

## TITELIUS AND JUSTICE

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

**File Ref: 96065  
Decision Ref: D03596**

Participants:

**Richard Titelius**  
Complainant  
  
- and -  
  
**Ministry of Justice**  
Respondent

### DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents relating to an investigation under the *Public Sector Management Act 1994* - clause 5(1)(b) - law enforcement, public safety, property security - whether there is a need to consider public interest limitations - section 26 - documents either in possession of the agency but cannot be found or do not exist - sufficiency of search - clause 7 - legal professional privilege.

*Freedom of Information Act 1992 (WA)* ss. 72(1)(b), 75(1), 76(4); Schedule 1 clauses 3, 5(1)(b), 5(4), 6, 7, 8(2).

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

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

*Grant v Downs* (1976) 135 CLR 674.

*Trades Practices Commission v Sterling* (1979) 36 FLR 244.

*Attorney-General (NT) v Kearney* (1985) 158 CLR 500.

*Waterford v Commonwealth* (1987) 163 CLR 54.

## DECISION

The decision of the agency is confirmed. The disputed documents are exempt under clause 5(1)(b) and clause 7 of Schedule 1 to the *Freedom of Information Act 1992*.

B. KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER  
18th June 1996

## REASONS FOR DECISION

### BACKGROUND

1. This is an application for external review by the Information Commissioner arising from a decision of the Ministry of Justice ('the agency') to refuse Mr Titelius ('the complainant') access to certain documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. The background to this complaint is as follows. In March 1995 the complainant was employed as an officer of the agency at the Perth Magistrates' Court. On 26 March 1995, the complainant was charged with committing an offence under the *Public Sector Management Act 1994* by providing information of a restricted nature to a member of the public. That charge was preferred against the complainant following an investigation into the incident ordered by the then Director General of the agency.
3. On 12 December 1995, the complainant lodged with the agency an access application under the FOI Act seeking access to documents relating to the incident, including the report of the investigations officer; instructions relating to the conduct of the disciplinary hearing; internal memoranda, notes or minutes of meetings held in the agency relating to the incident; correspondence between the agency and the Attorney General; and advice to and received from the Crown Solicitor's Office.
4. The agency released a number of documents to the complainant and denied him access to other documents on the ground that those documents are exempt under clauses 3, 5(1)(b), 6, 7 and 8(2) of Schedule 1 to the FOI Act. On 13 March 1996, the complainant sought internal review of the agency's initial decision and, on 4 April 1996, Mr Malcolm Penn, Acting Manager, Executive Support, confirmed the agency's decision and the reasons for denying access to those documents.
5. On 14 April 1996, the complainant lodged a complaint seeking external review by the Information Commissioner and informed me that his reasons for doing so included concerns he had about the manner in which the agency had dealt with a previous access application he had lodged and his belief that the agency or officers of the agency may have acted improperly or corruptly during the investigation by allegedly tampering with agency records.

### REVIEW BY THE INFORMATION COMMISSIONER

6. On 19 April 1996, I notified the agency that this complaint had been made and, pursuant to my powers under ss.75(1) and 72(1)(b) of the FOI Act, I sought the production to me of the documents in dispute together with the file maintained by the agency in respect of this matter.

7. My Investigations Officer met with the complainant and the agency on separate occasions in May 1996 and discussed aspects of this complaint. At a meeting with the complainant on 15 May 1996, the complainant informed my Investigations Officer that he did not wish to pursue access to documents or parts of documents containing personal information about third parties. He also withdrew his application for access to certain documents which the agency claimed were exempt under clause 7 of Schedule 1 to the FOI Act. However, the complainant did not withdraw his claims for other documents which the agency claimed were exempt under clause 7.
8. The complainant also claimed that additional documents which come within the ambit of his access application should exist within the agency and he gave reasons for his view. My Investigations Officer subsequently visited the agency and met with the agency's FOI Co-ordinator, who explained the manner in which he had searched for documents falling within the ambit of the complainant's access application. Following that visit, a further search was made of the agency's record-keeping system which resulted in additional documents being found. The complainant was provided with access to edited copies of two documents and access was refused to two others on the ground that they are exempt under clause 7.
9. Subsequently, the complainant informed my office that he remained of the belief that additional documents should exist in the agency, in particular, a press release issued by the agency in March 1995. A further search by the agency for the particular press release failed to locate such a document. A similar document was located and the complainant was provided with access to an edited copy of that document.
10. By letter dated 18 May 1996, the complainant withdrew his complaint with respect to all of the disputed documents with the exception of those documents described in paragraph 16 below.
11. On 30 May 1996, after examining the documents in dispute and considering the material before me, I provided the parties with my preliminary view and reasons for that view. Based on the material then before me, it was my preliminary view that the documents remaining in dispute between the parties were exempt documents, either under clause 5(1)(b) or clause 7 of Schedule 1 to the FOI Act. After informing the complainant of my preliminary view, I received a further submission from him on 2 June 1996.

## **SUFFICIENCY OF SEARCHES**

12. The complainant persisted in his claim that a further media release must exist in the agency. The complainant based that contention on the fact that an article had been published in *The West Australian* newspaper on Saturday 1 April 1995 which, he said, quoted a "spokesperson" for the agency and that the words used, he said, were similar to words used by the then Attorney General in Parliament some time later.

13. In my view, even if they are accurate, those claims do not establish or offer any substantial support for the contention that a media release exists, or should exist. Quotations of a spokesperson for the agency may, for example, have been obtained by way of a telephone conversation between that person and the journalist writing the article. In any event, when the complainant first raised this issue, my office raised it with the agency which, in turn, conducted a further search of its records in an endeavour to locate the document. Although a similar document, dated 26 May 1995, was located and an edited copy given to the complainant, no such document for the date with which the complainant is concerned was found.
14. As I have said previously, when an agency refuses access to a requested document on the basis that it either does not exist or cannot be found, I do not consider it my function to physically search the agency for the document. Rather, I consider it my function to determine, firstly, whether there are reasonable grounds to support any contention that the document exists or should exist; if there are, to assess the adequacy of the searches conducted by the agency to locate the document; and, if necessary, to require the agency to conduct a further search for the document.
15. In this instance, I do not consider that the complainant's view that the document exists or should exist is based on substantial grounds. Further, even if I were satisfied that it had been established that the document exists or should exist, I consider that the agency has taken all reasonable steps to locate the document and that it either does not exist or cannot be found. Accordingly, I find that the agency's decision to refuse access on that basis was justified.

## THE DISPUTED DOCUMENTS

16. There are only 6 documents in dispute. Those documents have been listed and described by the agency on a schedule a copy of which was provided to the complainant. The disputed documents and the exemptions claimed are described below:

Document	Description	Exemption clause
A	Report of investigation dated 15/5/95 by Investigation Unit of the agency, including appendices (Documents 1-5 and 9-18 on agency's schedule).	5(1)(b)
B	Draft copy of parts of Document A, including hand written notes (Documents 30-32 on agency's schedule).	5(1)(b)
C	Memorandum dated 30/5/95 from Senior Assistant Crown Solicitor to Director General (Document 48 on agency's schedule).	7

D	Memorandum dated 1/6/95 from Senior Assistant Crown Solicitor to Director General (Document 51 on agency's schedule).	7
E	Memorandum dated 29/8/95 from Director General to Senior Assistant Crown Solicitor (Document 69 on agency's schedule).	7
F	Document entitled "Sequence of Events Re: Richard Titelius Matter" prepared by Senior Assistant Crown Solicitor dated 17/10/95 (Document 78 on agency's schedule).	7

## THE EXEMPTIONS

### (a) Clause 5(1)(b) - Law enforcement, public safety and property security

17. The agency claims that Documents A and B are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. Clause 5, so far as is relevant provides:

*"5(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;"*

*...*

- (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."*

18. The scope and meaning of the exemption in clause 5(1)(b) has been considered by the Supreme Court of Western Australia in *Manly v Ministry of Premier and Cabinet* (15 June 1995, unreported, Library No. 950310) and *Police Force of Western Australia v Kelly and Smith* (30 April 1996, unreported, Library No. 960227). In *Manly v Ministry of Premier and Cabinet* Owen J. said, at page 25, that in order to be exempt under clause 5(1)(b) a document “...must reveal something about the content of the investigation”. In *Police Force of Western Australia v Kelly and Smith*, Anderson J., after referring to the *Manly* decision, said, at page 9:

*“...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 investigation”.”*

19. It was His Honour’s view that it matters not whether the investigation has been completed. At pages 9 - 10, His Honour said:

*“Even after an investigation has been completed there may be very good operational reasons why there should be no disclosure of it...Of course there may be no need for any secrecy whatever in a particular case and there may be good public interest reasons to give public access to the documents or to give the applicant access to the documents. However, whilst that may be a relevant consideration for the agency in exercising its discretion under s23(1) whether to allow access to the documents to the public or to a particular individual, it cannot help to determine whether the documents are in fact exempt documents under cl5(1)(b).”*

20. At pages 12 and 13 of that decision, His Honour said that “[o]nce it appears that disclosure of the matter could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law in a particular case, the matter is exempt...”. Although both of those cases involved police investigations and possible contraventions of the criminal law, I consider the comments to be applicable to the case presently before me. There is nothing in clause 5(1)(b) itself or elsewhere in the FOI Act which limits the operation of that clause to police investigations of possible contraventions of the criminal law. By the plain language of that clause, in my view, it clearly applies to any investigation of a contravention or possible contravention of the law. Further, the words of the clause itself clearly contemplate investigations of breaches of disciplinary provisions.
21. I have examined Documents A and B and I am satisfied that those documents contain matter the disclosure of which could reasonably be expected to reveal an investigation into the contravention or possible contravention of the law in a particular case, in this instance being an alleged breach of the *Public Sector Management Act 1994*.

**Do the limitations in clause 5(4) apply?**

22. In several submissions to me, the complainant stated that it is his view that the agency's investigation into his actions was improper. The complainant informed my office that he has been provided with a summary of the contents of the investigator's report. However, he contends that he requires access to the complete document because he is of the view that the inquiry into his alleged misconduct was not fair and just, nor was it conducted in a proper manner.
23. Clause 5(4) operates to limit the exemption in clause 5(1)(b), if the matter claimed to be exempt is information of the kind described in clause 5(4)(a)(i), (ii) or (iii) and its disclosure would, on balance, be in the public interest. The complainant has not claimed - and, having inspected the documents, I do not consider - that the documents contain matter of the kind described in subparagraphs (ii) or (iii) of clause 5(4)(a). Accordingly, in light of the complainant's claims, clause 5(4) will only operate as a limit on the exemption in clause 5(1)(b) if the disputed documents contain matter consisting merely of information revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law and its disclosure would, on balance, be in the public interest. If the disputed documents do not contain matter of that description then clause 5(4) will not apply and there will be no scope for my consideration of whether disclosure would, on balance, be in the public interest.
24. Although the complainant made a number of submissions to me indicating that he disagreed with the outcome of the investigation and that he considered it to have been conducted in an improper and unfair manner and made some general allegations about certain of those involved in the investigation, he provided nothing that went any way to demonstrating that the scope of the investigation had exceeded the limits imposed by the law. Further, as I have said, I have examined Document A and Document B, as well as other information before me. I am satisfied that none of the limitations in clause 5(4) applies to those documents. Therefore, I find that Documents A and B are exempt documents under clause 5(1)(b) of Schedule 1 to the FOI Act.
25. I note that some of the information in Document A and Document B may have already been revealed to the complainant as a result of the disciplinary hearing to which he was a party. Some of the information is also on the public record as a result of media publicity surrounding the incident that precipitated the disciplinary hearing and following an appeal by the complainant to the Industrial Relations Commission.
26. For those reasons, on the material before me, I cannot see any need for maintaining the secrecy of those documents. However, although the agency has a discretion to disclose a document even though it is an exempt document, it has chosen not to do so on this occasion. I have no such discretion. Pursuant to s.76(4) of the FOI Act, if it is established that a document is an exempt document, I do not have power to make a decision to the effect that access is to be given to the document.



**(b) Clause 7 - Legal professional privilege**

27. The agency claims that Documents C-F are exempt under clause 7 of Schedule 1 to the FOI Act. Clause 7 provides:

*"Legal professional privilege*

*Exemption*

- (1) *Matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege.*

*Limit on exemption*

- (2) *Matter that appears in an internal manual of an agency is not exempt matter under subclause (1)."*

28. As I have said in previous decisions involving claims for exemption under clause 7, it is clearly established law in Australia that confidential communications passing between a client and his or her legal adviser need not be given in evidence or otherwise disclosed by the client and, without the client's consent, may not be given in evidence or otherwise disclosed by the legal adviser if made for the sole purpose of enabling the client to obtain, or the adviser to give, legal advice: *Grant v Downs* (1976) 135 CLR 674. A claim for privilege is not limited, in the case of such communications, to communications which have been made for the purpose of existing or contemplated litigation: *Trade Practices Commission v Sterling* (1979) 36 FLR 244.
29. Legal professional privilege also extends to “ [n]otes, memoranda, notes or other documents made by 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...”: *Trade Practices Commission and Sterling* at page 246. Further, as I stated in *Re Clements and Graylands Hospital* (9 November 1995, unreported), at paragraph 8, an agency is entitled to claim privilege for advice obtained from salaried legal officers who are employed within the agency as legal advisers, where the legal advice is given within the professional relationship between the legal officer and the client, and the advice is independent in character: *Attorney-General (NT) v Kearney* (1985) 158 CLR 500; *Waterford v Commonwealth* (1987) 163 CLR 54.
30. Documents C, D and E are respectively two memoranda from the Senior Assistant Crown Solicitor to the Director General of the agency, and a memorandum from the Director General to the Senior Assistant Crown Solicitor. On the material before me, I am of the view that Documents C and D are clearly confidential communications between the agency’s legal advisers and the agency created for the sole purpose of giving the agency legal advice. On the material before me, I accept that Document E is a confidential communication between

the agency and its legal advisers created for the sole purpose of seeking legal advice. In my view, each of those documents would be privileged from production in legal proceedings on the ground of legal professional privilege.

31. Document F is a document prepared by the Senior Assistant Crown Solicitor. Having inspected the document and taken into account the submissions of the agency, I am of the view that the document outlines information sought and obtained by the legal adviser for the sole purpose of enabling him to advise the agency and that, in parts, it records previous confidential communications between the agency and its legal advisers for the sole purpose of the giving and obtaining of legal advice and its disclosure would reveal something of the advice given. In my view, Document F would be privileged from production in legal proceedings on the ground of legal professional privilege.
32. Accordingly, I find that Documents C, D, E and F are exempt under clause 7 of Schedule 1 to the FOI Act.

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