

KAPADIA AND DISABILITY SERVICES

OFFICE OF THE INFORMATION
COMMISSIONER (W.A.)

File Ref: 96082
Decision Ref: D04996

Participants:

Imtiaz Ahmed Kapadia
Complainant

- and -

Disability Services Commission
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 - whether disclosure could reasonably be expected to reveal the investigation of a contravention or possible contravention of the law in a particular case - sufficiency of search - record keeping practices of the agency - whether agency has taken reasonable steps to locate documents.

Freedom of Information Act 1992 (WA) ss. 3(3), 26(2), 30, 74(2), 75(1); Schedule 1 clauses 3(1), 5(1)(b), 5(1)(c), 5(4), 8(2).

Public Sector Management Act 1994 (WA) s. 81.

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).

DECISION

The decision of the agency is varied. The matter deleted from the disputed documents is exempt matter under clauses 5(1)(b) of Schedule 1 to the FOI Act and any further relevant documents either do not exist or cannot be found.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

16th August 1996

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Disability Services Commission ('the agency') to refuse Mr Kapadia ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. On 12 July 1995, the complainant was charged by police with the offence of stealing money from a client of his employer, the agency. After the police had preferred that charge against the complainant, the agency commenced its own investigation into allegations concerning money missing from other clients of the agency at the place at which the complainant was employed. The complainant was informed in writing of the investigation by the agency and suspended from duty as of 12 July 1995.
3. On 16 March 1996, before the charge against the complainant had been heard, the complainant applied to the agency under the FOI Act for access to documents relating to the investigation and the charge preferred against him by the police and to a particular statement made by an officer of the agency in 1995.
4. On 3 April 1996, Ms Darlene Steel, the agency's FOI Co-ordinator, without identifying any of the requested documents and without specifying the reason why matter in any particular document is claimed to be exempt, refused access to the requested documents on the ground that they were exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.
5. On 1 May 1996, the complainant applied to the agency for internal review. In the meantime, the charge against the complainant was heard on 9 and 10 May 1996. Following the hearing of that charge, on 15 May 1996, Mr John Knowles, Director Corporate Services of the agency, reviewed the agency's initial decision and granted the complainant access to two documents with exempt matter deleted.
6. Following being found guilty of the charge against him, the complainant was dismissed from his employment in the agency. Thereafter, the complainant lodged a complaint with the Information Commissioner against the agency's decision to provide him with access to edited copies of 2 documents. The complainant also raised the issue of the existence of additional documents within the ambit of his access application which the agency had not identified and to which access was taken, therefore, to have been refused.

REVIEW BY THE INFORMATION COMMISSIONER

7. Pursuant to my power under s.75(1) of the FOI Act, I obtained copies of the disputed documents from the agency. As the agency's notice of decision did not comply with the requirements of s.30 of the FOI Act, I also sought reasons for the agency claiming the matter in the documents to be exempt matter and the findings on material questions of fact underlying those reasons, and reference to the material on which those findings were based. Subsequently, the agency claimed that the matter deleted from the disputed documents is exempt matter under clauses 3(1), 5(1)(b), 5(1)(c) and 8(2) of Schedule 1 to the FOI Act.
8. After examining the disputed documents and considering the reasons given by the agency for the exemption, on 24 July 1996, I provided the parties with my preliminary view on this complaint and my reasons for that view. It was my preliminary view that the agency's claims for exemption under clause 5(1)(b) were justified. Further, in respect of the complaint concerning documents that had not been identified by the agency, it was also my preliminary view that the agency's decision to refuse access to those documents on the ground that they did not exist was justified. The complainant was given the opportunity to reconsider his complaint in light of my preliminary view and to withdraw his complaint, or, alternatively, to make further submissions to me. However, nothing further was received from the complainant by my office by the due date or at all.

THE DISPUTED DOCUMENTS

9. There are two documents in dispute in this matter. The first document is described by the agency as an internal memorandum dated 14 July 1995, addressed to the Regional Director (Document 1). The second is described by the agency as a statement submitted by the agency's Industrial Officer to the Acting Chief Executive Officer of the agency (Document 2).

THE EXEMPTIONS

10. The agency claims the matter deleted from Documents 1 and 2 is exempt matter under clauses 3(1), 5(1)(b), 5(1)(c) and 8(2) of Schedule 1 to the FOI Act. I propose to consider the agency's claim for exemption under clause 5(1)(b) as I consider that claim to be justified. Clause 5(1)(b) 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;"

11. The scope and meaning of the exemption in clause 5(1)(b) has been considered and determined by the Supreme Court in this State. In *Manly v Ministry of Premier and Cabinet* (Supreme Court of Western Australia, 15 June 1995, unreported, Library No. 950310), 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”. Further, in *Police Force of Western Australia v Kelly and Smith* (Supreme Court of Western Australia, 30 April 1996, unreported, Library No. 960227), another decision dealing with the scope and meaning of the exemption in clause 5(1)(b), 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”.”

12. It was His Honour’s view that it matters not the stage at which an investigation had reached or whether the investigation had in fact 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 cl 5(1)(b).”

13. 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...”.
14. Under s.81 of the *Public Sector Management Act 1994*, the agency is empowered to conduct investigations, in accordance with prescribed procedures, relating to a suspected breach of discipline under that Act. The *Public Sector Management Act 1994* is clearly, a law for the purposes of clause 5. If an investigation has been conducted by an agency under that Act, in my view, documents created during that investigation would be expected to contain information relating to various aspects of the investigation including, but not limited to, the identification of persons interviewed and evidence gathered by the investigator.
15. Some of the matter deleted by the agency from Document 1 and Document 2 consists of names of third parties, names of officers of agencies spoken to during the investigation and other information which would identify those persons. Other deleted matter is more directly related to aspects of the investigation.

However, having regard to my obligations under s.74(2) of the FOI Act, I am unable to discuss the nature of the deleted matter in any detail.

16. In this instance the agency provided the complainant with access to certain information in the disputed documents which clearly is personal information about the complainant. It appears to me that that decision was taken by the agency in the exercise of its discretion under s.3(3) of the FOI Act to give access to a document, or part of a document, which is technically exempt. Based on the material before me and my own examination of the disputed documents, I consider that it was open to the agency to claim exemption under clause 5(1)(b) for the whole of the disputed documents, not merely the matter deleted from those documents. That decision is one which the agency alone is entitled to make.
17. In this instance, I am satisfied that the disclosure of unedited copies of Document 1 and Document 2 could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law, namely the *Public Sector Management Act 1994*. I am also satisfied that the limitation in clause 5(4) does not apply to the disputed documents and that there is no scope for my consideration of whether disclosure of those documents would, on balance, be in the public interest. Accordingly, I find that the matter deleted from the disputed documents is exempt under clause 5(1)(b).
18. Although I consider that some of the deleted matter may also be exempt matter under clause 3(1) of Schedule 1 to the FOI Act, I need not consider the agency's claims for exemption under clauses 3(1), 5(1)(c) and 8(2) as I have found that the deleted matter constitutes exempt matter under clause 5(1)(b) for the reasons already given.

Documents alleged to be missing

19. The complainant also claims that additional documents should exist in the agency's record-keeping system. It was submitted by the complainant that he was never aware that the police were involved in the investigation of missing monies, nor was he advised at any time that they would be involved. According to the complainant, the lack of advice in this respect confirms his belief that additional documents must exist in the agency which record the involvement of the police. It was confirmed in a meeting with the complainant that he was seeking access to documents that would indicate how the agency reached the conclusion that he was involved in the alleged theft of money and why it was necessary for the police to be involved.
20. As I have said before, to deal with a complaint against a decision of an agency to refuse access to documents on the basis that documents either do not exist or cannot be found, I consider there are two questions that must be answered. Firstly, are there reasonable grounds to believe that the requested documents exist or should exist? Secondly, in circumstances in which the first question is

answered in the affirmative, were the searches conducted by the agency to locate the documents reasonable in all the circumstances?

21. In order to answer the first of those questions, my Investigations Officer inspected the file maintained by the agency in respect of the relevant investigation. I am informed by the agency that it maintains only one centralised record-keeping system containing one file relevant to the complainant's access application. No records are kept or maintained at the regional office of the agency. The inspection of that file by my officer confirmed that the agency has identified and dealt with all documents within the ambit of the complainant's access application.
22. Inquiries were made with the police officer responsible for the investigation. I am informed that the complaint to the police from the agency which initiated the police investigation and which resulted in the charge preferred against the complainant was a verbal complaint and no documents were given to the police by the agency.
23. As a result of the inquiries carried out in the course of my dealing with this complaint, there is no material from which I can conclude that additional documents exist, or should exist, in the agency. Whilst I have the power under s.26(2) of the FOI Act to require an agency to conduct further searches in an effort to locate documents where it appears that those searches initially were inadequate, in the circumstances, I am satisfied that the agency took reasonable steps to locate within the ambit of the complainant's access application and no further searches are necessary.
24. Accordingly, I confirm the decision of the agency to refuse access to documents of the kind described by the complainant on the ground that those documents either cannot be found or do not exist.
