

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

**File Ref: F1731999
Decision Ref: D0322000**

Participants: **Sydney James Chesson**
Complainant

- and -

Ministry of Fair Trading
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents relating to an investigation under the *Real Estate and Business Agents Act 1978* - clause 5(1)(b) - whether disclosure would reveal the investigation of a possible contravention of the law - clause 7 - legal professional privilege - communications between legal adviser and third party - whether for purposes of litigation - clause 3(1) - personal information about third parties - whether limits on exemption apply - clause 5(1)(c) - whether disclosure would reveal a confidential source of information.

Freedom of Information Act 1992 (WA) Schedule 1 clauses 3(1), 5(1)(b), 5(1)(c) and 7.
Real Estate and Business Agents Act 1978 ss. 13, 26, 27, 30(2), 31(1), 34(1), 101, 102(1)(a), 103(2).

Police Force of Western Australia v Kelly and Anor (1996) 17 WAR 9
Manly v Ministry of Premier and Cabinet (1995) 14 WAR 550
Esso Australia Resources Ltd v The Commissioner of Taxation (1999) 74 ALJR 339
Trade Practices Commission v Sterling [1978] 36 FLR 244
Waterford v Commonwealth (1987) 163 CLR 54; 71 ALR 673

DECISION

The decision of the agency is set aside. In substitution it is decided that:

- Document 237 is not exempt under clause 5(1)(c);
- Part of Document 201 (folios 560-563) and part of Document 204 (folios 575-578) are outside the scope of the complaint;
- the name in the first line of folio 751 of Document 256, the matter deleted from Document 13, and all of the matter in Document 298 is exempt under clause 3(1);
- Documents 3, 5, 6, 11, 12, 14-17, 19-30, 34, 38, 40, 73, 229, 241 (part), 246, 247, 270, 275 and 299 are exempt under clause 5(1)(b); and

the balance of the disputed documents are exempt under clause 7 of Schedule 1 to the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

13 June 2000

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Ministry of Fair Trading ('the agency') to refuse Mr Chesson ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. I understand that the complainant is a licensed real estate agent. In 1999, the complainant was the subject of an inquiry held by the Real Estate and Business Agents Supervisory Board ('the Board') in relation to certain events that occurred in 1990. The Board is, among other things, responsible for the licensing of persons wishing to conduct business as real estate agents. The agency provides administrative support to the Board in performing that function. The Registrar of the Board is empowered by the *Real Estate and Business Agents Act 1978* ('the Real Estate Agents Act') to conduct investigations or inquiries into certain matters, either on his own motion or at the direction of the Board. I understand that the Board initiated the inquiry to determine whether the complainant was a fit and proper person to hold the requisite real estate licence.
3. In June 1999, the complainant's solicitor made an application to the agency under the FOI Act for access to all records containing information about the complainant, including files relating to the inquiry held by the Board in 1999. The agency did not make a decision on the complainant's application within the permitted period of 45 days. On 9 August 1999, the complainant's solicitor applied for internal review of the agency's deemed refusal of access to the requested documents.
4. On 24 August 1999, the agency decided to grant the complainant access to some, but not all, of the requested documents. The agency granted the complainant full access to the documents contained in 3 licensing files relating to him, but refused access to the documents in one file, the complaint file, on the ground that those documents are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.
5. On 20 September 1999, the complainant's solicitor lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

6. I obtained the disputed documents from the agency. Inquiries were made to determine whether the complaint could be resolved by conciliation between the parties. Various discussions and meetings were held with both parties. As a result, the agency released some additional documents to the complainant and

made further written submissions claiming exemption under clauses 3(1), 5(1)(b), 5(1)(c) and 7 for the documents.

7. The complainant's access application involved a significant number of documents that the agency initially had neither identified nor described to the complainant. My office arranged for three schedules of documents to be prepared. Schedule 1 described 314 documents identified by the agency as falling within the scope of the access application. Schedule 2 listed and described 205 documents that were not in dispute, either because the agency had decided to give access to those documents or because the complainant withdrew his complaint in respect of those documents.
8. Schedule 3 listed and described 109 documents that were in dispute. A copy of each schedule was given to the complainant, together with the submission from the agency containing the agency's reasons for claiming that the documents listed on Schedule 3 are exempt under clauses 3(1), 5(1)(b) and (c) and 7 of Schedule 1 to the FOI Act.
9. On 10 April 2000, after considering the material before me, I informed the parties in writing of my preliminary view of this complaint. It was my preliminary view that most, but not all, of the disputed documents may be exempt under either clause 3(1), 5(1)(b) or 7. Thereafter, the agency reconsidered its claims for exemption for 2 documents and released to the complainant a copy of Document 119, in full, and a copy of another document, Document 13, with personal information deleted. I received a further submission from the complainant's solicitor.

THE DISPUTED DOCUMENTS

10. There are 107 documents remaining in dispute, including additional documents that were incorrectly described in Schedule 3. I refer to the disputed documents by the numbers assigned to them on Schedule 3, unless otherwise described by me in these reasons. The disputed documents include written communications between a legal officer of the agency and a barrister, file notes, letters, internal memoranda, and various other communications related to the inquiry conducted by the Board.

THE EXEMPTIONS

11. The agency claims exemption for the disputed documents under clause 7, clause 5(1)(b) and 5(1)(c) and clause 3(1).

(a) Clause 7 - Legal professional privilege

12. Matter is exempt under clause 7 if it would be privileged from production in legal proceedings on the ground of legal professional privilege. Legal professional privilege is the privilege of the client. It protects the confidentiality of communications made in connection with giving or obtaining legal advice or

the provision of legal services, including representation in proceedings in a court. The privilege exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers.

13. The decision of the High Court of Australia in *Esso Australia Resources Ltd v The Commissioner of Taxation* (1999) 74 ALJR 339 has altered the common law test for whether a document attracts the privilege. The test is now whether the dominant purpose, rather than the sole purpose, for the creation of a document was to give or obtain legal advice or for use in litigation which is on foot or reasonably expected or anticipated.
14. I have examined the disputed documents described in Schedule 3. Of those, Documents 48, 50, 57, 76, 78, 79, 80, 114, 117, 121, 122, 125, 128, 133, 135, 138, 153, 155, 157, 159, 161, 167, 179 (folios 482 and 483), 180 (folios 485-487), 181 (folios 484, 488 and 489), 181A (folio 490), 195, 205, 207, 209, 212, 214, 215, 224, 228, 239, 242, 244, 250, 252, 253, 254, 268, 276, 282, 283, 289, 290, 294, 301, 306 and 309 are letters between the agency and various barristers and are requests from the agency for legal advice and the advice given to the agency by the barristers. Some of the letters between the agency and the barristers contain attachments that, in the main, consist of draft documents and proofs of evidence. Having examined the documents and the attachments and considered the context in which they were created, I am satisfied that those documents were prepared either by the agency for submission to the barristers for legal advice, or prepared or amended by the barristers and given to the client, the agency. I consider that they are clearly confidential communications between the agency and its legal advisers that were created for the dominant purpose of giving or obtaining legal advice.
15. Therefore, those documents would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find that Documents 48, 50, 57, 76, 78, 79, 80, 114, 117, 121, 122, 125, 128, 133, 135, 138, 153, 155, 157, 159, 161, 167, 179 (folios 482 and 483), 180 (folios 485-487), 181 (folios 484, 488 and 489), 181A (folio 490), 195, 205, 207, 209, 212, 214, 215, 224, 228, 239, 242, 244, 250, 252, 253, 254, 268, 276, 282, 283, 289, 290, 294, 301, 306 and 309 are exempt under clause 7 of Schedule 1 to the FOI Act.
16. Documents 118, 132, 154, 158, 162, 240, 245 and 251 are files notes of conversations between officers of the agency and senior external counsel. Having considered the contents of those documents, I am satisfied that they record confidential communications made for the dominant purpose of seeking or giving legal advice. In my view, those documents would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find that Documents 118, 132, 154, 158, 162, 240, 245 and 251 are exempt under clause 7.
17. Documents 41, 53, 70 and 227 are memoranda from legal officers in the agency to officers of the agency. Those documents contain legal advice and appear to me to have been created for the dominant purpose of giving legal advice. Legal professional privilege extends to confidential communications of that kind

between government agencies and legal advisers in the employ of government, provided that the relationship is sufficiently independent: *Waterford v Commonwealth* (1987) 163 CLR 54; 71 ALR 673. Based on my examination of those documents, it is clear that the agency's legal officers were acting in their professional capacity as legal advisers. It is also clear to me that, in relation to the persons to whom the memoranda were addressed, the legal advisers were sufficiently independent in character for the documents to attract the privilege. In my view, Documents 41, 53, 70 and 227 would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find that Documents 41, 53, 70 and 227 are exempt under clause 7.

18. Document 73 appears to me to be a draft of a letter that the agency intended to send to the complainant, but it is clearly marked as not having been sent. The agency claims that Document 73 is exempt under clause 7. However, that document does not appear to me to be a communication that would attract legal professional privilege on any ground. Therefore, in the absence of any information from the agency about the circumstances of its creation, I find that Document 73 is not exempt under clause 7. However, I have made other findings in respect of that document at paragraph 45.
19. In *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at 246 Lockhart J. stated that legal professional privilege extends to, *inter alia*:

“(d) Notes, memoranda, minutes or other documents made by the client or officers of the client or the legal adviser of the client of communications which are themselves privileged, or containing a record of those communications, or relate to information sought by the client's legal adviser to enable him to advise the client or to conduct litigation on his behalf.”

20. Document 77 is a file note of a telephone conversation between an officer of the agency and counsel recording legal advice. Document 101 is a draft document bearing handwritten amendments. I accept that Document 101 records legal advice given in respect of its contents. Document 102 is a handwritten note of the Board hearing. Document 103 is headed “Inquiry/Court Report” and appears to me to be notes of a Board hearing. In my view, those documents were created for the purpose of providing legal advice to the agency. Document 230 is notes of the Supreme Court proceedings. Folios 747-750 of Document 256 are handwritten file notes of the Board hearing. Folios 747-750 of Document 256 and Document 230 appear to me to have been created by the agency's legal adviser for the purpose of giving legal advice to the agency.
21. I am satisfied that Documents 77, 101, 102, 103, 230 and folios 747-750 of Document 256 are documents that would also be privileged from production in legal proceedings on the ground of legal professional privilege as described by Lockhart J in *Trade Practices Commission v Sterling*. Accordingly, I find that those documents are exempt under clause 7.

22. Document 229 is a communication from a third party to one of the agency's legal advisers. Documents 270 and 299 are handwritten file notes. The contents of those documents appear to me to relate to the Board hearing. However, it is not clear from the contents of Documents 229, 270 and 299 whether they consist of information sought by the agency or its legal adviser for the purpose of providing legal advice to the agency for the purpose of litigation or would, for any other reason, be privileged from production in legal proceedings on the ground of legal professional privilege. In the absence of any material from the agency to establish grounds for exemption under clause 7, I find that Documents 229, 270 and 299 are not exempt under clause 7. However, I have considered whether they might be exempt under clause 5(1)(b) and I deal with that issue in paragraph 49 below.
23. Document 241 is a file note of two telephone conversations. The first of those is clearly a confidential communication between an officer of the agency and counsel made for the purpose of obtaining legal advice. In my view, that part of the document would be privileged from production in legal proceedings on the ground of legal professional privilege and I find that part to be exempt under clause 7. The second file note records a conversation between the agency's legal adviser and the Chairman of the Board. I doubt whether the agency's legal adviser could also be considered to be the legal adviser to the Board since that would raise the issue of whether there was a conflict of interest. However, the second file note clearly relates to the inquiry by the Board. I have, therefore, considered whether the second file note recorded in Document 241 might be exempt under clause 5(1)(b) and I deal with that in paragraph 48.
24. Folio 751 of document 256 is also a file note of two telephone conversations with third parties. Although the agency claims exemption for folio 751 under clause 7, the record of the conversations appears to me to relate to the Board's inquiry rather than to any legal proceedings. In my view, neither of the file notes would be privileged from production in legal proceedings on the ground of legal professional privilege. In the absence of any material from the agency to establish grounds for exemption under clause 7, I find that folio 751 is not exempt under clause 7. However, I have considered whether folio 751 might be exempt under clause 3(1) and I deal with that in paragraphs 53-62 below.
25. Documents 201 and 204 are incorrectly described in Schedule 3. Each document consists of a facsimile cover sheet and an attachment, being a copy of the decision of the Board. I understand that the complainant has a copy of the decision and, in any event, he has withdrawn his complaint in respect of documents already in his possession. Therefore, part of Documents 201 (folio 560-563) and part of Document 204 (folios 575-578) are outside the scope of this complaint. However, part of Document 201 (folio 564) and part of Document 204 (folio 579) have not been disclosed to the complainant. I refer to those folios as Document 201A and Document 204A respectively. Documents 201A and 204A are both facsimile letters from the agency to a barrister and are requests from the agency for legal advice. In my view, those documents would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find that Documents 201A and 204A are exempt under clause 7.

26. Document 298 is a handwritten letter from a third party addressed to the agency's legal officer. The agency claims exemption for Document 298 under clause 7. The contents of that document suggest to me that it was created for the purpose of bringing to the attention of the agency certain events alleged to have occurred between the complainant and an officer of the agency. There is nothing either before me from the agency, or that is apparent from Document 298, to persuade me that Document 298 would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find that Document 298 is not exempt under clause 7. However, I have considered whether it might be exempt under clause 3(1) and I deal with that issue in paragraph 55 below.

(b) Clause 5(1)(b)

27. The agency claims that Documents 3, 5, 6, 14-17, 19-30, 34, 38 and 40 are exempt under clause 5(1)(b). Those documents are, in the main, file notes, letters from third parties and letters and transmissions from the agency to third parties. Although the agency claims exemption for Documents 11, 12, 246 and 247 under clauses 3(1) and 5(1)(c), I have also considered whether those documents might be exempt, in any event, under clause 5(1)(b).

28. Clause 5(1)(b) provides that matter is exempt matter if its disclosure could reasonably be expected to 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. Two questions arise from the terms of the exemption: firstly, whether there was an investigation into a contravention or possible contravention of the law (which includes identifying the law that has been, or may have been, contravened) and, secondly, whether disclosure of the documents could reasonably be expected to reveal that investigation.

29. In the agency's notice of decision on internal review neither of those questions was answered. In my view, no proper reasons were given for the agency's refusal of access based on clause 5(1)(b); the decision maker made no findings on any material questions of fact; and there was no reference to any material to support the findings.

30. Subsequently, the agency informed me that the incident that prompted the inquiry into the complainant was a report in the *Sunday Times* newspaper dated 28 December 1997 that was reviewed by the Registrar of the Board as part of his duties. The agency considered that the conduct described in the article raised a question as to whether there had been a breach of the Real Estate and Business Agents Code of Conduct and whether the complainant remained a fit and proper person to hold a licence. On 27 January 1998, the Registrar issued a written direction to the Principal Compliance Officer of the Real Estate branch of the agency, directing him to inquire into those matters.

31. I am informed by the agency that the Principal Compliance Officer commenced collecting information from various sources, and some information was given to the agency by third parties. The agency submits that, therefore, the documents collected and created by the Principal Compliance Officer in the course of his investigation are exempt under clause 5(1)(b).
32. I have considered the agency's submission and I have examined the contents of the documents themselves to determine whether those documents "reveal" any investigation, in the sense that that term has been interpreted by the Supreme Court of Western Australia in *Police Force of Western Australia v Kelly and Anor* (1996) 17 WAR 9. In *Kelly's* case, Anderson J, after referring to the decision of Owen J in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550, said at page 13:
- "..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"."*
33. Anderson J also said, at page 13 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."*
34. The decision in the *Kelly* case makes it clear that, if an 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.

The investigation by the Board

35. Clearly, the Real Estate Agents Act, a statute of the Parliament of Western Australia, falls within the definition of "the law" in clause 5(5). Further, in clause 5(5) the word "contravention" is defined to include a failure to comply.
36. Section 26 of the Real Estate Agents Act provides that a person shall not carry on business as a real estate and business agent unless the person is licensed to do so under the Act and holds the requisite triennial certificate in respect of that licence. Section 27 of the Real Estate Agents Act provides that the Board shall grant a licence if the Board is satisfied that the person is, among other things, over 18 years of age, of good character and repute and a fit and proper person to hold a licence. However, the grant of a licence by the Board does not confer the right to carry on the business unless the licensee also holds a current triennial certificate, which confers the right to carry on business as an agent for the

period of three years commencing on the date on which the certificate is granted (s.30(2) and s.31(1)).

37. The Board may also prescribe and publish a code of conduct for agents and sales representatives (s.101). The Code of Conduct for Agents and Sales Representatives published in the Government Gazette (No. 89) on 29 June 1993 is made pursuant to the powers of the Board under that section. Pursuant to s.102(1)(a), the Board may, on application of the Registrar, an inspector or any other person, hold an inquiry into the conduct of any agent to determine if an agent is acting in conformity with the special conditions of his licence and triennial certificate, and the Code of Conduct issued by the Board and complying with the requirements of the Real Estate and Agents Act. After conducting such an inquiry, if the Board is satisfied that a proper cause exists for disciplinary action, it may reprimand or caution the agent, impose a fine not exceeding \$10,000, suspend or cancel a licence and any triennial certificate in respect thereof and, in addition, disqualify the agent, either temporarily or permanently, or until the fulfilment of any condition which may be imposed by the Board or until the further order of the Board, from holding a licence or triennial certificate or both (s.103(1)).
38. Section 103(2) provides that there shall be proper cause for disciplinary action against an agent if:
- “(a) the agent improperly obtained a licence or triennial certificate;*
 - (b) the agent, or any person acting with the authority or upon the instructions of the agent has in the course of any dealings with a party, or a prospective party, to a transaction, been guilty of conduct that constitutes a breach of any law other than this Act and that prejudices or may prejudice any rights or interests of the party, or prospective party to the transaction;*
 - (c) the agent is acting or has acted in breach of -*
 - (i) a special condition of his licence or triennial certificate;*
 - (ii) the requirements of this Act; or*
 - (iii) the agents code of conduct;*

or

 - (d) any other cause exists that, in the opinion of the Board, renders the agent unfit to hold a licence.”*
39. A real estate agent is required by s.34(1) to comply with the Real Estate Agents Act and the Code of Conduct made and published by the Board under that Act. I consider, therefore, that a failure by an agent to comply with the requirements of the Real Estate Agents Act or the Code of Conduct would be a contravention of the Act. It follows that if the Board were conducting an inquiry under s.102

of the Real Estate Agents Act, that inquiry would be an investigation into a contravention or possible contravention of the law.

40. Further, s.13 of the Real Estate Agents Act empowers the Registrar of the Board, on his own motion, to direct an inspector to make any inquiries or investigation considered necessary for the purpose of detecting offences against the Act and, among other things, determining whether agents are acting in conformity with the special conditions, if any, of their licences and triennial certificates, and are complying with the requirements of the Act.
41. It is clear from the material before me that the Principal Compliance Officer was directed by the Registrar to conduct an investigation into whether the complainant had acted in contravention of article 5 of the Code of Conduct and whether he remained a fit and proper person to hold a licence. The circumstances that led to that investigation are described in paragraphs 30 and 31 above. Since agents are bound by s.34(1) of the Real Estate Agents Act to comply with the code of conduct, a failure to do so would amount to a contravention or possible contravention of the law as defined in clause 5(5). Having inspected the disputed documents, I am satisfied that their disclosure could reasonably be expected to reveal something about the investigation conducted by the agency, including the identity of the person under investigation and the nature of the matters under investigation.
42. Clearly, the complainant is aware of the fact and the substance of the investigation. However, the exemption in clause 5(1)(b) can apply regardless of the actual state of knowledge of the complainant about the particular matter, or the stage the investigation has reached (*ibid*, at 14-15). In *Kelly's* case, Anderson J made it clear that documents can “reveal an investigation” even when the fact of the investigation has been revealed through other materials or the investigation has concluded (*ibid*).

The complainant's submission

43. The complainant submits that the exemption provisions are inapplicable to his immediate concern about whether there was, in truth, an investigation into the matters that were the subject of the inquiry before the Board, the identity of the true complainant and the purpose of the inquiry in the first place. It is submitted that the complainant was the subject of two notices of inquiry issued by the Board, and that the validity of the first notice was the subject of a successful challenge by the complainant before the Supreme Court of Western Australia. The complainant submits that, if there was a second inquiry into his fitness to hold a licence, then it follows as a matter of procedural fairness, that he should have the opportunity to refute any information given to the agency by third parties that impacts on his fitness to hold a real estate licence.
44. The complainant submits that it is one thing for matter to be exempt if its disclosure could reasonably be expected to reveal the fact of an investigation or something about its contents. The complainant submits that it is quite another thing to use the exemption provisions of the FOI Act to cloak the agency's

failure to observe due process in carrying out its functions, and that that is not the purpose of the exemption provisions.

Consideration

45. I accept that the Board conducted an investigation and that the investigation was into a contravention or possible contravention of the law. The issue of concern to the complainant, namely, the "identity of the true complainant" is not relevant to my consideration of a claim for exemption under 5(1)(b), and "the purpose of the inquiry" is relevant only insofar as whether or not the purpose of the inquiry was to investigate a possible contravention of the law.
46. As I have already stated, I am satisfied that such an investigation was conducted and that disclosure of Documents 3, 5, 6, 11, 12, 14-17, 19-30, 34, 38, 40, 246 and 247 could reasonably be expected to reveal something about that investigation. Accordingly, I find that Documents 3, 5, 6, 11, 12, 14-17, 19-30, 34, 38, 40, 246 and 247 are exempt under clause 5(1)(b).
47. Notwithstanding that I found, in paragraph 18 above, that Document 73 is not exempt under clause 7, I am satisfied that the disclosure of Document 73 could reasonably be expected to reveal the investigation conducted by the Board. In my view, disclosure of that document would reveal something about the investigation, including the identity of the person under investigation and the nature of the matters under investigation. Accordingly, I find that Document 73 is exempt under clause 5(1)(b).
48. The second file note recorded in Document 241 deals with matters concerning the Board's inquiry. In my view, the disclosure of that file note could reasonably be expected to reveal something about the content of the investigation conducted by the Board. Accordingly, I find that the matter consisting of the fourth dot point commencing on page 1 and concluding on page 2 of Document 241, together with the heading preceding that dot point, to be exempt under clause 5(1)(b).
49. At paragraph 22, I found that Documents 229, 270 and 299 are not exempt under clause 7. However, it is clear to me from the contents of those documents that their disclosure could reasonably be expected to reveal something about the investigation conducted by the Board. Therefore, I find that Documents 229, 270 and 299 are exempt under clause 5(1)(b).
50. The agency claims that Document 275 is exempt under clause 3(1). Document 275 is a memorandum of counsel's fees. Although it may be argued that the document contains personal information about the barrister concerned and is, therefore, exempt under clause 3(1), no information has been given to me by the agency to support its claims for exemption for that document. However, taking into account the content of Document 275, in my view its disclosure could reasonably be expected to reveal something about the content of the investigation conducted by the Board. Accordingly, I find that Document 275 is exempt under clause 5(1)(b).

(c) Clause 3 - Personal information

51. The agency also claims that Documents 11, 12, 13, 16, 38, 246, 247 and 275 are exempt under clause 3(1). As I have found that Documents 11, 12, 16, 38, 246, 247 and 275 are exempt under clause 5(1)(b), I need not consider whether they are also exempt under clause 3(1). Following my preliminary view, the agency gave the complainant access to an edited copy of Document 13. The agency also claimed Document 298 is exempt under clause 7. At paragraph 26, I found that Document 298 is not exempt under clause 7. However, it is clear to me from the contents of that document that it contains personal information about third parties and I have, therefore, considered whether it might be exempt under clause 3(1). Similarly, at paragraph 24, I found that part of Document 256 (folio 751) is not exempt under clause 7. However, it is also clear that folio 751 contains some personal information about third parties and I have considered whether it might be exempt under clause 3(1).
52. Clause 3(1) provides that matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead). The term “personal information” is defined in the Glossary in Schedule 2 to the FOI Act, to mean:
- “...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.”*
53. The only information deleted from Document 13 is the name and suburb of a third party. I am satisfied that that information is personal information, as defined in the FOI Act, about the third party and that it is, *prima facie*, exempt under clause 3(1). Folio 751 of Document 256 refers to two individuals by name. The first named individual was concerned with the Board’s inquiry. Taking into account the context in which the first of the names appears, I am satisfied that the document contains personal information that is, *prima facie*, exempt matter under clause 3(1). However, I do not consider that to be the case with respect to the second name. Although it is not clear, the second appears to be an officer of the agency. If that is the case, then it raises the question of whether the limit on exemption in clause 3(3) might apply to the second name. Document 298 is handwritten and contains a considerable amount of personal information, as defined in the FOI Act, about a third party. In my view, that information is, *prima facie*, exempt matter under clause 3(1). However, the third party concerned is an officer of the agency. That also raises the question of whether the limit on exemption in clause 3(3) might apply.

Limit on exemption - clause 3(3)

54. Clause 3(3) provides that matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of the agency, prescribed details relating to the person, the person's position or functions as an officer, or things done by the person in course of performing functions as an officer.
55. The prescribed details referred to in clause 3(3) are set out in regulation 9 of the *Freedom of Information Regulations 1993* ('the Regulations'). Regulation 9, so far as is relevant, provides:

"9 (1) In relation to a person who is or has been an officer of an agency, details of-

- (a) the person's name;*
- (b) any qualifications held by the person relevant to the person's position in the agency;*
- (c) the position held by the person in the agency;*
- (d) the functions and duties of the person, as described in any job description document for the position held by the person; or*
- (e) anything done by the person in the course of performing or purporting to perform the person's functions or duties as an officer as described in any job description document for the position held by the person,*

are prescribed details for the purposes of Schedule 1, clause 3(3) of the Act."

56. Based on my examination of Document 298, I am satisfied that the information in it does not consist of prescribed details. The information in Document 298 is, in my view, personal information about the third party that goes well beyond the kind of information relating to the performance of the individual's duties and functions as an officer of the agency. I do not consider that the limit on exemption in clause 3(3) applies to that matter such that it would render it not exempt under clause 3(1). Accordingly, I find that Document 298 is exempt under clause 3(1).
57. The second name mentioned in folio 751 of Document 256 appears to be the name of an officer of the agency. In my view, the context in which the name appears, establishes that the information relates to things done by that officer in the performance of that officer's functions or duties. In my view, the limit on exemption in clause 3(3) applies to the name. Accordingly, I find that lines 10-13 on folio 751 of Document 256 are not exempt under clause 3(1).

Limit on exemption clause 3(6)

58. In my view, the only limit on exemption that might apply to the matter deleted from Document 13, to the whole of Document 298, and to the balance of folio 751 of Document 256 is the limit in clause 3(6), which provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. The onus of persuading me on that point rests with the complainant.

Public interest

59. I consider that the exemption in clause 3(1) is designed to protect the privacy of individuals. I recognise a strong public interest in maintaining personal privacy that may only be displaced by some stronger countervailing public interest that requires the disclosure of personal information about one person to another. There is also a public interest in the agency being able to receive information and to conduct investigations relating to the agency's various statutory functions.
60. Balanced against those public interests, I also recognise a public interest in a person such as the complainant being informed of allegations made against him and being given the opportunity to respond to such allegations, and a public interest in an applicant being able to exercise his or her rights of access under the FOI Act.
61. In the circumstances of this complaint, I am satisfied that the amended notice issued to the complainant on 28 May 1999 and the supporting affidavit of the Inspector appointed to conduct the inquiry contain details of the nature and substance of the matters that were to be considered by the Board. Proceedings before the Board are governed by s.19 of the Real Estate Agents Act and the complainant has a right to be heard in any such proceedings. Therefore, I am not persuaded that it is necessary for the complainant to have access to personal information about third parties in order that natural justice is afforded to him. Taking into account all of the material before me, I am not persuaded that the disclosure of personal information about third parties would, on balance, be in the public interest.

Edited access

62. I have also considered whether it would be practicable to give the complainant access to edited copies of Document 298 and folio 751. Due to the nature of the personal information in Document 298 and the fact that the document is handwritten, in my view it is not practicable to give the complainant access to an edited copy of that document with exempt matter deleted.
63. However, in my view it is practicable to give the complainant access to an edited copy of folio 751 of Document 256 with the name only in the first line of that folio deleted. I consider that the disclosure of a copy of folio 751 edited in that manner would not reveal personal information about any identifiable individual and would not, therefore, be exempt.

(d) Clause 5(1)(c) - Confidential source of information

64. The agency also claims exemption for Documents 3, 11, 12, 13, 16, 19-21, 30 and 237 under clause 5(1)(c). As I have found that Documents 3, 11, 12, 13, 16, 19-21 and 30 are exempt under clause 5(1)(b) and clause 3(1), I need not consider whether those documents or parts of them are also exempt under clause 5(1)(c).
65. The agency claims that Document 237 is exempt under clause 5(1)(c). Clause 5(1)(c) provides that matter is exempt matter if its disclosure would enable the existence, or non-existence, or identity of any confidential source of information, in relation to the enforcement or administration of the law, to be discovered. The exemption in clause 5(1)(c) refers to a “confidential source of information” and is therefore, in my view, not directed at protecting from disclosure a source of confidential information. The requirement of confidentiality in clause 5(1)(c) relates to the nature of the source rather than the nature of the information. The information supplied from a confidential source need not be confidential (although it may be), but it must relate to the enforcement or administration of the law.
66. Document 237 is a facsimile transmission cover sheet to the agency from a firm of solicitors. There is nothing before me from the agency that goes any way towards establishing that the firm of solicitors is a confidential source of information relating to the enforcement or administration of the law. Having considered the contents of the facsimile cover sheet, I am not persuaded from the document itself that that is the case. Therefore, I do not consider that the agency has discharged the onus on it under s. 102(1) of the FOI Act to establish that its decision to refuse access was justified. Accordingly, I find that Document 237 is not exempt under clause 5(1)(c).
