

“E” AND F&C SERVICES

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

**File Ref: 95045
Decision Ref: D02895**

Participants:

"E"
Complainant

- and -

**Department for Family and Children's
Services (formerly the Department for
Community Development)**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - access to edited copies - draft report - internal memoranda - correspondence between agency and legal advisers - case conference notes - clause 6 deliberative processes - whether disclosure would be contrary to the public interest clause 7 legal professional privilege - external and internal legal advisers - clause 3 personal information - public interest in complainant gaining access to personal information about complainant.

Freedom of Information Act 1992 (WA) ss. 21; 24; 30; 41(1); 68(1); 72(1); 75(1); 76(1)(b); Schedule 1 clauses 3(1); 5(1)(a), (b), (c); 6; Glossary in Schedule 2.

Freedom of Information Act 1982 (C'wlth) s. 36(1)(a).

Freedom of Information Act 1992 (Qld) s.41(1).

Re Johnson and State Government Insurance Commission (Information Commissioner, WA, 29 May 1995, unreported).

Re Rindos and University of Western Australia (Information Commissioner, WA, 10 July 1995, unreported).

Re Eccleston and Department for Family Services and Aboriginal and Islander Affairs (Information Commissioner, QLD, 30 June, 1993, unreported).

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

Grant v Downs (1976) 135 CLR 674; 11 ALR 577.

DECISION

The decision of the agency is varied. In substitution it is decided that the following parts of the documents are exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*:

- all of Document E other than those parts specified in paragraph 19 of the reasons for this decision;
- the first and second paragraphs of Document I; and
- all of Document Y other than those parts specified in paragraph 29 of the reasons for this decision;

and, further, it is decided that the following are exempt under clause 7(1) of Schedule 1 to the *Freedom of Information Act 1992*:

- the second last and third last paragraphs of Document J; and
- all of Document K;

but the documents are not otherwise exempt.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

29th August 1995

REASONS FOR DECISION

BACKGROUND

1. On 31 January 1995, an access application under the *Freedom of Information Act 1992* ('the FOI Act') was made to the Department for Community Development, now known as the Department for Family and Children's Services ('the agency'), by solicitors on behalf of "E" ('the complainant'). In that application access was sought to documents dealing with the apprehension and placement of Care and Protection Application for, and the agency's plans for the future of, the complainant's niece, a ward of the State, as well as to other documents relating to the complainant. I have not named the complainant in my decision or these reasons for decision in the interest of protecting the identity of the child.
2. On 3 February 1995, Mr S Robbins, Acting Manager, Bunbury District, granted access to some documents identified by the agency as being within the ambit of the access application, but denied access to other documents on the ground that those documents are exempt under clauses 3(1), 5(1)(a),(b) and (c) and 6(1) of Schedule 1 to the FOI Act. The agency also determined that a charge of \$148.80 was payable for access to those documents which it had decided were not exempt.
3. Subsequently, the complainant exercised her right to have that decision of the agency reviewed internally. On 10 March 1995, Mr M Hepburn, Director, Southern Country Region decided to confirm the agency's original decision, except in relation to one page of one document (folio 266) a copy of which was provided to the complainant. Mr Hepburn also confirmed that the amount of the charge calculated by the agency for access to those documents was payable under the regulations made pursuant to the FOI Act.
4. On 15 March 1995, the complainant applied to the Information Commissioner seeking external review of the agency's decision denying access to those documents of the agency which are claimed to be exempt under various clauses of the FOI Act, and disputing the amount of charges payable for access to others.

REVIEW BY THE INFORMATION COMMISSIONER

5. On 23 March 1995, in accordance with my statutory obligation under s.68(1) of the FOI Act, I informed the agency that I had accepted this complaint for external review. Pursuant to my authority under ss.75(1) and 72(1)(b) of the FOI Act, I also sought the production to me of the documents in dispute together with the agency's file maintained in respect of this matter. I did not consider the agency's notice of decision, dated 13 February 1995, was in the form prescribed by s.30 of the FOI Act, nor that it contained sufficient particulars for me to deal with this complaint.

6. Therefore, pursuant to my authority under s.72(1)(a) of the FOI Act, I also required the agency to provide, in respect of each document or part of a document for which exemption was claimed, the findings it had made on material questions of fact and, where the public interest was a relevant consideration, the factors considered by the agency as weighing in favour of non-disclosure. I also required an explanation of the basis for the agency's calculation of the charges that it claimed were payable in respect of the access application.
7. On 29 March 1995, the disputed documents, together with the additional information requested, were produced to my office by the agency. On 13 April 1995, with the agreement of the agency, I provided a copy of the agency's letter of 29 March 1995 and a copy of the revised schedule of documents containing reasons for decision to the complainant, through her solicitors. The complainant's solicitors provided a brief response on her behalf on 20 April 1995.
8. After examining the documents in dispute and considering the submissions of the parties, I provided both parties with my preliminary view of the claims for exemption with respect to those documents, and the reasons for that view, on 27 June 1995. It was my preliminary view that a number of documents or parts of documents to which access has been denied are, *prima facie*, exempt under clause 3(1) of Schedule 1 to the FOI Act because those documents contain personal information about third parties other than the complainant. Further, it was my preliminary view, on the information then before me, that at least one other document was not exempt for any reason, whilst I was of the preliminary view that others may be exempt under clause 6 of Schedule 1 to the FOI Act.
9. Following receipt of my preliminary view, the agency released one additional document to the complainant and two other documents were released with exempt matter deleted under s.24 of the FOI Act in accordance with my preliminary view. Thereafter, the complainant withdrew that part of the complaint relating to those documents and others which, in my preliminary view, I considered to be exempt under clause 3(1). The complainant also accepted my preliminary view that the charges determined by the agency for providing access had been calculated in accordance with the legislation and abandoned that part of the complaint relating to charges. However, the agency maintained its claims for exemption for the remaining documents which are the documents to which this decision relates.

THE DISPUTED DOCUMENTS

10. There are five documents remaining in dispute between the parties. I have listed and described those documents below and the exemptions claimed, using the same letters of the alphabet assigned to identify each document in correspondence between my office and the parties to this complaint.

Document	Date	Description	Exemptions
E	24/4/94	Unsigned document marked "draft" containing a summary of issues determined by a field officer concerning the Care and Protection application relating to the child.	Clause 6(1)
I	3/6/94	Internal memorandum from Acting Child Protection Worker to Acting Senior Casework Supervisor.	Clause 6(1)
J	9/6/94	Letter from solicitors to Bunbury office of the agency.	Clauses 3(1) and 6(1)
K	15/6/94	Three page facsimile transmission between the agency and its Legal Section.	Clauses 3(1), 5(1)(b) and 6(1)
Y	1/8/94	Case conference notes (folios 390-397) plus 2 pages of notes relating to case conference on 25/11/94 (folios 385 and 386).	Clause 3(1)

THE EXEMPTIONS

(a) Clause 6 - Deliberative process

11. Each of the five disputed documents is claimed to be exempt under clause 6(1) of Schedule 1 to the FOI Act. Clause 6(1) provides:

"6. Deliberative processes

Exemptions

(1) Matter is exempt matter 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 purpose of, the deliberative processes of the Government, a Minister or an agency;

and

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

12. To establish an exemption under clause 6(1), a document must contain matter of the type described in paragraph (a) of the exemption and the agency must also establish that it would, on balance, be contrary to the public interest to disclose matter of that type. Matter which is purely factual or which is contained in internal manuals of the agency, is excluded from the ambit of the exemption under sub-clauses (2) and (3). For the purpose of this complaint, sub-clause (4) is irrelevant since the disputed documents are less than 10 years old.
13. I have discussed the meaning and purpose of the exemption in clause 6(1) in a number of my formal decisions, most recently in *Re Johnson and State Government Insurance Commission* (29 May 1995, unreported), at paragraphs 12-16 and *Re Rindos and University of Western Australia* (10 July 1995, unreported), at paragraphs 70-71. I repeat my comments and views on the application of this exemption.
14. In my view, the key words in clause 6(1)(a) are the "*deliberative processes...of an agency*". The meaning of the phrase "deliberative processes" has been considered in a number of cases based on the equivalent section in the Commonwealth *Freedom of Information Act 1982* (s.36(1)(a)). The relevant authorities were also extensively canvassed by the Queensland Information Commissioner in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (30 June 1993, unreported) where the relevant provision is s.41(1).
15. As I have said before, I also accept the views expressed in *Re Waterford and Department of Treasury* (No 2) (1984) 5 ALD 588, in relation to the equivalent Commonwealth provision, as being applicable to a consideration of clause 6(1) of the FOI Act in Western Australia and the meaning of the words "deliberative processes". In that case the Commonwealth Administrative Appeals Tribunal said, at paragraphs 58-60:

"As a matter of ordinary English the expression 'deliberative processes' appears to us to be wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency. The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing on one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action. Only to the extent that a document may disclose matter in the nature of or relating to deliberative processes does s.36(1)(a) come into play...

It by no means follows, therefore, that every document on a departmental file will fall into this category. Furthermore, however imprecise the dividing line may appear in some cases, documents disclosing deliberative processes must, in our view, be distinguished from documents dealing with

the purely procedural or administrative processes involved in the functions of the agency...

It is documents containing opinion, advice, recommendations etc. relating to internal processes of deliberation that are potentially shielded from disclosure...Out of that broad class of documents, exemption under s.36 only attaches to those documents the disclosure of which is 'contrary to the public interest'..."

16. Document E is a two page report from a Child Protection Worker in the agency. It is marked "Draft" and is unsigned. From my examination of that document, I consider that it contains opinion and advice in relation to the decisions that needed to be made by the agency regarding the welfare of the complainant's niece who is a ward of the State. On that basis I am satisfied that Document E contains matter of a type described in clause 6(1)(a). However, that document also contains personal information about the complainant and personal information about another person. The personal information about the other person is, in my opinion, *prima facie*, exempt matter under clause 3(1) of Schedule 1 to the FOI Act, and is dealt with at paragraphs 31-33 below.
17. In considering whether disclosure of Document E would, on balance, be contrary to the public interest, I consider that I am required by s.21 of the FOI Act to have regard to the fact that matter in that document is also personal information about the complainant, and to consider that as a factor in favour of disclosure for the purpose of making a decision as to whether disclosure would be in the public interest or the effect that disclosure might have. Having considered the submissions of the parties and examined the document itself, I do not consider that it would, on balance, be contrary to the public interest to disclose to the complainant those parts of Document E that contain personal information about her. In my view, the integrity of the deliberative processes of the agency is unlikely to suffer from such a disclosure.
18. It is the view of the agency that Document E is exempt under clause 6(1) because it represents, in summary form, the views of one officer of the agency and does not reflect a decision of the agency in regard to action that would be taken. It was the submission of the agency that disclosure of matter containing opinions offered as part of its informed decision-making processes may impact on or affect the integrity of those processes.
19. I recognise a public interest in maintaining the integrity of the "thinking processes" of an agency. Against that public interest must be balanced the public interest in the complainant being able to access documents containing personal information about herself. In my view, the agency has not had sufficient regard to this latter aspect of the public interest nor to the requirements of s.21 of the FOI Act. There is no material before me that persuades me that it would, on balance, be contrary to the public interest to disclose to the complainant the personal information about herself that is contained in Document E. Therefore, I find that parts of Document E are not exempt under clause 6 of Schedule 1 to the FOI Act. Those parts consist of all of part 1 on folio 249, the first sentence in the

- first paragraph on folio 248, and the second and third paragraphs on folio 248. The remaining matter in Document E is dealt with at paragraphs 31-33 below.
20. Document I is a two page internal memorandum from a Senior Casework Supervisor in the agency to a Child Protection worker. From my examination of that document I am satisfied that it contains opinion and records consultations that were undertaken by the agency in the course of dealing with matters affecting the welfare of a ward of the State. That is, I am satisfied that it is a deliberative process document containing matter of a type described in paragraph (a) of clause 6(1). The agency claims that Document I is exempt under clause 6(1) because it contains opinions of staff members and the document does not reflect a final decision or action plan.
 21. However, I am not persuaded that it would, on balance, be contrary to the public interest to disclose parts of that document. In my view, the mere fact that an internal memorandum of an agency records a step or steps in the agency's processes of deliberation, and not the final step, does not of itself mean that it is contrary to the public interest to disclose such a document. Part of the rationale for the existence of FOI legislation is to enable the public to understand and participate in the processes by which agencies make decisions that affect individuals and the community at large. In my opinion, it is not generally contrary to the public interest to disclose documents that reveal that process unless the process itself would suffer from such disclosures. In this instance, the agency has not persuaded me that this is the case, nor that any other harm to the public interest would be done by disclosure. Therefore, except for those parts of that document that contain personal information about third parties, which are dealt with at paragraphs 31-33 below, I find that Document I is not exempt under clause 6(1).
 22. Document J is a one page letter from the agency's solicitors. In my view, that document is not a deliberative process document but an administrative document dealing with a procedural matter relating to legal proceedings then on foot. Although the agency has not claimed exemption for this document under any other clause of Schedule 1 to the FOI Act, I am empowered by s.76(1)(b) of the FOI Act to make any decision that the agency could have made. In my opinion, that includes a decision that a document is exempt for some reason other than that claimed by the agency. However, I consider that parts of that document would be privileged from production in legal proceedings on the grounds of legal professional privilege because they record a confidential communication between the agency and its legal adviser for the sole purpose of giving the agency legal advice in respect of litigation then on foot.
 23. It is well established law that legal professional privilege attaches to confidential communications between a client and the client's legal adviser for the sole purpose of giving or receiving legal advice: *Grant v Downs* (1976) 135 CLR 674; 11 ALR 577. I find those parts exempt under clause 7 of Schedule 1 to the FOI Act. The matter which I find is exempt under clause 7 consists of the second and third last paragraphs commencing with the words "As discussed..." and concluding with the word "...care." The balance of the document records a communication which cannot, in my view, be considered to consist of legal

advice, nor to have been made for the sole purpose of giving or receiving legal advice. Therefore, I find that the balance of the document - which is clearly severable from the parts I have found to be exempt- is not exempt under clause 7.

24. The agency sought to persuade me that Document J is exempt under clause 6(1) because the matter in that document does not reflect any final decision made by the agency. However, for the reasons I have given in paragraph 21 above, that submission alone is insufficient to establish that it would, on balance, be contrary to the public interest to disclose the document. Further, in my view, Document J is not a deliberative process document in the sense described in *Re Waterford*. Therefore, for the reasons given, I find that, except for the parts of that document which I have found to be exempt under clause 7 of Schedule 1 to the FOI Act, Document J is not exempt under clause 6(1).
25. Document K is a three page facsimile transmission from the agency in Bunbury to its legal section. Taking into account the wardship hearing that was imminent when this document was created, and considering its contents, I am of the view that it consists of a client/solicitor communication that would be privileged from production in legal proceedings on the ground of legal professional privilege. Further, I am satisfied that the legal section from which the advice was sought had the sufficient degree of independence for the solicitor/client relationship to arise.
26. From my examination of Document K, I consider that it was created in response to a letter from the complainant's solicitor dated 2 June 1994, which was sent to the agency's legal representative in the wardship hearings. The letter from the complainant's solicitor concerned an alleged incident which may have had some bearing on the pending court proceedings and on the complainant's rights with respect to the guardianship and welfare of her niece, the subject of those proceedings. Although it is not entirely clear from the contents of Document K, I am of the view that the author of that document was seeking legal advice. Therefore, I am satisfied that Document K would be privileged from production in legal proceedings on the grounds of legal professional privilege and that it is exempt under clause 7 of Schedule 1 to the FOI Act.
27. Although that finding necessarily means that I need not reach a conclusion in relation to the agency's claims that Document K is also exempt under clauses 3, 5(1)(b) and 6, I consider that there is personal information about a number of parties other than the complainant contained in Document K which is, *prima facie*, exempt matter under clause 3(1) of Schedule 1 to the FOI Act. However, I make no finding that the document is also exempt under clause 3(1).

Document Y

28. Document Y consists of ten pages of case notes relative to case conferences held by the agency in August and November of 1994. In the first instance the agency provided the complainant with access to a copy of Document Y from which matter claimed by it to be exempt under clauses 5(1)(a) and 6(1) had been deleted. In an internal memorandum dated 5 July 1995, from the initial decision-

maker to the agency's FOI Co-ordinator following receipt of my preliminary view, a copy of which was provided to my office, the agency indicated that it accepted my preliminary view that the matter deleted from Document Y was not exempt under clause 6.

29. In that memorandum is a reference to an earlier claim for exemption under clause 5(1)(a) for Document Y. However, neither in its notices of decision to the complainant, nor in its submissions to me has the agency claimed or argued that exemption for Document Y or any of the disputed documents. A general reference to clause 5(1)(a) was made in the initial notice of decision but it was not claimed for any particular document in the schedule. As exemption under that clause has not been pursued and there is nothing before me to suggest it may apply to Document Y, I have not considered it. However, the agency remained of the view that parts of Document Y containing personal information about persons other than the complainant should not be disclosed.
30. I am satisfied that Document Y contains a considerable amount of personal information about third parties as well as some personal information about the complainant. For the reasons given in paragraphs 17 and 19 above, I am of the view that the complainant is entitled to be given access to personal information about herself in Document Y. Those parts consist of:

- | | |
|-----------|--|
| Folio 396 | The first sentence in paragraph 7; and
The second sentence in paragraph 8. |
| Folio 393 | Point 8 under the heading "PLAN". |
| Folio 392 | Point 7 under the heading "EVALUATION". |
| Folio 391 | The last paragraph. |
| Folio 390 | Under the heading "Discussion" - the second sentence in the first paragraph; the first sentence in the second paragraph; and the second sentence in the third paragraph. |
| Folio 386 | The last paragraph commencing with the words "There is..." and concluding with the word "...occurred." |
| Folio 384 | Points 3, 4 and 5 and the whole of the second paragraph. |

(b) Clause 3 - Personal information

31. Clause 3(1) of Schedule 1 to the FOI Act 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."*

32. In the Glossary in the FOI Act, "**personal information**" is defined as meaning "*...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."*

33. There is a considerable amount of personal information about parties other than the complainant, contained in the disputed documents. It was my preliminary view that matter consisting of personal information about those parties was, *prima facie*, exempt matter under clause 3(1) of Schedule 1 to the FOI Act. Following receipt of my preliminary view, the complainant withdrew her claim for access to that matter. The matter in the disputed documents which is exempt under clause 3(1), and to which the complainant no longer seeks access, is as follows:

- all of Document E, other than those parts specified in paragraph 19 above;
- the first and second paragraphs of Document I; and
- all of Document Y other than those parts specified in paragraph 30 above.
