

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

**File Ref: F1471999
Decision Ref: D0421999**

Participants: **Susan Watson**
Complainant

- and -

Education Department of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – clause 3(1) - personal information about access applicant – personal investigation file relating to access applicant – personal information about third parties – access to edited copies of documents – deletion of personal information about third parties – public interest factors for and against disclosure – public interest in maintaining privacy of third parties.

FREEDOM OF INFORMATION – refusal of access – clause 5(1)(b) – law enforcement – document relating to an investigation – scope and meaning of the phrase “reveal the investigation” in clause 5(1)(b).

Freedom of Information Act 1992 (WA) ss. 26, 45(1), 46(1)(b)(c), 102(3)
Schedule 1 clause 3(1), 3(6), 5(1)(b), 5(4)(a)(i)(ii)(iii), 5(5) and 8(1)
Education Act 1928 (WA) s.7C(2)(3)
Education Act Regulations 1960 r. 135(1)(b)

Police Force of Western Australia v Kelly and Anor (1996) 17 WAR 9

DECISION

The decision of the agency is confirmed. The matter to which access is refused in Documents 1-15 is exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*, and Document 16 is exempt under clause 5(1)(b). Further, access is also refused to the additional documents sought by the complainant because they either do not exist or cannot be found.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

25 November 1999

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Education Department of Western Australia ('the agency') to refuse Ms Watson ('the complainant') access to documents requested by her under the *Freedom of Information Act 1992* ('the FOI Act').
2. In April 1982, the complainant commenced employment with the agency as a teacher. In August 1998, the agency received a letter from the parents of a child at the school where the complainant taught, concerning aspects of the complainant's teaching. The agency informed the complainant that it had received the letter, provided her with a copy, and invited her to reply, in writing, to the particular concerns expressed in that letter. I understand that the complainant wrote directly to the parents concerned. A copy of the complainant's letter to the parents was also sent by her to the agency with her written response.
3. In November 1998, the District Director was instructed by the Director General of the agency to conduct an inquiry under regulation 135 of the *Education Act Regulations 1960* ('the regulations') into the complaint. In the interim, it appears that the agency received letters from other parents about the complainant. On 4 December 1998, the District Director reported the results of his inquiry to the Director General of the agency and recommended that a formal inquiry be conducted.
4. Following receipt of the report from the District Director, the Director General notified the complainant that a formal investigation under s.7C(3) of the *Education Act 1928* ('the Education Act') would be conducted by an independent investigator. On 3 April 1999, the independent investigator invited the complainant to attend an interview with him. Although it is not clear to me from the documents, it appears that the complainant did not respond to that invitation. The independent investigator subsequently completed his report to the agency. The Acting Director General of the agency notified the complainant of the results and gave her a copy of the report.
5. Based on that report, the Acting Director General decided to take disciplinary action against the complainant. I understand that the complainant was directed to report to a different school at the beginning of Term 3. I understand that the complainant did not comply with that direction due to illness. I also understand that the complainant is currently on leave of absence from the agency.
6. On 23 June 1999, the complainant made an application to the agency under the FOI Act seeking access to her personal investigation file and to her personal file. The agency granted the complainant access to her personal file outside the FOI

Act and granted access to most, but not all, of the documents on her personal investigation file. Although the agency refused the complainant access to 4 hand written letters, it gave her typed copies of those documents with information that would identify the authors deleted from the typed versions.

7. On 11 August 1999, the complainant sought internal review of the agency's decision and claimed that several documents were missing from the files. In particular, she alleged that certain statutory declarations required under the regulations and documents relating to an investigation in respect of another school were missing from her personal investigation file. In her request for internal review, the complainant also sought amendment by the agency of some of the information in several documents.
8. The internal reviewer confirmed the initial decision of the agency in respect of the documents comprising the personal investigation file. Some additional documents were found relating to the investigation at the other school and those documents were released to the complainant, either in full or in part. The agency described the searches it had undertaken to locate the particular statutory declarations, but none were found. Consequently, the agency refused access to those documents pursuant to s.26 of the FOI Act. In respect of her request for the amendment of certain information, the agency advised the complainant to make a fresh application for the amendment of personal information.
9. On 27 August 1999, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision in respect of her access application of 23 June 1999.

REVIEW BY THE INFORMATION COMMISSIONER

10. In order to assist me to deal with this matter, I required the agency to produce to me, for my inspection, its FOI file maintained in respect of the complainant's access application, together with the original of her personal investigation file. After examining those documents and considering the contents of the complainant's access application, inquiries were made with the complainant and with officers of the agency into the various issues raised by the complainant.
11. Some of the documents identified by the complainant in this instance are the subject of another complaint currently before me. Accordingly, I have not dealt with those documents in this decision. In the course of my review of this complaint, the agency identified an additional document that fell within the ambit of the complainant's access application. However, the agency that claims that document is exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.
12. Although it is preferable, in my view, to endeavour to resolve complaints of this nature by conciliation between the parties wherever possible, I do not consider that conciliation is an option in this case. I have dealt with this complaint on the basis that it concerns two matters: firstly, a refusal of access to some documents, either in full or in part; and, secondly, a refusal of access under s.26 of the FOI

- Act on the ground either that requested documents do not exist or cannot be found.
13. I have not dealt with the complainant's request for amendment of personal information because I do not consider that she has made a valid application for amendment that complies with the requirements in s.46(1) of the FOI Act. The right under s.45(1) to apply for the amendment of personal information is limited to the amendment of information that is inaccurate, incomplete, out of date or misleading. Section 46(1)(b) and (c) of the FOI Act requires that an applicant give enough details to the agency to enable the document that contains the information to be identified and to also give details of the matters in relation to which the applicant believes the information to be inaccurate, incomplete, out of date or misleading. In this case, the complainant did not do so.
 14. By way of comment, I do not consider that a mere assertion that information is defamatory and untrue is sufficient to comply with the requirements in s.46(1) of the FOI Act. Although the opinions of one person about another person may constitute personal information that is capable of being amended under the FOI Act, merely disagreeing with an expressed opinion does not necessarily mean that the information is inaccurate, incomplete, out of date or misleading.
 15. On 3 November 1999, after considering the material before me, I informed the parties in writing of my preliminary view of the matters remaining in dispute between them, including my reasons. It was my preliminary view that the matter to which the complainant had been refused access may be exempt under clause 3(1) of Schedule 1 to the FOI Act, and that one document may be exempt under clause 5(1)(b). It was also my preliminary view that the agency's deemed refusal of access to documents on the ground either that they do not exist or cannot be found appeared to be justified. Although the agency also claimed exemption under clause 8(1) for certain material, it has since withdrawn its claims for exemption under that clause.
 16. I received a further submission in writing from the complainant. She also informed me that her solicitor would also provide a submission. However, as at the date of this decision, no submissions have been received from the complainant's solicitor.

THE DISPUTED DOCUMENTS

17. There are 16 documents in dispute in this matter. Those documents are briefly described as follows:

Document number	Folio numbers	Document description
1	10	Letter dated 3 November 1998 from third party to Manager District Operations of the agency.
2	17-18	Handwritten undated letter from a third party to the agency.

3	19-20	Letter dated 5 November 1998 from a third party to the Perth District Education Office.
4	21	Handwritten letter dated 4 November 1998 from a third party to Manager District Operations of the agency.
5	24	Letter dated 3 November 1998 from a third party to District Director of the agency.
6	25-26	Letter dated 3 November 1998 from a third party to Manager District Operations of the agency.
7	27	Letter dated 3 November 1999 from a third party to Manager District Operations of the agency.
8	28	Handwritten letter dated 3 November 1998 from a third party to Manager District Operations of the agency.
9	30	Letter dated 3 January 1998 from a third party to Manager District Operations of the agency.
10	31	Handwritten letter dated 4 November 1998 from a third party to Manager District Operations of the agency.
11	33	Letter dated 3 November 1998 from a third party to District Director of the agency.
12	34	Copy of Document 1 addressed to the District Director
13	35	Letter dated 3 November 1998 to the District Director signed by a number of third parties.
14	70-73	Report dated 4 December 1998 from District Director to Director General of Education.
15	74	Letter dated 3 November 1998 to the District Director signed by a number of third parties (Copy of Document 13).
16	No folio numbers	Letter dated 7 January 1999 from Director General to another agency.

THE EXEMPTIONS

(a) *Clause 3 (Personal information)*

18. The agency has given the complainant access to Documents 1-15 by way of either an edited copy or, in the case of handwritten letters, a typed version of those documents with certain matter deleted from the typed version. The agency claims the matter to which access has been refused is exempt under clause 3(1) of Schedule 1 to the FOI Act. Clause 3(1), so far as is relevant, provides:

“3. Personal information

Exemption

(1) Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).

...

Limits on exemption

...

(6) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.”

19. In the Glossary to the FOI Act the term “personal information” is defined 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;”

20. The definition of “personal information” in the Glossary makes it clear that any information or opinion about a person, from which that person can be identified, is, on the face of it, exempt under clause 3(1). I have examined the matter deleted from the disputed documents and the documents that are handwritten letters. The deleted matter consists of names, addresses, telephone numbers, signatures, and other information that would clearly identify particular persons. In the case of the handwritten letters, I consider that the handwriting and other information in those letters consists of information from which the identities of the authors could reasonably be ascertained.

21. In my view, all of that matter is exempt under clause 3(1) unless any of the limits on exemption applies. In this instance, the only limit on exemption that might apply 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. Pursuant to s.102(3) of the FOI Act, the onus is on the complainant to persuade me that the disclosure of personal information about third parties would, on balance, be in the public interest.

The complainant’s submission

22. The complainant’s submission contained a number of claims about the background events leading to the agency’s investigation. In particular, she informed me that she has been badly treated by the agency and that she is concerned to ensure that the same treatment does not happen to someone else.

She claims that the names of third parties have been disclosed by the agency to other people and, since the FOI Act should be equitably and consistently applied, that information should also be disclosed to her. The complainant claims that there is a public interest in exposing the conduct of the agency and the harassment to which she has been subjected.

Public interest

23. In my view, the purpose of the exemption in clause 3(1) is to protect the privacy of third parties. I consider that there is a strong public interest in maintaining personal privacy and that that public interest may only be displaced by some other stronger countervailing public interest that requires the disclosure of personal information about one person to another person.
24. Weighing in favour of disclosure, I recognise that there is a public interest in a person such as the complainant being able to exercise her right of access under the FOI Act. I also consider that there is a public interest in people being informed of any allegations made against them to an agency and in those people being given an opportunity to respond to those allegations. I also consider that there is a public interest in the accountability of agencies for general personnel management issues and a public interest in agencies adhering to statutory requirements. In the case of this agency, there is also a public interest in ensuring a high standard of education delivered by professional, competent teachers.
25. I am of the opinion that the latter public interests have been satisfied, to a large extent, by the provision to the complainant of edited copies of some of the disputed documents and edited typed copies of others, containing the substance of the complaints made against her. I do not consider that the public interest in accountability necessarily requires the disclosure to her of personal information about third parties. In my view, the complainant has, on this occasion, been fully informed of the nature and substance of the complaints made against her and she has been given an opportunity to respond to and rebut those complaints and to offer her version of the events.
26. Balancing the competing public interests and based on the material before me, I consider that the public interest in protecting the privacy of third parties is not outweighed by any other countervailing public interest in this instance that requires the disclosure of personal information about the third parties to the complainant. Accordingly, I find that the disputed matter in Documents 1-15 is exempt under clause 3(1) of Schedule 1 to the FOI Act.

(b) Clause 5(1)(b)

27. The agency initially claimed exemption for Document 16 under clause 8(1). Following further consideration of the matter, the agency refused the complainant access to Document 16 on the ground that it was exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. Clause 5(1)(b) requires that, in order to be exempt, the disclosure of Document 16 could reasonably be expected

- to reveal the investigation of a contravention or possible contravention of the law, in a particular case.
28. The Education Act is clearly a law of this State within the meaning of clause 5(5). Under s.7C(3), the Chief Executive Officer of the agency may cause an inquiry to be held by an authorised person if it appears that a teacher may be guilty of misconduct as described in s.7C(2). An investigation to determine whether a particular teacher had engaged in conduct of the type referred to in s.7C(2) would be, in my view, an investigation into a contravention or possible contravention of the law within the meaning of clause 5(1)(b) of Schedule 1 to the FOI Act.
 29. The Supreme Court of Western Australia has determined the scope and meaning of the phrase “reveal the investigation” in clause 5(1)(b). If disclosure of the disputed matter could reasonably be expected to reveal that there has been an investigation, the identity of the person being investigated and the subject matter of the investigation then it will be exempt: *Police Force of Western Australia v Kelly and Anor* (1996) 17 WAR 9 at 13. In that case, Anderson J considered that “...*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” (ibid).*
 30. Clearly, the complainant is aware of the fact of the particular investigation by the agency under s.7C(3) of the Education Act. However, the exemption in clause 5(1)(b) can apply regardless of the actual state of knowledge of a person 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*). His Honour considered that the same state of affairs could be separately revealed in separate documents and that the separate disclosure of each separate document reveals that state of affairs (*ibid* at 14).
 31. I have examined Document 16. I consider that the disclosure of that document would reveal something of the agency’s investigation of a particular incident involving certain people and would, therefore, reveal the investigation of a contravention or possible contravention of the law within the terms of clause 5(1)(b). Clause 5(1) is subject to the limits on exemption in clause 5(4). However, I do not consider that Document 16 contains any matter of the kind described in subparagraphs (i), (ii) or (iii) of clause 5(4)(a) and clause 5(4) does not operate, therefore, in this instance to limit the exemption in clause 5(1)(b). Accordingly, I find that Document 16 is exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.

Refusal of access – s.26

32. Section 26 of the FOI Act deals with the requirements of agencies in circumstances where an agency is unable to locate documents sought by an access applicant. Section 26 provides as follows.

“Documents that cannot be found or do not exist

26. (1) *The agency may advise the applicant, by written notice, that it is not possible to give access to a document if -*
- (a) *all reasonable steps have been taken to find the document;*
and
 - (b) *the agency is satisfied that the document -*
 - (i) *is in the agency’s possession but cannot be found;*

or
 - (ii) *does not exist.*
- (2) *For the purposes of this Act the sending of a notice under subsection (1) in relation to a document is to be regarded as a decision to refuse access to the document, and on a review or appeal under Part 4 the agency may be required to conduct further searches for the document.”*

33. In dealing with a complaint against a decision of an agency to refuse access on the basis that the documents either do not exist or cannot be found, I consider there are two questions that must be answered. The first is whether there are reasonable grounds to believe the requested documents exist or should exist in the agency. In the circumstances where the first question is answered in the affirmative, the second question is whether the agency has taken all reasonable steps to locate the documents.

34. I do not consider that it is my function to physically search for the requested documents on behalf of an access applicant, nor that it is my function to examine in detail the manner in which an agency organises or maintains its record-keeping system. If I am satisfied that the requested document exists, or might exist, in an agency, it is my responsibility to inquire into the adequacy of the searches conducted by the agency, and to require the agency to conduct further searches, if necessary, to satisfy myself that the agency has acted in accordance with its obligations under the FOI Act.

Are there reasonable grounds to believe the documents exist, or should exist in the agency?

35. In her application to the agency for internal review, the complainant alleged that the statutory declarations required under the regulations were missing from the investigation file. The complainant also informed my office that she was concerned that no documents appear to exist in relation to Mr Stephen Home of the agency who had custody of her personal investigation file. The complainant expressed her concerns to me in relation to a particular document, folio 108, that

- no additional documents appear to have been prepared by Mr Home following his receipt of folio 108.
36. My office conducted inquiries into those two matters. As to the first matter, regarding the existence of the statutory declarations, according to regulation 135 of the regulations, the Chief Executive Officer of the agency may either initiate an investigation or may attempt a settlement between the parties, without a formal inquiry. The material in the personal investigation file suggests to me that it was the expectation of the agency that the complaints made against the complainant would be resolved at the local level, rather than by holding a formal inquiry. Hence, the District Director conducted the initial inquiries. In those circumstances, I consider that statutory declarations would not be a requirement.
 37. After completing his inquiries, the District Director recommended a formal investigation. That investigation might have been conducted pursuant to regulation 135, in which case statutory declarations would be required under regulation 135 (1)(b). However, the records show that the Director General of the agency decided instead, to conduct an investigation under s.7C(3) of the Education Act. I have also inspected the original of the complainant's personal investigation file. On the basis of the inquiries made by my office and a consideration of the material before me, including the original of the complainant's personal investigation file, I am not persuaded that the requested documents, the statutory declarations, exist or should exist in the agency.
 38. In respect of the second matter, my inquiries established that it is the normal practice of the agency that notices issued under s.7C of the Education Act are prepared by the Employee Relations Section. However, I understand that Mr Home was on leave at the time and, therefore, the notice relating to the investigation concerning the complainant was prepared by another officer of the agency. Further, since no other Directors in that section were available, the relieving Director General signed the notice. It appears that Mr Home did not even see the file.
 39. I am informed that Mr Home received folio 108 on 1 June 1999, initialled it on 2 June 1999 and referred it to Mr Ron Mance, as the Acting Director General, on 10 June 1999. It appears that Mr Home was not required to take any action in respect of folio 108 and, therefore, he created no documents. Further, in respect of a third entry recording that the file had been marked to Mr Home, it appears that he was not required to take any action and, therefore, he created no documents. Under those circumstances, and in the absence of any contradictory material, I accept those explanations. Accordingly, I am not persuaded that those requested documents exist or should exist in the agency.
 40. In her submission to me after receiving my preliminary view letter, the complainant also directed my attention to a further document that appeared to be missing from the sequence of documents provided to her by the agency. The particular document in question is page 1, a cover sheet to a three page facsimile transmission dated 25 May 1999. My office made additional inquiries into that aspect of the matter. I subsequently received written advice from the agency that the recipient of that particular facsimile transmission destroyed the cover

sheet because it was considered by the agency to be an ephemeral record containing no significant information and no annotations. I accept the agency's advice in that regard, in the absence of any material suggesting otherwise.

41. Therefore, I am satisfied that the facsimile cover sheet concerned existed in the agency at one time, but it no longer exists. The agency has, in any event, previously provided the complainant with a copy of the facsimile cover sheet, being folio 114 of the complainant's personal investigation file. In the circumstances, I consider that the agency has taken all reasonable steps to locate the additional documents described by the complainant. Accordingly, I confirm the decision of the agency to refuse access to those documents on the ground that they either cannot be found or do not exist.
