

SUTHERLAND AND MINISTER FOR POLICE

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

**File Ref: 97012
Decision Ref: D00697**

Participants:

**Eileen Patricia Sutherland and John Ellis
Neville Sutherland**
Complainants

- and -

Minister for Police
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents believed to contain accusations by a certain named person - information identifying a third party - clause 3(1) - personal information - balance of public interest - clause 5(1)(b) - whether disclosure could reasonably be expected to reveal the investigation of a contravention or possible contravention of the law in a particular case.

Freedom of Information Act 1992 (WA) ss. 74, 102(3); Schedule 1 clause 3(1), 5(1)(b), 5(4).

Police Force of Western Australia v Kelly and Smith (Supreme Court of Western Australia, 30 April 1996, unreported, Library No. 960227).

Manly v Ministry of Premier and Cabinet (Supreme Court of Western Australia, 15 June 1995, unreported, Library No. 950310).

DECISION

The decision of the Minister is varied. The matter deleted from Document 2 and the matter deleted from Document 4 is exempt matter under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*, and Document 1 and Document 3 are exempt under clause 5(1)(b) of Schedule 1 to the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

27th February 1997

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Minister for Police ('the Minister') to refuse Mr and Mrs Sutherland ('the complainants') access to certain documents requested under the *Freedom of Information Act 1992* ('the FOI Act').
2. On 14 November 1996, the complainants wrote to the Minister and sought access under the FOI Act to all records of correspondence, memos, notes and any other communications concerning accusations they believed had been made against them by a certain named person ('the third party') to the Minister.
3. The then Minister identified four documents as falling within the ambit of the access application. The Minister decided to grant the complainants access to edited copies of two documents with matter claimed to be exempt under clause 3 of Schedule 1 to the FOI Act deleted from those documents. The Minister refused access to the other two documents, in total, on the ground that those documents consist of matter which is also exempt matter under clause 3(1) of Schedule 1 to the FOI Act.
4. By letter dated 13 January 1997, the complainants lodged a complaint with the Information Commissioner seeking external review of the Minister's decision.

REVIEW BY THE INFORMATION COMMISSIONER

5. I obtained copies of the disputed documents from the Minister. After reviewing the contents of those documents and after making further inquiries with another agency, I informed the parties in writing of my preliminary view in respect of this complaint, and gave reasons for my view. Although the Minister did not claim any of the disputed documents to be exempt under clause 5(1)(b), upon my examination of the documents themselves, it became apparent to me that the contents of Documents 1 and 3 relate to investigations of possible contraventions of the law. On that basis, it was my preliminary view that the matter deleted from two of the documents may be exempt matter under clause 3(1) and the whole of the other two documents may be exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.
6. On 18 February 1997, the complainants responded to my preliminary view and provided a further submission for my consideration. I have considered that submission but it has not dissuaded me from my preliminary view. My reasons follow.

THE DISPUTED DOCUMENTS

7. The disputed documents are described as follows:
- Document 1 Letter dated 14 February 1996, from the third party to another agency, with attachment, indicating other parties to whom copies of that letter had been sent.
- Document 2 Letter dated 16 February 1996, from the Minister to the third party.
- Document 3 Letter dated April 1996, from the third party to the Minister.
- Document 4 Letter dated 19 April 1996, from the Minister to the third party.
8. The Minister claims that Document 1 and Document 3 are exempt in total, under clause 3. In respect of Document 2, exemption is claimed under clause 3 for the name and address of the addressee, the name in the salutation, and two words in line 1 of that letter. In respect of Document 4, exemption is claimed under clause 3 for the name and address of the addressee and the name in the salutation.

THE EXEMPTIONS

(a) Clause 3 - Personal information

9. Clause 3, so far as is relevant, 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

...

(6) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.”

10. In the Glossary in the FOI Act, “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.”*
11. As I have said before, I consider the exemption in clause 3(1) is designed to protect the privacy of persons about whom personal information may be contained in documents held by State and local government agencies. 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, *prima facie*, exempt matter under clause 3(1).
12. In this instance, the disputed matter in Document 2 and Document 4 consists of the name and address of the third party and other information which would identify that person. I am satisfied that the matter deleted from Document 2 and Document 4 comprises “personal information” as defined in the FOI Act. In my view, that information is, *prima facie*, exempt matter under clause 3(1).
13. Clause 3 is limited by sub-clauses (2)-(6) inclusive. In the context of this complaint, the only relevant limitation is that contained in sub-clause (6) which provides that matter is not exempt under sub-clause (1) if its disclosure would, on balance, be in the public interest. Pursuant to s.102(3) of the FOI Act, the complainant bears the onus of persuading me on that point.

Public interest

14. I recognise that there is a public interest in maintaining the privacy of individuals. I also recognise the public interest in people such as the complainants being able to exercise their rights of access under the FOI Act. In their submission, the complainants sought to persuade me that the public interest in justice being done and being seen to be done should prevail. The complainants said:

“As you will appreciate, we are in the extremely difficult situation of having to argue our case without knowing what is in the documents, who wrote them and who are the other parties referred to. Paradoxically, of course, if these details were known to us then we would not now be seeking access to the documents under the FOI Act.

A fundamental issue here seems to be one of natural justice. The situation is that someone has written to the Police with unfavourable comments about us (and possibly about others) ... and we are not permitted to know the content of what has been said and do not have the opportunity to correct any mis-information.

It is in the public interest to see that justice is done, and that it is seen to be done. In the present situation justice appears to have been denied to the aggrieved parties (i.e. ourselves and possibly others), in a manner that

would shake public confidence in the administration of justice. To put it simply, the whole procedure seems to be quite unfair and one-sided...”

15. I have previously recognised a public interest in persons being informed of the nature of allegations made against them and of knowing how an agency deals with such complaints and the results of those inquiries. The matter deleted from Documents 2 and 4 is not information of that kind. I do not consider, therefore, that obtaining access to the personal information about the third party in Document 2 and Document 4 will satisfy that public interest.
16. Therefore, in balancing the competing interests, I consider that the public interest in protecting the personal privacy of the third party outweighs the other public interests. Accordingly, I find that the matter deleted from Document 2 and Document 4 is exempt matter under clause 3(1) of Schedule 1 to the FOI Act.

(b) Clause 5(1)(b)

17. Document 1 and Document 3 also contain some matter which I consider to be personal information about individuals other than the complainants. Each document also contains some information that I consider to be personal information about one of the complainants. However, in my view, that information could not be disclosed without also revealing personal information about other people. I consider all of the personal information about people other than the complainants contained in those two documents to be, *prima facie*, exempt matter under clause 3(1) of Schedule 1 to the FOI Act. However, I do not consider it necessary that I specify that information, nor deal with that exemption claim further because, for the following reasons, I find Document 1 and Document 3 exempt under clause 5(1)(b).
18. Clause 5(1)(b) provides:

“5. Law enforcement, public safety and property security

Exemptions

(1) Matter is exempt matter if its disclosure could reasonably be expected to -

(a) ...

(b) reveal the investigation of any contravention or possible contravention of the law in a particular case, whether or not any prosecution or disciplinary proceedings have resulted;”

19. In *Police Force of Western Australia v Kelly and Smith* (Supreme Court of Western Australia, 30 April 1996, unreported, Library No. 960227) concerning the interpretation and application of the exemption in clause 5(1)(b), Anderson J,

after referring to the decision of Owen J in *Manly v Ministry of Premier and Cabinet* (Supreme Court of Western Australia, 15 June 1995, unreported, Library No. 950310), said at page 8:

“...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 stipulated by Owen J that the document “must reveal something about the investigation”.

20. Further, at page 9, His Honour said:

“In my opinion the phrase,...if its disclosure could reasonably be expected to ... reveal the investigation of any contravention of the law in a particular case...” is apt to include the revelation of the fact of a particular investigation by police of a particular incident involving certain people. I think there is very good reason to accept that Parliament intended that such matter be exempt from access under the Act. It is not difficult to imagine cases in which it would be highly detrimental to good government and inimical to the administration of law enforcement to disclose that a particular criminal investigation is contemplated, has been started or has been completed.”

21. At pages 9-10, His Honour said:

“Even after an investigation has been completed there may be very good operational reasons why there should be no disclosure of it...of course there may be no need for secrecy whatever in a particular case and there may be good public interest reasons to give public access to the documents or to give the applicant access to the documents. However, whilst that may be a relevant consideration for the agency in exercising its discretion under s23(1) whether to allow access to the documents to the public or to a particular individual, it cannot help to determine whether the documents are in fact exempt documents under cl 5(1)(b).”

22. That decision makes it clear that the scope of the exemption provided by clause 5(1)(b) is extremely broad. Documents which, if disclosed, could reasonably be expected to reveal almost anything of an investigation will be exempt under that clause. Documents which could reasonably be expected to reveal the fact that a particular investigation of a particular incident involving a possible contravention of the law, the identities of those being investigated, or something of the nature or substance of the investigation, will clearly be exempt under clause 5(1)(b).

23. In the *Kelly and Smith* decision, Anderson J, also said, at page 10:

“I do not see why any element of novelty or exclusivity should be imported into the phrase “reveal the investigation”. 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.”

Therefore, even though some of the matter contained in Documents 1 and 3 may already be known to the complainants by other means, it may still be separately revealed by disclosure of Documents 1 and 3.

24. In light of the *Kelly and Smith* decision, and the requirements of s.74 of the FOI Act which prohibit me from including exempt matter in my reasons for decision, I cannot discuss in other than very general terms the nature and contents of the disputed documents. However, based on my examination of the disputed documents and information provided to me by the Minister and by another agency, I am of the view that disclosure of Documents 1 and 3 would reveal the general subject matter of a particular investigation of a possible contravention or contraventions of the law, the identity or identities of the subject or subjects of the investigation and the identities of others involved in various ways. Accordingly, it is my view that their disclosure could reasonably be expected to reveal an investigation conducted by officers of an agency of a possible contravention or contraventions of the law in a particular case and that, therefore, they are exempt under clause 5(1)(b).
25. Finally, although the complainants sought to persuade me that there is a public interest in the disclosure to them of information concerning any complaint made against them, none of the documents contains information of a type described in clause 5(4) and the public interest does not, therefore, arise for my consideration.
