relation to a person who performs or has performed services for an agency under a contract for services, details of –*

- (a) *the person's name;*
 - (b) *any qualifications held by the person relevant to the person's position or the services to be provided pursuant to the contract;*
 - (c) *the title of the position set out in the contract;*
 - (d) *the nature of services to be provided and described in the contract;*
 - (e) *the functions and duties of the position or the details of the services to be provided under the contract, as described in the contract or otherwise conveyed to the person pursuant to the contract;*
 - (f) *anything done by the person in the course of performing or purporting to perform the person's functions or duties or services, as described in the contract or otherwise conveyed to the person pursuant to the contract ...".*
32. I note that all of the documents dealt with here contain references to third parties who are officers or former officers of the agency or other government agencies. In addition, as I understand it, there are references to persons who perform or have performed services for the agency under a contract for services (for example, in Document 1A, folios 115, 118-119 and 120).
33. In my view, much of that information is prescribed details as set out in regulations 9(1) and 9(2). This includes, for example, the salutations and names in the "To" lines of e-mails of officers of the agency. Following the receipt of my letter setting out my preliminary view of this complaint, most of that information was provided to the complainant by the agency on the basis that that information is merely prescribed details for the purposes of clauses 3(3) and 3(4) and, accordingly, that information is no longer in dispute between the parties.
34. However, I consider that certain information concerning officers of agencies – for example, details of alleged breaches of discipline which concern officers in the course of their employment with the agency in Documents 1-4; Document 2A, folio 16; and Document 3A, folios 17-18 – would reveal more than merely the prescribed details listed in regulations 9(1) and 9(2) about those officers. In my opinion, information of that nature does not fall within clauses 3(3) and 3(4) but, rather, it is personal information that is exempt under clause 3(1) unless another limit on exemption applies.
35. It was my preliminary view that folios 58 and 59 of Document 1A were exempt, in fact, under clause 7(1). However, it has been established that the complainant had previously been given access to edited copies of those documents by the agency. Accordingly, the agency withdrew its claim under clause 7 and only claims that the information deleted from those two documents is exempt under clause 3(1). Having examined those edited documents, I accept that some of the deleted information is exempt under clause 3(1) because that information identifies particular officers but is not information that is 'merely' prescribed details to which the limits on exemption in clause 3(3) or (4) would apply. I have identified that information in the appendix to this decision. In my view,

the remainder of the information deleted by the agency is prescribed details and is thus, not exempt.

Clause 3(6)

36. If I am satisfied that a *prima facie* exemption under clause 3(1) has been made out and none of the other limits on exemption in claims 3(2) to 3(5) applies, then, pursuant to section 102(3) of the FOI Act, the onus is on the complainant to establish that disclosure of personal information about the third parties would, on balance, be in the public interest, pursuant to clause 3(6).

The complainant's submissions

37. In his letter of complaint, the complainant submitted that there is a public interest in providing him with the disputed documents and information so that he is fully informed of the nature and substance of the allegations against him and is given an opportunity to respond to them and give his version of the events. The complainant submits that this is an overriding public interest, being a fundamental principle of natural justice.
38. The complainant, through his legal advisers, submitted that one of the requirements of natural justice is that he be fully informed of the case made against him. He submitted that that requirement is only satisfied if he is informed of the evidence given against him and what statements have been made affecting him, citing *Kanda v Government of the Federation of Malaya* [1962] AC 322 at 337. Consequently, the complainant submitted he should be given copies of all of the documents relating to the three matters itemised in his access application, in particular, all primary documents recording the allegations or which were lodged in support of the allegations, including any statutory declarations obtained by the agency's investigator or investigators.
39. On 28 August 2007, in response to my preliminary view, the complainant queried the veracity of some of the statements made by witnesses in the course of the agency's investigations into the complaints made against him. In effect, the complainant contends that the substance of the allegations made against him, which were provided to him in three letters by the agency, "*do not appear to be correct or accurate.*" The complainant submits that, accordingly, the public interest in respect of natural justice may not have been largely satisfied and that copies of all original complaints should be provided to him in full, since the allegations have the capacity to affect his vocation and reputation.

The agency's submissions

40. In its notice of decision on internal review, the agency advised the complainant that it had identified a number of public interests that favoured the disclosure of the disputed documents and information and a number that did not favour disclosure. The public interests that favour disclosure include an access applicant's:

- being able to exercise his or her general right of access to documents under the FOI Act;
- understanding the decision making process of the agency in relation to dealing with complaints against its staff; and
- knowing the substance of any complaints made against him or her and being given the opportunity to respond to those complaints.

The public interests that do not favour disclosure include the agency's being able to maintain:

- the credibility and trust of people to raise issues of concern, particularly those involving officers of the agency;
 - the personal privacy of individuals; and
 - the effectiveness of its inquiries into complaints by encouraging people to be accurate and open with their statements without fear of reprisal.
41. In its notices of decision, the agency said that, since the complainant has been told of the nature of the complaints and been given an opportunity to respond, that particular public interest has been satisfied. The agency also submitted that it would be inappropriate to disclose the disputed matter while its investigations were still on foot.

Consideration

42. The public interest is not defined in the FOI Act. In my view, the term is best described in the decision by the Supreme Court of Victoria in *DPP v Smith* [1991] 1 VR 63, at page 75, where the Court said:

“The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals ... There are ... several and different features and facets of interest which form the public interest. On the other hand, in the daily affairs of the community, events occur which attract public attention. Such events of interest to the public may or may not be ones which are for the benefit of the public; it follows that such form of interest per se is not a facet of the public interest”.

43. The application of the public interest test in clause 3(6) involves identifying the public interest factors for and against disclosure, weighing them against each other in order to determine where the balance lies.
44. The public interest in the protection of personal privacy is recognised by the inclusion of the clause 3 exemption in the FOI Act and, among other provisions, the obligation on agencies to consult with individuals before disclosing any information about them under the FOI Act. I consider the public interest in the protection of personal privacy to be a particularly strong one, which will

generally only be outweighed by significantly stronger public interests in disclosure.

45. Favours disclosure of the disputed documents and information, I recognise that there is a public interest in people being able to exercise their rights of access under the FOI Act and a public interest in people being able to access personal information concerning themselves which is held by a government agency. That latter public interest is also recognised in section 21 of the FOI Act. However, with regard to that latter interest I note that, with the exception of a small amount of information about the complainant in Document 1A, folio 38, the information deleted from Documents 1A, folios 33-34, 48-49, 58, 59, 115, 117, 118-119 and 120; Document 2A, folios 24-25, 80-85 and 91-96; and Document 3A folios 59, 73, 74-76, 80-83 and 86-89, is not information about the complainant but, rather, information about other people.
46. Of particular relevance to this case, I recognise a public interest in individuals such as the complainant being informed of the nature of any allegations made against them and being given an opportunity to respond to those allegations before any decisions adverse to their interests are made. That is a key requirement of procedural fairness.
47. The complainant referred me to *Kanda's* case. In that case, in the course of disciplinary proceedings, a report containing allegations of serious misconduct against the person accused was read out without his being given an opportunity to challenge the report. On appeal, the Judicial Committee of the Privy Council held that the accused had not been given a reasonable opportunity to be heard. The principle was stated by Brennan J in *Kioa v West* (1985) 159 CLR 550 at 628, in the following terms:

“A person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters adverse to his interests which the repository of the power proposes to take into account in deciding upon its exercise.”
48. However, Brennan J qualified the operation of that principle by adding, at 628:

“The person whose interests are likely to be affected does not have to be given an opportunity to comment on every adverse piece of information, irrespective of its credibility, relevance or significance. ... Administrative decisions are not necessarily to be held invalid because the procedures of adversary litigation are not fully observed.”
49. I do not consider that procedural fairness or the public interest otherwise necessarily requires the disclosure of the primary documents setting out the allegations made against the complainant, particularly where that is balanced, as here, against the public interest in the protection of personal privacy. In my view, it is not essential to procedural fairness that persons who have allegations made against them receive the actual written allegations, or other supporting documents, provided that the substance of those allegations is disclosed.

50. In *Re Viatores cum Christo Inc and Department of Consumer and Employment Protection* [2006] WAICmr 16 at 45, I said:

“The requirements of procedural fairness are flexible and vary according to the circumstances of each case: see Mason J in Kioa v West [1985] 159 CLR 550 at 585. Ordinarily the duty to act fairly requires that a person be given an opportunity to know the substance of the case made against that person: see McEniery and Medical Board of Queensland [1994] 1 QAR 349 at 363.”

51. With regard to those public interests identified, I consider that they – including the public interest in affording the complainant natural justice – have been largely satisfied by the information concerning the substance of the allegations having been given to the complainant by the agency, in its letters of 22 March 2004, 14 June 2004 and 10 May 2004, notwithstanding the complainant’s querying of the content of statements later made by witnesses.
52. Favours non-disclosure of the disputed information, as I have said, I recognise that there is a strong public interest in maintaining personal privacy. That public interest is recognised by the inclusion of the exemption in clause 3(1) and, in my view, that public interest may only be displaced by some other considerably stronger public interest that requires the disclosure of personal information about another person.
53. I also recognize that there is a public interest in maintaining the highest levels of professionalism in the teaching profession. To that end, I recognize a public interest in maintaining the confidence of individuals to raise issues of concern about teachers and other education professionals and the ability of the agency to gather sufficient information to thoroughly investigate those concerns.
54. In weighing the competing public interests for and against disclosure in this case, I am of the view that those favouring non-disclosure outweigh those favouring disclosure in this instance.
55. Accordingly, I find that Documents 1, 2, 3 and 4; Document 2A, folio 16; and Document 3A, folios 17-18 are exempt, in full, under clause 3(1) of Schedule 1 to the FOI Act. I also find that the information in Documents 5 and 6; Document 1A, folios 33-34, 38, 48-49, 58, 59, 115, 117, 118-119 and 120; Document 2A, folios 16, 24-25, 80-85 and 91-96; and Document 3A, folios 17-18, 59, 73, 74-76, 80-83 and 86-89 – as set out in the appendix to this decision – is exempt under clause 3(1).

Editing

56. I have considered whether it would be practicable to edit Documents 1-4; Document 2A, folio 16 and Document 3A folios 17-18 to delete the information about third parties which is interwoven with personal information about the complainant with a view to the complainant being given access to edited copies of those documents.

57. Section 24 of the FOI Act provides:

“If -

- (a) the access application requests access to a document containing exempt matter; and*
- (b) it is practicable for the agency to give access to a copy of the document from which the exempt matter has been deleted; and*
- (c) the agency considers (either from the terms of the application or after consultation with the applicant) that the applicant would wish to be given access to an edited copy,*

the agency has to give access to an edited copy even if the document is the subject of an exemption certificate.”

The complainant’s submissions

58. In his application seeking external review, the complainant submitted that section 24 of the FOI Act and the decision of the former Information Commissioner in *Re Winterton and Police Force of Western Australia* [1997] WAICmr 15 state that the agency must give access to edited copies of documents once all of the preconditions of section 24 are fulfilled. The complainant notes that section 24 does not allow an agency to refuse access to edited documents on the ground that to do so would be inappropriate because those documents form the basis of complaints which are subject to an investigation.

59. In relation to section 24, the former Information Commissioner said in *Re Winterton* at paragraphs 22 and 23:

“... I do not consider that the expression [‘if it is practicable’] refers to whether the document, once it has been edited by the deletion of exempt matter, is considered by the agency to be intelligible...”

and

“...if an access applicant wishes, nonetheless, to be given access to an edited copy of a requested document, and the other conditions precedent in section 24 are met, then the views of the agency regarding the effect of the editing are not relevant to the duty of the agency, pursuant to section 24, to provide access to an edited copy of the document concerned.”

60. The complainant submits that, in light of those comments in *Re Winterton*, the agency cannot refuse to give access to the disputed documents on the ground that editing them would make them unintelligible.

61. Alternatively, the complainant submits that it is practicable for the agency to edit the disputed documents and that the agency has, in fact, prepared edited copies.
62. The complainant also refers me to the decision of Scott J in *Police Force of Western Australia and Winterton* (Supreme Court of Western Australia, 27 November 1997, unreported, Library No. 970646). That case involved an appeal by the agency against the former Information Commissioner's decision in *Re Winterton*. In *Winterton's* case, Scott J held that an agency is not required to give access to documents that are "...so substantially edited as to make them either misleading or unintelligible." The complainant submits that whether or not a document is considered unintelligible is a matter of degree and what may be unintelligible to the agency may be intelligible to him.
63. With regard to *Winterton's* case, the complainant also submits that it is distinguishable on its facts from the present case because in *Winterton's* case it was said that the provision of edited documents which could be considered misleading or unintelligible could cause "*inconsiderable injustice*" or "*invite litigation*" but that is not the case here. The complainant notes that the agency has already informed him of the nature of the complaints made against him and the names of the complainants. In consequence, the complainant submits that he is unlikely to be misled and no party is likely to be subjected to injustice. In addition, the disclosure of edited copies of the disputed documents would not, of itself, invite litigation.

Consideration

64. I accept the complainant's submission that, once the preconditions of section 24 have been met, an agency must give access to edited copies of the relevant documents. I also agree that an agency cannot refuse to give access to edited copies of documents under section 24 on the basis that those documents form the basis of complaints which are being investigated by the agency.
65. However, I do not accept the complainant's submission that the agency cannot refuse to give him access to edited copies of the disputed documents on the ground that editing them would make them unintelligible or that the question of what is unintelligible is to be determined on the basis of what is intelligible to the complainant.
66. In my view, the meaning of the word 'practicable' in section 24 of the FOI Act was settled by the Supreme Court of Western Australia in its decision in *Winterton's* case. In that case, Scott J said, at page 16:

"It seems to me that the reference in s24(b) to the word "practicable" is a reference not only to any physical impediment in relation to reproduction but also to the requirement that the editing of the document should be possible in such a way that the document does not lose either its meaning or its context. In that respect, where documents only require editing to the extent that the deletions are of a minor and inconsequential nature and the substance of the document still makes sense and can be read and

comprehended in context, the documents should be disclosed. Where that is not possible, however, in my view, s24 should not be used to provide access to documents which have been so substantially edited as to make them either misleading or unintelligible.”

67. Contrary to the complainant’s submission, I do not understand those comments to be limited to documents in the possession of the Police Force of Western Australia and, thus, distinguishable in this case. In my opinion, the context of those remarks is not the editing of police documents but the meaning of the word ‘practicable’ in section 24 of the FOI Act and, accordingly, I consider them to be of general application.
68. Nor do I accept the complainant’s submission that he should be given access to copies of edited documents even though the editing makes them unintelligible to the agency, provided that they are intelligible to him. Section 24 imposes no obligation on an agency to consult with an applicant in relation to the editing of documents. In addition, that provision clearly establishes that the question is whether or not it would be practicable “*for the agency*” to give access in an edited format. It is the agency that has access to the complete contents of the documents and which is, therefore, in the position of being able to assess whether editing will cause the document to “*lose either its meaning or its context*”, not the complainant.
69. In my view, the question of whether or not a particular applicant, in light of any knowledge he or she may have, rather than any otherwise uninformed person, is likely to be misled by the disclosure of an edited document is not relevant. Since no conditions may be placed on documents released under the FOI Act, their disclosure is disclosure, in effect, to the world at large.
70. I also consider that the question of whether or not such disclosure would subject any party in this case to injustice or invite litigation are irrelevant for the purpose of deciding whether it is ‘practicable’ to edit the disputed documents. In *Winterton’s* case, Scott J was concerned with the question of whether the editing of documents would make them unintelligible. In that regard His Honour noted, at page 15:

“That in turn carries with it the inherent problem that it may invite speculation as to the subject matter of the documentation which in turn could cause considerable injustice and invite litigation.”

71. I do not understand those comments to mean that, provided no considerable injustice is caused or that no litigation is invited, documents which are unintelligible may be disclosed. Instead, I consider that those are simply examples of what might occur in that instance if unintelligible documents were to be disclosed and become, in consequence, the subject of speculation.
72. Having considered the disputed documents and information, I consider that it is not practicable to edit Documents 1-4; Document 2A folio 16; and Document 3A folios 17-18, because the extent of the editing required would render those documents misleading or unintelligible. There would be very little remaining in

them following deletion of all exempt personal information about third parties. While they do contain personal information about the complainant, it would not be possible to edit them in a way that gave him access to that information without also disclosing exempt personal information about other people.

APPENDIX

EXEMPT MATTER

DOCUMENT 5:	Words 1-8 and 13 in line 1 of paragraph 1. The first word in line 1; words 9- 12 in line 2; words 7-15 in line 3 and the whole of line 4 in paragraph 2. The first three words in paragraph 4. The first word in line 1 and word 9 in line 2 of paragraph 4. The whole of paragraph 5. Word 6 in paragraph 6.
DOCUMENT 6	The last three words of paragraph 1. Words 16-17 in paragraph 3. The signature.
DOCUMENT 1A	
Folios 33-34	The signature on folio 33; the names of the third parties in Box 6 and words 5 and 6 in the second line of the last paragraph in Box 6 on folio 34.
Folio 38:	The last 8 words in the second sentence; the first word of the third sentence, the eleventh word in the fourth line and the last sentence of the email message. The direct telephone number, mobile telephone number and direct e-mail address under the signature block.
Folios 48-49	The last three words in the first sentence and the signature on folio 48. Te initials under the column headed "Initial" on folio 49.
Folio 58	Words 1-9 in sentence 1 and words 5-18 of sentence 2 of paragraph 2.
Folio 59	The second sentence in paragraph 1. The whole of paragraph 3.
Folio 115:	In paragraph 1 of the second e-mail, words15-24 in sentence 2 and the whole of sentence 3.
Folio 117:	The whole of the second e-mail.
Folios 118-119:	In the first e-mail on folio 119, the last two words in the first sentence; the first word in line 3; and word 6 of the third sentence. In the second email, the addresses following "To"; the name in the salutation; the whole of the first sentence; and the mobile telephone number.

Folio 120: Words 7-8 and 17 in the first sentence and the mobile telephone number.

DOCUMENT 2A

Folio 24-25 The name in the “Received” stamp in folio 24. [Delete the signature in folio 24 and the initials in folio 25 to which the complainant is not seeking access].

Folio 82 The name in the last line of paragraph 6 and the name in the last line of paragraph 7.

Folio 93 The name in the last line of paragraph 6 and the name in the last line of paragraph 7.

DOCUMENT 3A

Folio 59 The mobile telephone number at the end of the last sentence.

Folio 73: The addressee’s name and address and the name in the salutation. [Delete the signature to which the complainant is not seeking access].

Folios 74-76 The name in the “Received” stamp in folio 75. [Delete the signature on folio 75 and the initials under the column headed “Initial” in folio 76 to which the complainant is not seeking access].

Folios 80-83 The name and address of the addressee; the name in the salutation and the initials in the “Approved” stamp on folio 80; the author’s address at the head of the page; the signature and signature block in folio 81; the name following the word “Author” in folio 82; and the names following the words “Document” and “Author” in folio 83. [Delete the initials under the column headed “Initial” in folio 83 to which the complainant is not seeking access].

Folios 86-89 The name and address of the addressee, the name in the salutation and the initials in the “Approved” stamp in folio 86; the address of the author and the signature and signature block in folio 87; the name following the word “Author” in folio 88; the names following the words “Document” and “Author” in folio 89. [Delete the initials under the column headed “Initial” in folio 89 to which the complainant is not seeking access].