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OFFICE OF THE INFORMATION COMMISSIONER (W.A.)

File Ref: 97072, 97073, 97077 & 97078
Decision Ref: D03097

Participants:

U
Complainant

- and -

Curtin University of Technology
First Respondent

John Howard Kelmar
Second Respondent

V
Complainant

- and -

Curtin University of Technology
First Respondent

John Howard Kelmar
Second Respondent

W
Complainant

- and -

Curtin University of Technology
First Respondent

John Howard Kelmar
Second Respondent

X
Complainant

- and -

Curtin University of Technology
First Respondent

John Howard Kelmar
Second Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - decision to give access - reverse FOI complaints by four third parties - documents relating to inquiry under an employment award - clause 5(1)(b) - whether documents contain matter the disclosure of which could reasonably be expected to reveal the investigation of a contravention or possible contravention of the law - nature of investigation - whether under award - whether into possible breaches of award - whether breach of award is breach of the law for the purposes of the FOI Act.

Freedom of Information Act 1992 (WA) ss 69(3), 76(4); Schedule 1 clauses 5(1)(b), 5(1)(e), 5(5), 6(1), 8(2), 11(1)(c), 11(1)(d):
Freedom of Information Regulations 1993 (WA) regulation 9.
Conciliation and Arbitration Act 1904 - 1928 (Cth)
Equal Opportunity Act 1997 (Vic)
Firearms Act 1973
Medical Act 1984
Australian Universities Academic Staff (Conditions of Employment) Award 1988
Police Force Regulations 1979
Industrial Relations (Consequential Provisions) Act 1988 (Cth)
Industrial Relations Act 1988 (Cth)

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 (1995) 14 WAR 550
Bartlett-Walker and Medical Board of Western Australia (Information Commissioner (W.A.), 11 February 1997, unreported D00497)
Clyde Engineering Co Ltd v Cowburn (1926) 37 CLR 466
Ex parte McLean (1930) 43 CLR 472
Ansett Transport Industry (Operations) Pty Ltd v Wardley (1980) 142 CLR 237

DECISION

The decision of the agency is set aside. In substitution it is decided that the documents are exempt under clause 5(1)(b) of Schedule 1 to the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

19th November 1997

REASONS FOR DECISION

BACKGROUND

1. These complaints seek external review by the Information Commissioner of a decision of Curtin University of Technology ('the agency') to grant Mr Kelmar ('the access applicant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').

2. These are "reverse FOI" complaints lodged by four complainants against the decision of the agency to grant the access applicant access to certain documents. As all four complaints concern the agency's decision on the access applicant's application, and due to the similarity of the nature of claims for exemption and the documents involved, I have decided to deal with these matters by way of one formal decision.

3. The four complainants in these matters are referred to in my decision and these reasons as 'the complainants'. The complainants have advised me that they do not wish their identities to be revealed. Their identities are part of the matter for which they claim exemption. Further, in view of the fact that the ambit of the original access application by the access applicant was limited to personal information about himself, I am satisfied that the names of the complainants are outside the ambit of the access application. In the circumstances, I have decided not to identify the complainants in my decision or these reasons.

4. The access applicant was formerly employed by the agency as a full-time staff member in the School of Management. As a result of certain matters arising in the course of his employment, I understand that, in 1994, the Head of the School of Management established an inquiry to determine whether the access applicant had breached his employment obligations. I am informed that the inquiry into the access applicant's conduct was prematurely terminated. Subsequently, further allegations were made against him and he was suspended from duty. Shortly thereafter, he tendered his resignation and ceased his employment with the agency.

5. By letter dated 10 November 1996 the access applicant lodged an application with the agency, seeking access under the FOI Act to all documents relating to the inquiry into his conduct in 1994. Initially, the agency refused access to those documents it had identified as coming within the ambit of the access application on the ground that those documents were exempt under clauses 6(1) and 8(2) of Schedule 1 to the FOI Act.

6. The access applicant applied for internal review of the agency's decision. In a notice of decision dated 19 March 1997, the access applicant was informed that the initial decision was set aside and access to the requested documents was granted. However, the agency deferred giving access to allow a number of third parties to exercise their rights of review under the FOI Act.

7. Thereafter, complaints by 6 third parties were lodged with the Information Commissioner, seeking external review of the agency's decision to grant access to certain documents which contain personal information concerning the complainants and the access applicant. As a result of negotiations with this office during the course of dealing with this matter, two third parties withdrew their complaints. The complainants, however, maintain their respective objections to disclosure and their claims that the documents are exempt.

8. The access applicant applied, pursuant to section 69(3) of the FOI Act, in a letter dated 22 July 1997, to be joined as a party to these complaints, and was joined.

REVIEW BY THE INFORMATION COMMISSIONER

9. During the course of my dealing with this matter, the access applicant, as a result of negotiations with my office, confirmed that he seeks access only to documents containing personal information about himself and that he would, therefore, accept access to edited copies of the documents with personal information about other individuals deleted from those documents.

10. The option of providing the access applicant with access to edited copies of the documents was discussed with the 6 original complainants in relation to those documents relevant to each of their complaints. As a result, 2 of them consented to the disclosure of the documents relating to them, with personal information about them deleted from those documents. Accordingly, as there were no further matters with which I had to deal with respect to those 2 complaints, the 2 complainants were invited to withdraw their complaints and they did so. The 4 remaining complainants considered that option. However, they would not agree to the access applicant being given edited copies and decided to maintain their claims that the documents are exempt in full under clauses 5(1)(e), 6(1), 8(2) and 11(1)(c) and (d) of Schedule 1 to the FOI Act.

11. After considering all the material before me, on 12 September 1997, I informed the parties in writing of my preliminary view on these complaints, together with my reasons. My preliminary view was that the documents may not be exempt under clauses 5(1)(e), 6(1), 8(2) or 11(1)(c) or (d), as claimed by the complainants. However, under section 76(1)(b) of the FOI Act, in dealing with a complaint, the Information Commissioner has the power to decide any matter with respect to an access application that could, under the FOI Act, have been made by the agency. Further, under s.76(4) of the FOI Act, if it is established that a document is an exempt document, the Information Commissioner cannot make a decision to the effect that access to it may be given. Therefore, as well as considering the claims of the complainants, I considered whether the material before me establishes that the documents are exempt for any other reason, whether or not put forward by the complainants. Based on the evidence before me, I came to the preliminary view that the disputed documents may be exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.

12. The parties were informed of my preliminary view and the reasons for it and invited to provide further evidence and submissions to me. I received a letter from the access applicant which, amongst other things, contained a brief submission in respect of the exemption under clause 5(1)(b). No submissions were received in respect of the other exemptions originally claimed.

THE DISPUTED DOCUMENTS

13. The disputed documents consist of handwritten contemporaneous notes taken by the Chairman of the inquiry, typed submissions purportedly recording the verbal submissions made by the complainants to that inquiry, copies of various pieces of correspondence and assignments prepared by students at the time.

THE EXEMPTION

Clause 5(1)(b)

14. Clause 5(1)(b) provides that:

> *"(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;"*

15. The scope and meaning of the exemption in clause 5(1)(b) have been the subject of two decisions by 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), and *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550. As Information Commissioner, I am bound by those decisions and must apply the law as stated by the Supreme Court when dealing with complaints under the FOI Act.

The application of clause 5(1)(b) to the disputed documents

16. Clause 5(1)(b) requires that, in order to be exempt, the documents could reasonably be expected to reveal the investigation of a contravention or possible contravention of the law, if disclosed. The questions that arise, therefore, are firstly whether the inquiry by the agency into the allegations against the access applicant was an "investigation into a contravention or possible contravention of the law" and, secondly, whether the disclosure of the documents in dispute could "reveal" that investigation.

17. The term "the law" is defined in clause 5(5) to mean the law of this State, the Commonwealth, another State, a Territory or a foreign country or state. The decision in *Kelly and Smith* dealt with an investigation by the police into allegations of possible criminal and police disciplinary offences which resulted in charges being laid under the *Firearms Act 1973* and the *Police Force Regulations 1979*. Clearly, the words of clause 5(1)(b) and that definition of "the law" do not limit the law which may be contravened to the criminal law and I have in earlier cases applied the clause to a wide variety of laws and regulations which have the force of law.

Nature of the investigation

18. Based on the evidence before me, and my examination of the disputed documents, it is my view that the inquiry conducted in 1994 was intended to be, and was understood by those conducting it to be, an inquiry under the *Australian Universities Academic Staff (Conditions of Employment) Award 1988* ('the Award'). It appears from the documentary evidence before me that, when the matter was first raised, it was recommended that an inquiry be conducted to investigate primarily whether there were sufficient grounds to substantiate claims of unsatisfactory performance in accordance with clause 8 of the Award. Subsequently, however, when the recommendation was accepted, it was also suggested that claims of serious misconduct may also be investigated if the committee of inquiry thought fit.

19. Procedures for dealing with unsatisfactory performance are set out in clause 8 of the Award. Clause 9 sets out procedures in respect of serious misconduct. A committee comprising three people was appointed to carry out the investigation. However, there is no evidence before me which establishes that those people were selected or appointed in accordance with clause 8(f) or clause 9(i) of the Award. Further, on the material before me, the inquiry does not appear to have been conducted in accordance with the procedures set out in clause 8, nor with the procedures set out in clause 9.

20. It also appears to me that those conducting the inquiry may not have themselves been clear as to the source of their authority to carry out the inquiry, that is, under which clause of the Award they were appointed, nor of the nature of the inquiry they were conducting - that is, an inquiry under clause 8 or clause 9 - and the procedures they were required to follow.

21. Nonetheless, it does appear to me from the material before me that, whether or not the inquiry may have been procedurally deficient, at the very least, those conducting the inquiry understood that they were investigating whether there may have been either unsatisfactory performance or serious misconduct, or both, on the part of the access applicant. Accordingly, it is my view that the 1994 inquiry was an inquiry which was established pursuant to the Award to investigate possible contraventions of the Award which might result in disciplinary action or dismissal.

22. In my decision in *Re Bartlett-Walker and Medical Board of Western Australia* (11 February 1997, unreported, D00497), I accepted that an investigation under s.13(1)(a) of the *Medical Act 1894* into allegations against a medical practitioner was an investigation of a possible contravention of that section of that Act (see paragraphs 13 to 16 of that decision). For similar reasons, I accept that an investigation under clause 8 and clause 9 of the Award is an investigation into contraventions or possible contraventions of the Award.

23. Although clauses 8 and 9 do not specifically prohibit unsatisfactory performance and serious misconduct by academic staff, such prohibition is clearly implicit in the terms of those clauses. A finding of unsatisfactory performance following an inquiry under clause 8 may result in disciplinary action, which means the imposition of any of the following penalties: censure; withholding of a salary increment; demotion; formal warning that failure to improve performance may lead to dismissal; or dismissal. Clause 8 prescribes the investigation process that must be undertaken by the agency before a recommendation of disciplinary action may be made.

24. Clause 9 defines serious misconduct in subclause (a) and prescribes the investigative procedures that must be undertaken in respect of allegations or suspicions of such conduct and specifies in subclause (b) that such matters "... *shall be investigated and reported on solely in accordance with those procedures, notwithstanding anything to the contrary in the staff member's terms of employment or any of the procedure(s) that may currently be in operation at any university."* The prescribed penalties under the award for serious misconduct include counselling; censure; withholding of salary increments; demotion; or dismissal.

25. Taking into account all of the provisions of clauses 8 and 9, it seems to me that, as a member of the academic staff of a university engaging in any of the conduct described in either of those clauses of the Award is punishable under the Award, engaging in such conduct is a breach (or contravention) of the Award. The question, therefore, is whether a contravention of the Award constitutes a contravention of the law for the purposes of clause 5(1)(b) of Schedule 1 to the FOI Act.

Status of the Award

26. The Award is a Federal award. The status of Federal awards under the Commonwealth *Conciliation and Arbitration Act 1904-1928* has been considered by the High Court of Australia in *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, in which it was held that a State statute did not override an award made under the *Conciliation and Arbitration Act.*

27. In considering a submission that an award of the Federal Arbitration Court is not a "law" (and thus the State legislation overrode it), Isaacs J stated (at page 494) that "[t]*he Federal Arbitration Court is not a law-maker but is an "award-maker", just as the Governor in Council is an "order-maker" or a*

municipal council is a "bylaw-maker", or a Court of Law is a "rule maker". And if Parliament, unable or unwilling - it matters not which - to legislate in detail or with reference to a specific instance, but having authority to empower, does empower a named functionary to formulate what he thinks a proper rule, Parliament, it may be, hedging his authority with whatever principles or conditions it pleases, his formulation, though not a law, may be adopted by Parliament so as to be law. The legislative adoption of the formulation is itself legislation on the subject matter, and the formulation is then part of the law, not by force of the formulation, but by force of the adoption."

28. His Honour went on to say (at page 497):

"…the "law" is not the piece of parchment or paper, nor is it the letters and words and figures printed upon the material. It consists of the "rule" resolved upon and adopted by the legislative organ of the community as that which is to be observed, positively and negatively, by action or inaction according to the tenor of the rule adopted....But "the law" is essentially the rule itself, and not the material evidence of it. This at once disposes of the main ground on which is rested the contention that the "award" is not a law because it refers back the whole matter to the statute. So a regulation is not a law. Nor is the statute itself a presently operating law, in the sense of creating specific obligations or rights, until its own conditions are fulfilled. When these are fulfilled the "law" is complete; that is the "rule" is stated which "those to whom it is prescribed are bound to observe"."

29. The High Court again considered the status of a Federal award in *Ex parte McLean* (1930) 43 CLR 472 and held that a Federal award dealing with the employment of shearers prevailed over the provisions of a State statute which, to the extent of its inconsistency with the Federal award, was invalid by virtue of s.109 of the Constitution. Isaacs C J and Starke J, in their joint judgment, considered at page 479 that:

"the award itself is, of course, not law, it is a factum *merely. But once it is completely made, its provisions are by the terms of the Act itself brought into force as part of the law of the Commonwealth. In effect, the statute enacts by the prescribed constitutional method the provisions contained in the award."*

30. Dixon J, with whom Rich J agreed, referred, at page 483, to the fact that s.44 of the *Commonwealth Conciliation and Arbitration Act* penalised any breach or non-observance of an award and considered that, *"… inasmuch as the award in this case commanded performance of the applicant's contract, his neglect to fulfil it would constitute an offence under this provision."* It was his Honour's view in respect of the award in that case that *"… unlawful as it is to depart from the course which such an instrument describes and requires, the instrument itself is, nevertheless, not "a law of the Commonwealth" within the meaning of those words in s.109 …"* and *"… if State law is superseded it must be upon the ground that the State law thereupon becomes inconsistent with the meaning and effect of the Commonwealth Conciliation and Arbitration Act itself."*

31. Rich J, at page 480, put it thus:

> *"The Commonwealth* Conciliation and Arbitration Act *confers upon the tribunal a power, and the award embodies the exercise of that power … And as in the case of other powers the efficacy and legal result of the exercise of the discretion is derived wholly from the instrument creating the power to which the exercise is referred and attributed."*

32. In *Ansett Transport Industry (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237, the High Court considered whether the Airline Pilots Agreement 1978 - which was deemed to be an award of the Commission for all the purposes of the *Conciliation and Arbitration Act* - prevailed over a provision of the Victorian *Equal Opportunity Act 1997.* In that decision, Stephen J described the agreement as *"…the present manifestation of Commonwealth law …"* (at page 245). Barwick C J considered the relevant federal law in that case to be a combination of certain provisions of the *Conciliation and Arbitration Act* and the certified industrial agreement on which it operates. Aickin J said, at page 277, "[i]*n the case of an award or a certified agreement the "law of the Commonwealth" with which the State law is to be regarded as inconsistent, is the Conciliation and Arbitration Act itself, which gives to an award statutory operation as a prescription of industrial conduct within the area of the dispute which the award settles."*

33. Wilson J, at page 282, considering the status of the Agreement for the purpose of applying s.109 of the Constitution said :

> *"As I have noted, it is deemed to be an award of the Commission. The question of inconsistency between the Agreement and a State law may arise, not because the Agreement is "a law of the Commonwealth" within the meaning of s.109 but because it derives its force from such a law, namely, the Conciliation and Arbitration Act: cf. s.65 and* Clyde Engineering Co. Ltd. v. Cowburn *(1926) 37 CLR 466;* Ex parte McLean *(1930) 43 CLR 472."*

34. Essentially, therefore, it would seem from those cases that, although an award made under the *Conciliation and Arbitration Act* was not, itself, a law, its provisions were by virtue of that Act brought into force as part of the law of the Commonwealth. Any breach or non-observance of an Award was subject to penalties under s.44 of that Act.

35. The *Conciliation and Arbitration Act* was repealed by the *Industrial Relations (Consequential Provisions) Act 1988* and simultaneously replaced by the *Industrial Relations Act 1988.* That latter Act received the Royal Assent on 8 November 1988 and commenced operation on 1 March 1989. By virtue of s.7 of the *Industrial Relations (Consequential Provisions) Act* an award or order in force under the previous Act continued in force after the commencement of the *Industrial Relations Act* as if it were an award made under the *Industrial Relations Act.*

36. As the Award is stated on its face to have come into operation on 17 October 1988, it would appear to be an award made under the *Conciliation and Arbitration Act* and continued under the *Industrial Relations Act.* The latter Act was still in force in 1994 at the time of the inquiry into the allegations against the complainant. By virtue of ss. 149 and 150 of the *Industrial Relations Act*, awards were binding and final. Section 178 of that Act imposed penalties for breaches of a term of an award.

37. The Award is clearly in my view a manifestation of the power given in the *Industrial Relations Act* to make such awards. The Award is expressed in clause 3 to be binding upon, *inter alia*, the respondents named in the Schedule to the Award and the agency is nominated in Schedule 1 to the Award. I accept, therefore, that the agency is bound by the Award. I am also of the view that a breach of the Award is, by the force of law given to it by *the Industrial Relations Act*, a breach of that Act.

38. The term "the law" is defined in the FOI Act to include the law of the Commonwealth. Accordingly, for the reasons given above, I am of the view that an investigation into a possible contravention of the Award in 1994 was an investigation into a possible contravention of a law of the Commonwealth and, therefore, an investigation into a possible contravention of the law for the purposes of clause 5(1)(b). In my view, that is so whether the investigation is an investigation under clause 8 (into allegations of unsatisfactory performance) or clause 9 (into allegations of serious misconduct by an employee) of the Award.

The access applicant's submission

39. The access applicant was afforded an opportunity to provide me with written submissions supporting his view that the disputed documents are not exempt documents under clause 5(1)(b). The access applicant submits that he is not a member of the Federated Australian University Staff Association and is not, therefore, a party to the Award. In addition, the access applicant submits that he negotiated his terms and conditions of employment separately from the Award and that, therefore, the application of clause 5(1)(b) is not valid. The access applicant also submits that he was not informed that the inquiry was constituted under the Award.

40. In my view, the access applicant's status as an employee and whether or not he is a union-member and thereby a party to the Award does not affect my determination in this matter. Central to it is the nature of the investigation and whether or not it could reasonably be expected to be revealed by disclosure of the particular documents. I am satisfied that the inquiry was established under the Award and was established to consider a contravention or possible contravention of the terms of the Award by the access applicant. I am informed by the agency that it is a party to the Award and that all its academic staff are employed subject to the Award. Further, the words of clause 9(b) of the Award which I have quoted in paragraph 24 above make it clear, in my view, that the

agency is bound to deal with serious misconduct under the Award, no matter what the contractual agreement with the particular staff member.

Reveal the investigation

41. The application of the exemption also requires consideration of the nature of the particular documents in question, either as described in the access application, or as ascertained upon their inspection. It must be that their disclosure could reasonably be expected to reveal, at the very least, the fact of a particular investigation of a contravention or possible contravention of the law. It is not sufficient that the documents merely reveal the fact that there has been an investigation. They must reveal, in the words of Anderson J in *Kelly and Smith*, "*...the fact of a particular investigation of a particular incident involving certain people"* (at page 9).

42. In the case of *Kelly and Smith* his Honour held, at page 13, that, to the extent that any of the subject documents would reveal (whether for the first time or not) that the Internal Investigations Branch of the Police Force of Western Australia was conducting, was about to conduct or had conducted an investigation into the conduct of the respondents in the matter in regard to a particular incident in Fremantle on 25 March 1995 in which a firearm was discharged, that document is an exempt document within the meaning of clause 5(1)(b) of the FOI Act. His Honour also said that whether the document fell into that category is a question of fact which is for the Information Commissioner to resolve.

43. Further, his Honour in that decision said, at page 10:

"I do not see why any element of novelty or exclusivity should be imported into the phrase "reveal the investigation". 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."*

44. I have examined each of the disputed documents. I consider that the disclosure of each of them would reveal the fact of an investigation of particular alleged incidents involving a particular person. Each of the documents would reveal something of the substance of that investigation. For the reasons explained in paragraph 43 above, it matters not how much of the fact, nature and substance of the investigation may already be known to the access applicant. Accordingly, I find that each of the disputed documents is *prima facie* an exempt document under clause 5(1)(b), as those documents would, if disclosed, reveal an

investigation into a contravention or possible contravention of the law and, are, therefore, exempt documents under clause 5(1)(b).

Public interest test

45. Clause 5(1)(b) is limited by a public interest test in clause 5(4). Clause 5(4) states:

> ***"5. Law enforcement, public safety and property security***
>
> *(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."*

In my view, none of the disputed documents contains matter of a kind described in paragraph (a) of clause 5(4). Therefore, the provisions of clause 5(4) are not relevant to this matter and I cannot consider whether disclosure would be in the public interest.

Conclusion

46. Accordingly, I find that the disputed documents are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.