

HUNTER AND FISHERIES

OFFICE OF THE INFORMATION
COMMISSIONER (W.A.)

File Ref: 95058
Decision Ref: D05295

Participants:

Vaughan Travis Hunter
Complainant

- and -

Fisheries Department of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - correspondence between the agency and its legal adviser - internal report to agency's legal officer - clause 7 - legal professional privilege - statements to agency's investigating officer - clause 3 - personal information - personal information about third parties - public interest factors for and against disclosure - clause 4(3) - commercial or business information - public interest factors for and against disclosure - clause 5(1)(b) and (c) - law enforcement, public safety and property security.

Freedom of Information Act 1992 (WA) ss.6, 72(1)(b), 74(2), 75(1), 102(3); Schedule 1 clause 3(1), 4(3), 4(7), 5(1), 7; Schedule 2 Glossary.

Fisheries Act 1905.

Marine Act 1982.

Re Read and Public Service Commission (Information Commissioner, WA, 16 February 1994, unreported).

Re Oset and Ministry of Justice (Information Commissioner, WA, 26 October 1995, unreported).

Grant v Downs (1976) 135 CLR 674.

Baker v Campbell (1983) 153 CLR 52.

Manly v Ministry of Premier and Cabinet (Supreme Court of Western Australia, 15 June 1995, unreported).

DECISION

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

- Document 1 is not exempt under clause 7 of Schedule 1 to the *Freedom of Information Act 1992* ('the FOI Act');
- Except for the fourth paragraph on page 2 of Document 2 which is not exempt, the matter deleted from Document 2 is exempt matter under clause 7 of Schedule 1 to the FOI Act;
- The matter deleted from Document 3 is exempt matter under clause 7 of Schedule 1 to the FOI Act;
- Document 4 is exempt under clause 7;
- Attachments A, B, E, J and K to Document 4 are not exempt;
- Attachments C and D to Document 4 are exempt under clause 3(1) of Schedule 1 to the FOI Act; and
- Attachments F-I are exempt under clause 4(3) of Schedule 1 to the FOI Act.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

20th November 1995

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Fisheries Department of Western Australia ('the agency') to refuse Mr Hunter ('the complainant') access to certain documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. The complainant and his father operate a fishing vessel in an area near Mandurah designated as a restricted entry trawl fishery. For some time now the complainant and his father have been engaged in a dispute with the agency over the legality of rules imposed by the agency on fishing licences relating to trawl fishing in the restricted entry trawl fishery, particularly as they relate to the sale of a fishing vessel the "Silvery Wave", and the alleged transfer of the fishing licence with the sale of that vessel.
3. On 21 February 1995, the complainant applied to the agency under the FOI Act seeking access to four documents, namely, copies of certain legal advice and a copy of the agency's report of an investigation into the sale of the "Silvery Wave", prepared by Mr Breeden, an officer of the agency.
4. On 11 April 1995, the complainant applied to the Information Commissioner for external review as he had not received a response from the agency concerning his FOI access application. On advice from my office the complainant applied to the agency for internal review of its "deemed refusal" of access to the requested documents. On 11 May 1995, a decision on internal review was made by Mr P Millington, Director, Fisheries Management Policy of the agency. In his notice of decision to the complainant Mr Millington refused access to the requested documents on the grounds that they are exempt under clauses 5(1)(b) and (c) and under clause 7 of Schedule 1 to the FOI Act.
5. On 18 May 1995, the complainant sought external review by the Information Commissioner of that decision.

REVIEW BY THE INFORMATION COMMISSIONER

6. Pursuant to my powers under s.75(1) and s.72(1)(b) of the FOI Act, on 31 May 1995, I obtained copies of the disputed documents from the agency, together with the agency's FOI file dealing with this matter. In the course of my dealing with this complaint the agency agreed to provide the complainant with edited copies of two of the disputed documents from which exempt matter had been deleted. However, the complainant was not satisfied that at least one of the documents to which he has been granted access by the agency was one of the documents requested by him in his access application. Therefore, a question also

arose as to the sufficiency of the searches undertaken by the agency to identify and locate the documents requested by the complainant.

7. After examining the documents in dispute and considering the submissions of the parties, on 5 October 1995, 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 parts of the disputed documents may contain exempt matter but that other parts did not appear to contain exempt matter. Further, in relation to that part of the complaint concerning the sufficiency of searches undertaken by the agency to identify and locate the documents requested by the complainant, I informed both parties that it was my preliminary view that the searches had been, in all the circumstances, reasonable.
8. On 7 October 1995, the complainant responded to my preliminary view and provided a further submission for my consideration. He also accepted my preliminary view regarding the sufficiency of the searches conducted by the agency and withdrew that part of his complaint. Although the agency was also given the opportunity to respond to my preliminary view, no further submissions were received by my office.

THE DISPUTED DOCUMENTS

9. There are four documents in dispute between the parties. Those documents and the exemptions claimed by the agency are described as follows:

Document 1 letter dated 4 August 1988, to the agency from Assistant Crown Solicitor concerning "Change of Ownership in Limited Entry Fisheries".

The agency claims this document is exempt under clause 7.

Document 2 letter dated 13 May 1994, from agency to Crown Solicitor seeking advice on the validity of rules pertaining to Mandurah Trawl Fishery.

The agency claims that matter deleted from this document is exempt under clause 7.

Document 3 letter dated 18 May 1994, from Senior Assistant Crown Solicitor to the agency containing the advice requested in Document 2.

The agency claims that the matter deleted from this document is exempt matter under clause 7.

Document 4 report dated 26 August 1994, from Mr John Breeden, Senior Fisheries Officer, Special Investigations Section of the agency,

to Mr Tony O'Connor, Legal Officer of the agency, with attachments.

The agency claims this document is exempt under clause 5(1)(b) and (c).

THE EXEMPTIONS

(a) Clause 7 - Legal professional privilege

10. Clause 7 of Schedule 1 to the FOI Act 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)."*

11. In a number of my formal decisions, I have discussed the principle and application of legal professional privilege, initially in *Re Read and Public Service Commission* (16 February 1994, unreported), at paragraphs 65-66, and most recently in *Re Oset and Ministry of Justice* (26 October 1995, unreported), at paragraphs 13-16.
12. I repeat my comments concerning the application of that privilege as it applies to the exemption in clause 7. It is clearly established law in Australia that confidential communications passing between a legal adviser and his or her client 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 or for use in existing or anticipated legal proceedings: *Grant v Downs* (1976) 135 CLR 674; *Baker v Campbell* (1983) 153 CLR 52.
13. The test to be applied in order to decide whether a document attracts legal professional privilege is the "sole purpose" test. This requires a consideration of whether the document was brought into existence for the sole purpose of giving or receiving legal advice or for use in existing or anticipated legal proceedings: *Grant v Downs* (*op. cit.*).

14. From my examination of Documents 1, 2 and 3, I am satisfied that each of those documents is, *prima facie*, exempt under clause 7 of Schedule 1 to the FOI Act on the basis that it would be privileged from production in legal proceedings on the ground of legal professional privilege. Document 2 is a request for legal advice and Document 3 contains the advice requested. Document 1 also contains legal advice to the agency from the Crown Solicitor. They are clearly confidential communications between the agency and its legal adviser created for the sole purpose of giving or seeking legal advice.
15. However, from material before me, it appears that the complainant's father obtained a copy of Document 1 from the agency in response to an access application submitted by him under the FOI Act. The complainant produced a copy of Document 1 for my inspection. I am satisfied that the document produced for my inspection is identical to Document 1. I consider that in those circumstances the agency has waived its privilege in respect of Document 1 by releasing a copy of that document to the complainant's father. In my view, Document 1 would not, therefore, be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find that Document 1 is not exempt under clause 7.
16. The complainant has been provided with access to edited copies of Documents 2 and 3. The agency claims exemption under clause 7 for certain matter that has been deleted from those documents. Document 2 consists of two pages. The second and third paragraphs have been deleted from page 1, together with the first and second paragraphs, parts of the third paragraph and all of the fourth paragraph from page 2. Except for the fourth paragraph on page 2, I am satisfied that the deleted matter comprises the substance of the issue about which the agency was seeking legal advice from the Crown Solicitor's Office. In my view, that matter would be privileged from production in legal proceedings on the ground of legal professional privilege.
17. The fourth paragraph contains the names and telephone numbers of contact people in the agency. In my view, that information is not exempt under clause 7, nor is it exempt for any other reason.
18. The matter deleted from Document 3 contains legal advice provided to the agency by the Crown Solicitor's Office. In my view, that matter would also be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find that, except for the fourth paragraph on page 2 of Document 2, the matter deleted from Document 2 and Document 3 is exempt matter under clause 7 of Schedule 1 to the FOI Act.

(b) Clauses 5(1)(b) and 5(1)(c) - Law enforcement, public safety and property security

19. The agency claims that Document 4 is exempt under sub-clauses 5(1)(b) and (c) of Schedule 1 to the FOI Act. Clause 5(1) so far as is relevant provides:

"5. Law Enforcement, public safety and property security

Exemptions

(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;*

(c) *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;"*

20. In my view, clause 5(1)(b) is intended to protect the public interest in law enforcement and other regulatory bodies being able to effectively carry out their functions without interested observers or possible suspects knowing in advance what those inquiries are likely to be. Further, the scope of the exemption and the meaning of the words "reveal the investigation" in clause 5(1)(b) of Schedule 1 to the FOI Act arose for consideration by the Western Australian Supreme Court in *Manly v Ministry of Premier and Cabinet* (15 June 1995, unreported). Owen J said, at p.25 of the judgment:

"I think the clause is aimed at the specifics of an investigation, and not at the mere fact that there is or has been an investigation...A document is not exempt from disclosure simply because it would reveal the fact of an investigation. It must reveal something about the content of the investigation.

I also think that it would be wrong to test the coverage of the clause by looking at the document in isolation. It must be considered in the light of the surrounding circumstances and in view of what else is known to the parties and the public...The exemption applies if disclosure of that document would reveal the investigation. There must be something in the document which, when looked at in the light of the surrounding circumstances, would tend to show something about the content of the investigation. If that material is already in the public arena then it could not properly be said that the disclosure of the document would reveal the investigation."

21. Clause 5(1)(b) exempts matter that could reasonably be expected to reveal the investigation into a contravention or possible contravention of the law. The agency claims that the complainant's allegations concerned the validity of the rules made under the *Fisheries Act 1905* governing the Mandurah Trawl Fishery

and submits that it was possible that the rules had been breached. However, the agency has not been able to direct me to any specific contravention or possible contravention of the law that it was investigating.

22. In my view, the agency's claims are not sufficient to establish a valid claim for exemption under clause 5(1)(b). I consider that the words "in a particular case" in clause 5(1)(b) narrow the application of the exemption and require that the contravention be particularised, at the very least, by reference to some action or inaction that may be a contravention or possible contravention of the law.
23. In response to a request from my office to provide information concerning the circumstances in which Document 4 had been created, the agency informed me that this particular inquiry was not a normal investigation commenced after the submission of a "Breach Report" from a fisheries officer. Rather it was treated as a "one-off" inquiry by the agency, initiated in response to a complaint made to the Minister for Fisheries by the complainant, and it was referred for assessment by the agency's legal officers.
24. On the basis of information provided by the agency, and from my own examination of Document 4, I am not satisfied that the disclosure of Document 4 could reasonably be expected to reveal anything about the investigation into any contravention or possible contravention of the law. In my view, the inquiry by Mr Breeden was an inquiry conducted for the purpose of determining who were the legal owners of the fishing vessel "Silvery Wave", in so far as the question of the legal ownership of that vessel and the license to fish in the Comet Bay Trawl Fishery between Mandurah and Safety Bay, now known as Zone D (Mandurah area) was in issue. Accordingly, I find that Document 4 is not exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.
25. I also reject the claim that Document 4 is exempt under clause 5(1)(c). That clause is directed at preserving the anonymity of sources of information. It is concerned with protecting the confidentiality of the source of information to an agency, regardless of whether the information from that confidential source is confidential or not. There is no information before me that supports the agency's claim that an officer of the agency is a confidential source of information, nor do I consider the persons providing information in the form of the records of interview attached to Mr Breeden's report to fit into that category. Accordingly, I find that Document 4 is not exempt under clause 5(1)(c) of Schedule 1 to the FOI Act.

Is Document 4 exempt for any other reason?

26. From my examination of Document 4, it appears to me that Mr Breeden's report may have been prepared for the purpose of seeking legal advice. Document 4 is addressed to Mr T O'Connor, who is a solicitor employed by the agency. The report requests legal advice from Mr O'Connor about matters related to the legal ownership and the fishing boat licences in respect of the vessel the "Silvery Wave". Whilst it was my preliminary view that Document 4 may have been

exempt under clause 7, at that stage there was insufficient material to satisfy me that it had been created for the sole purpose of seeking legal advice. In fact, the advice given to me from Mr O'Connor was that the document had been created for some other purpose.

27. Accordingly, two of my officers met with Mr Breeden, the author of Document 4, to clarify the matter. Mr Breeden informed my officers that he prepared Document 4 for the express purpose of referring it to Mr O'Connor for his legal advice about the issues concerning the vessel the "Silvery Wave". On the basis of that advice and my own examination of the document, I informed the complainant that I was satisfied that Document 4 would be privileged from production in legal proceedings on the ground of legal professional privilege.
28. The complainant did not accept my view on the exempt status of Document 4 and he made a further submission to me about the matter. The complainant submitted that he had been advised by a lawyer that this was a case of criminal fraud and that my preliminary view about Document 4 was based on false evidence produced by the agency. Notwithstanding those claims, there is no evidence before me to substantiate the matters raised in the complainant's submission. On the basis of the document itself and Mr Breeden's evidence, I am satisfied that Document 4 was created for the sole purpose of seeking legal advice, an essential requirement for the document to attract the protection of legal professional privilege: *Grant v Downs* (1976) 135 CLR 674. Therefore, I am of the view that Document 4 would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find that Document 4 is exempt under clause 7 of Schedule 1 to the FOI Act.

The attachments to Document 4

29. There are other documents attached to Document 4. Those documents are described as Attachments A-K. The agency did not make any initial submissions as to the exempt status or otherwise of those attachments, nor did it provide any submissions after receiving my preliminary view. From my examination of those attachments, I consider some are not exempt for any reason and others are exempt under clause 3(1) or clause 4(3) of Schedule 1 to the FOI Act, for the following reasons.
30. Attachment A is a letter to the complainant's father containing conditions attached to his fishing licence. That document is unlikely to be exempt for any reason. Accordingly, on the material before me, I find that attachment A to Document 4 is not exempt. Attachment B consists of copies of relevant sections from the Western Australian *Marine Act 1982*. On the material before me I find that attachment B is not exempt.
31. Attachments C and D are records of interview between Mr Breeden and third parties which contain a considerable amount of personal information about third parties, other than the complainant. In my view, that information is, *prima facie*,

exempt matter under clause 3(1) of Schedule 1 to the FOI Act. Clause 3(1) 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

- (2)..
(3)..
(4)..
(5)...

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

32. In the Glossary in Schedule 2 to the FOI Act, "**personal information**" is defined as meaning "...*information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead*

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- (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."*

33. As I have said before, I consider the purpose of the exemption in clause 3 is to protect the privacy of individuals, the exemption being a recognition by Parliament of the fact that all government agencies collect and hold a vast amount of important and sensitive private information about individual citizens and that information of that kind should not generally be accessible by other persons without good cause.

34. Pursuant to s.102(3) of the FOI Act, the complainant bears the onus of establishing that he should be given access to personal information about third parties. Except for the submission referred to in paragraph 39 below, the complainant did not address that point. I recognise that there is a public interest in the protection of the privacy of individuals. I also recognise a public interest in the complainant being able to exercise his rights of access under the FOI Act. However, I do not consider, in this instance, that the latter public interest is of sufficient force to outweigh the former. Therefore, I find Attachments C and D are exempt under clause 3(1) of Schedule 1 to the FOI Act.

35. Attachments F, G, H, and I contain personal information about parties other than the complainant. The personal information includes private addresses and dates of birth. In addition, those attachments also contain information about the third parties that is of the kind referred to in clause 4(3) of Schedule 1 to the FOI Act. However, I am unable to describe that information in detail without breaching the requirements of s.74(2) of the FOI Act.
36. Clause 4, so far as is relevant, provides:

"4. Commercial or business information

Exemptions

(1)...

(2)...

(3) *Matter is exempt matter if its disclosure -*

(a) would reveal information (other than trade secrets or information referred to in subclause (2)) about the business, professional, commercial or financial affairs of a person; and

(b) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.

Limits on exemptions

(4) *Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of an agency.*

(5) *Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of the applicant.*

(6) *Matter is not exempt matter under subclause (1), (2) or (3) if the applicant provides evidence establishing that the person concerned consents to the disclosure of the matter to the applicant.*

(7) *Matter is not exempt matter under subclause (3) if its disclosure would, on balance, be in the public interest."*

37. The exemption in clause 4(3) is general in its terms and is directed at protecting from adverse effects, the business, professional, commercial or financial affairs of a person, in circumstances where disclosure of that kind of information could

reasonably be expected to produce some adverse effect on those affairs, or could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency. Thus, clause 4(3) provides a means whereby the general right to access documents in the possession or control of government agencies can be prevented from causing unwarranted commercial harm to persons and business entities dealing with government agencies. However, the "public interest test" in clause 4(7) also envisages that some kinds of business or commercial information may be disclosed if, on balance, it would be in the public interest to do so. Under s.102(3) of the FOI Act the onus is on the complainant to establish that disclosure of information of the type described in clause 4(3) would, on balance, be in the public interest.

38. Although the agency did not provide any material for my consideration, I am satisfied, from my examination of attachments F, G, H and I, and from the information provided by Mr Breeden, that they contain information of the type described in paragraph (a) of sub-clause 4(3). Further, I am satisfied that the business and commercial information in those attachments was provided to Mr Breeden voluntarily by third parties in order to assist him to prepare his report. I am also satisfied that the attachments contain no information, personal or otherwise, about the complainant. On that basis, I consider that the disclosure of private business and commercial information about third parties, voluntarily given to the agency, could reasonably be expected to prejudice the future supply of that kind of information in the future to the agency. Therefore, the exempt status or otherwise of those attachments must be determined by an application of the "public interest test" in clause 4(7).

The public interest

39. The complainant submitted that it was in the public interest for the disputed documents to be disclosed because the management and rules of the fishing industry are entrusted to the Minister for Fisheries and the agency on behalf of the public. It was the submission of the complainant that the agency should be answerable for that management process and that it should not be allowed to hide behind legal technicalities.
40. I recognise a public interest in the protection and maintenance of individual privacy and in the protection of information about the business, professional, commercial or financial affairs of third parties recorded in documents held by State and local government agencies. I also recognise a public interest in maintaining the ability of the agency to obtain that kind of information in the future to assist the agency in the discharge of its statutory responsibilities. Against those public interests, I accept that there is a public interest in the accountability of the agency for the proper discharge of its duties. Having inspected the documents and considered their contents and nature, I am not satisfied that their disclosure would satisfy that public interest to any extent. I also recognise a public interest in the complainant being able to exercise his rights of access under the FOI Act. Balancing those competing public interests, in this instance, I am not persuaded that the latter outweighs the former. Accordingly, I

find that attachments F-I inclusive are exempt under clause 4(3) of Schedule 1 to the FOI Act.

41. Attachments J and K are copies of licences issued under the *Fisheries Act 1905*. I was not provided with any material from the agency to establish the exempt status or otherwise of those documents. Further, it is my understanding that the information contained in attachments J and K is available from the agency upon payment of a fee. If that is the case, then s.6 of the FOI Act operates to exclude those documents from the access provisions under the FOI Act. In any event, they are not exempt under the FOI Act. From my own examination of attachments J and K, I am satisfied that those documents do not contain any confidential information, nor do they contain any business or commercial information about third parties that is not known by the complainant, given his involvement in the fishing industry. Accordingly, I find those documents are not exempt for any reason.
