

HOUSTON AND MPC

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

**File Ref: 94051
Decision Ref: D02094**

Participants:

Guy Nicholas Dickson Houston
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 -.documents exempt under clause 5(1)(a) - documents exempt under clause 5(1)(b).

FREEDOM OF INFORMATION - clause 3 - personal information - clause 4(3) business or commercial information - clause 6 - deliberative process documents - clause 8 - documents constitute confidential communications.

Freedom of Information Act 1992 (WA) ss. 63(1); 63(2); Schedule 1 clauses 3, 4, 5(1)(a), 5(1)(b), 5(1)(d), 5(4), 6, 8.

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

The decision of the agency of 17 March 1994 is varied. The document is exempt under clauses 5(1)(b) and 5(1)(d) of Schedule 1 to the FOI Act.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

October 1994

REASONS FOR DECISION

1. This is an application for a review by the Information Commissioner arising out of a decision of the Ministry of the Premier and Cabinet ("the agency") to refuse Mr Houston ("the applicant") access to a document described by the applicant as "*accountant Stephen Mann's independent examination (report) of Liberal MP Wayde Smith's financial dealings*" (the requested document).

BACKGROUND

2. The background to this complaint is substantially the same as that described in paragraphs 2-9 of my decision in *Re Manly and Ministry of the Premier and Cabinet* (16 September 1994, unreported). In this instance, the applicant is a journalist with the Australian Broadcasting Corporation, TV News. Like the applicant in *Re Manly*, he sought and was denied access to a document described by the agency as 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 in *Re Manly*).
3. On 20 December 1993, the applicant had sought to exercise his rights of access under the *Freedom of Information Act 1992* ("the FOI Act") and formally applied to the agency for access to the requested document.
4. On 11 March 1994, the applicant was advised that on 28 January 1994 Mr M C Wauchope, Chief Executive, Office of State Administration, a division of the agency, ("the initial decision-maker") had refused the applicant access to the document requested on the grounds that the document was exempt under one or more of clauses 3, 4, 6 and 8(2) of Schedule 1 to the FOI Act.
5. On 15 March 1994 the applicant requested an internal review of the initial decision-maker's decision to refuse him access to the requested document. On 18 March 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 17 March 1994, to "*uphold the original decision to refuse access on the grounds that the document is exempt matter under clauses 3, 4, 6 and 8(2) of Schedule 1 to the Act*".
6. On 29 April 1994, the applicant sought external review by the Information Commissioner of the agency's decision of 17 March 1994 to deny access to the document.

REVIEW BY THE INFORMATION COMMISSIONER

7. At the time of receiving the applicant's complaint I was already reviewing a decision of the agency to deny Mr Manly access to the requested document and to one other. Whilst I formally accepted this complaint, I obtained agreement from the applicant to defer a decision on his complaint pending the outcome of my decision in *Re Manly*. On 24 May 1994 I formally advised the agency that I had received and accepted the applicant's complaint pursuant to my functions under the FOI Act.
8. On 16 September 1994 I handed down my decision in *Re Manly*. That same day, the applicant was provided with a copy of my decision and reasons for decision. Although I had determined that the requested document was exempt under clauses 5(1)(b) and (d) of Schedule 1 to the FOI Act, on 26 September 1994, the applicant advised me that he wished to pursue his application for external review in the hope that arguments included in his previous correspondence would produce a positive response.
9. In view of this, the applicant was afforded the opportunity to make submissions in relation to my finding that the requested document was exempt under clauses 5(1)(b) and (d). On 13 October 1994, in response to this invitation, the applicant said:

"I base my argument for non-exemption under clause 5(4)(b) of Schedule 1 to the FOI Act (that is, the disclosure of the Mann Report would, on balance, be in the public interest.)."

Wayde Smith, whose finances are subject of the Mann Report, is a Member of Parliament. He is paid by the taxpayers of Western Australia. He is accountable to the taxpayers of Western Australia. He is a public figure in a position of high esteem.

Mr Smith's activities were also the subject of wide spread public comment throughout the last half of 1993 and early 1994.

In fact, it was his activities and the subsequent media and political scrutiny, which led to Premier Richard Court, ordering the Mann Report."

10. In relation to the finding that clause 5(1)(b) applied to the requested document, the applicant said:

"If, as argued under 5(1)(b), the document's disclosure may reveal the investigation of any contravention or possible contravention of the law, then it

is imperative, in this instance, that the document be made public. Politicians have to be seen to be acting above reproach. If any one of them has behaved in a way which warrants an investigation, the public has a right to know what the circumstances are. It kills off unwarranted, and sometimes malicious, speculation. It also brings the M.P. involved to account. There've been numerous examples where details of investigations into politicians have been made public. Two that spring to mind are the police investigations into former Premier, Carmen Lawrence (RE: the \$5,000 travel allowance), and former Opposition Leader, Richard Court (RE: Alleged Family Court irregularities). Both parties were cleared of any wrong doing. But the revelation of the investigations allowed the public to participate in robust debate over political standards. And the ensuing publicity obviously didn't harm the careers of both parties. Doctor Lawrence is now Federal Health Minister and Mr Court went on to become Premier of Western Australia".

11. In relation to the finding that clause 5(1)(d) applied, the applicant said:

"The argument for exemption is irrelevant. I know of no action being heard, or due to be heard, against Wayde Smith. If there is the potential for legal action then it's still a dubious argument for exemption. The media was criticised during the so called WA Inc era in the 1980's for not exposing the activities of politicians. If you apply 5(1)(d) to the era, NOTHING could have been reported. So until charges have been laid, there're no sound reasons to deny the public the truth about the activities of politicians".

"You would no doubt be aware of yesterday's High Court decision which will lead to a greater era of political accountability. I therefore think it's appropriate that the High Court decision be take into account when considering my application."

12. The applicant based his argument for non-exemption on clause 5(4)(b) of Schedule 1 to the FOI Act. Clause 5(4) provides:

"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;*
- (ii) *a general outline of the structure of a programme adopted by an agency for dealing with any contravention or possible contravention of the law; or*

(iii) *a report on the degree of success achieved in any programme adopted by an agency for dealing with any contravention or possible contravention of the law;*

and

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

13. Clause 5(4) operates as a limitation on the exemptions provided in clauses 5(1) and (2) but only where the requested document is of a type described in sub-clauses 5(4)(a)(i)-(iii). Further, the public interest test in sub-clause 5(4)(b) does not stand alone as a separate limitation and it must be read together with part (a) of that clause. A consideration of the public interest for and against disclosure of the requested document will arise if, and only if, firstly, the document is of a type described in clauses 5(1) or (2) and, secondly, it nevertheless consists of one or more of the types of matter described in clause 5(4).
14. A description of the contents of the requested document appears in various parts of my decision in *Re Manly*, principally in paragraphs 8, 32, 35-40, 47, 50, 83 and 85. From this description it should be clear that the requested document (being Document 1 in *Re Manly*) is not, in my view, a document of a kind referred to in clause 5(4)(a)(i)-(iii). The applicant has presented no evidence and made no submissions that it is. Accordingly, in my opinion, the limitation in clause 5(4) does not operate in respect of this document and, therefore, the public interest does not arise for consideration. Therefore, I reject the applicant's submission on this point.
15. The applicant in this matter has not put before me any evidence that would persuade me that the requested document is not exempt from disclosure under the FOI Act. In particular, the applicant's submissions of 13 October 1994 demonstrate a lack of understanding of the limitations set out in clause 5(4) of Schedule 1 to the FOI Act. Whilst I appreciate the difficulties that the applicant might experience in making submissions to me without sighting the requested document, there is nevertheless a sufficient description of the document in *Re Manly* to establish that the requested document is not a document of the kind referred to in clause 5(4)(a) and that it is, therefore, not subject to the limits on exemptions set out in clause 5(4) of Schedule 1 to the FOI Act. Accordingly, for the reasons set out in paragraphs 26 to 41 on pages 7 to 10 of my decision in *Re Manly*, I find that the requested document is exempt from disclosure under clauses 5(1)(b) and 5(1)(d) of Schedule 1 to the FOI Act.
