

Sobczuk and Police Force

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

**File Ref: F0031999
Decision Ref: D0111999**

Participants:

Pedro Sobczuk
Complainant

- and -

Police Force of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to the investigation of a criminal offence – clause 5(1)(b) – scope and meaning of the phrase “reveal the investigation” in clause 5(1)(b) – limits on exemption – clause 5(4) – section 26 – whether documents exist – whether searches undertaken by the agency were sufficient – meaning of “document”.

Freedom of Information Act 1992 (WA) ss.26(2), 3(3), Schedule 1 clauses 3(1), 5(1)(b), 5(4);
Criminal Code (WA);

Manly v Ministry of Premier and Cabinet (1995) 14 WAR 550

Police Force of Western Australia v Kelly and Anor (1997) 17 WAR 9

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

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*. Further, the decision of the agency to refuse access to other documents pursuant to s.26 on the ground that those documents either do not exist or cannot be found, is also confirmed.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

18 May 1999

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Police Force of Western Australia ('the agency') to refuse Mr Sobczuk ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. In 1995, the complainant was offered employment with the Carnarvon Medical Service Aboriginal Corporation ('the CMSAC') in the position of Accountant/Administrator Officer. He accepted that offer and commenced employment. Subsequently, the complainant was charged and convicted of the crime of stealing as a servant under s.378(7) of the Criminal Code.
3. By letter dated 21 August 1998, which was received at the agency on 9 October 1998, the complainant lodged an application with the agency seeking access under the FOI Act to the following:
 1. Copies of a "document of allegations" made by ATSIC against him during early 1996.
 2. Copies of personal references (originals) written by third parties which the complainant alleged were taken from his place in June 1996 and not returned to him.
 3. Evidence about his wallet that was lost in Shark Bay, December 1995, and reported to Shark Bay Police. (The complainant alleged that his wallet had never been returned to him and he requested from the agency copies of the documents containing information as to the identity of the finder and information explaining why it had not been returned to him).
 4. Evidence tendered at his trial consisting of a copy of a cheque and a cheque requisition for the amount of about \$5,020 spent on airfares for the complainant and his family.
 5. Copy of the hours he had worked for the CMSAC.
 6. Copies of calculations made by his employer concerning his entitlements (including overtime).
 7. Copy of the minutes of the Carnarvon Aboriginal Medical Services Corporation referred to in his video interview with Carnarvon detectives.
 8. His wallet.

4. By letter dated 19 October 1998, the agency acknowledged receipt of the complainant's access application and informed him that he was required to pay an application fee of \$30.00 since his access application was a request for non-personal information. I understand that the complainant paid that fee to the agency on 30 October 1998.
5. By letter dated 10 December 1998, Chief Inspector Rae, Officer in Charge, FOI Services of the agency, advised the complainant that, following a search of the agency's records, no documents of the kind described in items 1, 2 and 5 of his access application were held by the agency. Chief Inspector Rae further advised the complainant that, to the best of his knowledge, all original personal reference letters and handwritten notes of the hours he had worked at the CMSAC were returned to the complainant's solicitor on 9 March 1998.
6. Accordingly, the Chief Inspector made three decisions in respect of the complainant's access application. The first decision was made pursuant to s.26 of the FOI Act. The Chief Inspector refused access to documents of the kind described in items 1, 2 and 5 of the access application on the ground that documents of that kind did not exist in the agency.
7. The second decision made by the Chief Inspector was that the agency had identified one document, consisting of 13 folios, of the kind described in items 3, 4, 6 and 7 of the access application. The Chief Inspector refused access to that document on the ground that it is exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.
8. The third decision made by the Chief Inspector was to refuse access to folio 3 and folios 6-9 of that document on the ground that those folios contain matter that is exempt matter under clause 3(1) of Schedule 1 to the FOI Act. He informed the complainant that it was not possible to give him access to edited copies of those folios because, in the Chief Inspector's opinion, it was not practicable to delete exempt matter from them.
9. The Chief Inspector also advised the complainant that the FOI Act was not concerned with the return of personal property (item 8 of the access application). Nonetheless, he informed the complainant that his wallet would be returned to him directly by the Carnarvon detectives.
10. By letter dated 21 December 1998, the complainant applied for internal review of the agency's decision on access. By letter dated 4 January 1999, the internal reviewer confirmed the agency's initial decision to refuse access to documents relating to items 1, 2 and 5 of the access application on the grounds that those documents did not exist. The internal reviewer also confirmed the decision to refuse access to the one document identified on the ground that it is exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. Although it is not apparent from the notice of decision, the internal reviewer appears to have abandoned the agency's claim for exemption under clause 3(1), as no reference to that ground was made.

11. By letter dated 7 January 1999, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision. Initially, the complainant did not provide my office with a copy of the relevant notice of decision of the agency and he was informed of the need to do so. I received a copy of the agency's notice of decision on internal review from the complainant on 27 January 1999 and accepted his complaint.

REVIEW BY THE INFORMATION COMMISSIONER

12. The agency was notified that I had accepted this complaint and I required it to produce to me, for my examination, the FOI file maintained by it for the purposes of dealing with the complainant's access application, together with the original of the document to which access had been refused.
13. Subsequently, I examined the disputed document produced to me by the agency. In my opinion, there are 12 separate, and clearly identifiable, documents that fall within the ambit of the complainant's access application, and not simply one document as claimed by the agency. Further, it appeared to me that this might have been an instance where the agency could have exercised its discretion under s.3(3) of the FOI Act. Therefore, inquiries were made with the agency to determine if this complaint could be resolved by conciliation. However, no concessions were made by the agency in that regard.
14. On 28 April 1999, after considering the material before me, I informed the parties in writing of my preliminary view of this complaint, including my reasons. With regard to items 1, 2 and 5 of the access application, it was my preliminary view that the agency had taken all reasonable steps to find the documents described, but that those documents are no longer in the possession or under the control of the agency. Therefore, they are not documents of the agency and the FOI Act does not apply to them.
15. It was also my preliminary view that the other documents described in paragraph 17 below may be exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. On 12 May 1999, I received a written submission from the complainant in response.

THE DISPUTED DOCUMENTS

16. In the FOI Act, "*document*" means any record, any part of a record or any copy or duplicate of a record. This means that more than one copy of a document may exist and frequently does, and more than one agency may hold a copy of a particular document. It is also clear to me that, in terms of the definition, each page of a multi-page document may itself be a "*document*" for the purposes of the FOI Act.
17. In this instance, however, the various records produced to me by the agency are not part of a single multi-page document. They are clearly identifiable as discrete documents created on different dates, for different purposes and by

different people. The mere fact that those documents have been filed together, in my view, does not mean that they lose their identity as separate documents for the purposes of the FOI Act. Accordingly, I consider that there are 10 documents that fall within the ambit of the complainant's access application. Those documents are as follows:

Document	Description
1	Photocopy of cheque dated 13 December 1995
2	CMSAC Payment Authority voucher dated 15 December 1995.
3	Agency Found Property Receipt Report dated 13 May 1996.
4	Complainant's Payroll Record from 5 April 1995 to 27 December 1995 (2 folios).
5	CMSAC Payroll Record dated 2 August 1995 and 27 December 1995 (2 folios).
6	Letter dated 29 January 1996, from CMSAC to Deputy Commissioner for Taxation concerning the complainant.
7	Minutes of special meeting dated 29 August 1995.
8	Computer printout of complainant's pay history details for period 3 January 1996 to 17 January 1996 (2 folios).
9	CMSAC general ledger report for period 3 January 1996 to 17 January 1996.
10	Handwritten pay record of complainant for period 22 November 1995 to 27 December 1995.

THE EXEMPTION

18. The agency claims that each of the disputed documents is exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. 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. The scope and meaning of the exemption in clause 5(1)(b) has been the subject of three decisions by the Supreme Court of Western Australia: *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550; *Police Force of Western Australia v Kelly and Another* (1996) 17 WAR 9; and *Police Force of Western Australia v Winterton* (unreported, Supreme Court of Western Australia, Library No. 970646, 27 November 1997).
20. In order for the disputed documents to fall within the terms of the exemption in clause 5(1)(b), the agency must establish that the disclosure of those documents could reasonably be expected to reveal the investigation of a contravention or

possible contravention of the law. Two questions arise from the terms of the exemption in clause 5(1)(b). Those are, firstly, whether the investigation conducted by the Carnarvon detectives was “*an investigation into a contravention or possible contravention of the law*”; and, secondly, whether the disclosure of the disputed documents could reasonably be expected to “reveal” that investigation.

21. It is my understanding that the complainant was charged by the police with a breach of s.378(7) of the Criminal Code (stealing as a servant). The Criminal Code forms part of the *Criminal Code Compilation Act 1913*. I am satisfied that that Act is a statute of the Parliament of Western Australia and is, therefore, a “law” as defined in clause 5(5). I am also satisfied that the investigation conducted by Carnarvon detectives was an investigation into a contravention or possible contravention of the law within the terms of clause 5(1)(b).

Could disclosure reasonably be expected to reveal the investigation?

22. The exemption in clause 5(1)(b) requires a consideration of the nature of the particular documents in dispute, either as described in the access application, or as ascertained upon their inspection. It must be clear that the disclosure of those documents could reasonably be expected to reveal, at the very least, the fact of a particular investigation into a particular incident for the exemption to apply. It is not sufficient that the documents merely reveal the fact that there has been an investigation. They must reveal, in the words of Anderson J in *Kelly’s* case, “... *the fact of a particular investigation of a particular incident involving certain people*” (at page 13).
23. The agency claims exemption for the disputed documents under clause 5(1)(b) because it claims that their disclosure would reveal the investigation conducted by Carnarvon detectives which resulted in the conviction of the complainant for the crime of stealing as a servant. Although that particular investigation is at an end, the agency claims that the exemption applies to the disputed documents regardless of whether the investigation is current or complete.
24. I accept that latter proposition is clearly the case from the inclusion in the provision of the words “...*whether or not any prosecution or disciplinary proceedings have resulted.*” Further, however much the complainant might know of the fact and content of the investigation as a result of the proceedings that ensued, disclosure of the documents may nonetheless “reveal the investigation” for the purposes of clause 5(1)(b). In *Kelly’s* case Anderson J expressed the view, at pages 14 – 15 that:

“... the stipulation that matter, disclosure of which reveals an investigation, is exempt even after a prosecution of the events investigated, confirms the conclusion that should anyway be reached that [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.”

25. In *Kelly's* case, after referring to the comments of Owen J. concerning clause 5(1)(b) in *Manly's* case, Anderson J. said, at page 13:

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

26. I have examined the disputed documents in light of the interpretation placed on the exemption by the Supreme Court of Western Australia. In my opinion, the disclosure of the disputed documents would reveal the fact of the agency's investigation into a particular incident involving certain people, namely, the complainant. In my view, the disputed documents are, *prima facie*, exempt under clause 5(1)(b).

Limits on exemption

27. Clause 5(1)(b) is subject to the limits on exemption in clause 5(4). Having inspected the disputed documents, I do not consider that they contain any matter of the kind described in subparagraphs (i), (ii) or (iii) of clause 5(4)(a). Accordingly, the limit does not apply and there is no scope for me to consider whether disclosure of the requested documents would, on balance, be in the public interest. Therefore, I find that the disputed documents are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.

Section 26 – Documents that cannot be found

28. The agency also decided that some of the documents described in the complainant's access application do not exist. Therefore, access to those documents was refused under s.26 of the FOI Act. Section 26 states:

“Documents that cannot be found or do not exist

26. (1) *The agency may advise the applicant, by written notice, that it is not possible to give access to a document if -*

*(a) all reasonable steps have been taken to find the document;
and*

(b) the agency is satisfied that the document -

(i) is in the agency's possession but cannot be found;

or

(ii) does not exist.

(2) For the purposes of this Act the sending of a notice under subsection (1) in relation to a document is to be regarded as a

decision to refuse access to the document, and on a review or appeal under Part 4 the agency may be required to conduct further searches for the document.”

29. If an agency refuses access to requested documents on the grounds that those documents cannot be found or do not exist, two questions must be answered. The first question is whether there are reasonable grounds to believe that the requested documents exist or should exist at the agency. If that question is answered in the affirmative, the next question is whether the agency has taken all reasonable steps to find those documents.
30. In this instance, it appears that the agency does not dispute the existence of documents of the kind described in items 1, 2 and 5 of the complainant's access application. However, the agency claims that, following a search of its records, it has not been able to locate those documents and it understands that they were returned to the complainant's solicitor.
31. The agency informs me that searches were conducted of its record-keeping systems, including searching files held by the Carnarvon detectives and the Crime Support Services of the agency. Inquiries were also made with the arresting officers, but no documents were found.
32. Although I may require an agency to conduct further searches, based on the material before me, I do not require the agency to do so. I consider that the agency has taken reasonable steps to locate documents of the kind described at items 1, 2 and 5 of the complainant's access application, but those documents cannot be found. The agency searched in the places where the documents could reasonably be expected to be found if held by the agency and made inquiries with the relevant officers. In my view, the agency has taken all reasonable steps to find the documents requested. I am satisfied, therefore, that the agency has complied with its obligations under the FOI Act.
33. With respect to item 1 on the complainant's access application, on the material currently before me, there is no evidence that such a document ever existed in the agency. Certain documents relating to item 2 of his request may have been held by the agency at some point. However, inquiries conducted by Chief Inspector Rae indicate that all original personal reference letters were returned to the complainant's solicitor on 9 March 1998. Therefore, it appears that documents of that kind may no longer exist in the agency. With regard to item 5 of the access application, inquiries by the Chief Inspector also indicate that the complainant's solicitor tendered handwritten notes at the complainant's trial and it appears that the notes were returned to the solicitor. I accept that the explanations proffered by the agency are reasonable, in all the circumstances. There is no material before me that persuades me otherwise.
34. Therefore, I am satisfied that the agency has taken all reasonable steps to find documents of the type requested and that it is not possible to give access to those documents because either they do not exist in the agency or they cannot be found.