

**DECISION SUMMARY ISSUED BY THE INFORMATION COMMISSIONER (WA)**

**Decision title and citation: *Re Roy Morgan Research Centre Pty Ltd and State Revenue Department* [1999] WAICmr 16**

**COMPLAINT No:** F0231999

**DECISION No:** D0161999

**PARTIES:** Roy Morgan Research Centre Pty Ltd

Complainant

STATE REVENUE DEPARTMENT

Respondent

**No. of documents in dispute:** 2

**Exemption clause(s):** Clause 5(1)(b)

Roy Morgan Research Centre Pty Ltd ('the complainant') is registered in Western Australia as an employer under the *Pay-roll Tax Assessment Act 1971*. Registration as an employer means that the complainant is subject to random audit by the State Revenue Department ('the agency'). The complainant has been the subject of two such audits, one in 1995 and another in 1998. Following the 1998 audit, the agency decided that the complainant was liable for payroll tax in respect of certain of its subcontractors. That decision effectively reversed the former decision of the agency in respect of the same matter following the 1995 audit.

On 27 October 1998, the complainant lodged two access applications with the agency seeking access under the *Freedom of Information Act 1992* ('the FOI Act') to documents relating to the agency's decisions. The agency dealt with the two applications together and issued one notice of decision. The agency refused access under s.26 of the FOI Act to certain documents on the ground that they did not exist or could not be found; refused access to some on the ground that they were exempt under clause 5(1)(b) of Schedule 1 to the FOI Act; and granted access to others. Although additional documents were located following a request for internal review, the agency confirmed its initial decision to refuse access on the ground that the requested documents are exempt under clause 5(1)(b).

By letter dated 13 February 1999, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

#### **Review by the Information Commissioner**

I obtained the disputed documents from the agency. After considering the material before me, on 27 May 1999, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that those of the requested documents identified and located by the agency and to which access was refused may be exempt under clause 5(1)(b). It was also my preliminary view that the agency had taken all reasonable steps to locate the other documents identified by the complainant in its access applications but they either cannot be found or do not exist.

Nothing further was received from the complainant. The parties have been fully informed in detail of my reasons and, as no new evidence or information has been put before me, I am not dissuaded from my preliminary view that the disputed documents are exempt under clause 5(1)(b) and that others do not exist. A summary of my reasons follows.

#### **The disputed documents**

The documents in dispute consist of two reports both headed "Compliance Report (Payroll)". Document 1 indicates the date of visit as 18 May 1995. Document 2 notes the date of visit as 25 May 1998.

#### **The exemption – Clause 5(1)(b)**

Clause 5(1)(b) provides that matter is exempt 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. The word "contravention" is defined in clause 5 to include a failure to comply.

Two questions arise from the terms of the exemption: firstly whether the audits conducted by the agency were investigations into a contravention or possible contravention of the law and, secondly, whether disclosure of the documents could reasonably be expected to reveal those investigations.

The *Pay-roll Tax Assessment Act 1971* is, by s.2 of the *Pay-roll Tax Act 1971*, incorporated with – and to be read as one with – the *Pay-roll Tax Act 1971*. Both are written laws of this State and are clearly relevant “laws” for the purpose of clause 5(1)(b). The *Pay-roll Tax Assessment Act 1971* empowers the Commissioner of State Taxation to conduct inquiries for the purpose of determining the liability of an employer to pay tax under that Act. The agency submits that audits are conducted for the purpose of determining the extent of an employer’s compliance with its obligations to pay-roll tax and whether offences have been committed or additional tax is payable. In my view, such an audit is an investigation into a possible contravention of, or possible failure to comply with, the provisions of the *Pay-roll Tax Assessment Act 1971* and the audits carried out on the complainant were investigations of that kind.

The Supreme Court of Western Australia has considered the meaning of the phrase “reveal the investigation” in clause 5(1)(b) on three occasions and I am bound by those decisions. In *Police Force of Western Australia v Kelly and Anor* (1996) 17 WAR 9, Anderson J said, at page 13, that “...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.”

Although the complainant is aware of the fact of the particular investigation or audit by the agency, the exemption can still apply. Anderson J said that the exemption in clause 5(1)(b) is not limited to new revelations and can apply regardless of the actual state of knowledge of the complainant about the particular matter, or the stage the investigation has reached (*ibid* at 14-15). In *Kelly’s* case, Anderson J made it clear that documents can “reveal an investigation” even when the investigation has been revealed through other materials or the investigation has concluded (*ibid*).

Having examined the disputed documents, I am satisfied that their disclosure could reasonably be expected to reveal the investigation conducted by the agency for the purpose of determining whether the complainant had complied with its obligations under the *Pay-roll Tax Assessment Act 1971*. In my view, disclosure of each of those documents would reveal the investigation of a particular incident involving certain people.

Accordingly, I find that the disputed documents are exempt under clause 5(1)(b) and confirm the decision of the agency to refuse access to those documents.

#### **Sufficiency of searches**

The complainant also alleged that additional documents should exist in the agency. I understand that the agency maintains a separate file in respect of each body registered with it as an employer. I have inspected the file maintained by the agency in respect of the complainant. The first document on the complainant’s file Ref 298211 is an application dated 13 December 1984 for registration as an employer. The balance of the file appears to me to be a continuous record, in date sequence, of the agency’s various dealings with the complainant.

Based on my understanding of the agency’s record-keeping practices, I am satisfied that that file contains the agency’s records relating to the complainant, including the documents identified in its access applications. There is nothing before me to suggest that additional documents exist, or should exist, in the agency. In the circumstances, I am satisfied that the agency took all reasonable steps to find the requested documents and that there are no further documents.

**B. KEIGHLEY-GERARDY**  
INFORMATION COMMISSIONER

29 June 1999