

MANLY AND MPC

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

**File Ref: 94021
Decision Ref: D01694**

Participants:

Christopher Roydon Manly
Applicant

- and -

Ministry of the Premier and Cabinet
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents relating to preparation of the "Mann Report" - clause 5 - law enforcement, public safety and property security - whether documents exempt under clause 5(1)(a) - requirements to establish exemption under clause 5(1)(a) - whether documents exempt under clause 5(1)(b) - requirements to establish exemption under clause 5(1)(b) - section 23(1)(b) - documents requested not documents of agency.

FREEDOM OF INFORMATION - section 76(4) - Commissioner does not have power to make decision to give access to a document, if it is established that document is an exempt document - whether documents are exempt documents for any other reason - clause 5(1)(d) - documents under consideration seized by police.

FREEDOM OF INFORMATION - clause 3 - personal information - whether documents contain personal information - clause 6 - whether documents from part of the deliberative processes of an agency - public interest factors - clause 8 - confidentiality under the FOI Act - whether documents constitute confidential communications - whether disclosure of documents could reasonably be expected to prejudice future supply of that kind of information - clause 4(3) business or commercial information - adverse effect of disclosure.

FREEDOM OF INFORMATION - section 69(4) - third party consultation - Commissioner's power to obtain information or receive submissions from persons who may be affected by a decision.

Freedom of Information Act 1992 (WA) ss.23(1)(b); 69(2); 72(1)(b); 75(1); 76(3); 76(4); 102(2); Schedule 1 clauses 3, 4, 5(1)(a), 5(1)(b), 5(1)(d), 6, 8.

Members of Parliament (Financial Interests) Act 1992 (WA).

Freedom of Information Act 1982 (C'wlth) s.37(2)(b).

Freedom of Information Act 1982 (Vic) s.33(1).

Re Mickelberg and Australian Federal Police (1984) 6 ALN N176.

Re Kobelke and Minister for Planning and Others (Information Commissioner WA, 27 April 1994, unreported).

Re Veale and Town of Bassendean (Information Commissioner WA, 25 March 1994, unreported).

Re Read and Public Service Commission (Information Commissioner WA, 16 February 1994, unreported).

DPP v Smith [1991] 1 VR 63.

Re Halliday and Corporate Affairs (1991) 4 VAR 327.

Re Waterford and Department of Treasury (No. 2) (1984) 5 ALD 588.

Attorney-General's Department v Cockcroft (1986) 10 FCR 180.

DECISION

The decision of the agency of 22 February 1994 is varied. Documents 1 and 2 are exempt under clauses 5(1)(b) and 5(1)(d).

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

16th September 1994

REASONS FOR DECISION

1. This is an application for review by the Information Commissioner arising out of a decision of the Ministry of the Premier and Cabinet ('the agency') to refuse Mr Manly ('the applicant') access to documents described by the applicant as "...[the] *report to the Premier by Steven Mann, reporting on Mr Mann's investigations into the financial affairs of Wanneroo MLA, Mr Wayde Smith, the report given by Mr Smith to the Premier upon which Mr Mann based his enquiries, all documentation, including attachments to the report, correspondence briefing notes and financial statements relating to Mr Mann's investigations and any minute or other record of the meeting between the Premier and Police Commissioner Bull on 20 December 1993 related to the Mann Report* " ('the requested documents').

BACKGROUND

2. Mr Wayde Smith MLA, a member of the Liberal Party, was elected to Parliament in March 1993 as the Member for Wanneroo. Prior to his election Mr Smith was a businessman and Councillor for the City of Wanneroo. He had previously resigned as a member of the Police Force of Western Australia in October 1991 to continue his business interests. In early 1993, after the State election, a listening device was discovered in a property formerly owned by Mr Smith. This discovery was reported in the media and the police subsequently admitted responsibility for the device and explained that Mr Smith had been the subject of a police internal investigation whilst he was a serving officer. The removal of the device had apparently been overlooked by police when the investigation was no longer current.
3. Speculation about the nature of the police investigation continued in the media and it was reported that Mr Smith had extensive property investments which, it was suggested, appeared incompatible with his position and salary as a police officer. Although the police confirmed that he had been under investigation whilst a police officer, no charges, disciplinary or criminal, had been preferred against Mr Smith. Nevertheless certain members of the media continued to probe the substance of the police inquiry and there was continuing speculation about Mr Smith's financial dealings and business associations.
4. On 20 October 1993, the Premier publicly announced that he had called for a personal explanation from the Member for Wanneroo about certain of his financial dealings. Mr Smith provided a report, prepared by his accountant, to the Premier on 27 October 1993. On 1 November 1993 the Premier appointed Mr S J Mann to access the report provided by Mr Smith and verify its main conclusions. The Premier asked Mr Mann to investigate and report more fully on matters which had been the subject of an overview in the report by Mr Smith's accountant. In the course of preparing his report, Mr Mann inquired of, and obtained information from, a number of sources.

5. On 17 December 1993 Mr Mann provided his report to the Premier by way of letter addressed to Mr M C Wauchope, Chief Executive, Office of State Administration, Department of the Premier and Cabinet. On the receipt of Mr Mann's report, the Premier referred both Mr Smith's report and Mr Mann's report to the Commissioner of Police to examine and consider. On 21 December 1993, by media statement, the Premier announced that the Commissioner of Police had reported to him that an examination of the documents had provided no new information which warranted re-opening or commencing a fresh police inquiry into the matter.
6. On 21 December 1993, the applicant, a journalist with the *Sunday Times* newspaper, endeavoured to exercise his rights of access under the *Freedom of Information Act 1992* ('the FOI Act') and formally applied to the agency for a copy of the requested documents.
7. On 2 February 1994, Mr M C Wauchope, Chief Executive, Office of State Administration, a division of the agency, ('the initial decision-maker') advised the applicant that the agency had identified 6 documents as falling within the terms of the applicant's request and that full access had been granted to 3 of those documents. However, access to the report provided to the Premier by Mr Smith, being one of the three remaining documents, was refused under section 23(1)(b) of the FOI Act. The agency claimed that that document belonged to Mr Smith and was not in the possession of the agency nor was the agency entitled to access it and, therefore, it was not a document of the agency.
8. Access was refused to the remaining two documents on the grounds that they were exempt under one or more of clauses 3, 4, 6 and 8(2) of Schedule 1 to the FOI Act. The remaining two documents were described by the agency as:
 - (i) A letter dated 17.12.93 to Mr M C Wauchope, Chief Executive, Office of State Administration entitled 'Re: Wayde Smith', consisting of 9 pages ('Document 1'); and
 - (ii) A two page letter dated 1.11.93 from Mr M C Wauchope, Chief Executive, Office of State Administration, to Mr S Mann, Managing Partner, Bentleys, providing instructions for the assignment he had been asked to undertake ('Document 2').
9. On 11 February 1994, the applicant sought internal review of the initial decision-maker's decision to refuse him access to Document 1 and Document 2. On 23 February 1994, the applicant was advised that Mr D Saunders, Chief Executive, Policy Office of the agency ('the review decision-maker'), had conducted an internal review and had decided, on 22 February 1994, to uphold the decision of the initial decision-maker to "...refuse access to the report on Mr Smith's financial dealings under section 23(1)(b) and to other documents previously specified on the Ministry's document schedule under clauses 3, 4, 6 and 8(2) of Schedule 1 to the Act".

10. On 3 March 1994, the applicant sought external review by the Information Commissioner of the agency's decision of 22 February 1994 to deny access to Documents 1 and 2 on the grounds that they are exempt documents under various clauses of Schedule 1 to the FOI Act.

REVIEW BY THE INFORMATION COMMISSIONER

11. On 4 March 1994, I advised the agency that I had accepted the applicant's complaint for external review and, in accordance with my powers under s.72(1)(b) and s.75(1) of the FOI Act, sought production to me of the documents in dispute and the agency's FOI file in the matter. As it is early days for the administration of FOI in Western Australia, I considered it necessary to examine the disputed documents, in order to properly assess the agency's claim that they were exempt.
12. The FOI Act also obliges me to consider whether any other person or body is likely to be affected by a decision made on the complaint, and to provide that person or body with an opportunity to be heard or to make submissions. This process may have the effect of extending the time for decision-making on a complaint beyond the statutory period of 30 days as provided in s.76(3). This case was one of those instances in which it was impracticable for me to make a decision on this complaint within the statutory period due to the number of parties involved and the nature of the issues concerned.

Third Party consultation

13. My examination of Document 1 and Document 2 revealed that they contained personal information related to a number of third parties, including Mr Smith. A "third party" is defined in clause 1 of Schedule 2 to the FOI Act and means an individual about whom the requested documents contain personal information or, *inter alia*, information concerning the business, professional, commercial or financial affairs of a person, who is not the applicant.
14. Under s.69(2) of the FOI Act, any third party to a complaint is entitled to be joined as a party to proceedings, on giving written notice to me. I identified six third parties referred to in the documents concerned and, on 18 March 1994, I wrote to four of the six persons identified. Two were not contacted as the applicant, in response to a query from my office, indicated that he was not seeking access to personal information about third parties who were not public figures. In my view, the applicant's advice therefore placed the information about two of the parties outside the ambit of his access application.
15. However, it should not be assumed from this, that any or all of the remaining third parties are public figures. That is not necessarily the case. In some instances the information about a third party contained in Document 1 or

- Document 2 is so inextricably entwined with information about Mr Smith's affairs as to render it not clearly outside the scope of the access application.
16. Three of the four third parties who were contacted indicated a desire to be joined as third parties and subsequently they provided submissions to me. One indicated no objection to disclosure of the information relating to the third party and Mr Smith. On 30 March 1994, the applicant was advised that three additional persons had been joined as third parties to his complaint and that I had received preliminary submissions from each of them. The applicant was also advised that, whilst one of the third parties was Mr Smith, the disclosure of the names of any of the others may, in itself, disclose exempt matter. In response, the applicant confirmed that he was not seeking access to information about third parties who are not public figures.
 17. On 13 April 1994, I received the agency's response to the applicant's initial submission. The applicant was provided with a copy of this, together with a summary, prepared by my office in consultation with Mr Smith's solicitors, of the submission received from Mr Smith. It was necessary to adopt this approach to avoid the disclosure of exempt matter to the applicant. I received a further submission from the applicant on 17 May 1994.
 18. During the process of dealing with a complaint, as a matter of practice I will normally provide an applicant and other parties with copies of submissions or further reasons provided to me by the agency. This enables all parties to remain informed about the progress of the matter and it also provides the applicant, who is at a disadvantage in that he or she does not have access to the documents, with an opportunity to identify any public interest factors which may tilt the balance in favour of disclosure. The same process enables third parties to discharge their onus under s.102(2) if applicable.
 19. On 3 June 1994, the agency made a supplementary submission to me in relation to this matter. In that submission the agency advised that in order to properly discharge its responsibilities, the specific exemption in clause 8(1) of Schedule 1 to the FOI Act would also be claimed for Document 1. On 7 June 1994, with the consent of the agency, I provided a copy of the agency's supplementary submission to the applicant for his consideration and invited his response.
 20. On 10 June 1994, taking into account the substance of the agency's supplementary submission, I asked the agency to identify with particularity the information in Document 1 the disclosure of which it claimed would found an action for breach of confidence.

The seizure of Documents by the Police

21. On 17 June 1994, after learning that police had executed a search warrant on the agency, my officers contacted the agency and enquired whether Document 1 had in fact been taken by the police. The agency confirmed that Document 1 had been seized pursuant to the search warrant and was no longer in its possession. The agency further advised that, since Document 1 was no longer in its

- possession, the particulars requested in my letter of 10 June 1994 could not be provided.
22. Subsequently, on 5 July 1994, I wrote to both the Director of Public Prosecutions ('the DPP') and the Commissioner of Police and advised them that I was dealing with an application for external review of a decision involving access to Document 1. I sought their advice as to the status Document 1 in relation to the police investigation and asked them to advise me by 11 July 1994 whether they considered Document 1 to be exempt from disclosure under any of the provisions of the FOI Act. On 5 July 1994 the applicant was informed of the action I had taken and why this was considered necessary.
 23. On 7 July 1994 I received a written response from the DPP. He told me that he had requested the police to conduct certain investigations. He did not elaborate on the nature of those investigations but said that police officers had executed a search warrant and seized Document 1. He further advised me that it was his understanding that the police were holding Document 1 pursuant to the provisions of a specified section of the Criminal Code and it was his view that the disclosure of Document 1 *"...at this stage in the investigation is likely to seriously impair future investigation of possible offences which may have been committed "* and further *"...if charges do result, that the publication of Document 1 is bound to have a prejudicial effect on any subsequent trial."*
 24. On 12 July 1994, the Assistant Commissioner (Crime Operations) ("the Assistant Commissioner"), on behalf of the Commissioner of Police advised me that Document 1 had been identified as being an integral part of ongoing police investigations involving particularly sensitive issues. The Assistant Commissioner did not elaborate on the nature of those investigations. He did, however, say that it was paramount that the investigations should remain confidential and that Document 1 should not be subjected to disclosure as such disclosure may well hinder the proper conduct of those investigations. The Assistant Commissioner said that he believed Document 1 was exempt from disclosure on the grounds set out in clause 5(1)(a) and 5(1)(b) of Schedule 1 to the FOI Act.
 25. On 15 July 1994 I advised the applicant that I had received advice from the DPP and the Assistant Commissioner and that I had formed a preliminary view that Document 1 may be exempt under clauses 5(1)(a) and 5(1)(b) and invited him to reconsider his complaint. On 18 July 1994 the applicant requested a formal decision on his complaint. Although the seizure of Document 1 by the police had the effect of complicating my role in dealing with this complaint, I considered that there was sufficient material before me to finally decide the issue once I was in receipt of the advice of the DPP and the Assistant Commissioner. The question which I had to answer was whether Document 1 or Document 2 was exempt under clauses 3, 4, 5, 6 or 8 of Schedule 1 to the FOI Act and, if so, under which clause or clauses, and for what reason.

THE EXEMPTIONS

(a) **Clause 5 Law enforcement, public safety and property security**

26. Both the DPP and the Assistant Commissioner advised me that Document 1 was seized under warrant by the police as part of ongoing police investigations. However, neither the DPP nor the Assistant Commissioner elaborated on either the nature or extent of those police ongoing investigations, nor would I expect them to do so. Both clearly indicated that they believed that Document 1 should not be subject to disclosure.
27. Clause 5, so far as it relates to this complaint, provides as follows:

"Exemptions

- (1) *Matter is exempt matter if its disclosure could reasonably be expected to:*
- (a) *impair the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law;*
 - (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;*
 - (c)...
 - (d) *prejudice the fair trial of any person or the impartial adjudication of any case or hearing of disciplinary proceedings;*
 - (e)....
 - (f)....
 - (g)....
 - (h)....
- (2)....
- (3)...."

The requirements to establish an exemption under clause 5(1)(a)

28. Similar provisions to clause 5(1)(a) exist in other FOI legislation although there are differences with the wording of the equivalent provisions. However, in my view, the differences are not significant. The exemption in clause 5(1)(a) is directed at investigative methods and procedures which themselves must be lawful to attract the exemption. For a document to be exempt under this sub-clause it must be established that it is reasonable, as opposed to something irrational or absurd, to expect that its disclosure would result in some degree of impairment to investigative methods or procedures.

29. The application of the exemption is not without difficulty in providing evidence that is sufficient to establish a *prima facie* claim. In considering the application of s.37(2)(b) of the *Freedom of Information Act 1982* (Commonwealth), the Commonwealth equivalent of clause 5(1)(a), the Administrative Appeals Tribunal in that jurisdiction in *Re Mickelberg and Australian Federal Police* (1984) 6 ALN N176, said:

"It is of course difficult to discuss adequately the application of this provision to the documents now under review. Perhaps the most useful comments are to say firstly, that in the public interest it is essential that law enforcement agencies have speedy, accurate and secure systems of communication, both within an agency and between agencies especially where agencies have different fields of responsibility. Secondly, it is one thing for observers to deduce, with varying success from everyday experience media reports and other informational sources, what appear to be the methods and procedures employed by such agencies to achieve their objects, but it is quite another thing to have spelt out publicly from the agencies' own documents or in the proceedings of a Tribunal such as this what those methods and procedures are. The risk that they may be less effective would seem to be increased if a person endeavouring to combat or evade them has authoritative knowledge of them."

30. The applicant disputed the applicability of this exemption on the basis that the police investigation would not be hampered by disclosing Document 1 because it would only tell Mr Smith something he already knows, that is, his financial situation.
31. Of course, the exemption does not only require that a police investigation be hampered, accepting that if this occurred it would "impair" that investigation. The comments of the Tribunal in *Re Mickelberg* suggest that disclosure of the disputed document must somehow result in the exposure of police methods or procedures such that it would be, *prima facie*, contrary to the public interest to do so.
32. I have been advised that Document 1 contains information identified as being an integral part of ongoing police investigations and I feel compelled to accept that advice. However, from my own examination of Document 1, I am of the view that that document does not disclose any methods or procedures adopted by police investigators, nor by officers of the DPP. It may contain information that is relevant to the investigation but, if that information of itself is not connected with investigative methods or procedures or does not reveal what those methods or procedures might be, then the exemption, in my view, does not apply. On the basis of my examination of the contents of Document 1 and without further reasons, I am unable to accept the claim of the Assistant Commissioner that lawful methods or procedures could be reasonably expected to be impaired or affected in any way by its disclosure. Accordingly, I find that Document 1 is not exempt from disclosure under clause 5(1)(a) to the FOI Act.

The requirements to establish an exemption under clause 5(1)(b)

33. Matter is exempt matter under clause 5(1)(b) of Schedule 1 to the FOI Act if its disclosure could reasonably be expected to "reveal" an investigation in a particular case, whether or not any prosecution or disciplinary proceedings have resulted. No other FOI legislation in Australia provides exemption for documents that could "reveal" an investigation but similar provisions in other Australian jurisdictions exempt matter that would "prejudice" such an investigation.
34. The applicant also disputed the claim for exemption based on this clause since he was of the view that "*...the disclosure of Document 1 could not possibly "reveal" the investigation in the terms envisaged by the Act because such an investigation is already a matter of detailed public record and the disclosure could not "reveal" the specifics of such an investigation*".
35. As far as I am aware, the applicant has no knowledge of the contents of Document 1 and, therefore, he is not able state, with any degree of particularity, whether the specifics of an investigation would or would not be revealed by the disclosure of this document. Of course, the onus to do so does not lie on the applicant. However, several possibilities come to mind. Disclosure may reveal for example, the names of potential witnesses, sources of evidence, the nature of the investigation, the substance of the particular matters being investigated, the identity of possible offenders or other breaches of the law.
36. Document 1 has been seized by the police as part of ongoing police investigations. That much is publicly known. However, it is not publicly known, to my knowledge, just who or what the police are investigating nor what the nature, substance or extent of the police investigations might be. The details of the contents of Document 1 are not matters of public knowledge either and the relevance of its contents to any investigation would be within the knowledge of a limited number of police investigators and officers of the DPP. I accept the advice provided to me by the Assistant Commissioner and the DPP about the status of Document 1. Taking into account that advice, and my own examination of its contents, I am satisfied that it is reasonable to expect that the disclosure of Document 1 could reveal more than merely the fact that there was an investigation of some kind. I therefore find that Document 1 is exempt from disclosure under clause 5(1)(b) of Schedule 1 to the FOI Act.

Is Document 1 exempt from disclosure for any other reason?

37. I have noted the advice of the DPP that if charges result from the police investigations, the publication of Document 1 is "*bound to have a prejudicial effect on any subsequent trial.*" Clause 5(1)(d) of Schedule 1 to the FOI Act provides that matter is exempt matter if it could reasonably be expected to prejudice the fair trial of any person. Whilst the DPP did not explicitly refer to clause 5(1)(d) of Schedule 1 to the FOI Act, the substance of his advice is directly relevant to that clause. I accept that there is a strong public interest in

accused persons being afforded a fair trial and that any matter likely to affect the right to a fair trial would constitute a sufficient prejudice to attract this exemption.

38. If it is established that a document is an exempt document on any grounds, s.76(4) provides that I do not have the power to make a decision to the effect that access is to be given to the document. I have advice from the DPP that Document 1 has been seized as part of ongoing police investigations. Having inspected and considered the contents of the document and having considered the advice of the DPP on this aspect of the matter, I am satisfied that Document 1 would also be exempt from disclosure under clause 5(1)(d) of Schedule 1 to the FOI Act.

Is Document 2 exempt from disclosure under Clauses 5(1)(b) or (d)?

39. I have examined both Documents 1 and 2 during the course of my deliberations on this matter. Document 1 was created after Mr Mann was instructed to assess the report concerning certain of Mr Smith's financial affairs, provided to the Premier by Mr Smith, and to verify the accuracy of Mr Smith's report. Document 2 contains matter which is repeated in Document 1. In it are set out the terms of reference for Mr Mann and disclosure of Document 2 would, therefore, reveal the particular matters that were reviewed and addressed by Mr Mann in his report. That report is now part of an investigation by the police and the DPP.
40. In my view, the disclosure of Document 2 would have the effect of disclosing matter contained in Document 1. From my examination of the contents of the documents, I am satisfied that, if Document 1 is exempt for the reasons given above, then Document 2 must also be exempt for similar reasons. The matter in Document 2 which would be disclosed is matter which the DPP and the Assistant Commissioner have advised me should not be disclosed, and which I have already determined would be exempt from disclosure under clauses 5(1)(b) and 5(1)(d) of Schedule 1 to the FOI Act. I am satisfied that the matter contained in Document 2 would also be exempt from disclosure under clauses 5(1)(b) and 5(1)(d) of Schedule 1 to the FOI Act for the same reasons.
41. Whilst I was in the process of drafting my decision on this complaint the agency identified a third document which was within the ambit of the access application. That document was located on the agency's computer data base and is the original draft of the letter of instruction to Mr Mann. It is substantially the same as Document 2 with minor changes in the wording. Neither the applicant nor I was aware of the existence of this draft but I understand that the agency has since advised the applicant of its existence. I have examined that document and, for reasons which have been given in paragraphs 39 and 40 above in respect of Document 2, I am satisfied that this document is also exempt under clauses 5(1)(b) and (d).

THE ADDITIONAL CLAIMS FOR EXEMPTION.

42. In ordinary circumstances, as I have found that Document 1 and Document 2 are exempt under clauses 5(1)(b) and 5(1)(d) of Schedule 1 to the FOI Act, it would be unnecessary for me to decide the claims for exemption under clauses 3, 4, 6 and 8 of Schedule 1 to the FOI Act. However, the proceedings before me had almost reached the stage at which I was preparing to hand down a formal decision in the matter when the police investigation resulted in the seizure of one of the disputed documents. In my view, therefore, it is appropriate for me to record my findings in relation to the other exemptions claimed.
43. This is a matter of considerable importance to the applicant, the agency and the third parties, including Mr Smith and is also, in my view a matter in which there would be an expectation by all the parties that I consider fully all the issues related to the matter. It is also my belief that it is in the public interest that I do so.

(b) Clause 3 Personal Information

44. Clause 3(1) of Schedule 1 to the FOI Act provides:

"Exemption

- (1) *Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).*

Limits on exemption

(2)....

(3)....

(3)....

(4)....

(5)....

- (6) *Matter is not exempt matter under subclause 1 if its disclosure would, on balance, be in the public interest.*

45. In the Glossary in Schedule 2 to the FOI Act, "**personal information**" is defined to mean *"information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead -*

(a) *whose identity is apparent and can be reasonably be ascertained from the information or opinion; or*

(b) *who be identified by reference to an identification number or number identifying particulars such as a fingerprint, written or print or body samples."*

46. The agency, Mr Smith and other third parties all claimed that Documents 1 and 2 were exempt from disclosure under clause 3(1) of Schedule 1 to the FOI Act. As I have stated in previous decisions (see *Re Kobelke and Minister for Planning and others*, 27 April 1994, unreported); (*Re Veale and Town of Bassendean*, 25 March 1994, unreported)), the purpose of the exemption in clause 3 is to protect the privacy of individuals. The protection of personal privacy is an important feature of the legislation in Western Australia and I consider that there is a public interest in the maintenance of that privacy.
47. I accept that the documents contain personal information about Mr Smith and the third parties. This much is evident from the circumstances of their creation, from their general description provided by the agency and from the documents themselves. The information that is personal information consists of names and addresses, personal relationships, financial details and business details and, if disclosed, would enable the identity of the third parties to be discovered. In my view, this information is *prima facie*, exempt under clause 3(1). However, clause 3(1) is limited by the public interest test in clause 3(6).
48. The public interest as a concept, involves more than the curiosity of sections of the public about matters that may appear newsworthy from time to time. In my first decision in *Re Read and Public Service Commission* (16 February 1994, unreported), at paragraph 56, I referred to a decision of the Victorian Supreme Court in which the court recognised the difference between matters of general interest and those of private concern only. That passage has been quoted by me in other decisions and, in my view, it remains an important statement to guide agencies and applicants in their consideration of where the balance of the public interest should be in any given case. In *DPP v Smith* [1991] 1 VR 63, at 65, the court said:
- " The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well being of its members...There are...several and different features and facets of interest which form the public interest. On the other hand, in the daily affairs of the community events occur which attract public attention. Such events of interest to the public may or may not be ones which are for the benefit of the public; it follows that such form of interest per se is not a facet of the public interest."*
49. The agency identified accountability of publicly elected officials as a factor in favour of disclosure but against this balanced the public interest in the protection of personal privacy. The agency noted that the public interest balance with respect to disclosure of information about publicly elected officials may be weighted differently to that of other citizens. However, the agency was also of the view that, when balancing these public interests, the Premier's public statement on the issue was of critical importance and had led the agency's decision-maker to conclude, on balance, that the greater public interest lay in the protection of personal privacy.

50. Mr Smith claimed that both documents contained very detailed information about his personal financial affairs, none of which related to his performance either as a police officer or a Member of Parliament and that the documents were exempt under clause 3(1). Mr Smith also claimed that there was no basis upon which the disclosure of the material could be justified as being in the public interest.
51. The applicant claimed that because "...serious questions have been publicly raised about Mr Smith's candour and conduct..." and because "Mr Smith's honesty, integrity, personal and business morality and the way he conducts himself are matters which a member of the public would properly and reasonably take into account in deciding to elect Mr Smith" that the public should have an opportunity to judge for themselves the conclusions drawn in Document 1.
52. I recognise that there is a public interest in the accountability of elected officials. That public interest was recognised by Parliament itself with the enactment of the *Members of Parliament (Financial Interests) Act 1992*. In my view, that public interest is satisfied to some extent by the scrutiny to which the financial affairs of all Members of Parliament are now subject, following the commencement of that Act on 24 November 1992.
53. The *Members of Parliament (Financial Interests) Act 1992*, requires each Member of Parliament to provide an annual return to the Clerk of the House of Parliament of which the person is a Member. That return must provide details of, among other things, the Member's real property interests, sources of income, gifts received, contributions to travel expenses received, interests in and positions held in corporations, trade unions and professional associations. In addition, each Member must provide the name and address of each person to whom the member is liable to pay any debt, except where the debt is less than \$500, the debt is owed to a relative or in the case of a debt arising from a loan of money from a bank, building society, credit union or other person whose ordinary business includes the lending of money and the loan was made in the ordinary course of business.
54. Members of the public are entitled to inspect the Register of Members' Financial Interests maintained by the Clerk of each House of Parliament, in order to satisfy themselves as to the financial interests of all Members of Parliament, including Mr Smith.
55. In this matter, the events which were investigated and reported on by Mr Mann took place several years ago, at a time when Mr Smith was not a Member of Parliament. He was not, therefore, required by the *Members of Parliament (Financial Interests) Act 1992* to disclose information about his private financial interests at that time. Mr Smith provided personal information to the Premier voluntarily, being under no legal obligation to do so.

56. In my view, the applicant has not shown any compelling argument that would displace the public interest in protecting the privacy of individuals whose personal information would be disclosed by granting access to the requested documents. If there is a public interest in the affairs of this individual Member of Parliament being subjected to greater scrutiny than those of other Members of Parliament, then I am of the view that, in this matter, that public interest is served by allowing the police investigation to run its course unhindered. However, even if the police investigation had not interrupted my consideration of the complaint, I would nevertheless consider that the public interest will be served by maintaining an atmosphere in which Members of Parliament will make available details of those confidential personal or financial affairs (which they are not legally obliged to disclose) when requested to do so in such circumstances as arose in this case, in order that they may be referred to the appropriate authorities for scrutiny and investigation if necessary.

Personal information on the public record or in the public domain.

57. In the submission provided with his application the applicant claimed that details about Mr Smith's property dealings with other third parties are a matter of public record and that the privacy question raised by clause 3(1) does not sensibly arise in relation to such dealings which the applicant also claimed had been widely reported. Generally, I agree with this view since information that is a matter of public record would not normally attract the exemption in clause 3(1) because it would have lost its "private" character. However, the exemption in clause 3(1) requires only that a requested document, if disclosed, would "reveal" personal information about an identifiable individual.
58. Information that is in the public domain can be described as any information that is generally available to the public. Information enters the public domain, or becomes a matter of public record, through a number of avenues, such as information tabled in Parliament (assuming that there are no restrictions on the reporting of the information, by order of the Parliament), or where the information becomes part of the Hansard record of Parliamentary proceedings and the information collected by government agencies to which the public is allowed access (whether or not a fee is payable), for example, information lodged by corporations with the Australian Securities Commission.
59. I would not expect a decision-maker to "second guess" the extent of personal information in the public domain or on the public record. Nor would I expect a decision-maker to assume how much or how little an applicant knew about such issues. The FOI Act only requires that each case be considered on its merits and that adequate reasons be given for all decisions that are made.
60. In this instance, there was a great deal of personal information about Mr Smith and other people reported in the media. Further, some of the information in the documents is available to members of the public by a search of the public record in at least one government agency. In at least one case it has been considered by the Victorian Administrative Appeals Tribunal that information that is on the

public record is not exempt: *Re Halliday and Corporate Affairs* (1991) 4 VAR 327 at 331. Section 33(1) of the Victorian *Freedom of Information Act 1982* exempts documents the disclosure of which "...would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person)."

61. Clause 3 of Schedule 1 to the FOI Act involves no such notion of "unreasonableness" when considering whether personal information or information about personal affairs may be disclosed. Personal information about an identifiable person is exempt unless its disclosure would be, on balance, in the public interest. It may be argued that disclosure of matter that is already a matter of public record cannot be against the public interest. However, that proposition clearly falls short of establishing that, on balance, disclosure would positively be in the public interest.
62. Further, even if some matter contained in a document is already in the public domain, it may not be public knowledge that that particular matter is contained in the document sought, nor may it be publicly known the context in which the matters appears in the document nor the use to which it has been put. There is no distinction made in the wording of clause 3 between personal information that is not in the public domain and personal information that is. In my view, personal information about any person is exempt, whether or not it is in the public domain, unless it is established that one of the limits on the exemption provided by clause 3 applies. In my opinion, therefore, it was open to the decision-maker to conclude that the information in the documents was "personal information" and exempt under clause 3(1). It was also open to the decision-maker to decide, notwithstanding the information already in the public domain, that there were no compelling reasons to justify the exercise of the discretion in s.3(3) to release information that was technically exempt.
63. The applicant appeared to suggest that information already in the public domain could not be "revealed" by further disclosure under the FOI Act. Where disclosure under FOI might add to that information I am of the view that the exemption is capable of applying and that it is a question of fact for the agency in the first instance.

(c) **Clause 4 Commercial or business information.**

64. Exemption was also claimed by the agency, Mr Smith and other third parties under clause 4(3) of Schedule 1 to the FOI Act. Clause 4(3) provides:

"Exemptions

(1)...

(2)...

(3) *Matter is exempt matter if its disclosure -*

- (a) *would reveal information (other than trade secrets or information referred to in subclause (2)) about the business, professional, commercial or financial affairs of a person; and*
- (b) *could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.*

Limits on exemption

- (4) *Matter is not exempt under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of an agency.*
 - (5) *Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of the applicant.*
 - (6) *Matter is not exempt matter under subclause (1), (2) or (3) if the applicant provides evidence that the person concerned consents to the disclosure of the matter to the applicant.*
 - (7) *Matter is not exempt matter under subclause (3) if its disclosure would, on balance, be in the public interest."*
65. Parts (a) and (b) of clause 4(3) must be satisfied to establish this exemption. Because of the circumstances leading to the creation of Documents 1 and 2 and from an examination of their contents, I am satisfied that both documents meet the description required in clause 4(3)(a). Disclosure of these documents would reveal information about the business and financial affairs of Mr Smith and the third parties.
66. Neither the agency, Mr Smith nor the third parties provided material to explain how or in what manner the business or financial affairs of any of them would be adversely affected and why it would be reasonable to expect such an effect, if any, to follow from disclosure of the documents. The only information provided to me consisted of generalised statements that assumed adverse effects to follow as a foregone conclusion. I am unable to accept that it is reasonable to expect something without reasons to justify that conclusion. Feelings and unsupported assumptions are not sufficient reasons, in my view.
67. Both the agency and Mr Smith also claimed that the future supply of information would be prejudiced by disclosure. The agency said that prejudice would occur because Members of Parliament would be unwilling to provide personal and confidential information in the future, in the absence of any legal requirement to do so.

68. The applicant refuted these assertions on the basis that the information was not provided to Government in the way envisaged by the FOI Act, but rather that it had been provided to the Premier as leader of the Parliamentary Liberal Party. The applicant also said that the agency had failed to make out its claim for exemption under this clause because it was required to precisely address "that kind" of information.
69. The agency has not satisfied me in relation to its claim based on this element of clause 4(3). The information provided to it in the Mann Report (Document 1) was provided pursuant to a client relationship established for the purpose of verifying the information volunteered by Mr Smith to the Premier. Documents 1 and 2 which are the subject of the access application and this complaint were created pursuant to a commercial arrangement with the agency. When an agreement is entered into it would be a breach of that agreement if the required information was not subsequently provided. I find such a situation to be possible but highly unlikely.
70. Although the information provided by Mr Smith to the Premier was provided voluntarily that information is outside the intended scope of clause 4(3) even though it formed the basis for the Mann Report. In the context of the matter before me, the reference to "information of that kind" in clause 4(3) is a reference to information about financial and business affairs volunteered by a Member of Parliament to his Parliamentary Party leader. In my view, it was rightly characterised by the applicant as being information provided to the Premier as leader of the Parliamentary Liberal Party and not as information provided to the Government or to an agency.
71. Therefore, without more, I am not satisfied on the material provided to me by the agency, Mr Smith or the third parties, that Documents 1 and 2 are exempt from disclosure under clause 4(3) of Schedule 1 to the FOI Act.

(d) Clause 6 Deliberative Processes

72. Exemption was also claimed for Document 1 on the basis of clause 6. Clause 6(1) of Schedule 1 to the FOI Act provides:

"Exemptions

- (1) *Matter is exempt if its disclosure-*
 - (a) *would reveal -*
 - (i) *any opinion, advice or recommendation that has been obtained, prepared or recorded; or*
 - (ii) *any consultation or deliberation that has taken place,*

in the course of, or for the purposes of, the deliberative processes of the Government, a Minister or an agency;

and

(b) would, on balance, be contrary to the public interest.

73. The agency claimed that Document 1 was solicited, prepared, funded, received and maintained by the agency and therefore it was representative of the kind of document envisaged as being within the ambit of clause 6(1). The agency did not claim that Document 2 was exempt under this clause. The agency said that the purpose of the report was to assist the Premier's deliberations as to whether any further action needed to be taken in respect of the issue and that the assignment called for the consultant's professional opinion and recommendations. The agency further said that the Premier's press statement of 21 December 1993 represented the outcome of that deliberative process.
74. The applicant claimed that Document 1 was created after the Premier called upon Mr Smith to provide a statement of his financial affairs which was then provided to Mr Mann, by the Premier, for verification. The applicant refuted the agency's claim that Document 1 was solicited, prepared, funded and received by the agency for the deliberative processes of Government, a Minister or an agency and claimed that Document 1 was produced as a result of political imperatives and not as part of the deliberative processes of Government.
75. The applicant provided material to me which he said supported his claim that at all times the Premier acted from a political imperative and was not involved in any of the deliberative processes of his office when he commissioned, considered or acted upon Document 1. In particular, the applicant referred me to extracts taken from a debate in the Parliament of Western Australia on 10 November 1993 (*Hansard*, pages 6758 to 6786) which the applicant claimed indicated that the Speaker of the Parliament had specifically ruled that two questions about the matter did not come under the Premier's ministerial responsibilities. The applicant contended that any action the Premier took upon receipt of Mr Mann's report, in referring the matter to the Commissioner of Police and issuing a press statement, was purely procedural or administrative and did not flow from any "deliberative processes" as envisaged under the FOI Act.
76. I have also had the opportunity of examining Document 1 and I am not satisfied that it was prepared for the purposes of the deliberative processes of the Government, a Minister or an agency. It does not exhibit any of the characteristics of weighing up and evaluation of options or arguments for and against a particular course of action, sufficient to bring it within the description of clause 6(1): see *Re Waterford and Department of Treasury* (No 2) (1984) 5 ALD 588, at paragraphs 58-60. Whilst it is arguable that it contains opinion, I am of the view that that opinion was not recorded for the purpose of, nor in the course of, the deliberative processes of either the Government, a Minister or an agency.

77. I accept the fact that the agency was the administrative means by which Document 1 was created and subsequently provided to the Premier for his consideration. I also accept as reasonable the view that actions taken by the Premier to act upon the concerns about the propriety of Mr Smith's business dealings before he was elected to Parliament were "political" in the sense that they were addressing a political issue. However, that political issue needs to be separated from "government" issues which the FOI Act was designed to address.
78. The FOI Act recognises a difference between documents which are accessible under its provisions and those which are not. This is done by characterising them as "documents of an agency", any agency. However, where they are documents of a Minister, clause 4(2) of Schedule 2 to the FOI Act defines them in such a way as to exclude those which may be documents of a Minister as a member of a political party. In my view, Document 1 and Document 2 are such documents. Whilst they were documents of the agency for the purposes of being subject to an FOI access application, they were not deliberative process documents of that agency nor were they connected with the Premier's ministerial responsibilities such that either of them could be classed as deliberative process documents of the Premier. This much is evident from the Hansard extracts to which the applicant referred in his submission.
79. For these reasons, and in the absence of any material to the contrary, in my view, Document 1 is not exempt from disclosure under clause 6(1) because it does not meet the threshold requirements of sub-clause (a) of that clause. Although the agency did not claim that Document 2 was exempt under this clause it follows that I am also of the view that clause 6(1) does not apply to Document 2 either.

(e) Clause 8 Confidential communications

80. The agency claimed exemption for Document 1 under clause 8(1) and exemption for both Documents 1 and 2 under clause 8(2) of Schedule 1 to the FOI Act. Clause 8(1) provides that matter is exempt matter if its disclosure (otherwise than under the FOI Act or another written law) would be a breach of confidence for which a legal remedy could be obtained. Due to the seizure of Document 1 by the police, the agency was unable to particularise the information for which it was claimed a legal remedy was available in an action for breach of confidence if that document was disclosed. In the absence of such information, there is no material before me which would satisfy the requirements of clause 8(1). As I have found Document 1 to be exempt under clause 5(1)(b) and clause 5(1)(d), I have taken the matter no further with the agency.
81. Clause 8(2) provides as follows:

"(2) Matter is exempt matter if its disclosure -

- (a) would reveal information of a confidential nature obtained in confidence; and*

- (b) *could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.*

Limits on exemption

(3)...

- (4) *Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest.*

82. In order to establish the exemption under clause 8(2), the agency must not only establish that the information was of a confidential nature and obtained in confidence, but also that the disclosure of that information could reasonably be expected to prejudice the future supply of information of that kind to the government or an agency.
83. The agency claimed that each of the third parties consulted in this matter clearly indicated that the information contained in Mr Mann's report was of a highly confidential nature, which was certainly provided and received, and is presently maintained, in confidence. The agency also claimed the confidentially agreement between Mr Mann and Mr Smith (a copy of which has been produced to me) prohibited Mr Mann from divulging or disclosing to any person any information obtained during the course of his enquiries. It also required him to keep absolutely secret and confidential such information - except as was necessary to disclose the information to the Premier and to nominated members of his staff - without the express consent of Mr Smith or unless required by law.
84. The nature of the information and the circumstances in which it was given to Mr Mann, and in turn to the Premier, also convince me that it was given and received in confidence. Although the applicant suggested that the confidentiality undertaking had been breached by the disclosure of the documents to the Commissioner of Police, the fact that there is a limited disclosure of a confidential document does not necessarily mean that the document loses its character of confidentiality: *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180. In these circumstances, I consider that it did not.
85. I also consider that Document 2 contains confidential information that was given to and received by the agency in confidence. The terms of reference specified in Document 2 for Mr Mann's report are based on information provided to the Premier by Mr Smith's accountant. Having considered the contents of Document 2, together with the submissions of the parties, including Mr Smith and his accountant, I am satisfied that disclosure of Document 2 would reveal confidential information obtained in confidence.
86. However, the agency must also satisfy part (b) of clause 8(2) to establish this exemption. In its submissions, the agency did not address clause 8(2)(b) and did not offer any arguments or material evidence to satisfy these requirements. The third parties claimed that the information contained in Documents 1 and 2 was confidential information, provided, received and maintained in confidence but, again, they did not claim nor offer any evidence to show that it would be

reasonable to expect that the disclosure of these documents would prejudice the future supply of information of that kind to the Government or the agency.

87. In light of the above, whilst I am satisfied that part (a) of clause 8(2) has been established there has been no material provided which would convince me that Part (b) of that clause has been satisfied. Although it may be argued that the future supply of sensitive, personal financial information could reasonably be expected to be prejudiced by the disclosure of these documents - and I am of the view that there is a strong public interest in maintaining the supply of information of that kind when necessary - there is no material before me to establish that that consequence could be reasonably expected to follow. Therefore, on the evidence presently before me and from my own examination of the documents, I consider that Document 1 and Document 2 are not exempt from disclosure under clause 8(2) of Schedule 1 to the FOI Act.
