

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

**File Ref: F2003220
Decision Ref: D0092004**

Participants:

Paul Stanley Byrnes
Complainant

- and -

**Office of the Public Sector
Standards Commissioner**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to inquiry into an alleged breach of Public Sector Standards – clause 5(1)(b) – whether disclosure could reasonably be expected to reveal the investigation of a contravention or possible contravention of the law – whether limits on exemption in clause 5(4) apply – discretion to disclose exempt matter.

Freedom of Information Act 1992 (WA) ss.3(3), 76(4); Schedule 1 clauses 5(1)(b), 5(4), 5(5), 6(1).

Public Sector Management Act 1994 ss.9, 21(9), 97(1)(b)

Public Sector Management (Examination and Review Procedures) Regulations 2001 Regulations 7, 12, 15, 19, 24(1)(b), 27.

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

Re Henderson and Others and Education Department of Western Australia [1997] WAICmr 21

Re Cumming and Others and Metropolitan Health Service Board and Another [2000] WAICmr 7

DECISION

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

D A WOOKEY
A/INFORMATION COMMISSIONER

1 April 2004

REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Office of the Public Sector Standards Commissioner ('the agency') to refuse Mr Byrnes ('the complainant') access to certain documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. The complainant is an officer of the Department of Environment ('the DoE'). In late 2003, the complainant wrote to the A/Chief Executive Officer of the DoE, formally notifying him, in accordance with regulation 7 of the *Public Sector Management (Examination and Review Procedures) Regulations 2001* ('the Regulations'), that he was making a claim of a breach of the Public Sector Standards in Human Resource Management ('the Standards') by the DoE in relation to his then recent secondment and also in relation to a proposal to transfer him from his substantive position in the Kwinana Regional Office of the DoE to the Environmental Management Division of the DoE.
3. The complainant's claim of a breach of the Standards could not be resolved with the DoE and, on 12 August 2003, the A/Chief Executive Officer of the DoE referred his claim to the Commissioner for Public Sector Standards ('the Commissioner'), in accordance with regulation 12 of the Regulations. Following an examination of the complainant's claim by an OPSSC Examiner, in accordance with regulation 15, on 1 September 2003, the Commissioner appointed an Independent Reviewer, under s.97(1)(b) of the *Public Sector Management Act 1994* ('the PSM Act'), to review the complainant's claims. At the completion of that review, the Independent Reviewer submitted a report of his findings to the Commissioner on 25 September 2003, for her consideration.
4. On 8 October 2003, the Commissioner wrote to the A/Chief Executive Officer of the DoE, notifying him that the Independent Reviewer had provided her with a report of his review of the complainant's claim of a breach of the Standards. The Commissioner advised the A/Chief Executive Officer that, having considered the Independent Reviewer's report, she had determined that the DoE had breached the Transfer Standard in the management of the process used to transfer the complainant from his substantive position in the Kwinana Regional Office to a position in the Environmental Management Division of the DoE. The Commissioner also directed the A/Chief Executive Officer to inform the complainant of her determination in relation to his claim.
5. On 22 October 2003, the A/Chief Executive Officer notified the complainant of the Commissioner's determination and provided him with a copy of the Commissioner's letter of 8 October 2003. On 31 October 2003, the A/Chief Executive Officer wrote to the complainant, advising him of the action that the DoE proposed to take as a result of the Commissioner's determination that the DoE had breached the Transfer Standard. The A/Chief Executive Officer also

provided him with a copy of the Commissioner's report to the DoE, which was attached to the Commissioner's letter of 8 October 2003.

6. On 20 November 2003, the complainant applied to the agency, under the FOI Act, for access to documents relating to the review of his claim of a breach of Standards. In particular, he sought access to copies of:

- “(a) all documents reviewed by the reviewer pursuant to regulation 19(1)(a);*
- (b) all records of interviews conducted by the reviewer pursuant to regulation 19(1)(c);*
- (c) all records of interviews conducted by the reviewer pursuant to regulation 19(1)(d); and*
- (d) the reviewer's report to the Commissioner for Public Sector Standards ... pursuant to regulation 19(2)”.*

7. On 25 November 2003, the complainant sent an email to the FOI Coordinator at the agency, also seeking access to a copy of any response that the Commissioner may have made to the DoE, under regulation 24(1)(b) of the Regulations, in relation to the remedy for the breach of the Transfer Standard.

8. On 1 December 2003, the Executive Director of the agency made the initial decision on access. The complainant was given access to a number of documents, including a copy of the record of his interview with the Independent Reviewer. However, he was refused access to four documents ('the disputed documents') on the ground that they were exempt under clause 5(1)(b) and clause 6(1) of Schedule 1 to the FOI Act. The complainant was also advised that no documents of the kind described in his email of 25 November 2003 were held by the agency.

9. By letter dated 10 December 2003, the complainant applied to the agency for internal review of the decision to refuse him access to the disputed documents. He made written submissions to the agency in support of his application. However, by letter dated 16 December 2003, the Commissioner confirmed the decision on access and, on 30 December 2003, the complainant applied to the Information Commissioner for an external review of that decision.

REVIEW BY THE A/INFORMATION COMMISSIONER

10. After receiving this complaint, I required the agency to produce to me, for my examination, its FOI file relating to the complainant's access application and the originals of the disputed documents. In order to further assist me with my inquiries into this complaint, the agency also provided me with the original of the file relating to the Independent Review of the complainant's claim of a breach of the Standards.

11. Following an examination of that material, my Senior Legal Officer met with the complainant on 13 January 2004, to discuss his complaint with him. On 16 January 2004, my Senior Legal Officer wrote to the complainant confirming the matters discussed at that meeting. He invited the complainant to reconsider his complaint and, if he wished to pursue it, to provide additional information to me in support of his claims. The complainant did not withdraw his complaint.
12. On 19 February 2004, after considering the material then 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 documents are exempt under clause 5(1)(b). In response, the complainant made a further submission in support of his argument that the documents should not be exempt.

THE DISPUTED DOCUMENTS

13. The disputed documents consist of three summaries of interviews between the Independent Reviewer and three third parties and the Independent Reviewer's report to the Commissioner.

THE EXEMPTIONS CLAIMED

14. The agency claims that the disputed documents are exempt under clauses 5(1)(b) and 6(1) of Schedule 1 to the FOI Act.

Clause 5(1)(b)

15. Clause 5(1)(b) of Schedule 1 to the FOI Act 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*”.
16. The scope and meaning of the exemption in clause 5(1)(b) was determined by the Supreme Court of Western Australia in *Police Force of Western Australia v Kelly & Another* (1996) 17 WAR 9. In that decision, the Supreme Court made it clear that clause 5(1)(b) protects from disclosure a wide range of documents associated with an inquiry or investigation into an alleged contravention or possible contravention of the law. It was held, at p.13 of *Kelly's* case, that documents which, if disclosed, would reveal the fact of a particular investigation of a particular incident involving certain people will “*reveal the investigation*” for the purposes of clause 5(1)(b).
17. It is also clear from the decision in *Kelly's* case that the exemption in clause 5(1)(b) can apply regardless of how much an applicant may know, or claim to know, about an investigation and, further, that the exemption in clause 5(1)(b) can also apply to particular documents which “*reveal the investigation*”, notwithstanding the fact that the applicant may have obtained information

about the investigation from other sources or that the information in the documents may have already been otherwise revealed (p.14).

The agency's claims

18. The agency claims that the exemption in clause 5(1)(b) may be claimed irrespective of whether or not prosecution or disciplinary action had been taken following the investigation into the complainant's claim of a breach of the Standards and "the law" referred to in the complainant's case is the PSM Act, the Western Australian Public Sector Code of Ethics and the Standards.
19. The agency also claims that the breach of standards review it undertook was directed at the secondment and transfer process followed by the DoE and not at the merits of the complainant's claim. Accordingly, that review was not concerned with accusations about the complainant but, rather, the process followed by the DoE when making the decision to transfer the complainant from its Kwinana District Office to the Perth Office of the DoE.

The complainant's submissions

20. The complainant made submissions to the agency, and to me, in support of his request for access to copies of the disputed documents. In summary, the complainant's submissions are that:
 - (1) the investigation undertaken by the agency was as a result of his claim of a breach of Standards and that the investigation was not performed for the purposes of law enforcement, public safety and property security;
 - (2) the disputed documents were obtained for the purposes of gathering facts and information, in order to determine whether the Standards had been complied with, and the information provided to the agency by the Independent Reviewer was used in determining the complainant's claim of a breach of Standards and in determining that the remedy proposed by the DoE was appropriate;
 - (3) disclosure of the disputed documents would afford the complainant natural justice by giving him access to information upon which decisions and/or accusations about him were made, including the processes that the DoE used to transfer him from its Kwinana District Office to the Perth Office;
 - (4) it does not seem appropriate to deny him some form of access to the disputed documents, as he has a direct interest in understanding the information provided to the Independent Reviewer appointed to review his claim of a breach of Standards;

- (5) there is a strong public interest in the workings of Government and government agencies and their decision-making processes being open and accountable and those processes being fair, equitable and based upon merit; and
 - (6) there is a strong public interest in the complainant obtaining information directly relating to him which outweighs any other public interests in the non-disclosure of the disputed documents.
21. In response to my preliminary view, the complainant submitted that the disputed documents cannot be exempt under clause 5(1)(b) because:
- (1) There is a high degree of knowledge that the DoE breached the Transfer Standard; that Directors and Human Resource officers of the DoE are aware of the breach; and that minutes of the DoE's Corporate Executive placed on the DoE's intranet site make reference to a breach of Standards.
 - (2) The complainant is aware of which DoE officers were interviewed by the Independent Reviewer; that the things investigated were the elements of the Standard in relation to transfers; and that the complainant and the DoE were the subjects of the breach of the Transfer Standard.
 - (3) As the Commissioner has the capacity under regulation 27 of the Regulations to make written reports to the Parliament of Western Australia, the Commissioner will, in the normal course of business, exercise that capacity and make a report to Parliament that the DoE has not complied with the Regulations. In making such a report to Parliament, the Commissioner has revealed, or will reveal, the investigation in a public forum, namely Parliament and "[t]o claim that a document is exempt on the basis that it would reveal an investigation is contradictory while exercising the provision of Section 27 of the Regulations".

The application of clause 5(1)(b) in this case

22. Clause 5(1)(b) requires that, in order for a document to be exempt, it must contain some information the disclosure of which could reasonably be expected to reveal the investigation of a contravention or possible contravention of the law in a particular case. Two questions arise from the terms of clause 5(1)(b). The first question is whether there was "...an investigation of any contravention or possible contravention of the law in a particular case" and, if so, the second question is whether the disclosure of the disputed documents could reasonably be expected to "reveal" that investigation in the sense described in *Kelly's* case.

23. Clause 5(5) defines the term “the law” for the purposes of clause 5 of Schedule 1 to the FOI Act to mean “*the law of this State, the Commonwealth, another State, a Territory or a foreign country or state*”. Clause 5(5) also defines the term “contravention” for the purposes of clause 5 as including a failure to comply.
24. In applying the exemption in clause 5(1)(b), the expression “the law” is used in a broad sense and it is not limited in its application to the criminal law only. The language of clause 5(1)(b) itself clearly contemplates investigations other than criminal investigations, expressly referring, as it does, to investigations that may lead to disciplinary proceedings, as well as those potentially leading to prosecutions. The PSM Act is a statute enacted by the Parliament of Western Australia. It is clearly, therefore, a law of this State and a law for the purposes of clause 5(1)(b).
25. In *Re Henderson and Others and Education Department of Western Australia* [1997] WAICmr 21, the former Information Commissioner (‘the former Commissioner’) accepted, for the reasons given at paragraphs 18 to 20 of that decision, that the Standards fall within the definition of “the law” in clause 5(5) of Schedule 1 to the FOI Act. I agree with the former Commissioner’s findings in that regard.
26. Section 9 of the PSM Act prescribes general principles of official conduct that are to be observed by persons subject to the PSM Act. Those principles include complying with the provisions of the PSM Act and with the Standards, the Code of Ethics and any other applicable code of conduct. The Standards and the Code of Ethics are given the force of law by s.21(9) of the PSM Act, as if enacted as part of that Act. Accordingly, in my view, a breach or a failure to comply with the PSM Act, the Standards, the Code of Ethics and any applicable code of conduct would be a breach of, or a failure to comply with, the PSM Act and, thus, for the purposes of clause 5(1)(b) of Schedule 1 to the FOI Act, a contravention of the law.
27. In *Re Cumming and Others and Metropolitan Health Service Board and Another* [2000] WAICmr 7, the former Commissioner considered the meaning of the word “investigation” and she accepted that it should be given its plain meaning. I share that view.
28. The Australian *Concise Oxford Dictionary* (2nd edition, 1992) defines “investigation” to mean “*the process or an instance of investigating; a formal examination or study*” and defines “investigate” as meaning “*enquire into; examine; study carefully; make an official inquiry into; make a systematic inquiry or search*”. In *Re Cumming*, the former Commissioner held that clause 5(1)(b) applies to official inquiries (which are not limited to law enforcement officials) of varying degrees of formality, which might involve nothing more than a gathering of information as the basis for a decision. I agree with that view.

An investigation of a contravention or possible contravention of the law?

29. Although the terminology used in the Regulations is that an independent reviewer appointed under s.97(1)(b) of the PSM Act is to “review” a claim, it is clear to me from the functions of a reviewer, as set out in regulation 19 of the Regulations, that such a review involves actively investigating the claim and reporting to the Commissioner following that investigation.
30. In this instance, on the basis of my examination of the material presently before me, including the disputed documents themselves, it is clear that:
- there was an investigation into the complainant’s claim of a breach of the Standards;
 - that investigation was conducted by an Independent Reviewer, appointed by the Commissioner under s.97(1)(b) of the PSM Act for the express purpose of conducting that investigation; and
 - the Independent Reviewer subsequently reported his findings to the Commissioner who, having considered that report, determined that the DoE had breached the Transfer Standard in the management of the process used to transfer the complainant from the Kwinana District Office to the Perth Office of the DoE.
31. In my view, the Independent Reviewer’s investigation was an investigation conducted for the purpose of determining whether or not the DoE had contravened (or failed to comply with) one or more of the Standards. Accordingly, that investigation was, in my opinion, an investigation of a contravention or possible contravention of the law of the kind referred to in clause 5(1)(b) and I do not accept the complainant’s first two submissions, cited in paragraph 20 above, which I understand to be essentially that the documents do not relate to an investigation of a contravention or possible contravention of the law.

“Reveal the investigation”

32. The next question for my determination is whether the disclosure of one or more of the disputed documents could reasonably be expected to “reveal” the investigation conducted by the Independent Reviewer, in the sense described in *Kelly’s* case. In *Kelly’s* case, Anderson J said, at p.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 ... of a particular incident involving certain people”.

33. I have examined the disputed documents. I am satisfied that the disclosure of each of the disputed documents would certainly reveal the fact of the investigation of a particular incident involving certain people. Having inspected them, I am satisfied that disclosure of each disputed document could reasonably be expected to reveal not only the fact of the Independent Reviewer’s investigation but also the identities of the persons being

investigated; the things that were investigated by the Independent Reviewer; and, finally, something about the subject matter of that investigation.

Whether investigation otherwise “revealed”

34. The complainant’s submissions in response to my preliminary view are set out in paragraph 21 above. In summary they are that, because information and documents concerning the Independent Reviewer’s investigation have already been disclosed to him, and other people, and because the Commissioner may at some stage table in the Parliament a report containing information about the investigation, thereby making it public, the disputed documents cannot reveal the investigation as it has already been, and may further be, otherwise revealed. Similar arguments were considered and rejected by the Supreme Court in *Kelly’s* case and the Information Commissioner is bound by that decision.
35. In that context, I have considered the complainant’s submissions, but I do not accept them. The thrust of his first two submissions is, in essence, a claim that the disputed documents cannot be exempt under clause 5(1)(b) because he is fully aware of the fact of the Independent Reviewer’s investigation of his claim of a breach of the Standards, and of its outcome, and because there is a high degree of knowledge within the DoE that the DoE breached the Transfer Standard.
36. As I explained to the complainant in my preliminary view, in *Kelly’s* case the Court dealt with the question of whether the exemption in clause 5(1)(b) is lost in respect of documents which would reveal information about an investigation, once information about the investigation has by other means found its way into the hands of the applicant or into public hands. Anderson J said, at page 14 of that case:

“... 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. There is no such qualification in the Act save insofar as the word ‘reveal’ may be said to connote it. The argument goes that if the matter has already been ‘disclosed’, so that the investigation has been in that way ‘revealed’ (regardless of how that may have happened), access to the documents cannot any longer ‘reveal’ the investigation.

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. Further, I think it would be a very inconvenient construction of the Act, as 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.”

37. The Supreme Court has made it clear that a document which would reveal information about an investigation will be exempt under clause 5(1)(b) even if other documents which reveal information about the investigation have already been disclosed or information about it has been made known to the applicant or the public by other means. As I have said, I am required to apply the law in the way it has been interpreted by the Supreme Court in *Kelly's* case. Therefore, the fact that the complainant and other people know something about the investigation does not alter the fact that each particular document that reveals information about the investigation will be exempt under clause 5(1)(b) if that particular document has not been disclosed.
38. The third submission, based upon the complainant's interpretation of regulation 27 of the Regulations, is in my view misconceived. Regulation 27 does not, as I read it, authorise or require the Commissioner to table a report about the investigation of a breach of standards. That regulation authorises the Commissioner to give a written report to a public sector body and to the Minister responsible for that public sector body, in circumstances where the Commissioner has determined that the relevant public sector body "*has not complied with any of [the] regulations*" and, if appropriate, the Commissioner may also cause a copy of such a report to be laid before each House of Parliament.
39. The Regulations prescribe the process that is to be followed in dealing with an allegation of a breach of the Standards. As I read it, regulation 27 gives the Commissioner the power to make a report if the Commissioner determines that the prescribed process has not been followed by the agency concerned when dealing with the allegation, or those regulations have otherwise not been complied with. That regulation does not give the Commissioner the power, nor require the Commissioner, to report to Parliament where the Commissioner finds that the Standards have not been complied with, as I understand the complainant to suggest. Accordingly, this submission, based upon a misunderstanding of regulation 27, is not relevant to my determination of whether or not the disputed documents are exempt under clause 5(1)(b), as claimed.
40. I understand that the Commissioner can, and does, submit reports to Parliament, including an Annual Compliance Report. That Annual Compliance Report contains, among other things, a brief summary of breach claims and their outcomes, by Ministerial portfolio. The relevant agency is identified, but individuals are not identified.
41. However, even if the Commissioner did table a report of that nature or a report on the investigation of the alleged breach of the Standards specifically, that document would become a public document by virtue of its having been tabled, but that would not affect the exempt status of any other document that would reveal information about the investigation. As I have explained, the Court made it clear in *Kelly's* case that each document which, if disclosed,

would reveal information about the investigation will be exempt under clause 5(1)(b) whether or not other documents revealing similar information have been disclosed or information about the investigation has otherwise become known and regardless of the actual state of knowledge that the applicant may have on the subject.

42. Further, in that case, the Court, at page 14, said of the argument that documents cannot reveal an investigation if it has already been ‘revealed’ in some other way:

“It would also run counter to the stipulation in cl 5(1)(b) itself, that matter revealing of an investigation remains exempt “whether or not any prosecution or disciplinary proceedings have resulted”. Obviously the presentation of a prosecution would reveal both the fact that there had been an investigation and to a large extent the fruits of it. Therefore, to interpret the word “reveal” as meaning “first reveal” or “newly reveal” or “reveal for the first time” would produce an inconsistency within the clause. In my opinion, the stipulation that matter, disclosure of which reveals an investigation, is exempt even after a prosecution of the offence investigated, confirms the conclusion that should anyway be reached that cl 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.”

43. That makes it clear that, even if the details of an investigation are disclosed in a public forum, each document that has not been disclosed and contains information about the investigation will, nonetheless, be exempt under clause 5(1)(b). It may be in those circumstances that an agency may decide not to claim the exemption. However, as explained in paragraph 51 below, while an agency has the discretion to claim or not claim an exemption, I have no such discretion.
44. The disputed documents relate to the investigation conducted into the complainant’s claim of a breach of standards. I have examined those documents and I am satisfied that an investigation occurred, which was for the purpose of determining whether the DoE had breached any of the Public Sector Standards made under the PSM Act. Accordingly, I am satisfied that disclosure of the disputed documents would reveal that investigation and that the documents are, therefore, *prima facie* exempt under clause 5(1)(b).

The limit on exemption in clause 5(4)

45. The complainant’s other submissions, cited in paragraph 20 above and numbered (3) – (6), are essentially “public interest” arguments. Clause 5(4) of Schedule 1 to the FOI Act provides:

“Limits on exemptions

- (4) *Matter is not exempt matter under subclause (1) or (2) if –*
- (a) *it consists merely of one or more 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;*
- and*
- (b) *its disclosure would, on balance, be in the public interest.”*

46. Clause 5(4) operates to limit the exemption in clause 5(1)(b) if, and only if, the matter claimed to be exempt consists of information of the kind described in clause 5(4)(a)(i), (ii) or (iii) and its disclosure would, on balance, be in the public interest. In this instance, the complainant has not claimed - and, having inspected the disputed documents, I do not consider - that the disputed documents contain any matter of the kind described in subparagraphs (i), (ii) or (iii) of clause 5(4)(a).
47. If the disputed documents do not contain matter of that kind, then clause 5(4) cannot apply and there is no scope for my consideration of whether disclosure of the disputed documents would, on balance, be in the public interest. As I am of the view that the documents do not contain merely information of a kind described in paragraph (a)(i) - (iii), it is not open to me to consider whether, on balance, disclosure of the documents would be in the public interest.

Finding on exemption

48. I acknowledge that the complainant is already aware of the fact of the agency’s review of his claim of a breach of the Standards and its outcome and that he has also been given a copy of the Commissioner’s report to the DoE, as well as other documents relating to that review. However, the decision in *Kelly’s* case makes it clear that how much someone may know about the investigation, and the fact that the complainant has been given access to copies of documents relating to the investigation, is irrelevant to a determination of the question of whether the disputed documents are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act, as claimed by the agency.

- 49. As A/Information Commissioner, I am bound to apply the law as enacted by the Parliament and subsequently interpreted by the Supreme Court of Western Australia. In my opinion, the disputed documents contain matter the disclosure of which could reasonably be expected to reveal the investigation into a contravention or possible contravention of the law in a particular case, namely an alleged breach of the Standards.
- 50. Accordingly, I find the disputed documents exempt from disclosure under clause 5(1)(b) of Schedule 1 to the FOI Act.

The discretion to disclose exempt matter

- 51. Pursuant to s.3(3) of the FOI Act, an agency has the discretion to give access to documents, including documents that are technically exempt, where that can properly be done. However, I do not have that discretion. Section 76(4) of the FOI Act expressly prohibits me from making a decision to the effect that access is to be given to a document, if it is established that the document is exempt. Therefore, I can only deal with the question of whether the documents are exempt from disclosure, as claimed by the agency and, for the reasons given above, I have found that they are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.
- 52. As I am of the view that the disputed documents are exempt under clause 5(1)(b), it is unnecessary for me to consider the agency's claim for exemption under clause 6(1) of Schedule 1 to the FOI Act.
