OFFICE OF THE INFORMATION COMMISSIONER (W.A.)

File Ref: F2091999
Decision Ref: D0072000

Participants:

John Andrew Cumming,
Susan Denise Terry and
William George Simpson
Complainants

- and -

Metropolitan Health Service Board
First Respondent

Michael Harris Moodie
Second Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - clause 5(1)(b) - meaning of "the law" in clause 5 - meaning of "investigation" - whether a failure to comply - whether disclosure would "reveal the investigation" - matter already in the public domain - public interest - agency's discretion under section 3(3) - anomaly of clause 5(1)(b) - application of section 76(4).

Freedom of Information Act 1992 (WA) ss.3(3), 76(4); Schedule 1 clauses 5(1)(b), 5(4)(a) and 5(5).

Public Sector Management Act 1994 (WA) s.21(1)(a)
Interpretation Act 1984 (WA)

Police Force of Western Australia v Kelly and Another (1997) 17 WAR 9
Re Henderson, Goatley, McHale and Weaver and Education Department of Western Australia [1997] WAICmr 21

DECISION

The decision of the agency is confirmed. The disputed document is exempt under clause 5(1)(b) of Schedule 1 to the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

22 February 2000

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Metropolitan Health Service Board ('the agency') to refuse Doctors Cumming and Simpson, and Nursing Sister Terry ('the complainants') access to a document requested by them under the *Freedom of Information Act 1992* ('the FOI Act'). The agency claims that the requested document is exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.

2. On 12 May 1999, the agency endorsed, in principle, the abolition of certain Executive Director positions at King Edward Memorial Hospital ('KEMH') and Princess Margaret Hospital ('PMH'). The complainants occupied three of those Executive Director positions and were formally advised of the decision by Mr Michael Moodie, Chief Executive of both hospitals, at a meeting on 12 May 1999.

3. The agency's decision generated considerable concern amongst interested persons and organisations and various reports concerning the proposed changes appeared in the media. I understand that, as a result of the concern expressed about the proposed structural changes, Mr Andrew Weeks, Chief Executive Officer of the agency, instigated a review of the process leading up to the meeting on 12 May 1999.

4. On 22 June 1999, the complainants wrote to the agency requesting an inquiry into the process because they were concerned that a breach of public sector standards might have occurred. I am advised that the complainants initially approached the office of the Public Sector Standards Commissioner and were advised to lodge their grievance with their employing authority and, if they were not satisfied with the way their grievance was handled by the agency, they could then lodge a separate complaint with the Public Sector Standards Commissioner.

5. The agency responded to the complainants' request in the following terms:

> "*As you are aware, two weeks ago the Chief Executive Officer, Mr Andrew Weeks, appointed Denzil McCotter to conduct an internal review of the process. That review is under way and hopefully will result in a satisfactory outcome for those involved. If at the end of that process you are dissatisfied with the outcome or the manner in which the review has been conducted, it is open to you to lodge a breach of standard claim with the Public Sector Standards Commissioner."*

6. I understand from that notification that both parties understood that the internal inquiry would address the complainants' concerns raised by them in their letter to the agency of 22 June 1999. The agency's internal inquiry was completed on 4 July 1999. On 13 July 1999, the agency informed each complainant in writing

that the inquiry had found that the process was flawed and that there was substance to their complaints. However, none of the complainants was given a copy of the report and the alleged flaws in the process were not specified. Further, the complainants' grievance about a possible breach of the public sector standards was not addressed.

7. On 30 July 1999, the complainants applied to the agency under the FOI Act for access to the internal report ('the disputed document'). On 17 September 1999, the principal officer of the agency refused access on the ground that the document is exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. No proper notice of decision was given to the complainants. No reasons were given for the decision, nor any findings on the material questions of fact underlying the reasons and no reference was made to any material on which those findings were based. On 1 November 1999, the complainants lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

8. I obtained the disputed document from the agency. My office made inquiries with the agency and the person who had conducted the internal inquiry to clarify matters relating to the basis for that inquiry. On 21 December 1999, after considering the material before me, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that the disputed document may be exempt under clause 5(1)(b), but that some of the attachments to the disputed document may not be. The parties responded to my preliminary view, but the complaint remained unresolved.

9. In the course of my dealing with this complaint, Mr Moodie sought to be joined as a party. Mr Moodie is a third party, as defined in s.32 of the FOI Act, and he is entitled to be joined and, accordingly, was joined as a party to the complaint. I shall refer to him as the third party in these reasons for decision.

THE DISPUTED DOCUMENT

10. The disputed document is the report dated 4 July 1999 prepared by Dr McCotter entitled "*Executive Director Positions KEMH-PMH, Review of Process Resulting in the Events of 12 May 1999*". The report consists of 10 pages with 14 attachments.

THE EXEMPTION

11. Clause 5(1)(b) provides that matter is 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, whether or not any prosecution or disciplinary proceedings have resulted.

12. Two questions arise from the terms of the exemption set out in clause 5(1)(b). Those are, firstly, whether the internal inquiry conducted by Dr McCotter was an "*investigation of any contravention or possible contravention of the law*" and, secondly, whether the disclosure of the disputed document could reasonably be expected to 'reveal' that investigation.

13. The decision of the Supreme Court of Western Australia in *Police Force of Western Australia v Kelly and Another* (1997) 17 WAR 9 makes it clear that the scope of the exemption provided by clause 5(1)(b) is very broad. Once it is established that there was an investigation of a contravention or possible contravention of the law in a particular case, and that disclosure of the relevant document could reasonably be expected to reveal the identity of the person investigated and generally the subject matter of the investigation, then the document is exempt.

The complainants' submission

14. The thrust of the complainants' submission is that the disputed document should be disclosed to them because it is a report of the inquiry into the complaint made by them and they have not been properly informed of the inquiry that was conducted or the findings of that inquiry. They requested an inquiry into whether there had been a breach of public sector standards. They have not been informed whether or not the inquiry found that such a breach of standards had occurred.

15. The complainants argue that *"…it would appear that where employees may have been unlawfully dealt with and they have requested details of the actions taken against them, they are to be denied access due to the fact that the investigation may reveal the very issue that led to the investigation in the first place."* The complainants submit that they should be given access to the disputed document in order to verify the information given to the reviewer and ensure that it is factually correct, and that refusing access prevents them from learning the truth about *"their effective dismissal from the service."*

The third party's submission

16. The third party submits that, in his view, he was denied natural justice in the review process in that he was not informed of the terms of reference of the review, was not given an opportunity to respond to the report and has not been given a copy of it. The third party submits that he is of the view that the complainants should be given a copy of the disputed document. However, he objects to its disclosure on the basis that he has not been given a copy himself and has had no opportunity to review or comment on it.

The agency's submission

17. The agency submits that the purpose of the internal review was to determine whether the complainants had been treated in accordance with the principles of human resource management applicable to public sector employees under the

Public Sector Management Act 1994 ('the PSM Act'). Although there were no written terms of reference for that inquiry, the agency's files record that the reviewer was "*to conduct an internal review of the process leading up to the events of 12 May 1999 to determine whether or not the Executive Directors were treated in accordance with the requirements of the Public Sector Management Act 1994 and Public Sector Standards*".

18. The agency categorised the review as an informal, internal inquiry. I understand that the inquiry was conducted in compliance with Public Sector Standard 9 (Grievance Resolution) following the lodging of the complainants' grievance with the agency.

Investigation of any contravention or possible contravention of the law

19. The term "the law" in clause 5 is used in a broad sense and is not limited in its application to the criminal law only. Clearly, the PSM Act is a law as defined in clause 5(5) for the purposes of the exemption in clause 5(1)(b). I also consider that the public sector standards established under s.21(1)(a) of the PSM Act, fall within the definition of "the law" in clause 5(5): see my decision in *Re Henderson, Goatley, McHale and Weaver and Education Department of Western Australia* [1997] WAICmr 21, at paragraphs 18-20.

20. The term 'investigation' is not defined in the FOI Act or the *Interpretation Act 1984* or in any of the FOI legislation in other Australian jurisdictions. The fundamental rule of statutory interpretation is that plain words must be given their plain meaning. The *Australian Concise Oxford Dictionary* (Second Edition) defines the word 'investigation' to mean "*the process or an instance of investigating; a formal examination or study"*. In the same source the term 'investigate' is defined as meaning "*inquire into; examine; study carefully; make an official inquiry into; make a systematic inquiry or search"*. Further, 'inquire' means "*seek information formally; make a formal investigation*".

21. I consider that the term 'investigation', according to its ordinary dictionary meaning, applies to the many kinds of formal inquiries normally associated with law enforcement activities. However, I also consider that the term is equally capable of applying to less formal, but official, inquiries into other matters that involve the gathering of information. In the latter case, an inquiry might involve nothing more formal than seeking a report about a particular matter (being a contravention or possible contravention of the law) as the basis for action or decision.

22. In my opinion, the reference by the agency to Dr McCotter's inquiry being 'informal' is a reference to the manner in which it was conducted. In my view, it was an official inquiry, conducted on an informal basis. I consider that it is enough that there was an inquiry for the purpose of determining whether there was a failure to comply with the provisions of the PSM Act or the public sector standards to establish that the agency conducted an investigation.

23. I am satisfied that the internal review was an inquiry to determine whether or not the complainants had been treated in accordance with the requirements of the PSM Act and the standards established under that Act, that is, whether their treatment was in compliance with the relevant legislation. The word "contravention" is defined in clause 5(5) to include a failure to comply. In my opinion, the inquiry was, therefore, an investigation of a contravention or possible contravention of the law. Further, having inspected the disputed document, I am of the view that its disclosure would reveal the investigation, in the sense described in *Kelly*'s case.

Reveal the investigation

24. In *Kelly*'s case, concerning documents relating to a police investigation, Anderson J said, at page 13:

> "*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*".

25. At pages 14 and 15, his Honour said:

> "*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*…[clause] *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."*

26. Clearly, the complainants are aware of the particular investigation. However, the decision in *Kelly*'s case makes it clear that matter will be exempt if its disclosure could reasonably be expected to reveal the investigation of a contravention or possible contravention of the law in a particular case, regardless of the access applicant's actual knowledge of the investigation. I am satisfied that disclosure of the disputed document would have that effect. Accordingly, I find that the disputed document is exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.

Attachments to the disputed document

27. There are 14 attachments that form part of the disputed document and the report refers to each of those attachments. I have received no submission from the agency in relation to any particular attachment. Attachment 1 is a notice of motion for a meeting of the agency with a 2 page submission. Attachment 2 is a handwritten statement that appears to have been directed to the complainants. Attachment 3 consists of copies of letters sent to the complainants informing

each of them of the agency's decision. Attachment 4 is a media statement. Attachment 5 is an extract of a newspaper article in *The West Australian* newspaper dated 20 May 1999. Attachment 6 consists of briefing notes and a 2 page submission to the Minister for Health. A copy of Attachment 1 is included with those documents.

28. Attachment 7 summarises various diary notes relating to meetings held with the third party. Attachment 8 is a facsimile message from the reviewer to the third party and it includes file notes and a request for information. Attachment 9 is a facsimile message, together with notes from a workshop held on 1 April 1999 attended by 2 of the complainants. Attachment 12 consists of 2 e-mail messages. Attachment 10 appears to me to consist of responses from the third party to the reviewer's request for information. Attachment 11 consists of handwritten notes of various events recorded in a personal diary. Attachment 13 is a Parliamentary Question on Notice given to the Legislative Assembly on 24 June 1999, including a draft answer to that question. A pro forma letter dated 2 July 1999 and marked "Draft" is attached to the Parliamentary Question. Attachment 14 is copies of sections of the PSM Act.

29. Taking into account the contents of those documents, the references to each of them in the main part of the report, and the fact that they form part of the disputed document, I consider that those documents fall within the terms of the exemption in clause 5(1)(b). In my view, the disclosure of those documents could reasonably be expected to reveal the identity of a person or persons being investigated in this particular instance and, generally, the subject matter of the investigation.

30. I am mindful that the information in Attachments 3, 5, 13 and 14 is matter that has already been revealed or is otherwise in the public domain. Notwithstanding that, the disclosure of those documents would reveal the investigation in the sense described in *Kelly*'s case. Accordingly, I find that those documents are exempt under clause 5(1)(b).

Limit on exemption

31. The complainants' submission is, essentially, a public interest argument in favour of disclosure. I agree that there is a public interest in people who make a complaint to a government agency being as fully informed as possible of the action taken in respect of that complaint and the outcome. I consider that to be important where, as in this case, a government agency is the employer and the complaint concerns the administrative processes leading to the abolition of the complainants' positions, that action having such a significant impact on their careers. I consider that to be an aspect of public interest in the accountability of agencies.

32. However, once it is established that a document is exempt under clause 5(1)(b) the public interest only arises for consideration if the document in question is of a kind described in clause 5(4)(a), that is, if it consists merely of one of the following:

> *"(i) information revealing that the scope of a law enforcement investigation has exceeded the limits imposed by the law;*
>
> *(ii) a general outline of the structure of a programme adopted by an agency for dealing with any contravention or possible contravention of the law; or*
>
> *(iii) a report on the degree of success achieved in any programme adopted by an agency for dealing with any contravention or possible contravention of the law."*

33. I am satisfied that the disputed document and those attachments that I have found to be exempt under clause 5(1)(b) are not of a kind described in clause 5(4)(a). Therefore, it is not open to me to consider whether disclosure would, on balance, be in the public interest.

The agency's discretion under s.3(3)

34. Under s.3(3) of the FOI Act, the agency has the discretion to disclose documents which are technically exempt. It appears to me that, although the complainants have been informed that the particular process leading up to the decision to abolish their executive positions in KEMH and PMH was flawed, their questions about a possible breach of standards remain unanswered. They have not been properly informed of what inquiry was made into their complaints or the results of those inquiries.

35. I would have thought that, as a matter of good administrative procedure, and in the interests of fairness to the complainants and procedural fairness to the third party, all of those parties should have been given a copy of the report, or as full a summary of it as possible, as part of the review process and without the need to resort to the FOI legislation to endeavour to obtain a copy. I consider that this is clearly an instance in which the agency could have exercised its discretion to give the complainants access to the disputed document or parts of it. However, the agency chose not to exercise its discretion in that manner.

36. This complaint is another example of the anomaly that is clause 5(1)(b) in Western Australia. The usual approach to the exemption provisions in FOI legislation is to prevent disclosure in circumstances where some identifiable harm could reasonably be expected to result. However, clause 5(1)(b) exempts matter that could reasonably be expected to reveal an investigation, whether or not any harm or adverse effect could reasonably be expected to follow from disclosure. The effect of that particular exemption is that a document may be withheld by agencies merely because its disclosure may "reveal an investigation" even when there is no good reason for withholding it, and no identifiable harm likely to result from disclosing it. In this case, no good reason for withholding the disputed document has been given to me and none is apparent.

37. Clearly, the complainants are aware of the particular investigation and its subject matter because their complaints resulted in the particular investigation that was undertaken. There is nothing before me to indicate that any harm could reasonably be expected to result from disclosing that document to the complainants. Notwithstanding that, the breadth of the scope of the exemption in clause 5(1)(b), as interpreted by the Supreme Court of Western Australia, means that the main part of the disputed document clearly falls within the terms of the exemption. In those circumstances, I do not have the power to make a decision that access should be given to it (s.76(4)).

38. I have repeatedly commented on the adverse consequences to accountability flowing from this exemption. I have recommended that the FOI Act be amended to bring this particular exemption clause into line with its equivalents in other jurisdictions where the exemption protects documents the disclosure of which could reasonably be expected to prejudice, rather than merely reveal, an investigation. That approach is consistent with the fundamental principle germane to all FOI legislation, that access should only be refused where there is good reason to do so.

39. An amendment is essential to avoid the unfair and absurd results caused by the use of clause 5(1)(b) in Western Australia as a reason for non-disclosure by agencies whose primary functions have little to do with law enforcement, public safety and property security. The result in this complaint is a case in point. Outcomes such as that produced in this instance detract from the efficacy of laws that are designed to enhance the accountability of government agencies and do not assist public confidence in the operation of the FOI Act.

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