

ROWAN AND POLICE

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

**File Ref: 97158
Decision Ref: D02797**

Participants:

Andrew Rowan
Complainant

- and -

Police Force of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - record of interview - section 23(2) - whether apparent from nature of document as described in access application that document is exempt - clause 5(1)(b) - matter which could reasonably be expected to reveal the fact and content of a particular investigation by police of a contravention or possible contravention of the law - limits on exemption - whether obligation under section 24 to give access to an edited copy of the document.

Freedom of Information Act 1992 (WA) ss.10, 23, 24, 74; Schedule 1 clause 3(1), 5(1)(b), 5(4), 5(5), Glossary.

The Criminal Code (WA)

Public Sector Management Act 1994

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).

DECISION

The decision of the agency to refuse access pursuant to s.23(2) of the *Freedom of Information Act 1992* is confirmed.

D A WOOKEY
A/INFORMATION COMMISSIONER

14th October 1997

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Police Force of Western Australia, known as the Police Service ('the agency'), to refuse Mr Rowan ('the complainant') access to a document requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. By letter dated 11 June 1997, the complainant lodged an access application with the agency and sought access under the FOI Act to a document of the agency described as a record of interview between a named detective from the Official Corruption Investigation Unit of the agency and a person also named by the complainant.
3. By letter dated 11 July 1997, the agency's decision-maker refused the complainant access to the requested document pursuant to s.23(2) of the FOI Act, on the ground that the document as described in the access application would be an exempt document under clause 5(1)(b) and clause 3(1) of Schedule 1 to the FOI Act.
4. The agency's decision was confirmed on internal review and, on 29 August 1997, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

5. The agency produced to the Information Commissioner a copy of its file maintained in respect of the access application. A preliminary conference was also held between one of my officers and the complainant. After examining the documents produced by the agency and considering the material provided by both parties, the Information Commissioner informed the parties in writing of her preliminary view of this complaint, and her reasons for that view. It was the Information Commissioner's preliminary view that the document requested, as described by the complainant in his access application, may be an exempt document under clause 5(1)(b) of Schedule 1 to the FOI Act and, therefore, the agency's decision to refuse access to the requested document under section 23(2) of the FOI Act may have been justified.
6. Further, as the Information Commissioner was of the preliminary view that the requested document may be exempt under clause 5(1)(b), the Information Commissioner did not, at that stage, consider it necessary to deal with the agency's additional exemption claim under clause 3(1) of Schedule 1 to the FOI Act.
7. In light of the Information Commissioner's preliminary view, the complainant was provided with an opportunity to reconsider his complaint and to withdraw or

to make further submissions. The complainant has not withdrawn his complaint, but nothing further has been received from him.

REFUSAL OF ACCESS - SECTION 23(2)

8. Section 23(1) of the FOI Act provides *inter alia* that, subject to s.24, an agency may refuse access to a document if the document is an exempt document. Further, s.23(2) of the FOI Act provides:

"The agency may refuse access to the requested documents without having identified any or all of them and without specifying the reason why matter in any particular document is claimed to be exempt matter if -

- (a) it is apparent, from the nature of the documents as described in the access application, that all of the documents are exempt documents; and*
- (b) there is no obligation under section 24 to give access to an edited copy of any of the documents."*

9. Before an agency may rely upon section 23(2) of the FOI Act and refuse access without identifying the requested documents to an access applicant, as the agency has done in this instance, the requirements of both paragraphs (a) and (b) of section 23(2) must be satisfied. If it can be shown that the documents are of the type described in paragraph (a), then it is necessary to consider the requirements of paragraph (b), that is, whether the agency is obliged under section 24 to give access to an edited copy of any of the documents.

Section 23(2)(a) - exempt document?

10. The complainant seeks access to a document relating to an investigation undertaken by the Public Sector Investigation Unit, formerly known as the Official Corruption Investigation Unit, of the agency, as a consequence of certain allegations made by the complainant about a particular public officer. It is the contention of the agency that a document of the kind requested by the complainant would contain matter that is exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. Clause 5(1)(b) provides:

"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. The exemption in clause 5(1)(b) has been the subject of two decisions by the Supreme Court of Western Australia. In the case of *Police Force of Western*

Australia v Kelly and Smith (Supreme Court of Western Australia, 30 April 1996, unreported, Library No. 960227), Anderson J, after referring to the decision of Owen J in *Manly v Ministry of Premier and Cabinet* (Supreme Court of Western Australia, 15 June 1995, unreported, Library No. 950310), 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. Anderson J also said, at page 9 of that decision:

"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. It is not difficult to imagine cases in which it would be highly detrimental to good government and inimical to the administration of law enforcement to disclose that a particular criminal investigation is contemplated, has been started or has been completed."

13. His Honour also recognized that in a particular case there may be no need for secrecy and may even be good public interest reasons why the particular documents should be publicly disclosed, or disclosed to the particular access applicant. However, His Honour expressed the view that, whilst it may be a relevant consideration for the agency in deciding whether to exercise its discretion under s.23(1) to refuse access, it cannot affect the determination of whether the documents are exempt (at pages 9, 10).
14. In *Kelly and Smith* it was held (at page 13) that, to the extent that any of the documents in dispute in that matter would reveal that there was, had been, or was going to be an investigation by police into the conduct of the respondents in that matter in relation to a specified incident, that document was exempt under clause 5(1)(b) of Schedule 1.
15. The decision in the *Kelly and Smith* case makes it clear that if the agency was conducting, had conducted or was about to conduct an investigation into a contravention or possible contravention of the law and if disclosure of documents connected with that investigation could reasonably be expected to reveal something about the investigation, including the identities of those under investigation and the nature of the matter under investigation, then those documents will be exempt.
16. Further, it seems from the decision in *Kelly and Smith* that how much of the investigation may already be known to the complainant is irrelevant to the determination of whether a particular document could reveal the investigation. At page 10, His Honour expressed the following view:

“A document may reveal a state of affairs which is also revealed by other things. The same state of affairs may be separately revealed in several documents. I do not think there is any difficulty in saying that the separate disclosure of each separate document reveals that state of affairs.”

At page 11, His Honour said:

“...cl 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 for the actual state of knowledge that the applicant may have on the subject or the stage that the investigation has reached.”

17. In this instance, the complainant requested access to a specific document - a record of interview - relating to the investigation of a certain named person following allegations made by the complainant against that person. In his complaint to the Information Commissioner, the complainant advised that the *“complaint to police was about this [public officer] and also requested that an investigation should also determine whether any other W.A. laws had been broken.”*
18. In clause 5(5) of Schedule 1 to the FOI Act, “the law” is defined to mean the law of this State, the Commonwealth, another State, a Territory or a foreign country or state. In my view, the requested document, as described in the access application, would clearly relate to the investigation of a contravention or possible contravention of the law in the sense which satisfies that definition in the FOI Act. As I understand it, the allegations made against the public officer by the complainant were of such a nature that they involved possible criminal offences and a possible breach or breaches of *the Public Sector Management Act 1994* (the PSM Act). Although I consider that I am constrained from here specifying the particular provisions, because of the obligation imposed upon me by s.74(2) of the FOI Act not to include exempt matter in my reasons for decision, I have satisfied myself that the investigation carried out by the police was in respect of possible contraventions of particular provisions of *The Criminal Code* and the PSM Act. Both of those statutes are written laws of the State of Western Australia, and are clearly “laws” for the purposes of clause 5(1)(b).
19. Having considered the nature of the requested document as described in the access application, I am satisfied that a document of that nature would contain matter that could reasonably be expected to reveal the fact of a particular investigation by police of a particular incident involving certain people and

something of the content of that investigation. That is, I am satisfied that the document as described by the complainant in his access application is an exempt document under clause 5(1)(b).

The complainant's submission

20. The complainant's submission in this matter amounts to a general submission on the "public interest" considerations which he contends weigh in favour of disclosure of the matter contained in the requested document. However, clause 5(1)(b) is subject only to the limits provided in clause 5(4). 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."*

21. Accordingly, it is only if the requested document comprises only matter of the kind described in one or more of subparagraphs (i), (ii) or (iii) of clause 5(4)(a) that the question of whether disclosure would be in the public interest arises.
22. On the basis of the description of the requested document, the lack of any evidence from the complainant to persuade me otherwise and the inquiries made on my behalf, I am satisfied that the requested document is not of a kind described in clause 5(4)(a). Therefore, the question of where the balance of the public interest lies does not arise for my consideration.
23. For the reasons given above, I find that the requested document as described in the complainant's access application is exempt and, accordingly, the agency has satisfied the requirements of paragraph (a) of s.23(2).

Section 23(2)(b) - obligation to edit?

24. Section 23(2) is subject to the requirements of s.24 of the FOI Act. Section 24 provides:

"If -

(a) the access application requests access to a document containing exempt matter; and

(b) it is practicable for the agency to give access to a copy of the document from which exempt matter has been deleted; and

(c) the agency considers (either from the terms of the application or after consultation with the applicant) that the applicant would wish to be given access to an edited copy,

the agency has to give access to an edited copy even if the document is the subject of an exemption certificate."

25. Given the nature of the particular document, I am of the view that it would not be practicable to give access in that form. A record of a police interview with a person against whom allegations of illegal conduct have been made, concerning those allegations, must necessarily contain many of the specifics of the investigation of the particular matters the subject of inquiry and reveal the identities of those under investigation. In my view, very little, if any, of a document of that nature would not be exempt under clause 5(1)(b).
26. In any event, in my view, the only parts of such a document that might not be exempt under clause 5(1)(b) would be parts of the record that do not relate to the allegations made against the officer or any other person. It is clear from the terms of the access application and subsequently the application for internal review that the complainant specifically seeks access to the public officer's responses to the allegations made by the complainant. That is the matter that would be deleted from the document if it were to be edited by deleting exempt matter.
27. Accordingly, as editing the document in accordance with s.24 would result in deleting the very material to which the complainant seeks access, in my view, it was clear from the terms of the access application - and did not require consultation with the complainant - that the complainant would not wish to be given access to a copy of the document edited in that way. In my view, in the circumstances of this complaint, there was no obligation under s.24 to give the complainant access to an edited copy of the requested document.
28. Accordingly, for the reasons given, I find that the decision of the agency to refuse access to the requested document pursuant to s.23(2) of the FOI Act was justified.