

NESTOR AND MPC

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

**File Ref: 95034
Decision Ref: D01895**

Participants:

Kelly Maree Nestor
Complainant

- and -

Ministry of the Premier and Cabinet
Respondent

- and -

Sydney Ronald Shea
Third party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents held by agency related to investigation of complaint to Minister - clause 3(1) - personal information about third parties - public interest factors for and against disclosure - third party's desire for privacy - requirements to establish exemption under clause 3(1) - limitations in clause 3 - public interest.

FREEDOM OF INFORMATION - refusal of access - information provided by third parties - clause 5(1)(b) - reveal an investigation - fact or substance of investigation - requirements to establish exemption - limitations in clause 5(4) - public interest.

Freedom of Information Act 1992 (WA) ss. 68(1); 70(2); 71(1); 72(1)(b); 74(2); 75(1); 102(3); Schedule 1 clauses 3, 5(1)(b), 5(1)(d), 5(4), 6(1); Glossary in Schedule 2.

Re Tickner and Police Force of Western Australia (Information Commissioner, WA, 7 March 1995, unreported).

Re Manly and Ministry of the Premier and Cabinet (Information Commissioner, WA, 16 September 1994, unreported).

Re C and Department for Community Development (Information Commissioner, WA, 12 October 1994, unreported).

Manly v Ministry of Premier and Cabinet (Supreme Court of Western Australia, Appeal No. SJA 1143 of 1994, 15 June 1995).

DECISION

The decision of the agency is varied. It is decided that:

- (i) Documents 1, 8, 9, 10, 11, 12, 13, 14a, 14b and 17 are exempt under clause 5(1)(b) of Schedule 1 to the *Freedom of Information Act 1992*;
- (ii) Documents 6 and 7 are exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*; and
- (iii) Documents 3 and 4 are not exempt.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

29th June 1995

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 the Premier and Cabinet ('the agency') to refuse Ms Nestor ('the complainant') access to documents requested by the complainant under the *Freedom of Information Act 1992* ('the FOI Act').
2. The complainant is a journalist with the Australian Broadcasting Corporation Television News Department in Perth. On 10 November 1994, the complainant applied to the agency under the FOI Act, seeking access to documents concerning a complaint she had made to the Minister for the Environment on 6 October 1994. The agency's decision-maker decided, on 21 December 1994, to grant deferred access to four documents initially, and to refuse access to fourteen other documents on the ground that those documents are exempt under various clauses of Schedule 1 to the FOI Act.
3. On 9 January 1995, the complainant applied to the agency for internal review of the decision to refuse access to fourteen documents. On 20 January 1995, Mr M Wauchope, Chief Executive, Office of State Administration in the agency, informed the complainant that he had decided to confirm the agency's original decision to grant access to four documents and to refuse access to fourteen others on the grounds that those documents are exempt under clauses 3(1), 5(1)(b) and (d), and clause 6(1) of Schedule 1 to the FOI Act. On 1 March 1995, the complainant applied to the Information Commissioner for external review of the agency's decision to refuse access to those documents.

REVIEW BY THE INFORMATION COMMISSIONER

4. On 8 March 1995, in accordance with my obligation under s.68(1) of the FOI Act, I notified the agency that I had accepted this complaint for review. Pursuant to my authority under s.75(1) and s.72(1)(b), I sought the production to me of the documents in dispute together with the file maintained by the agency with respect to this matter. Those documents were provided to my office on 9 March 1995.
5. On 14 March 1995, one of my investigations officers contacted the complainant with a view to conducting a preliminary conference between the parties to this complaint. It is the normal practice of my office to arrange a meeting of this nature in order to clarify the issues in dispute between the parties and to provide an explanation of the procedures to be adopted by me in dealing with a complaint. Meetings of this kind have proven to be a useful device in resolving, partially or fully, matters of complaint between agencies and access applicants. However, the complainant informed my officer that she could see no useful purpose in such a meeting, and no such meeting was held.

6. On 1 June 1995, after my examination of the documents in dispute, I met with officers of the agency to discuss the agency's claims that the requested documents are exempt. Following that meeting, it appeared to me that there was room to conciliate part of this complaint. My office approached the complainant again about a meeting but to no avail. On 8 June 1995, the complainant informed me in writing that she was seeking access to copies of all documents held by the agency in relation to this matter. The complainant again informed my officer that, acting upon advice from her solicitor, she was of the view that no useful purpose was to be gained from such a meeting and, if she was to attend such a meeting, she required written advice of the purpose and outcomes to be achieved. Further, I was also advised that the complainant required a determination of this matter.
7. Pursuant to s.70(2) of the FOI Act, proceedings before the Information Commissioner are to be conducted with as little formality and technicality, and with as much expedition, as the requirements of the FOI Act and a proper consideration of the matters before the Information Commissioner, permit. Further, pursuant to s.71(1) of the FOI Act, the Information Commissioner may, at any stage, suspend inquiries or investigations so that efforts can be made to resolve a complaint by conciliation or negotiation between the parties.
8. The complainant was clearly informed, on a number of occasions, of the purpose of my officer convening a meeting at a particular stage of the proceedings. I am satisfied that she has been given ample opportunity to participate in proceedings before me but that she chose not to do so. Therefore I abandoned any further attempts to conciliate this matter and commenced my formal deliberations.
9. On 8 June 1995, following a discussion with my investigations officer, a third party, Mr Syd Shea, Chief Executive Officer, Department of Conservation and Land Management ('the third party'), requested in writing to be joined as a party to this complaint and he was so joined.
10. On 14 June 1995, I provided all parties with my preliminary view, and the reasons for that preliminary view. Based on the material then before me, it was my preliminary view that the agency's claims for exemption based on either clause 3(1) or clause 5(1)(b) of Schedule 1 to the FOI Act could be substantiated with respect to all documents except two. Following receipt of that preliminary view, the agency withdrew its claims for exemption in relation to those two documents. The third party subsequently provided me with a submission relating to the two documents for which the agency had withdrawn its claims for exemption. Therefore, there remain fourteen documents which are in dispute between all the parties in this matter and upon which I am required to decide the issue of access.

THE DISPUTED DOCUMENTS

11. As some of the documents identified by the agency are copies of others, I have listed and described the documents remaining in dispute and the exemptions

claimed by the parties, using the same numbers as used by the agency in the schedule provided to the complainant with its initial notice of decision.

Document	Description	Exemptions
1	Letter from Minister for the Environment to Premier (undated)	5(1)(b); 5(1)(d)
3	Draft memo from Premier to third party, dated 7 October 1994 (unsigned)	3(1)
4	Signed copy of Document 3	3(1)
6	Copy of a reference dated 7 October 1994	3(1)
7	Copy of reference dated 7 October 1994	3(1)
8	Letter from third party to Premier dated 11 October 1994	3(1); 5(1)(b); 5(1)(d)
9	Memo from Mike Pervan to Kevin Payne, dated 12 October 1994	3(1); 6(1); 5(1)(b); 5(1)(d)
10	Report of Kevin Payne to the Premier dated 14 October 1994	3(1); 6(1); 5(1)(b); 5(1)(d)
11	Covering letter from Kevin Payne to Premier dated 14 October 1994	3(1); 6(1); 5(1)(b); 5(1)(d)
12	Draft letter from Premier to third party, including hand-written notations, undated	3(1);5(1)(b); 5(1)(d)
13	Copy of Document 12 without hand-written notations	3(1); 5(1)(b); 5(1)(d)
14a	Letter from Premier to third party dated 19 October 1994	3(1); 5(1)(b); 5(1)(d)
14b	Signed copy of Document 14a	3(1); 5(1)(b); 5(1)(d)
17	Copy of Document 8 bearing pencil markings	3(1); 5(1)(b); 5(1)(d)

THE EXEMPTIONS

(a) Clause 5(1)(b)

12. Clause 5(1)(b) of Schedule 1 to the FOI Act 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;"*

13. The particular wording of the exemption in clause 5(1)(b) of the FOI Act is unique in FOI legislation. No other FOI legislation in Australia provides exemption for documents that could "reveal" an investigation. Similar provisions in other Australian jurisdictions exempt matter that would, or could reasonably be expected to, "prejudice" such an investigation. The Concise Oxford Dictionary, Eighth Edition, defines "reveal" as meaning, *inter alia*, "display or show; allow to appear" and "disclose, divulge, betray". The words "display" and "show" are also defined as follows:

"display" "expose to view; exhibit; show" and "allow to appear; reveal; betray".

"show" "allow or cause to be visible; manifest; appear".

14. In my view, clause 5(1)(b) is susceptible to at least two possible interpretations. Either clause 5(1)(b) is concerned to exempt matter that could reasonably be expected to show, as a matter of fact, that there was, or is, an investigation, or it is concerned to exempt matter the disclosure of which could reasonably be expected to reveal the substance of an investigation.
15. In my decision in *Re Tickner and Police Force of Western Australia* (7 March 1995, unreported), at paragraphs 34-44, I discussed the meaning of this exemption in some detail and concluded that the exemption is designed to protect from disclosure information that would disclose the substance of an investigation. Further, in my decisions in *Re C and Department for Community Development* (12 October 1994, unreported) at paragraph 33, and *Re Manly and the Ministry of the Premier and Cabinet* (16 September 1994, unreported), at paragraph 35 and 36, I reached the same conclusion.
16. The meaning of the words "reveal the investigation" in clause 5(1)(b) of Schedule 1 to the FOI Act arose for consideration by the Western Australian Supreme Court in *Manly v Ministry of Premier and Cabinet* (Appeal No SJA 1143 of 1994, 15 June 1995, unreported). Owen J said, at p.25 of the judgement:

"I think the clause is aimed at the specifics of an investigation, and not at the mere fact that there is or has been an investigation..."

There must be something in the document which, when looked at in the light of the surrounding circumstances, would tend to show something

about the content of the investigation. If that material is already in the public arena then it could not properly be said that the disclosure of the document would reveal the investigation."

17. Therefore, the issue for my determination is whether disclosure of the documents for which exemption is claimed under clause 5(1)(b) could reasonably be expected to reveal something about the content of an investigation of any contravention or possible contravention of the law. Further, there is an axiom in FOI matters that disclosure under FOI legislation is "disclosure to the world at large", not merely to the access applicant. Although the point did not specifically arise in *Manly v Ministry of Premier and Cabinet (supra)*, if disclosure of the requested documents could reasonably be expected to reveal something about the content of an investigation to anyone who might read them, then it matters not, in my view, that this particular complainant is apprised of some of that detail by virtue of the fact that she initiated the investigation.
18. In my view, clause 5 is intended to protect the public interest in law enforcement and other regulatory bodies being able to effectively carry out their functions without interested observers or possible suspects knowing in advance what those inquiries are likely to be. Further, in some instances, the contents of the documents themselves can provide real and substantial grounds for expecting that disclosure might have this effect and the documents thus may, *prima facie*, be exempt from disclosure under clause 5(1)(b) of Schedule 1 to the FOI Act.
19. In this instance, the complainant made a complaint to the Minister for the Environment which was subsequently investigated by officers from the Workforce Management and Development Office of the agency. However, I am unable to disclose the nature of that complaint without breaching the requirements of s.74(2) of the FOI Act. I have examined the documents in dispute and considered the submissions of the parties and surrounding circumstances. I am satisfied that disclosure of Documents 1, 8, 9, 10, 11, 12, 13, 14a, 14b and 17 could reasonably be expected to reveal something about the content of an investigation into a contravention or possible contravention of the law, namely the *Public Sector Management Act 1994*.
20. Further, it is my view that none of the limitations in clause 5(4) applies to those documents. Therefore, there is no scope for my consideration of whether disclosure of those documents would, on balance, be in the public interest. That question simply does not arise. In my view, Documents 1, 8, 9, 10, 11, 12, 13, 14a, 14b and 17 are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.

(b) Clause 3(1)

21. Exemption was claimed under clause 3(1) for Documents 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14a, 14b and 17. From my examination of Documents 1, 8, 9, 10, 11, 12, 13, 14a, 14b and 17, I am satisfied that those documents each contain personal information about third parties that is, *prima facie*, exempt matter. As I have already found those documents to be exempt under clause 5(1)(b) of Schedule 1 to the FOI Act, it is unnecessary that I consider whether those documents might also be exempt under clause 3(1). However, the exempt status or otherwise of

Documents 3, 4, 6 and 7 under clause 3(1) does require my consideration. Clause 3(1) provides:

"3. Personal information

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)...

(4)...

(5)...

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

22. 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 or can reasonably be ascertained from the information or opinion; or*

(b) *who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample.*

Documents 6 and 7

23. In previous decisions I have recognised and given weight to the fact that clause 3(1) protects the privacy of individuals whose personal information may appear in documents of State and local government agencies. I have examined Documents 6 and 7. I am satisfied that those documents contain personal information about third parties who are not public sector employees. The personal information in those documents consists of names, employment history and details of current employment. I am also satisfied that those documents contain personal information about the third party, namely, the authors' opinions about the third party. In my view, the personal information in Documents 6 and 7 is, *prima facie*, exempt matter under clause 3(1) of Schedule 1 to the FOI Act.

The public interest test

24. Clause 3 is subject to a number of limitations. Those provided by sub-clauses (2), (4) and (5) do not apply in this instance. The limit in sub-clause (3) does not

apply because some of the personal information in Documents 6 and 7 concerns parties who are not employees in State or local government agencies. They also contain personal information about the third party. However, in my view, that personal information is not of the nature contemplated by clause 3(3) and is not, therefore, subject to that limitation. Clause 3(6) provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. The onus of persuading me that disclosure of that matter would, on balance, be in the public interest lies on the complainant by virtue of s.102(3) of the FOI Act. Although the complainant was provided with the opportunity to make further submissions on this point following receipt of my preliminary view, none was made.

25. The onus the complainant bears by virtue of s.102(3) of the FOI Act requires her to establish that, on balance, the public interest requires the disclosure of the personal and private information of third parties. In my view, the complainant has not discharged the onus she bears in this respect. As I understand it, the complainant is concerned that her complaint to the Minister has not been dealt with properly or at all. One of her reasons for seeking access to the documents is to ascertain exactly what action has been taken by the government in respect of the matters of complaint she raised with the Minister.
26. I recognise a public interest in matters of serious complaint such as those raised by the complainant in her complaint to the Minister being properly and promptly investigated and dealt with by the government as the principles of accountability require. I also recognise a public interest in complainants being properly informed of the steps taken to deal with their complaints, the outcome and the reasons for the outcome, in order that public confidence may be maintained in this aspect of the government's activities. However, the nature and contents of Documents 6 and 7 is such that their disclosure would not, in my opinion, meet or further those public interests in any way.
27. Based on the material before me, including my examination of the contents of Documents 6 and 7, I am not persuaded that there is any public interest that outweighs the public interest in protecting the privacy of individuals about whom personal information is contained in those documents. It is my view that Documents 6 and 7 are exempt under clause 3(1) of Schedule 1 to the FOI Act.

Documents 3 and 4

28. The third party claimed that Documents 3 and 4 were exempt under clause 3(1). Document 3 is an unsigned copy of Document 4. From my examination of those documents, I am satisfied that those documents contain personal information about the third party. As I do not consider that I can describe that personal information without disclosing it, the requirements of s.74(2) do not permit me to describe it. As those documents contain personal information that is, *prima facie*, exempt matter under clause 3(1), the limits on the exemption also arise for consideration in respect to Documents 3 and 4. The limits in sub-clauses (2), (4) and (5) clearly do not apply. In my view, the limit in sub-clause 3(3) does not apply to Documents 3 and 4 because the personal information in those documents

does not relate to something done by the third party in the normal course of performing or purporting to perform his functions or duties of his position as a Chief Executive Officer in the public sector.

The public interest test

29. In his submission to me, the third party identified a public interest in retaining public confidence in the processes of government with respect to investigations. However, it was his submission that there was no public interest that would benefit from the disclosure of Documents 3 and 4. It was the third party's view that, as the statutory process for dealing with complaints had not been formalised by the presentation of a formal written complaint, the proper time for discovery of relevant documents was during that process and not through the FOI process.
30. In my view, the disclosure of Documents 3 and 4 could not reasonably be expected to disclose the contents of any investigation into a contravention or possible contravention of the law. They appear to me to be administrative, procedural documents only. At most, they reveal the fact that there was an investigation undertaken, but not the substance or the specifics of that investigation. However, I consider the disclosure of that fact, in the context of revealing personal information about the third party, would, on balance, be in the public interest. In my view, the personal information in those documents is not of the very private nature that the public interest demands be protected from disclosure.
31. I accept that the disclosure of documents revealing the fact of an investigation might be personally embarrassing and uncomfortable for the third party, especially as the complainant is a journalist. However, on balance, I consider there is a public interest in knowing how the agency deals with complaints concerning public sector employees who are also Chief Executive Officers. I recognise a public interest in ensuring the professional and personal accountability of public administrators. I also recognise a public interest in ensuring that the accountability processes of agencies are as transparent as efficient public administration will allow.
32. I accept that the agency has not yet finalised its investigation and that it is awaiting a formal written statement of complaint from the complainant. However, the information before me suggests that some preliminary conclusions had been reached by 19 October 1994, the day that Document 14b was sent to the third party. One would expect the complainant to have received some explanation of that outcome either by that date or shortly thereafter. There is some material before me to indicate that officers of the agency, namely those in the Workplace Management and Development Office whose duty it was to deal with the complainant's complaint to the Minister, have explained options and possible outcomes to the complainant. However, that explanation was some time after the complainant had lodged an FOI access application and after she had complained to my office.

33. In my view, the public interest in a person who finds himself or herself in the position of the complainant, having made a complaint to a government agency, being informed of the steps taken to deal with his or her complaint and of the outcome requires more than was provided on this occasion. It is also my view that that public interest includes appropriate and timely advice to a complainant about the inquiries undertaken and the results of an investigation and an explanation of how the agency dealt with any conflicts of evidence between the parties, in order that the complainant may be satisfied that his or her complaint has been properly investigated and dealt with by the agency concerned. In this way public confidence in such investigations may be maintained.
34. I recognise a public interest in the maintenance of public confidence in the Government's capacity and willingness to properly deal with such matters. Generally speaking, it is my experience that State and local government authorities with a responsibility for the investigation of complaints do not provide sufficient detail of the nature described above to complainants. More often than not the public interest in maintaining confidence in those systems of investigation is not being adequately addressed with the result that complainants are forced to exercise their rights of access under the FOI Act to find the explanations that are lacking.
35. Without revealing the substance of the investigation, the disclosure of Documents 3 and 4 would reveal at least one step that was taken by the agency in this instance. In the absence of evidence that the public interest in maintaining confidence in the processes of government with respect to the agency's investigation has otherwise been served, I am of the view that disclosure of Documents 3 and 4 would go some way towards addressing that public interest and that the disclosure of those documents would, on balance, be in the public interest.
36. The agency also claimed that various documents were exempt under clause 5(1)(d) and clause 6(1) of Schedule 1 to the FOI Act, However, I have already found those documents to be exempt under clause 5(1)(b), so I need not decide this point.
