

Participants:

**West Australian Newspapers
Limited**
Complainant

- and -

Attorney General
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access - documents relating to funding and performance of a government agency - clause 1(1) - deliberations or decisions of an Executive body - meaning of ‘reveal’, ‘deliberation’ and ‘decision’ - limits on the exemption.

Freedom of Information Act 1992 (WA): sections 74(1), 74(2), 76(5), 76(8), 85, 90(1)(a) and 90(3); Schedule 1, clauses 1(1), 1(2), 1(5) and 1(6).

BGC (Australia) Pty Ltd v Fremantle Port Authority and Another [2003] WASCA 250

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

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

Re Environmental Defender's Office (WA) Inc and Ministry for Planning [1999] WAICmr 35

Re Porter and Department of Community Services and Health (1988) 14 ALD 403

DECISION

The decision of the agency to refuse access under clause 1(1) of Schedule 1 to the *Freedom of Information Act 1992* is confirmed.

JOHN LIGHTOWLERS
A/INFORMATION COMMISSIONER

30 May 2008

REASONS FOR DECISION

BACKGROUND

1. This complaint arises from a decision by the Attorney General - who, as a Minister, is defined as an agency for the purposes of the *Freedom of Information Act 1992* ('the FOI Act') - to refuse West Australian Newspapers Limited ('the complainant') access to documents.
2. On 17 September 2007, the complainant applied to the Attorney General ('the agency') for access to:
 - “1. All documents regarding funding for the Department for Public Prosecutions.
 2. All documents regarding the performance of the Department for Public Prosecutions.

The time frame for this request is from 1 January 2006 to date.”
3. On 5 November 2007, the agency gave the complainant a detailed notice of decision which identified 18 documents as within the scope of the access application. In its notice, the agency said that it had assumed that the reference to the Department for Public Prosecutions was intended to be a reference to the Office of the Director of Public Prosecutions and had treated the application accordingly. The agency gave the complainant access to four documents in edited form but refused access - under clauses 1 and 6 of Schedule 1 to the FOI Act - to the remaining 14 documents. On 12 November 2007, the complainant applied to me for external review in relation to those 14 documents.

REVIEW BY THE A/INFORMATION COMMISSIONER

4. Following the receipt of this complaint, the agency was required to produce to me the originals of the disputed documents and its FOI file maintained in respect of the access application. On 13 May 2008, having considered the documents, the parties' submissions and the information before me at that time, I wrote to the parties setting out my preliminary view of this complaint. In response to that letter, the agency agreed to give the complainant access in full to four documents and the complainant withdrew its complaint in respect of nine documents, leaving one document in dispute between the parties.
5. On 23 May 2008, the agency advised me that it maintained its claim that the remaining document is exempt under clause 1(1) and made further submissions and provided further evidence on that point. However, the agency withdrew its claim that the disputed document was also exempt under clause 6(1).

THE DISPUTED DOCUMENT

6. The document in dispute in this matter is listed by the agency as Document 18 on its schedule of documents - which was given to the complainant - and described as follows:

“E-mail dated 05/09/05 [bears date 9/5/2007] from R Cock to C Wright”. [The document indicates ZIP file attachments].

CLAUSE 1 - CABINET AND EXECUTIVE COUNCIL

7. The agency claims that Document 18 is exempt under clause 1(1) of Schedule 1 to the FOI Act. Clause 1, insofar as it is relevant, provides:

“1. Cabinet and Executive Council

Exemptions

- (1) *Matter is exempt matter if its disclosure would reveal the deliberations or decisions of an Executive body, and, without limiting that general description, matter is exempt matter if it -*
- (a) ...
 - (b) ...
 - (c) ...
 - (d) *was prepared to brief a Minister in relation to matters --*
 - (i) *prepared for possible submission to an Executive body;*
 - (ii) ...

Limits on exemptions

- (2) *Matter that is merely factual, statistical, scientific or technical is not exempt matter under subclause (1) unless –*
- (a) *its disclosure would reveal any deliberation or decision of an Executive body; and*
 - (b) *the fact of that deliberation or decision has not been officially published.*
- (3) ...
- (4) ...
- (5) *Matter is not exempt by reason of the fact that it was submitted to an Executive body for its consideration or is proposed to be submitted if it was not brought into existence for the purpose of submission for consideration by the Executive body.*

Definition

- (6) *In this clause “Executive body” means –*

- (a) *Cabinet;*
- (b) *a committee of Cabinet;*
- (c) *a subcommittee of a committee of Cabinet; or*
- (d) *Executive Council.”*

8. The purpose of the exemptions in clause 1 is to protect the confidentiality of the deliberations, discussions or decisions of Cabinet and certain other Executive bodies, which are listed in clause 1(6). Those exemptions are limited by clauses 1(2)-1(5). If a document is found to fall within one of the heads of exemption in clause 1, there is no discretion for me to find that the document should be disclosed. There is no overriding public interest test that could permit disclosure of such a document.

Information Commissioner to ensure non-disclosure of certain matter

9. Section 76(5) of the FOI Act requires that, in dealing with a complaint, the Information Commissioner has to include in the decision the reasons for that decision, the findings on any material questions of fact underlying those reasons and reference to the material on which those findings were based. In addition, s.76(8) of the FOI Act requires that the Information Commissioner publish his or her decisions “...in order that the public is adequately informed of the grounds on which such decisions are made.”
10. However, s.74(1) of the FOI Act enjoins 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.”
11. In this case, the question whether the complainant is entitled to access to Document 18 depends entirely on whether the agency’s decision that it is an exempt document is correct. Taking into account the provisions of sections 76(5) and 76(8), and bearing in mind the mandatory obligations imposed upon me by s.74(2), I note that I am constrained from describing in more detail the submissions made by the agency in relation to the disputed document and from discussing in detail the evidence on which my decision is based, because to do so would be a breach of my obligations under s.74(2) in the event that the disputed document is found to be exempt.
12. Similarly, the Supreme Court, when hearing and determining an appeal under s.85 of the FOI Act, is also obliged to avoid the disclosure of exempt matter under s.90(1)a) and may not include any exempt matter in its decision in review proceedings or in reasons given for the decision (s.90(3)).
13. In this way, the legislation seeks to ensure that the objective terms and effect of matter which is asserted to be exempt from disclosure may be scrutinised and examined by an officer 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 ... This same conclusion was reached by Owen J in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at 556-557 where his Honour was faced with a similar situation in that the question of whether the document was exempt depended, to a significant degree, on the contents of the document itself and, therefore, the applicant and his counsel were severely handicapped in the conduct of the appeal by being unable to scrutinise the document. Nevertheless, Owen J concluded that this 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.”*

The agency’s submissions

14. In its notice of decision, the agency submits that all of the documents for which it claimed an exemption under clause 1(1) would, if disclosed, reveal the deliberations - or in some cases, the decisions - of the Expenditure Review Committee (‘the ERC’). The agency advises that the ERC is a committee of Cabinet and, therefore, falls within the definition of “Executive body” in clause 1(6) of Schedule 1 to the FOI Act.
15. In its letter to me of 23 May 2008, the agency notes that clause 1(1) provides that matter is exempt matter “if its disclosure would reveal the deliberations or decisions of an Executive body...” and submits that the meaning of the term ‘reveal’ was considered by the Supreme Court in *Police Force of Western Australia v Kelly and Another* (1996) 17 WAR 9 (in the context of the former exemption in clause 5(1)(b), which provided that matter was exempt matter if its disclosure could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law in a particular case).

16. In *Kelly*'s case, Justice Anderson considered the meaning of the term 'reveal' in the context of whether documents, the subject of a claim to exemption under clause 5(1)(b), would reveal the investigation of a contravention or possible contravention of the law and observed (at 13) that:

"I think documents which reveal that there is an investigation, the identity of the people being investigated and, generally the subject matter of the investigation probably would satisfy the requirement ... that the document 'must reveal something about the content of the investigation...'

The phrase ... is apt to include the revelation of the fact of a particular investigation by police of a particular incident involving certain people."

17. Justice Anderson also accepted (at 14) that there was no reason why any element of novelty or exclusivity should be imported into the phrase 'reveal the investigation' and said:

"A document may reveal a state of affairs which is also revealed by other things. The same state of affairs may be separately revealed in several documents. I do not think there is any difficulty in saying that the separate disclosure of each separate document reveals that state of affairs.

... [C]lause 5(1)(b) is not limited to new revelations but covers all matter that of itself reveals the things referred to, without regard for what other material might also reveal those things, or when that other material became known, and without regard for the actual state of knowledge that the applicant may have on the subject or the stage that the investigation has reached."

18. The agency submits that the construction of the phrase 'reveal the investigation', which was adopted by Justice Anderson, was referred to with approval by Justice Scott in *Police Force of Western Australia and Winterton* (Supreme Court of Western Australia, 27 November 1997, unreported, Library No. 970646) at 18.

19. Although both of those cases considered the meaning of the word 'reveal' in the context of the former clause 5(1)(b), the agency submits that the context in which the word is used is the same in both clause 5(1)(b) and clause 1(1). In each case, the use of the word 'reveal' indicates that the disclosure of a document would, because of the information contained in the document, convey something about the subject matter to which the document relates, whether that subject matter be an investigation, or - as in this case - a deliberation or decision of an Executive body.

20. The agency submits that giving the word 'reveal' in clause 1(1) the same meaning that it was determined to have in clause 5(1)(b) is consistent with the wide protection that is afforded under clause 1(1) to the deliberations, and potential deliberations, of Executive bodies (as defined in clause 1(6)): see *Re Environmental Defender's Office (WA) Inc and Ministry for Planning* [1999] WAICmr 35 at [9], where the former Information Commissioner said:

“I consider that the purpose of the exemption in clause 1 is to protect the confidentiality of Cabinet discussions and of consultations between Ministers. Among other things, the maintenance of Cabinet solidarity and collective responsibility is generally accepted to be an essential part of the Westminster system of government and the FOI Act recognises this in clause 1 and in the range of documents that are protected from potential disclosure by this exemption.”

21. In brief, the agency submits that the wide scope of the exemptions in clause 1 reflects the fundamental importance of the principle of Cabinet confidentiality in our system of government.
22. The agency further submits that a document will ‘reveal’ the deliberations or decisions of an Executive body, if, at the very least, it contains information which indicates (for example) that an Executive body deliberated upon or made a decision upon a particular matter, or which indicates generally the subject matter of a deliberation or decision made by an Executive body. In addition, a document may reveal the deliberations or decisions of an Executive body irrespective of whether those deliberations or decisions are also revealed by other sources or whether an applicant might already be aware of the deliberation or decision.
23. The agency submits that the disclosure of Document 18 would reveal the deliberations or decisions of an Executive body, for the following reasons:
 - Document 18 is an email from the Director of Public Prosecutions (‘the DPP’) to the agency’s legal policy officer who, together with another officer to whom the email refers, had sought information from the DPP in order to assist the agency in relation to matters which concerned the deliberations and decisions of the ERC.
 - To disclose Document 18 would ‘reveal’ - in the sense referred to in paragraphs 17-19 above - both the deliberations and the decisions of an ‘Executive body’. The agency has provided me with an explanation of the relevance of various matters referred to in Document 18 in that context and how its disclosure would have the effect claimed.
 - The attachments referred to in Document 18 - which were not attached to Document 18 but were instead sent to the agency by facsimile - include documents no longer in dispute (Documents 7 and 9), which I accepted in my letter of 13 May 2008 to the parties, as being exempt from disclosure under clause 1(1).
24. Finally, the agency submits that none of the limits on the exemption applies in this case. In particular, clause 1(2) is not applicable because the matter contained in Document 18 cannot be described as *“merely factual, statistical, scientific or technical in nature”*. Rather, it consists of a summary of matters deliberated upon by the ERC and refers to the decisions of the ERC in relation to those matters. The agency also submits that clause 1(5) is not applicable

because the agency's claims relate to clause 1(1) and not to clause 1(1)(d)(i) of Schedule 1 to the FOI Act.

Consideration

25. In order for documents to be exempt under clause 1(1), their disclosure must reveal the deliberations or decisions of an Executive body. The *Australian Concise Oxford Dictionary* (4th edition, 2004) defines 'deliberation' to mean: "*1 careful consideration. 2 a the discussion of reasons for and against. b a debate or discussion...*" and 'decision' to mean: "*1 the act or process of deciding. 2 a conclusion or resolution reached, esp. as to future action after consideration...*".
26. In *Re Porter and Department of Community Services and Health* (1988) 14 ALD 403, the Administrative Appeals Tribunal of Australia considered the application of s.34(1)(d) of the *Freedom of Information Act 1982 (Cth)*, which concerned an equivalent exemption in respect of "*a document the disclosure of which would involve the disclosure of any deliberation or decision of Cabinet*". In that case, Deputy President Todd said at 407:

"'Deliberation' of Cabinet seems to me to connote what was actively discussed in Cabinet. It is not the agenda for a meeting of Cabinet, nor is it what Cabinet formally decided. What the words "deliberation or decision" of Cabinet cover is debate in Cabinet (deliberation), and formal decisions made in Cabinet. It is not to be concluded that there was deliberation in respect of matter contained in a document merely because a document was before Cabinet at a meeting thereof."

I agree with that statement.

27. Consequently, I do not accept the agency's submission that revealing an Executive body's deliberations necessarily extends to "*information which indicates (for example) that an Executive body deliberated upon a particular matter ... or which indicates generally the subject matter of a deliberation or a decision made by an Executive body.*" In my view, that construction, as contended by the agency, goes further than the plain meaning of the words "*matter is exempt matter if its disclosure would reveal the deliberations or decisions of an Executive body*".
28. I understand Justice Anderson's remarks in *Kelly's* case to be limited to circumstances which indicate in some way that there is an investigation, either because it is clear that certain people or certain matters are being investigated or because something relating to the content of the investigation would be revealed by disclosure of the relevant documents. That is, those indicators must be linked to 'an investigation'. The agency's submissions seem to me to go beyond that connection. The agency's submission implies that it is enough if the subject matter of a deliberation or decision of an Executive body is simply referred to in the document in question and it is not necessary that the actual deliberation or decision be disclosed.

29. In my view, for 'deliberations' to be revealed in the context of clause 1(1), the information must consist of - or reveal - debate or discussion for and against a position - and not simply refer to the subject matter of that deliberation. I consider that the same is true for a decision. That is, in order to establish that a decision of an Executive body would be revealed by the disclosure of the relevant documents, what must be revealed, in my opinion, is the conclusion reached by the Executive body in relation to an issue, not simply a reference to the general topic or subject matter of a decision.
30. I do, however, accept the agency's submission - in paragraph 21 above that a document may reveal the deliberations or decisions of an Executive body irrespective of whether those deliberations or decisions are also revealed by other sources or whether an appellant might already be aware of the deliberation or decision.
31. I have carefully examined Document 18 and considered the agency's submissions. Having reviewed that material, I consider that the disclosure of Document 18 would reveal the deliberations of the ERC because that document discloses debate or argument considered by the ERC. I also agree with the agency's submission that the document relates to matters which in general terms appear to have been the subject of the ERC's deliberations. I have been able to confirm this submission from my examination of the document.
32. Based on my examination of the document, and taking into account the submissions of the agency, I am satisfied that Document 18 would, if disclosed, reveal a decision of the ERC. Because of the constraint placed upon me by s.74 of the FOI Act, I am unable to disclose or discuss the information upon which my conclusion is based. This is because there is no discretionary component vested in me in the sense that I might decide that access should be given to the document - notwithstanding that it contains exempt matter - on the basis of some asserted public interest consideration.
33. Finally, having considered the limits on the exemption in clauses 1(2)-1(5) and examined Document 18, I am satisfied that none of those limits applies in this case.
34. Therefore, for the reasons given here, I find that Document 18 is exempt under clause 1(1) of Schedule 1 to the FOI Act.
