

TURNER AND POLICE

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

**File Ref: 97021
Decision Ref: D00897**

Participants:

Jeffrey Charles Turner
Complainant

- and -

Police Force of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents contained on an investigation file - clause 5(1)(b) - whether documents reveal the investigation of a contravention or possible contravention of the law - reliance upon section 23(2).

Freedom of Information Act 1992 (WA) ss. 23(2), 24; Schedule 1 clause 5(1)(b).

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

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

DECISION

The decision of the agency is set aside. In substitution it is decided that Documents 1-7 described in paragraph 8 of these reasons for decision are not exempt.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

24th March 1997

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Police Force of Western Australia, known as the Police Service ('the agency') to refuse Mr Turner ('the complainant') access to documents of the agency requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. In August 1996 the complainant made a complaint to the agency concerning the alleged conduct of two police officers. By letter dated 29 October 1996, the complainant applied to the agency under the FOI Act for access to documents comprising a file of the Internal Investigations Unit ('the IIU'). Following further correspondence between the complainant and the agency, the complainant agreed to grant the agency an extension of time until 20 December 1996 to deal with his access application.
3. Without identifying any of the requested documents, by letter dated 16 December 1996, Chief Inspector M J B Rae refused the complainant access to the requested documents pursuant to s.23(2) of the FOI Act, on the ground that the documents described in the access application would be exempt documents under clause 5(1)(b) of Schedule 1 to the FOI Act.
4. The complainant sought internal review of the agency's decision and, on 20 January 1997, the agency's internal reviewer confirmed the initial decision of the agency to refuse access under s.23(2). Thereafter, on 10 February 1997, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

5. The IIU is responsible for investigating complaints against police officers made by members of the public. The Parliamentary Commissioner for Administrative Investigations ('the State Ombudsman') also investigates such matters and conducts assessments of the adequacy of police investigations in respect of certain complaints referred to his office. By the time this matter came before me, the documents in dispute were in the possession of the State Ombudsman. Therefore, with the concurrence of the State Ombudsman and the agency, I obtained a copy of the IIU file from his office and I obtained a copy of the FOI file maintained in respect of this matter from the agency.
6. After considering that material, on 10 March 1997, I informed the parties in writing of my preliminary view in respect of this complaint, including my reasons for that view. I was of the view that most of the documents in the IIU file are exempt documents under clause 5(1)(b). However, it was also my view that

other documents in that file, including routine, administrative documents of the agency, may not be documents to which clause 5(1)(b) applies. Accordingly, the agency was invited to consider the release of those documents to the complainant.

7. I received a written response from the agency dated 14 March 1997. In that submission the agency maintained its claims for exemption under clause 5(1)(b) in respect of all documents. The complainant withdrew his complaint in respect of those documents which, in my preliminary view, are exempt documents under clause 5(1)(b). Therefore, this decision concerns only the agency's decision to refuse access to seven documents on the ground that those documents are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.

THE DISPUTED DOCUMENTS

8. The seven documents remaining in dispute are described as follows:

Number	Description
1	Internal Investigation Branch Cost Sheet.
2	Investigation Cost Sheet dated 12/9/96.
3	Blank memorandum, undated.
4	Internal memorandum dated 12 September 1996, from District Office, Fremantle to Brentwood Police.
5	Internal memorandum to Fremantle District, undated.
6	Memorandum dated 25/9/96 from IIU to State Ombudsman.
7	Memorandum dated 25/9/96 from IIU to State Ombudsman.

THE EXEMPTION

9. Clause 5(1)(b) of Schedule 1 to the FOI Act provides:

“(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;”

10. The interpretation of clause 5(1)(b) has been the subject of two decisions by the Supreme Court of Western Australia. As Information Commissioner, I am bound by those decisions and must apply the law as stated by the Supreme Court when dealing with complaints under the FOI Act.
11. In *Manly v Ministry of Premier and Cabinet* (Supreme Court of Western Australia, 15 June 1995, unreported, Library No. 950310) Owen J expressed the view that a document will be exempt from disclosure under clause 5(1)(b) if there is something in the document which, when looked at in the light of the surrounding circumstances, would tend to show something about the content of the investigation. In the case of *Police Force of Western Australia v Kelly and Smith* (Supreme Court of Western Australia, 30 April 1996, unreported, Library No. 960227), Anderson J said, at page 8 of that decision, that “...documents which would reveal that there is an investigation, the identity of the people being investigated and generally the subject matter of the investigation would probably satisfy the requirement stipulated by Owen J that the document “must reveal something about the content of the investigation”.” 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.”
12. In that case His Honour held, at page 13, that, to the extent that any of the subject documents would reveal (whether for the first time or not) that the Internal Investigations Branch of the agency was conducting, was about to conduct or had conducted an investigation into the conduct of the respondents in the matter as regards a particular incident in Fremantle on 25 March 1995 in which a firearm was discharged, that document is an exempt document within the meaning of clause 5(1)(b) of the FOI Act. His Honour also said that whether the documents fall into that category is a question of fact which is for the Information Commissioner to resolve.
13. I have examined each of the disputed documents. Although I do not consider the disputed documents are likely to contain any information of interest to the complainant, each of the documents described in paragraph 8 above is a separate document for the purpose of the complainant’s access application and must be dealt with accordingly.
14. The agency submits that all documents of the nature described in the complainant’s access application will inevitably reveal an investigation and are, therefore, exempt documents under clause 5(1)(b). The agency said, *inter alia*:

“The extent to which a particular document reveals an investigation, is in my opinion, not relevant to the application of the exemption clause. Therefore to label a document an [sic] “routine administrative document, is clearly an attempt to revert to the interpretation of clause 5(1)(b) which

applied prior to His Honour Justice Anderson's decision...and does not reflect the current state of the law."

15. In my view the agency's decision-makers have misunderstood the effect of that decision. That decision is authority that, to the extent that any of the requested documents would reveal the fact that an investigation was, will be or is being conducted into a particular incident (amounting to a contravention or possible contravention of the law) involving certain people, that document will be exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. It is not authority that clause 5(1)(b) creates a blanket exemption for all documents that may be in any way related, directly or indirectly, to an investigation, nor for documents merely because they are located on an investigation file, nor for documents merely because they are located within an investigative unit of the agency.
16. The application of the exemption still requires consideration of the nature of the particular documents in question, either as described in the access application, or as ascertained upon their inspection. It must be that their disclosure could reasonably be expected to reveal, at the very least, the fact of a particular investigation by police of a contravention or possible contravention of the law. It is not sufficient that the document merely reveal the fact that there has been an investigation. They must reveal, in the words of Anderson J, "*...the fact of a particular investigation by police of a particular incident involving certain people.*"

The application of clause 5(1)(b) to the disputed documents

17. Document 1 and Document 3 are blank *proforma* documents used administratively by the agency in its internal management of the complaint process. Although Document 1 contains a file reference number, in my view, neither of those documents reveals anything about a particular investigation of a contravention or possible contravention of the law. They could not reasonably be expected to reveal "*...the fact of a particular investigation by police of a particular incident involving certain people*" as contemplated by Anderson J, nor anything of the content of any such investigation. Accordingly, I find that Document 1 and Document 3 are not exempt under clause 5(1)(b).
18. Document 2 contains a record of various costs incurred by the agency in relation to an investigation. However, there is nothing in that document which relates those costs to any particular investigation into a contravention or possible contravention of the law. It does not reveal the identity of the person or people being investigated, nor what they were being investigated for, nor anything of the content of the investigation. Accordingly, I find that Document 2 is not exempt under clause 5(1)(b).
19. Document 4 and Document 5 appear to be memoranda accompanying documents sent from one part of the agency to another. Document 5 is a *proforma* type of cover sheet used to accompany such documents. In my view, neither of those documents reveals anything of a particular investigation into a contravention or

possible contravention of the law. Accordingly, I find that Document 4 and Document 5 are not exempt under clause 5(1)(b).

20. Document 6 and Document 7 are both the same type of form. Those documents contain a number of prepared statements in the form of a checklist to be completed by an officer of the agency. In my view, neither Document 6 nor Document 7 reveals anything of a particular investigation into a contravention or possible contravention of the law. Accordingly, I find that Document 6 and Document 7 are not exempt under clause 5(1)(b).

RELIANCE ON SECTION 23(2)

21. Section 23(2) of the Act provides that, in specified circumstances, an agency may refuse access to the documents that have been requested without having identified any or all of them and without specifying the reason why matter in any particular document is claimed to be exempt. Those circumstances are, firstly, that it is apparent from the nature of the documents as described in the access application that all of the documents are exempt documents and, secondly, that there is no obligation under s.24 to give access to an edited copy of any of the documents.
22. Before an agency can rely on that section it must be apparent from the description of the documents in the access application that all of the documents are exempt documents. An example might be where a request is made for all confidential legal advices provided to an agency by its legal advisers. It is apparent from that description that any such documents would be exempt under clause 7 of Schedule 1 because they would be privileged from production in legal proceedings on the ground of legal professional privilege.
23. Clearly, documents which of their very nature could reasonably be expected to reveal the investigation of a contravention or a possible contravention of the law in a particular case will be exempt. However, as I have indicated above, I am of the view that not all documents on an investigation file will necessarily be of that nature. The complainant did not apply for particular documents or particular kinds of documents which, from their very description, could be seen to be exempt; rather, the complainant applied for access to a complete file, *albeit* an investigation file. As I have said, I do not accept that all documents on an investigation file are necessarily of a type to which clause 5(1)(b) applies.
24. Not all the documents on an investigation file will necessarily reveal the fact of a particular investigation by police of a particular incident involving certain people. There is likely to be on such a file administrative documents that reveal nothing of that nature. Accordingly, I do not accept that it was apparent, from the nature of the documents as described in the access application, that all of the documents are exempt. Further, my examination of all the documents contained on the file in question has confirmed my view in that regard. Accordingly, in my opinion, it was not appropriate in this instance for the agency to rely on s.23(2) and refuse access without having identified any or all of the documents.