

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

**File Ref: 97070
Decision Ref: D02197**

Participants:

**Shaun David Henderson
Kenneth John Goatley
John Michael McHale
Jody Suzanne Weaver**
Complainants

- and -

**Education Department of Western
Australia**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - report relating to inquiry into alleged breaches of Public Sector Standards - clause 5(1)(b) - whether document contains matter the disclosure of which could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law - clause 8(2) - confidential communications - information of a confidential nature obtained in confidence - whether disclosure could reasonably be expected to prejudice future supply.

Freedom of Information Act 1992 (WA) s.24; Schedule 1 clauses 3(1), 5(1)(b), 8(2).

Freedom of Information Act 1982 (C'wlth) s.43(1)(c)(ii).

Public Sector Management Act 1994 ss.9, 16, 21, 80, 83, 84, 86, 97.

Public Sector Management (Review Procedures) Regulations 1995 Regulation 8.

Interpretation Act 1984 s.42.

Police Force of Western Australia v Kelly and Smith (Supreme Court of Western Australia, 30 April 1996, unreported, Library No. 960227).

Manly v Ministry of Premier and Cabinet (Supreme Court of Western Australia, 15 June 1995, unreported, Library No. 950310).

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

Re Kapadia and Disability Services Commission (Information Commissioner of Western Australia, 16 August 1996, unreported, D04996).

Attorney General's Department and Australian Iron and Steel Pty Ltd v Cockroft (1986) 10 FCR 180.

Ryder v Booth [1985] VR 869.

Re Markham and Ministry of Justice (Information Commissioner of Western Australia, 9 August 1995, unreported, D02595).

DECISION

The decision of the agency is varied. In substitution it is decided that the document, including the attachments, is exempt under clause 5(1)(b) of Schedule 1 to the *Freedom of Information Act 1992*, except for pages 1 and 2, the first six paragraphs on page 3, and the matter beginning with the heading “Recommendations” on page 11 and concluding on page 12 of the document, which are not exempt under clause 5(1)(b) nor are they exempt under clause 8(2) of Schedule 1 to the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

26th August 1997

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review arising out of a decision of the Education Department of Western Australia ('the agency') to refuse Messrs Henderson, Goatley and McHale and Ms Weaver ('the complainants') access to a document requested under the *Freedom of Information Act 1992* ('the FOI Act').
2. I understand that, in August 1996, an officer of the agency ('the third party') lodged a complaint with the agency alleging breaches of several Public Sector Standards ('the standards'). The allegations concerned certain events at Halls Creek District High School.
3. Two independent reviewers ('the reviewers') were selected by the agency to inquire into and review the third party's allegations concerning breaches of the standards, in accordance with the *Public Sector Management (Review Procedures) Regulations 1995* ('the regulations'). After completing their investigations, the reviewers provided a written report of their specific findings concerning the alleged breaches of the standards to the agency. The reviewers also provided a copy of that report to the Commissioner for Public Sector Standards ('the Commissioner'). In addition, the reviewers prepared a second report on additional matters arising out of the information gathered by them in the course of their inquiries into the alleged breaches of the standards. The reviewers also provided a copy of that second report to the Director General of the agency and to the Commissioner.
4. In November 1996, the General Secretary of the State School Teachers Union of WA (Inc) ('the SSTU') lodged an application with the agency seeking access, on behalf of the third party, to a copy of the reviewers' report of their findings concerning the alleged breaches of the standards. Subsequently, the SSTU was given access to a copy of that document.
5. By letter dated 19 November 1996, the SSTU lodged an access application with the agency, on behalf of the complainants, seeking access to a copy of the second report prepared by the reviewers, which was described in the SSTU's application as "*...a report prepared for Ms C Vardon, Director General of the Education Department of WA. This report was prepared in September 1996 for Ms Vardon by Independent Reviewers Ms Joan Harris and Mr Bob Pollard and deals with matters surrounding Halls Creek District High School.*"
6. The agency refused the complainants access to the second report on the grounds that it is exempt under clause 5(1)(b) and clause 8(2) of Schedule 1 to the FOI Act. The complainants, through solicitors acting for the SSTU, sought internal review of the agency's decision. On 25 March 1997, the internal reviewer confirmed the initial decision of the agency that the second report is exempt under clauses 5(1)(b) and 8(2). By letter dated 10 April 1997, the complainants,

through the solicitors, lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

7. I obtained a copy of the second report from the agency. Preliminary conferences were held with solicitors representing the complainants to determine if conciliation was possible. Although the complainants indicated their willingness to accept access to an edited copy of that document with exempt matter deleted, the agency maintained its claims that the document in its entirety is exempt. Submissions were sought and obtained from the parties and from the two independent reviewers.
8. After considering all the material before me, on 11 July 1997, I informed the parties in writing of my preliminary view of this complaint, together with my reasons. It was my preliminary view that parts of the document may be exempt under clause 5(1)(b). However, I was not satisfied that the document was exempt under clause 8(2) as claimed by the agency. Thereafter, I received a further submission from the complainants and a further submission from the agency. Among other things, the solicitors representing the complainants advised me that the complainants would not withdraw their complaint.

THE DISPUTED DOCUMENT

9. The disputed document is a report comprising 12 pages and attachments, dated 13 September 1996, submitted to the Director General of the agency by the reviewers.

THE EXEMPTIONS

(a) Clause 5(1)(b)

10. Clause 5(1)(b) of Schedule 1 to the FOI Act provides as follows:

“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;”

11. I have previously discussed the scope and meaning of the exemption in clause 5(1)(b) in a number of my decisions following the decision of the Supreme Court of Western Australia in *Police Force of Western Australia v Kelly and Smith* (Supreme Court of Western Australia, 30 April 1996, unreported, Library No. 960227). In that case, after referring to the comments of Owen J concerning clause 5(1)(b) in *Manly v Ministry of Premier and Cabinet* (Supreme Court of Western Australia, 15 June 1995, unreported, Library No. 950310), Anderson J said, at page 8:

“...documents which reveal that there is an investigation, the identity of the people being investigated and generally the subject matter of the investigation probably would satisfy the requirement stipulated by Owen J that the document ‘must reveal something about the content of the investigation’.”

12. Further, His Honour said at page 9:

“In my opinion the phrase “...if its disclosure could reasonably be expected to...reveal the investigation of any contravention of the law in a particular case...” is apt to include the revelation of the fact of a particular investigation by police of a particular incident involving certain people. I think there is very good reason to accept that Parliament intended that such matter be exempt from access under the Act.”

The agency’s submission

13. The agency submits that the disputed document was prepared from information collected during the investigation conducted by the reviewers into the alleged breaches of the standards. The agency also submits that it is legally obliged to comply with the requirements of the *Public Sector Management Act 1994* (‘the PSM Act’) and that an inquiry into alleged breaches of the standards constitutes an investigation into a possible contravention of the law in a particular case. The agency submits that disclosure of the disputed document would reveal details of the reviewers’ investigation, including the facts, the process and the actions taken by the reviewers during their investigation and, therefore, the disputed document is exempt from disclosure under clause 5(1)(b) of Schedule 1 to the FOI Act.

The complainants’ submission

14. The complainants do not dispute the fact that the reviewers investigated and reported on the third party’s allegations concerning breaches of the standards. However, the complainants submit that the SSTU alleged there were more general problems at the Halls Creek District High School and that the SSTU urged the agency to undertake an independent investigation into those alleged problems at the Halls Creek District High School. The complainants further submit that the SSTU proposed, and subsequently the agency agreed, that the reviewers could undertake a separate, parallel investigation into the alleged

- problems at the Halls Creek District High School whilst they were investigating the third party's allegations about the breaches of the standards.
15. The complainants submit, therefore, that there was a twofold purpose to the reviewers' investigation. They claim that a number of teachers and members of the Halls Creek community were interviewed by the reviewers and those persons cannot recall having been asked about the alleged breaches of the standards during their interviews with the reviewers. Further, the complainants submit that many people interviewed were asked about their views of the alleged problems at the Halls Creek District High School. Accordingly, the complainants submit that the disputed document is the reviewers' report to the agency of the results of their parallel investigation into the alleged problems at Halls Creek District High School and that the disputed document cannot, therefore, be exempt under clause 5(1)(b) because the parallel investigation did not concern a contravention or possible contravention of any law.

The reviewers' submission

16. The reviewers deny that they were engaged to independently review and report on the alleged problems at Halls Creek District High School at the same time as they were investigating the alleged breaches of the standards. The reviewers inform me that the purpose of their visit to Halls Creek was to carry out the independent review of the allegations concerning the breaches of the standards, in accordance with their statutory duties and obligations under the regulations. The report of their findings in respect of the alleged breaches of the standards was given to the agency. In addition, they also prepared a separate report (the disputed document) for the Director General of the agency, setting out detailed information gathered during their investigation into, and the circumstances surrounding, the alleged breaches of the standards, and reporting on additional matters arising out of it.

Investigation of a contravention or possible contravention of the law

17. Clause 5(1)(b) requires that, in order for a document to be exempt, it must contain some information the disclosure of which could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law in a particular case. In the circumstances of this matter, the first issue that arises is the question of whether an investigation into an alleged breach of standards constitutes an investigation of a contravention or possible contravention of the law within the terms of clause 5(1)(b).
18. I accept that the PSM Act, a statute enacted by the Parliament of Western Australia, is a law as defined in clause 5(5) of Schedule 1 to the FOI Act: see my decisions in *Re Neville and The State Housing Commission of Western Australia (Homeswest)* (15 July 1996, unreported, D04296) and *Re Kapadia and Disability Services Commission* (16 August 1996, unreported, D04996).
19. Section 16(1) of the PSM Act creates the Office of the Commissioner. Section 21(1)(a) of the PSM Act provides that the functions of the Commissioner include the establishment of standards in relation to recruitment, selection,

- appointment, transfer, secondment, performance management, redeployment, discipline and termination of employment of public sector employees and such other human resource management activities relating to employees as are prescribed.
20. Standards must be published in the *Government Gazette* of Western Australia (s.21(5)). Section 42 of the *Interpretation Act 1984* - which requires, *inter alia*, the laying of regulations before the Houses of Parliament - applies to and in relation to a public sector standard as if it were regulations within the meaning of that section (s.21(6)). Each standard has, in relation to other Acts and subsidiary legislation made under them, the force of law as if enacted as part of the PSM Act (s.21(9)). Further, section 9 of the PSM Act requires all public sector bodies and employees to comply with published standards. Accordingly, I am of the view that standards established by the Commissioner under s.21(1)(a) of the PSM Act, fall within the definition of “the law” in clause 5(5) of Schedule 1 to the FOI Act.
 21. The term “contravention” is defined in clause 5(5) of Schedule 1 to the FOI Act to include a failure to comply. Section 80(b) of the PSM Act provides that an employee who contravenes a provision of the PSM Act or a public sector standard or code of ethics commits a breach of discipline. If, following investigation or admission, a person is found to have committed a breach of discipline, he or she is potentially subject to one or more of the penalties provided in Division 3 of Part 5 of the PSM Act (see ss.83, 84, 86).
 22. Section 97(1)(a) of the PSM Act provides, among other things, that the functions of the Commissioner under Part 7 of the PSM Act (Procedures for Seeking Relief in Respect of Breach of Public Sector Standards) include recommending to the Minister the making of regulations prescribing procedures, whether by way of appeal, review, conciliation, arbitration, mediation or otherwise, for employees and other persons to obtain relief in respect of breaches of the standards. Section 97(1)(b) of the PSM Act further provides that it is also a function of the Commissioner to appoint persons for the purposes of implementing procedures referred to in s.97(1)(a).
 23. In this instance, the third party lodged an application with the agency in accordance with the provisions of regulation 8 of the regulations, seeking review in respect of alleged breaches of the standards. The Director General of the agency selected two independent reviewers, appointed by the Commissioner pursuant to his power under s.97(1)(b) of the PSM Act, to conduct the requested review in accordance with the regulations. The reviewers investigated the third party’s allegations and provided a written report of their findings to the Director General of the agency and to the Commissioner.
 24. I consider that the reviewers’ investigation constituted an investigation carried out in accordance with the regulations to determine if the standards had been breached. In my view, that investigation is an investigation into a contravention or possible contravention of the law within the meaning of clause 5(1)(b) of Schedule 1 to the FOI Act.

Reveal the investigation

25. In his decision in *Kelly and Smith*, Anderson J made it clear that documents can “reveal an investigation” even when the fact of that investigation has been revealed through other materials. His Honour said, at pages 10 and 11 of the case:

“I do not think it could have been intended that exemption should depend on how much the applicant already knows or claims to know of the matter...[clause] 5(1)(b) is not limited to new revelations but covers all matter that of itself reveals the things referred to, without regard for what other material might also reveal those things, or when that other material became known, and without regard to the actual state of knowledge that the applicant may have on the subject or the stage that the investigation has reached.”

26. I have examined the disputed document. I am satisfied that the disclosure of most, but not all of the disputed document, and the attachments to it, could reasonably be expected to reveal something of the content of the investigation carried out by the reviewers into the alleged breaches of the standards, including disclosing the identity of the person or persons whose actions were under investigation, the general subject matter of that investigation, the identities of persons interviewed as potential witnesses and other sources of information relevant to that investigation.
27. However, I also consider that certain parts of the disputed document do not comprise matter that falls within the terms of clause 5(1)(b). In my view, pages 1 and 2, the first six paragraphs of page 3, and the matter beginning with the heading “Recommendations” on page 11 and concluding on page 12 is not matter of the kind to which clause 5(1)(b) refers. The matter on those pages of the disputed document comprises general background material and certain observations of the reviewers, and recommendations made by the reviewers for the consideration of the agency. In my view, the disclosure of information of that type could not reasonably be expected to reveal anything about the reviewers’ investigation into alleged breaches of the standards or any other investigation of a contravention or possible contravention of the law.
28. Accordingly, I find that, except for pages 1 and 2, the first six paragraphs on page 3, and the matter beginning with the heading “Recommendations” on page 11 and concluding on page 12, the disputed document including the attachments is exempt under clause 5(1)(b). However, the matter which is not exempt matter under clause 5(1)(b) can be easily severed and, accordingly, access to an edited copy of the disputed document with the exempt matter deleted in accordance with s.24 of the FOI Act, can practicably be given.
29. However, the agency also claims that the whole of the disputed document is exempt under clause 8(2) of Schedule 1 to the FOI Act. Therefore, I must

consider the agency's claim in respect of those parts of the disputed document which I have found are not exempt under clause 5(1)(b). I do not consider it necessary to consider that claim in respect of those parts I have already found to be exempt under clause 5(1)(b).

(b) Clause 8(2)

30. Clause 8(2) provides as follows:

"8. Confidential communications

Exemptions

(1)...

(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."*

31. There are two parts to the exemption in clause 8(2) and the requirements of both paragraphs (a) and (b) must be satisfied for a *prima facie* claim for exemption to be established. Further, if both elements of clause 8(2) are established, the limit on exemption in clause 8(4) must then be considered.

The agency's submission

32. The agency submits that the disputed document is inherently confidential and that it has been maintained and kept in confidence, having been seen only by the most senior officers in the agency after it was received from the reviewers. The Director General of the agency informs me that she received the disputed document and that it was handed to her personally by the reviewers. The Director General further informs me that the disputed document was given to, and accepted by, her in confidence. I am further informed that access to the disputed document is restricted to the Director General and two senior officers of the agency and that, until I required the disputed document to be produced to me for the purpose of my dealing with this complaint, it was held by the Director General in a secure location. The agency also submits that, from the date the disputed document was received by the Director General, the agency has consistently maintained the confidentiality of that document.

33. The agency further submits that the reviewers guaranteed confidentiality to the persons interviewed and that the reviewers were sure that the agency would fulfil its obligation to receive and handle the disputed document in confidence. Finally, the agency submits that the reviewers believe that they would not have been able to obtain the quantity and quality of information in the disputed document if they had not been in a position to guarantee participants that the information obtained in confidence would be for the Director General's eyes only.

The reviewers' submission

34. The reviewers inform me that certain individuals in Halls Creek only agreed to be interviewed on the clear understanding that their identities would not be disclosed. The reviewers also confirm that, in order to obtain as much information as possible about the matter the subject of their investigation, they gave express assurances of confidentiality to the individuals interviewed in order to obtain their cooperation. Finally, the reviewers also inform me that they provided the disputed document to the Director General of the agency on the understanding that it was intended for her eyes only and in order that she could take such further action as she determined necessary.
35. The reviewers further submit that the disputed document was prepared by them for the purpose of bringing to the attention of the Director General matters which the reviewers believed impinged on the agency's ability to deliver educational services to the Halls Creek community. Having reported their findings concerning the alleged breaches of the standards to the agency, the reviewers discharged their statutory obligations. However, I am informed by the reviewers that they also felt duty bound to provide a detailed report about the circumstances and events at Halls Creek District High School that gave rise to the allegations of a breach of the standards in the first instance, and making recommendations to the agency so that the events which led to the allegations would not occur again.

The complainants' submission

36. The complainants submit that the SSTU has checked the claims of confidentiality with its members in Halls Creek and has been advised that no member of the SSTU was guaranteed confidentiality, nor was any member advised that the disputed document would be confidential. In addition, the complainants also submit that, after receiving my preliminary view on this complaint, the SSTU made further inquiries about this aspect of the matter with a number of other members of the Halls Creek community who were interviewed by the reviewers. The complainants submit that not all persons interviewed were advised that the investigation was confidential and, further, that some members of the Halls Creek community expected an open and accountable report to be provided to all persons interviewed.

37. The complainants also submit that representatives of the SSTU were present in Halls Creek at the same time as the reviewers were conducting their inquiries; that the SSTU representatives also interviewed members of the Halls Creek community; and that during public meetings held at that time, there was much discussion between many of the people interviewed by the reviewers, in relation to what each had said during those interviews. The complainants further submit that the disputed document cannot be said to be confidential, because the Director General of the agency had already discussed the recommendations with a representative of the SSTU.
38. Finally, the complainants submit that a substantial number of the persons who agreed to be interviewed by the reviewers did so because they expected an open and accountable report to be prepared. The complainants submit that those individuals have now lost confidence in the reviewers because none of their concerns have been dealt with and because the process has been neither open, nor accessible nor accountable. The complainants therefore submit that there is a clear public interest in the release of the disputed document, in order that all participants in the process can be confident about the review process.
39. The reviewers strongly disagree with the complainants' submission concerning the confidentiality of the review process. They informed my office that they provided clear and unequivocal assurances of confidentiality to each of the individuals interviewed that neither the individual's identity nor the information given by that individual during the review process would be disclosed to anyone, except in accordance with their statutory responsibilities to report their findings under the regulations.

8(2)(a) - Information of a confidential nature obtained in confidence

40. Information is inherently confidential if it is not in the public domain. That is, the information must be known by a small number or limited class of persons. Based on my examination of the disputed document and the evidence currently before me, I am satisfied that it contains confidential information that is not in the public domain. Although the complainants submit that the disputed document cannot now be confidential, as a result of the recommendations having been discussed during the meeting between the Director General of the agency and a representative of the SSTU, the fact that there has been a limited disclosure of the contents of the disputed document, during those discussions, does not necessarily mean that the document loses its character of confidentiality: *Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft* (1986) 10 FCR 180. In the circumstances of this matter, I consider that it did not.
41. I accept that the fact and general scope of the reviewers' investigation at Halls Creek is public knowledge, and I understand that there was also a degree of public discussion about aspects of the investigation by some people interviewed by the reviewers. However, as far as I am aware the complainants have no direct knowledge of any of the contents of the disputed document nor are its contents a matter of public knowledge.

42. It is apparent to me from the nature of the information in the disputed document itself, that a substantial part of the matter contained in the disputed document is personal information, as defined in the FOI Act, about a number of third parties. Given the nature of the comments and observations reported, I have some difficulty in accepting the complainants' submission that that kind of information was not given to the reviewers in confidence. Further, not all those who gave information to the reviewers were members of the SSTU. Therefore, I give more weight to the claims of the reviewers on this point and I accept the submission of the reviewers that assurances of confidentiality were given by them so that they could obtain personal information and opinions from people interviewed.
43. I also accept the submission of the Director General of the agency that the disputed document was given to, and received by her, in confidence and that the document has been held securely with access to it limited to only two senior staff members.
44. Accordingly, I accept that the disputed document contains information of a confidential nature obtained in confidence. However, I am not satisfied that all of the information in the disputed document is information of that type. In particular, I am not satisfied that the information on pages 1 and 2, and the first six paragraphs on page 3, is information which is inherently confidential and, therefore, consists of matter that falls within the terms of clause 8(2)(a). The information on those pages is general background information only about Halls Creek provided to the Director General by the reviewers so that their findings and recommendations could be considered in context. I do not consider that that kind of information could be described as information of a confidential nature nor do I consider that it is the kind of information that clause 8(2) is designed to protect from disclosure.
45. Even if I were satisfied on that point, the agency has not provided any probative material to convince me that the disclosure of matter consisting of general background material in a report to the agency could reasonably be expected to prejudice the ability of the agency to obtain that kind of information in the future. Accordingly, I find that pages 1 and 2, and the first six paragraphs on page 3 are not exempt under clause 8(2) of Schedule 1 to the FOI Act.
46. On the other hand, I am of the view that the recommendations contained in the report may have been confidential in nature and I accept that they were obtained in confidence. The reviewers submitted that they considered that their recommendations may assist the agency to review its human resource management practices and policies to ensure, so far as is possible, that circumstances and events which gave rise to the allegations of breaches of the standards, do not occur again. Given the circumstances in which those recommendations were submitted to the agency, and the nature of the recommendations made, I am satisfied that the matter beginning with the heading "Recommendations" on page 11 and concluding on page 12, comprises information of a confidential nature obtained by the agency in confidence.

47. However, in order to establish a *prima facie* case for exemption under clause 8(2) in respect of that part of the disputed document, it is not sufficient to establish only that the information was of a confidential nature and obtained in confidence. Paragraph (b) must also be satisfied for the exemption to apply.

8(2)(b) - Prejudice to the future supply of information of that kind

48. In *Attorney-General's Department v Cockcroft*, the Full Federal Court said at page 190, that the words "*could reasonably be expected to prejudice the future supply of information*" in s.43(1)(c)(ii) of the *Freedom of Information Act 1982* (Commonwealth) were intended to receive their ordinary meaning and required a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that those who would otherwise supply information of the relevant kind to the Commonwealth would decline to do so if the documents in question were disclosed.
49. On this point, I also agree with the comments of Young C.J. of the Victorian Supreme Court in *Ryder v Booth* [1985] VR 869. In that case the Full Court considered whether the Victorian equivalent of clause 8(2)(b) applied to medical reports provided in confidence to the State Superannuation Board. On the question of whether disclosure would be reasonably likely to impair the future supply of similar information, Young C.J. said, at p 872:

"The question then is, would disclosure of the information sought impair (i.e. damage) the ability of the Board to obtain similar information in the future. Put in terms of the present appeals this means that the question is, would the disclosure of the information damage the ability of the Board to obtain frank medical opinions in the future. It may be noted that it is the ability of the Board that must be impaired. The paragraph is not concerned with the question whether the particular doctor whose report is disclosed will give similar information in future but with whether the agency will be able to obtain such information. There may well be feelings of resentment amongst those who have given information "in confidence" at having the confidence arbitrarily destroyed by the operation of the legislation, but it is another thing altogether to say that they or others will not provide such information in the future. It is not sufficient to show that some people may be inhibited from reporting so frankly if they know that their report may be disclosed. More is required to satisfy the onus cast upon the agency by s.55(2) of the Act."

50. Further, it is not sufficient to establish the exemption to merely make the claim that the future supply of information of that kind could reasonably be expected to be prejudiced. The claim must be supported in some way. On this point, I respectfully refer to the comments of Owen J at p.44 in the *Manly* case, where His Honour said in respect of a claim for exemption under clause 4(3):

“How can the Commissioner, charged with the statutory responsibility to decide on the correctness or otherwise of a claim to exemption, decide the matter in the absence of some probative material against which to assess the conclusion of the original decision maker that he or she had “real and substantial grounds for thinking that the production of the document could prejudice that supply...”? In my opinion it is not sufficient for the original decision-maker to proffer the view. It must be supported in some way. The support does not have to amount to proof on the balance of probabilities. Nonetheless, it must be persuasive in the sense that it is based on real and substantial grounds, and must commend itself as the opinion of a reasonable decision-maker.”

51. In respect of the matter on pages 11 and 12 of the disputed document which I have not found to be exempt under clause 5(1)(b), taking into account the reviewers’ submission that they considered themselves to be duty bound to bring to the attention of the agency certain matters relating to its human resource management practices and to make recommendations about those matters, in the absence of any probative material to the contrary, I have some difficulty in accepting the agency’s claim that the disclosure of recommendations made by the reviewers could reasonably be expected to prejudice the future supply of information of that kind to the agency.
52. The agency sought to persuade me that its claims for exemption under clause 8(2) were analogous to those made by the relevant agency in my decision in *Re Markham and Ministry of Justice* (9 August 1995, unreported, D02595), and that disclosure would have the same detrimental effect on the quality and quantity of information supplied to the agency in the future.
53. *Re Markham* concerned access to a report prepared by a Senior Prison Officer which contained a number of allegations against another Senior Prison Officer. In the circumstances of that case, I accepted the claim that the prison officer concerned volunteered certain information relating to administrative issues such as the management and performance of personnel in a prison system. I also recognised the potential for disharmony in a closed and confined environment and considered that fact would be a strong disincentive for officers to provide that kind of information in the future if the document were to be disclosed.
54. In my opinion, there is little, if any, similarity between the circumstances in *Re Markham* and the circumstances in this matter. They are dissimilar in most respects. In the matter presently before me, there is no suggestion that the reviewers work in a closed environment where there is a potential for disharmony which could disrupt the operation of the agency in the same way that it would disrupt the operation of a prison. The reviewers are temporary officers of the agency for the purpose of the review. Further, the subject matter of the disputed document does not personally concern the complainants as it did the complainant in *Re Markham*.

55. I consider the facts and the document in *Re Markham* to be clearly distinguishable from those before me in the present case. The disputed document is not of the kind that was before me in *Re Markham* where it was found that confidentiality of its contents (which consisted of personal information about another individual) was necessary for the efficient management of the prison system.
56. For those reasons, I consider the claim for exemption based on clause 8(2) has not been established for any of the matter which I have found is not exempt under clause 5(1)(b). That is, I consider the matter on pages 1 and 2 and the first six paragraphs on page 3 of the disputed document does not meet the requirements of clause 8(2)(a) and, in any event, there is nothing before me to satisfy the requirements of clause 8(2)(b) in respect of that matter. Whilst I consider the matter comprising the recommendations of the reviewers on pages 11 and 12 of the disputed document meets the requirements of clause 8(2)(a), there is no probative material before me which establishes the requirements of clause 8(2)(b) with respect to that matter. I find accordingly.

Clause 3 - Personal Information

57. I have also considered whether the matter comprising the recommendations of the reviewers on pages 11 and 12 may be exempt for any other reason as the agency alluded to a claim under clause 3(1) in respect of certain comments appearing on page 12. Although there are opinions of the reviewers expressed about several distinct stakeholders in the Halls Creek community, I do not consider that those opinions relate to any identifiable individuals. Accordingly, I do not consider that that information satisfies the definition of “personal information” in the FOI Act.
