

DECISION SUMMARY ISSUED BY THE INFORMATION COMMISSIONER (WA)

Decision title and citation: *Re Evans and Graylands Selby-Lemnos and Special Care Health Services*
[2001] WAICmr 46

COMPLAINT No: F2001144

DECISION No: D0462001

PARTIES: Robert Charles EVANS

Complainant

GRAYLANDS SELBY-LEMNOS AND SPECIAL CARE HEALTH SERVICES

Respondent

No. of documents in dispute: 4

Exemption clause(s): Clauses 3(1) and 5(1)(b)

Mr Evans ('the complainant') is an officer of Graylands Selby-Lemnos and Special Care Health Services ('the agency'). In April 2001, the agency initiated an internal inquiry to determine whether there had been a breach of the Metropolitan Health Service Code of Conduct ('the Code') by another of its officers. At the same time, a related matter was the subject of an investigation by the Commissioner for Public Sector Standards. The complainant obtained a copy of the report into that investigation by the Commissioner for Public Sector Standards.

On 13 July 2001, the complainant made an application to the agency for access under the *Freedom of Information Act 1992* ('the FOI Act') to documents relating to the investigation conducted by the agency. Access was refused and the complainant lodged a complaint with the Information Commissioner.

Review by the Information Commissioner

I obtained the disputed documents from the agency and made inquiries into this complaint. An attempt was made to resolve this matter by conciliation, but that attempt was unsuccessful. On 23 November 2001, after considering the material before me, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that of the 5 documents in dispute, 3 might be exempt under clause 5(1)(b); 1 might be exempt under clause 3(1); and 1 might be exempt under clause 7.

The complainant withdrew his complaint in respect of the document that I considered might be exempt under clause 7. He made a written submission to me concerning the other 4 documents. He submitted that, among other things, there had been several breaches of the Public Sector Code of Ethics and the Code and that disclosure of such conduct advanced the public interest in agencies being open and accountable. I have considered the complainant's submission, but I am not dissuaded from the view that the disputed documents are exempt under clauses 3(1) and 5(1)(b) of Schedule 1 to the FOI Act. A summary of my reasons follows.

Clause 5(1)(b)

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. Clause 5(5) defines 'the law' to mean, among other things, the law of this State, and defines the term 'contravention' to include a failure to comply.

Section 9(a)(iii) of the *Public Sector Management Act 1994* ('the PSM Act') provides that all public sector bodies and employees are to comply with any code of conduct applicable to the public sector body or employee concerned. Section 80(b)(i) of the PSM Act provides that an employee who contravenes any provision of the Act, applicable to that employee, commits a breach of discipline.

I understand that the Code came into effect in June 1999 and was prepared to complement the Code of Ethics developed by the Commissioner for Public Sector Standards. I accept that it is a code of conduct applicable to the agency and its employees pursuant to section 9(a)(iii) of the PSM Act. I also accept that the PSM Act is a law as defined in clause 5(5) of Schedule 1 to the FOI Act for the purposes of clause 5(1)(b) and I am satisfied that a breach of the Code would be a failure to comply with s.9(a)(iii) of the PSM Act.

I accept that the investigation conducted by the agency was an investigation of a contravention or possible contravention of the law, namely the PSM Act.

Documents which reveal that there is or was an investigation, the identity of the people being investigated and, generally, the subject matter of the investigation fall within the terms of the exemption in clause 5(1)(b): see *Police Force of Western Australia v Kelly and Another* (1996) 17 WAR 9; *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550. Clearly, the complainant is aware of the particular investigation. However, in *Kelly's* case the Supreme Court made it clear that the exemption applies regardless of an applicant's state of knowledge about the investigation.

Document 1 is the report of the investigation. Documents 2 and 4 are letters concerning aspects of that investigation and action to be taken by the agency. I have examined Documents 1, 2 and 4. In my view, their disclosure could reasonably be expected to reveal the contravention or possible contravention of the law in the sense described in *Kelly's* case, in that it would reveal something about the content of the investigation conducted by the agency, including the identity of the person under investigation and the results of that investigation. Accordingly, I find that Documents 1, 2 and 4 are exempt under clause 5(1)(b).

Although the complainant's submission raised public interest arguments in support of disclosure, I am satisfied that the limit on exemption in clause 5(4) does not apply to any of those documents. In my view, none of them contains matter of the kind described in clause 5(4) and, accordingly, there is no scope for me to consider whether disclosure would, on balance, be in the public interest.

Clause 3

Clause 3(1) provides that matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).

The agency submits that Document 5 contains personal information about one of its officers, which does not form part of the official functions and duties of that officer and submits that, therefore, the limit on exemption in clause 3(3) does not apply to that personal information.

I have examined Document 5. I am satisfied that it contains no personal information about the complainant, but does contain personal information, as defined in the FOI Act, about third parties. Taking into account its contents, I am also satisfied that the information goes well beyond the information that is prescribed details for the purpose of clause 3(3). Accordingly, I find that the limit on exemption in clause 3(3) does not apply to Document 5.

Public interest

Clause 3(1) is also subject to the limit on exemption 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. I have considered the submissions made by the complainant relating to the public interest.

I recognise that there is a public interest in agencies being open and accountable and a public interest in the complainant being able to exercise his rights of access under the FOI Act. These are factors favouring access. On the other hand, I recognise a public interest in protecting the privacy of individuals and I consider that public interest to be a strong one.

In the circumstances of this complaint, I do not consider that the disclosure of the personal information in Document 5 would make the agency any more open or accountable and I have, therefore, given that factor less weight.

In my view, the public interest in protecting privacy is not outweighed by any stronger countervailing public interest that requires the disclosure of personal information about one person to another. Accordingly, I find that Document 5 is exempt under clause 3(1).

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER
30 November 2001