

## TITELIUS AND JUSTICE

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

**File Ref: F0211998  
Decision Ref: D0161998**

Participants:

**Richard Titelius**  
Complainant  
  
- and -  
  
**Ministry of Justice**  
Respondent

### DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to an investigation under the *Public Sector Management Act 1994* – clause 5(1)(b) – law enforcement, public safety, property security – whether there is a need to consider public interest limitations – sufficiency of search – clause 7 – legal professional privilege.

*Freedom of Information Act 1992 (WA)* ss.3(3), 76(4); Schedule 1 clauses 5(1)(b), 5(4), 5(5), 7.

*Public Sector Management Act 1994* ss. 80, 81, 83, 84, 86.

*Justices Act 1902*

*Re Titelius and Ministry of Justice* (Information Commissioner, WA, 18 June 1996, unreported, D03596).

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

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

*Police Force of Western Australia v Winterton* (Supreme Court of Western Australia, 27 November 1997, unreported, Library Number 970646).

*Re Neville and The State Housing Commission of Western Australia (Homeswest)* (Information Commissioner, WA, 15 July 1996, unreported, D04296).

*Re Kapadia and Disability Services Commission* (Information Commissioner, WA, 16 August 1996, unreported, D04996).

*Re Clements and Graylands Hospital* (Information Commissioner, WA, 9 November 1995, unreported, D04995).

*Attorney-General (NT) v Kearney* (1985) 158 CLR 500.

*Waterford v Commonwealth* (1987) 163 CLR 54.

## 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*.

B.KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

10th June 1998

## REASONS FOR DECISION

### BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Ministry of Justice ('the agency') to refuse Mr Titelius ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. The complainant is an officer of the agency. In 1995, whilst employed at the Perth Magistrate's Court, the complainant is alleged to have provided a member of the public with a copy of a restricted court document. The agency investigated the allegation and charged the complainant with having committed a disciplinary offence under the provisions of the *Public Sector Management Act 1994* ('the PSM Act'). After a disciplinary hearing, the former Director General of the agency imposed certain penalties on the complainant.
3. In 1995, the complainant lodged an appeal with the Public Service Appeal Board ('the Appeal Board') against the penalties imposed on him. The Appeal Board upheld the complainant's appeal in part only and, among other things, ordered that the monetary penalty imposed on him by the former Director General of the agency be replaced with a reprimand.
4. In December 1995, the complainant lodged an application with the agency seeking access under the FOI Act to documents relating to the investigation and disciplinary proceedings. On that occasion, the agency refused the complainant access to most, but not all, of the documents to which he had requested access. The agency's decision to refuse the complainant access to the requested documents on that occasion was, ultimately, the subject of my decision in *Re Titelius and Ministry of Justice* (18 June 1996, unreported, D03596).
5. In December 1997, the complainant lodged another application with agency seeking access under the FOI Act to all documents associated with the investigation and subsequent disciplinary inquiry, including any notes, minutes of meetings and written reports prepared by the investigating officer. It appears that the agency interpreted the complainant's second access application as a request for access to the documents that were the subject of my decision in *Re Titelius*. On that basis, the agency refused the complainant access on the ground that the requested documents are exempt under clause 5(1)(b) and clause 7 of Schedule 1 to the FOI Act. The initial decision of the agency was confirmed following internal review. On 5 February 1998, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

## REVIEW BY THE INFORMATION COMMISSIONER

6. After I had received this complaint, I obtained the requested documents and the FOI file from the agency and I directed a member of my staff to conduct further inquiries. A preliminary conference was held with the complainant to clarify the ambit of his second application and to determine whether it was possible to resolve this complaint by conciliation between the parties. The complainant confirmed that the scope of his second application included not only those documents to which he had previously been refused access, but all documents held by the agency relating to the investigation and subsequent disciplinary inquiry. However, after examining the document schedules prepared by the agency in respect of his first application, the complainant reduced the scope of his request to a request for access to certain specific documents that he identified from those schedules.
7. The complainant further confirmed that he also seeks access to any notes, minutes of meetings and written reports prepared by the investigating officer. As documents of that kind were not previously identified by the agency in the document schedules, inquiries were made with the agency concerning the existence of any such documents. Following those inquiries, the agency produced to me for my inspection, the originals of the notes and handwritten drafts prepared by the investigating officer.
8. Finally, the complainant also informed my office that he was prepared to accept access to the requested documents by way of supervised inspection. In light of those concessions on the part of the complainant, a preliminary conference was arranged with the agency's FOI decision-makers. The agency reviewed its decision, but advised me that it would not allow the complainant to inspect the requested documents, under supervision or otherwise.
9. On 30 April 1998, I informed the parties in writing of my preliminary view of this complaint, including my detailed reasons. I was of the preliminary view that all except two of the requested documents (Documents numbered 35 and 38 from File No. 95/04253) may be exempt under clause 5(1)(b). It was also my preliminary view that certain of the documents may also be exempt under clause 7 of Schedule 1 to the FOI Act.
10. Subsequently, the agency released copies of Documents 35 and 38 to the complainant, but otherwise maintains its claims that the requested documents are exempt under clauses 5(1)(b) and 7 of Schedule 1 to the FOI Act.
11. I received a further written submission from the complainant. He maintains his complaint and his claim that the limit on exemption in clause 5(4) applies to the requested documents and that disclosure of those documents to him would, on balance, be in the public interest.

## THE DISPUTED DOCUMENTS

12. The documents remaining in dispute between the parties ('the disputed documents'), identified by the reference number on the agency's schedule, are as follows:

- ◆ File No 95/04253 Documents 33, 35, 38-42, 44, 47-51, 53-54, 57-62, 64, 67-69, 71, 73-74, 77-80, 82-85, 90, 93 and 95-96;
- ◆ File No. 95/08824 Documents 10, 12-15, 20, 34-62, 66-74, 77-81, 95-96, 99-100, 104, 126-130, 131-133 and 139-140; and
- ◆ The documents prepared by the investigating officer.

13. The disputed documents consist of, among other things, correspondence from the complainant and the complainant's legal advisers to the former Director General of the agency; memoranda and file notes passing between the former Director General and the Crown Solicitor's Office ('the CSO'); draft documents and memoranda of advice from the CSO to the former Director General; confidential communications between the agency and several third parties; and memoranda and file notes prepared by the CSO. In those instances where a disputed document consists of correspondence from the complainant or his legal advisers to the former Director General, the agency has given access to edited copies of that document with handwritten annotations made by the former Director General or the CSO deleted.

## THE EXEMPTIONS

### (a) Clause 5(1)(b)

14. Clause 5 of Schedule 1 to the FOI Act, so far as is relevant, 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;*

*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;...*

*and*

*(b) its disclosure would, on balance, be in the public interest.”*

15. 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). As Information Commissioner, I am bound by those decisions and must apply the law as interpreted by the Supreme Court when I am dealing with complaints under the FOI Act.

16. Clause 5(1)(b) requires that, in order to be exempt, the disclosure of the documents in dispute 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: firstly, whether the investigation into the alleged breach of discipline was an “investigation of any contravention or possible contravention of the law”; and, secondly, whether the disclosure of the disputed documents could reasonably be expected to “reveal” that investigation following the interpretation of the phrase “reveal the investigation” by the Supreme Court.

**Investigation of a contravention or possible contravention of the law**

17. In my decisions in *Re Neville and The State Housing Commission of Western Australia (Homeswest)*, (15 July 1996, unreported, D04296); *Re Kapadia and Disability Services Commission*, (16 August 1996, unreported, D04996), I determined that the PSM Act is a law of Western Australia and, accordingly, a “law” as defined in clause 5(5) of Schedule 1 to the FOI Act for the purposes of the clause 5 exemptions.

18. Section 80(d) of the PSM Act provides that an employee who is negligent or careless in the performance of his or her functions commits a breach of discipline. A public sector employee who is found to have committed a breach of discipline may be subject to one or more of the penalties provided in Division 3 of Part 5 of the PSM Act (see ss. 83, 84, 86). In my view, a breach of discipline by a public sector employee is a “contravention” of s.80(d) the PSM Act and is, therefore, a contravention of the law within the meaning of subclause 5(1)(b) of Schedule 1 to the FOI Act.

19. In March 1995, the former Director General of the agency notified the complainant that he was suspected of having committed a serious breach of discipline whilst serving as a Public Service officer. After receiving the complainant's response to that notification, the former Director General, pursuant to s.81(2) of the PSM Act, ordered an investigation into the suspected breach of discipline. After receiving and considering the investigator's report, the former Director General charged the complainant with having committed a serious breach of discipline, contrary to s.80(d) of the PSM Act. Thereafter, a disciplinary hearing into the matter was held in November 1995.
20. Based on the material before me, I consider that the investigator carried out his investigation for the purpose of determining whether the complainant had committed a serious breach of discipline. That is, he conducted an investigation into a possible contravention of s.80(d) of the PSM Act. The subsequent disciplinary inquiry was conducted into the charge preferred against the complainant following that investigation. In my view, the investigation was clearly an investigation into a contravention or possible contravention of the law within the meaning of clause 5(1)(b).
21. Taking into account the interpretation of the exemption in clause 5(1)(b) decided by the Supreme Court of Western Australia, and from my own examination of the disputed documents, I am satisfied that the disclosure of the disputed documents could reasonably be expected to reveal that there had been an investigation into a contravention or possible contravention of the PSM Act, the identity or identities of the person being investigated and generally the subject matter of the investigation. It is clear from *Kelly's* case that it is irrelevant how much the complainant may know of the investigation through his involvement in the disciplinary and appeal proceedings (see the comments of Anderson J at 14 and 15). Accordingly, I consider that the disputed documents fall within the terms of clause 5(1)(b).

## **THE COMPLAINANT'S SUBMISSION**

22. The complainant submits that his first request for access to the disputed documents was refused by the agency because, among other things, there were investigations, tribunal proceedings and related matters which had not then been determined. The complainant submits that, as all of those matters have now been finalised, the disputed documents are no longer exempt under clause 5(1)(b) because the limit on exemption in clause 5(4)(a)(i) applies to those documents.
23. The complainant also submits that his actions in disclosing the information of a restricted nature to a member of the public did not contravene the provisions of the *Justices Act 1902*, nor did they contravene any policies, procedures or guidelines of the agency relating to the release of judicial records made in open court. The complainant contends that the release of a copy of a public record made in open court is not an offence under the PSM Act and he contends that the investigation to determine whether he had committed a breach of discipline proceeded on the basis that the *Justices Act 1902* and policies, procedures and

guidelines of the agency relating to the release of judicial records had been contravened.

24. The complainant also submits that the manner in which the investigation was carried out and the reliance on s.80(d) of the PSM Act vitiates the exemptions listed in clause 5; that it was inappropriate for an officer of the agency's Internal Investigations Branch to investigate the matter; that the Executive Summary of the investigating officer's report contains information and conclusions which could not reasonably be reached solely from the interviews and documents referred to in that Executive Summary; that the investigating officer's findings are open to question; and that the investigating officer was not appropriately qualified to conduct the investigation.
25. Finally, the complainant submits that the exemption in clause 5(1)(b) so far as it applies to disciplinary actions taken by employers against their employees is not available to any other agency of the WA Public Sector. The complainant submits that, therefore, because the investigation has been completed and its findings acted upon, the documents relating to the matter should not be exempt from public scrutiny and accountability, and that disclosure of the documents would, on balance, be in the public interest.

#### **LIMIT ON EXEMPTION – CLAUSE 5(4)(A)**

26. Clause 5(4) operates to limit the exemption in clause 5(1)(b) if the matter claimed to be exempt is 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. From my inspection of the disputed documents, I am satisfied that they do not contain matter of the kind described in subparagraphs (ii) or (iii) of clause 5(4)(a). The complainant's claims appear to be directed at subparagraph (i) which concerns information revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law. Therefore, in this case, it is only if the disputed documents contain matter consisting merely of that kind of information that the question of whether disclosure would, on balance, be in the public interest arises for consideration.
27. In each case where clause 5 is relied upon by an agency as a reason for non-disclosure, the applicant will be at a disadvantage in that he or she is not able to see the documents and to make submissions on the application of the limitation in clause 5(4). Parliament has decided that the task of deciding whether clause 5(4) applies in a particular instance is one for the Information Commissioner to consider and adjudicate upon.
28. I have considered the provisions of Division 3 of Part 5 of the PSM Act in order to determine whether that limit might apply in this matter. Sections 81-90 of the PSM Act set out the procedures to be followed by an employing authority when dealing with disciplinary matters. In my opinion, the former Director General, as the employing authority under the PSM Act, had the lawful authority to institute the investigation and the lawful authority to direct that a disciplinary hearing be held into the matter.



29. Having examined the contents of the disputed documents in the light of the relevant provisions of Division 3 of Part 5 of the PSM Act, in my view, there is no information showing or tending to show that the scope of the investigation (or the disciplinary inquiry) exceeded the limits imposed by the law (in this case, the PSM Act). To the contrary, in my opinion, the contents of the disputed documents clearly establish that the agency followed the procedures set out in Division 3 of Part 5 of the PSM Act to the letter.
30. The complainant's submissions contain a number of unsupported claims, including his claim that, because his actions did not contravene the *Justices Act 1902* or the policies, procedures or guidelines of the agency, the disputed documents cannot be exempt under clause 5(1)(b). However, that claim indicates a misunderstanding of the nature of the exemption in clause 5(1)(b). The application of the exemption does not depend on whether the complainant's actions in providing information of a restricted nature to a member of the public contravened the provisions of the *Justices Act 1902* or any other policies, procedures or guidelines of the agency. It depends on the existence of documents associated with an investigation into a contravention or possible contravention of the law in a particular case. In this instance, the circumstances relating to the actions of the complainant indicated that it was possible that he had committed a breach of discipline under the PSM Act and that allegation was the subject of the investigation.
31. Further, the exempt status of documents associated with an investigation does not depend upon what stage the investigation or subsequent proceedings have reached. In particular, the fact that the investigation, the disciplinary hearing and the complainant's subsequent appeal to the Appeal Board have all been finalised, has no bearing on the exempt status of the disputed documents. It is clear from the judgment of Anderson J in the *Kelly* case, that clause 5(1)(b) is not limited to new revelations, but that it covers all matter that of itself reveals the things referred to, without regard to the actual state of knowledge that the complainant may have on the subject or the stage that the investigation has reached. The words of the exemption clause itself do not require that, to be protected, the investigation must be current or ongoing. If disclosure could reasonably be expected to reveal an investigation of the relevant kind – whether ongoing or long-since finalised – the document is exempt.
32. Having examined the disputed documents and considered the relevant provisions of the PSM Act, I am satisfied that none of the limits on exemption in clause 5(4) applies to the disputed documents. Accordingly, I find that all of the disputed documents are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.
33. That finding means that I need not consider the agency's claims for exemption under clause 7. In any event, as I stated in my decisions in *Re Clements and Graylands Hospital* (9 November 1995, unreported, D04995) and in *Re Titelius*, an agency is entitled to claim privilege for advice obtained from salaried legal officers who are employed within the agency as legal advisers, or from another agency such as the CSO, where the legal advice is given within the professional

relationship between the legal officer and the client, and the advice is independent in character: *Attorney-General (NT) v Kearney* (1985) 158 CLR 500; *Waterford v Commonwealth* (1987) 163 CLR 54.

34. Documents that are confidential communications such as letters, memoranda and file notes passing between the former Director General of the agency and the CSO; draft documents and memoranda of advice from the CSO to the former Director General; and memoranda and file notes prepared by the CSO in relation to the investigation would, in my view, fall within the terms of the exemption in clause 7, and such documents would, in my opinion, be privileged from production in legal proceedings on the ground of legal professional privilege.

***The discretion to disclose exempt matter***

36. Finally, I consider it appropriate to make some comment on the general discretion to disclose exempt matter. Pursuant to s.3(3) of the FOI Act, an agency has the sole discretion to give access to documents, including documents that are technically exempt, where that can properly be done. Given that the investigation into the matter is complete, and the disciplinary proceedings and the complainant's subsequent appeal to the Appeal Board have all been finalised, I consider this to be a case where the agency could have exercised its discretion and allowed the complainant access by inspection. In my view, this is not a case where any likelihood of harm to the public interest could be expected to follow from allowing him access in that manner.

36. I have reached that view based on the fact that the complainant is still an employee of the agency and allowing an aggrieved employee access in the manner proposed by the complainant would, in my view, be consistent with good human resource management practice. In circumstances where some of the exempt matter has already been revealed to the complainant as a result of the disciplinary inquiry and where the events surrounding the matter have been well publicised in the media, I find it difficult to understand the agency's decision to rely on an exemption where it appears that there is no demonstrable harm likely to follow from granting limited access in the form of inspection only. To the contrary, the complainant clearly has some difficulty in accepting the course of events and resulting action taken against him, and I consider that disclosing the documents may well be able to assist him to understand the actions taken by the agency.

37. I consider that the decision of the agency is not in keeping with the spirit of the FOI Act and it also appears to be inconsistent with the Western Australian Public Sector Code of Ethics. In particular, it would seem to be contrary to the Ethical Values and Behaviours referred to under Principle 1, the Principle of Justice, and the Public Sector Standards in Human Resource Management, Standard 7 – Discipline. Further, it also appears to be inconsistent with the statements in the agency's Handbook, at p.152, about its human resources policy that employees may have supervised access to their personal files and obtain copies of relevant documents. Even if the disputed documents are not filed on the complainant's

personal files, this appears to be a case where good personnel management practices would allow an aggrieved employee access to the relevant documents.

38. Although the agency has a discretion to disclose documents that are exempt documents, it has chosen not to do so on this occasion. I have no such discretion. My role as Information Commissioner is limited to determining the question of whether the documents are exempt as claimed. If it is established that a document is an exempt document, then s.76(4) of the FOI Act provides that I do not have power to make a decision to the effect that access is to be given to that document.

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