HILL AND UWA

OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	File Ref: 95198 Decision Ref: D06095

Participants:

Murray William Hill
Complainant

- and -

The University of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents relating to external review of department of agency - clause 3(1) - personal information - clause 8(2) - confidential communications - information of a confidential nature obtained in confidence - prejudice future supply - candour and frankness of future responses - clause 11(1)(c) - effective operations of agencies - substantial adverse effect on agency's management or assessment of its personnel - public interest factors relevant to disclosure.

Freedom of Information Act 1992 (WA) ss. 72(1)(b), 75(1), Schedule 1 clauses 3(1), 8(2), 11(1)(c).
Freedom of Information Act 1982 (C'wlth) ss. 40(b), 43(1)(c)(ii).

Re Rindos and The University of Western Australia (Information Commissioner, WA, 10 July 1995, unreported).
Attorney-General's Department v Cockcroft (1986) 10 FCR 180.
Manly v Ministry of Premier and Cabinet (Supreme Court of Western Australia, 15 June 1995, unreported).
Ryder v Booth [1985] VR 869.
Department of Health and Anor v Jephcott (1985) 62 ALR 421.
Searle Australia Pty Ltd v Public Interest Advocacy Centre (1992) 108 ALR 163.
Harris v Australian Broadcasting Corporation (1983) 78 FLR 236.
Re Jones and Shire of Swan (Information Commissioner, WA, 9 May 1994, unreported).
Re Healy and Australian National University (Commonwealth Administrative Appeals Tribunal, 23 May 1985, unreported).
Re James and Australian National University (1984) 2 AAR 327.

DECISION

The decision of the agency is set aside. In substitution it is decided that the disputed document is not exempt under clauses 8(2) and 11(1)(c) of Schedule 1 to the *Freedom of Information Act 1992*, and the complainant is entitled to have access to an edited copy of the disputed document from which the matter described in paragraph 41 of this decision has been deleted.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

11th December 1995

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision by The University of Western Australia ('the agency') to refuse Professor Hill ('the complainant') access to a confidential report provided to the Vice Chancellor of the agency in 1990.

2. During the late 1980's, the complainant was appointed to a Chair in Dentistry following a standard selection process in the agency, and he was subsequently appointed Head of the School of Dentistry. In August 1990, a review of the School of Dentistry was conducted by Professor Hume, then Dean, Faculty of Dentistry, University of Sydney, Mr D L Baker, Dental Surgeon and Mr G B Barblett, Dental Surgeon ('the Review Team').

3. On 17 August 1990, the Review Team provided its report to the Vice Chancellor. The complainant was provided with a copy of that report and he was given the opportunity to comment upon its findings and recommendations. The Review Team also provided the Vice Chancellor with a second report ('the disputed document'). It is my understanding that the disputed document was confidential and remained confidential with it contents known only to two or three people within the agency including the Vice Chancellor.

4. On 24 July 1995, some time after the complainant became aware of the fact of the existence of the disputed document and after his earlier attempts to obtain a copy of that document had failed, the complainant again sought access to a copy of the disputed document pursuant to his rights under the *Freedom of Information Act 1992* ('the FOI Act'). That request was denied by the agency on 3 August 1995 on the grounds that the disputed document is exempt under clauses 3(1), 8(2) and 11(1)(c) of Schedule 1 to the FOI Act.

5. On 8 August 1995, the complainant applied to the agency for internal review of that decision. On 21 September 1995, after consulting with the authors of the disputed document, the Registrar of the agency confirmed the earlier decision. On 29 September 1995, the complainant applied to the Information Commissioner for external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

6. On 18 October 1995, the agency was notified that a complaint had been made to my office in relation to this matter. Pursuant to my authority under ss.75(1) and 72(1)(b) of the FOI Act, I sought the production to me of the document in dispute, together with the agency's FOI file maintained in respect of this matter. Those documents were delivered to my office on 19 October 1995.

7. On 30 October 1995, my office consulted with Professor Hume, the chairman of the Review Team, about the disclosure of the disputed document. On 16 November 1995, after examining the disputed document and considering the submissions of the parties, including a submission from Professor Hume, I provided the parties with my preliminary view and reasons for that view.

8. The agency and the complainant responded to my preliminary view with further submissions. The complainant accepted my view that parts of the disputed document contain personal information about third parties which is, *prima facie*, exempt matter under clause 3(1) of Schedule 1 to the FOI Act. Thereafter, the complainant did not seek access to those parts of the disputed document. However, the agency maintains its claims that the disputed document is exempt under clauses 8(2) and 11(1)(c) of Schedule 1 to the FOI Act.

THE DISPUTED DOCUMENT

9. The disputed document is a 3 page letter to Professor F Gale, Vice Chancellor of the agency, dated 17 August 1990, from the Review Team. It is marked "Confidential" and is signed by each member of the Review Team. There is material before me that indicates that the disputed document was sent to the Vice Chancellor under separate cover from the main report. There is also material before me that indicates the document was treated confidentially and that it was accorded special treatment in that it was not placed upon any of the agency's files in the normal manner but was kept in the office of the Vice Chancellor.

10. Notwithstanding those facts, the agency identified the document as a "document of an agency" to which the FOI Act applied. In my view, that decision is correct. I accept that the disputed document is a document to which the complainant is entitled to have access under the FOI Act, subject to any valid claims for exemption.

THE EXEMPTIONS

(a) Clause 8(2) - Confidential communications

11. Clause 8 of Schedule 1 to the FOI Act , so far as is relevant, provides:

> *"**Confidential communications***
>
> ***Exemptions***
>
> *(1)...*
>
> *(2) Matter is exempt matter if its disclosure -*

(a) would reveal information of a confidential nature obtained in confidence; and

(b) could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.

Limits on exemption

(3)...

(4) Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest."

12. In previous decisions, and most recently in my decision involving the agency in *Re Rindos and The University of Western Australia* (10 July 1995, unreported), at paragraphs 27-32, I have discussed the meaning of clause 8(2). My comments on the scope and meaning of clause 8(2) in my decision in *Re Rindos* are relevant to the matters in dispute in this instance and I repeat those comments. To establish a *prima facie* claim for exemption under clause 8(2), the agency must not only show that the document contains information of the type described in paragraph (a) of sub-clause 2, but also that it meets the requirements of paragraph (b) of sub-clause 2.

13. The words *"could reasonably be expected to..."* in clause 8(2) also appear in several other exemption clauses in Schedule 1 to the FOI Act. I accept and previously have accepted the meaning of the phrase *"could reasonably be expected to prejudice the future supply of information"* that was given by the Full Federal Court in *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180, when the Court considered the meaning of s.43(1)(c)(ii) of the Commonwealth FOI Act, the Commonwealth equivalent to the exemption in clause 8(2). Bowen C.J. and Beaumont J. said, at 190, that those words were intended to receive their ordinary meaning and require a judgement to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that those who would otherwise supply information of the relevant kind to the Government would decline to do so if the documents in question were disclosed. In my view, that is the correct test to be applied by agencies to the interpretation of the same words in clause 8(2).

14. In *Manly v Ministry of Premier and Cabinet* (Supreme Court of Western Australia, delivered 15 June 1995), Owen J., at page 43, found the following passage from the judgment of Sheppard J. in *Cockcroft* to be of particular assistance:

"What is required is that the decision-maker act reasonably. For the document to be exempt his conduct must be taken as that of the reasonable man. But then comes the difficulty. So acting, the decision-maker must expect that disclosure of the document could prejudice the future supply of information. In my opinion he will not be justified in claiming the exemption unless, at the time the decision is made, he has real and substantial grounds for thinking that the production of the document could

prejudice that supply. But, stringent though that test may be, it does not go so far as to require the decision-maker to be satisfied upon a balance of probabilities that the document will in fact prejudice the future supply of information."

15. It was Owen J.'s opinion, at page 44, that:

"...it is not sufficient for the original decision-maker to proffer the view. It must be supported in some way. The support does not have to amount to proof on the balance of probabilities. Nonetheless, it must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasonable decision-maker."

16. Further, as I stated in my decision in *Re Rindos* (at paragraph 30), it is also my view that the phrase "*could reasonably be expected to prejudice the future supply of information of that kind to the Government or an agency*" is not to be applied by reference to whether the particular person whose confidential information is being considered for disclosure could reasonably be expected to refuse to supply such information in the future, but by reference to whether disclosure could reasonably be expected to prejudice the future supply of such information from other sources available or likely to be available to the Government or an agency: see the comments of Young C.J. in *Ryder v Booth* [1985] VR 869, at p.872.

17. Therefore, when considering the application of the exemption in clause 8(2) to a document in dispute, the agency should ask itself the following questions:

    (i) does the document contain information of a confidential nature obtained in confidence;

    (ii) are there real and substantial grounds to expect that disclosure of the particular document could prejudice the ability of the agency in the future to obtain information of the kind under consideration; and

    (iii) are there any competing interests to be weighed against that risk such that disclosure of the document would, on balance, be in the public interest?

18. When answering those questions, an agency must make findings of fact upon which to base its decision to provide or deny access. Reliance upon entrenched and unquestioned beliefs about the potential consequences of disclosure, without any critical analysis of the basis for those beliefs and whether or not there are real and substantial grounds for holding them, is not sufficient to establish the exemption. The application of the exemption clauses in the FOI Act needs to be considered without any preconceived ideas about the effects of disclosure. Findings of fact must be made and the basis for opinions and assertions critically analysed against the factual background.

Does the disputed document contain information of a confidential nature obtained in confidence?

19. Information is inherently confidential if it is not in the public domain. That is, the information must be known by a small number or limited class of persons. Where the person supplying the information specifically requests that the information should not be disclosed, and the person receiving it agrees, then an obligation of confidence arises. In *Department of Health and Anor v Jephcott* (1985) 62 ALR 421, the Full Federal Court held that a source of information is confidential if provided under an express or implied pledge of confidentiality.

20. The disputed document is clearly marked "Confidential". I accept the claims of the agency that it was given and received in confidence under separate cover to the main report. I also accept that it contains confidential information consisting of the unanimous opinions of the Review Team about the complainant's management of the School of Dentistry, and that that information is known to only a small group of people within the agency. Therefore, I am satisfied that the disputed document meets the requirements of paragraph (a) of clause 8(2).

Could disclosure of the disputed document reasonably be expected to prejudice the ability of the agency in the future to obtain information of the kind under consideration?

21. The agency maintains its decision to deny access to the disputed document because of the repeated objections to such disclosure by Professor Hume. In a letter dated 15 September 1995 to the agency, Professor Hume stated:

> *"I hereby notify you of my absolute objection to the release of all parts of the document. The document was prepared at the request of Vice-Chancellor Gale on the basis and assurance that it was to be at all times strictly confidential. It is therefore a privileged communication. In no circumstances will I consent to the release of this document."*

22. The response to my office from Professor Hume was equally adamant. He said:

> *"...The potential for release of such reports would, in my view and I believe the reasonable view of others in my position, seriously limit the potential effectiveness of such reviews to the point where it would not be worthwhile for them to be undertaken."*

23. The agency responded to my rejection of that view in the following terms:

> *"The University questions your consistent rejection of such views. The fact that Professor Hume has expressed such strong and emphatic opposition to the supply of the document suggests that he would not undertake to prepare a similar document again. It is also fair to assume that Professor Hume would not be prepared to undertake a similar review for this University if its guarantee of confidentiality could not be upheld.*

Professor Hume's response to a hypothetical invitation to chair another review committee would be a fair test of the argument in question.

Given the strength of Professor Hume's objections, the University believes it must act in good faith and maintain its position with regard to the denial of the confidential report of the review committee."

24. I accept that the disputed document was created and received into the agency at a time when the FOI Act was no more than a political promise. I also accept the fact that there was some understanding between the Review Team and the agency with respect to the confidentiality of the document. However, the enactment of FOI legislation in Western Australia, with some exceptions, was without any limitation as to its retrospectivity. The result is that the question of access under the FOI Act to documents previously given to and received by agencies in confidence must be decided by reference to the legislative scheme in the FOI Act and not by having regard only to previous understandings of confidentiality. Further, since the decision of the Full Court of the Federal Court of Australia in *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 108 ALR 163, it appears that a government agency cannot, by agreement or conduct, bind itself so as to guarantee that confidential information provided to it will not be disclosed under FOI laws. The Court said, at p.180:

"Prior to the coming into operation of the FOI Act, most communications to Commonwealth Departments were understood to be confidential because access to the material could be obtained only at the discretion of an appropriate officer. With the commencement of the FOI Act on 1 December 1982, not only could there be no understanding of absolute confidentiality, access became enforceable, subject to the provisions of the FOI Act. No officer could avoid the provisions of the FOI Act simply by agreeing to keep documents confidential. The FOI Act provided otherwise."

25. In my view, the claims of Professor Hume are insufficient justification for an exemption under clause 8(2)(b). Professor Hume submitted that periodic reviews by external experts are an essential component of maintenance of the quality of institutions such as Universities. I do not disagree with that submission. He also submitted that, if the disputed document were to be disclosed, he would not participate in such a review in the future, nor did he believe would others in his position. He also submitted that some part of the report of such a body may need to be transmitted confidentially to the head of the organisation.

26. However, other than stating that if the disputed document were to be disclosed he would not participate in such reviews in the future, Professor Hume has offered nothing to support those views. He has not said why he would not take part in future reviews; he has not said why some parts of the reports of such reviews need to be secret; he has not said why be believes others would not participate in such reviews in the future. In short he has made a number of assertions as to the potential consequences of disclosure of the document, but has

offered nothing in support of those assertions to show they are made on real and substantial grounds.

27. The other members of the Review Team, when consulted by the agency, informed the agency that neither objected to the disclosure to the complainant of the report. Professor Hume contended that they may have a different view to him because they are private practitioners and not involved *"...on a day to day basis with maintenance of the quality of academic programs within a University"* as, he submits, he is. However, Professor Hume offered no reasons why that should cause a different view on the question of disclosure to the complainant of the report. If anything I would have expected that a person who is intimately involved in the maintenance of the quality of academic programs and experienced in conducting such reviews, would be less likely to object to disclosure of his report, which he described as containing *"...only a statement of advice to the Vice-Chancellor, objectively derived from the submissions of many people whom we interviewed during the review process."*

28. Although Professor Hume may not agree to be the chairman of another review team, I do not accept the claim, if it is being advanced by the agency, that without the participation of Professor Hume the agency would not be able to conduct similar reviews in the future. It seems to me that there is an abundance of consultants in the private sector who are able to perform such reviews with professional input if required.

29. The disputed document is now five years old. The complainant is no longer employed by the agency, and the complainant does not work with the members of the Review Team. There is no evidence that the complainant has ever been informed about the matters raised in the disputed document, nor is there evidence that he has been given an opportunity to respond to those matters. Given those circumstances, I do not consider that the disclosure of a document containing personal information about an academic staff member, five years after the document was compiled, could reasonably be expected to prejudice the ability of the agency to obtain such reports in the future.

30. Therefore, on the material before me, I am not satisfied that disclosure of this document to the complainant could reasonably be expected to prejudice the ability of the agency in the future to obtain reports of that kind, and I reject the claim of the agency, which is not supported by any probative material, that *"[i]t logically follows that if the University is unable to guarantee confidentiality of a document prepared and provided in such a manner, then the supply of such information in the future would be severely prejudiced."*

31. However, even if I were satisfied as to the requirements of paragraph (b) of clause 8(2), which I am not, I consider that disclosure of the document would, on balance, be in the public interest. I have previously recognised that there is a public interest in a person being informed of personal information about him or her held by a government agency, and being afforded an opportunity to respond to that information, if necessary, or to seek correction of the record if it is incorrect, incomplete, out of date or misleading. I consider that public interest to

be particularly strong where the agency is (or in this case was, at the relevant time) the employer of the person seeking access and the information may impact - whether positively or negatively - on that person's employment and career.

32. I consider the public interest in the complainant being able to have access to personal information about himself, particularly after this length of time and given that he is no longer in the employ of the agency, would outweigh the public interest in the agency being able to obtain confidential information of the kind contained in the disputed document. However, as I am not satisfied that a *prima facie* claim for exemption has been established, I find the disputed document is not exempt under clause 8(2).

(b) Clause 11(1)(c) - Effective operations of agencies

33. Clause 11 provides:

> ***"11. Effective operations of agencies***
>
> ***Exemptions***
>
> *(1) Matter is exempt matter if its disclosure could reasonably be expected to -*
>
> *(a) impair the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency;*
>
> *(b) prevent the objects of any test, examination or audit conducted by an agency from being attained;*
>
> *(c) have a substantial adverse effect on an agency's management or assessment of its personnel; or*
>
> *(d) have a substantial adverse effect on an agency's conduct of industrial relations.*
>
> ***Limit on exemptions***
>
> *(2) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest."*

34. The Federal Court in *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236 considered the meaning of the words "substantial adverse effect" in s. 40(b) of the Commonwealth FOI Act. Beaumont J. said, at p. 249:

> *"...In my view, the insertion of a requirement that the adverse effect be "substantial" is an indication of the degree of gravity that must exist before this exemption can be made out."*

35. As I said before, I respectfully agree with that view. In my opinion, the words "substantial adverse effect" wherever they appear in the exemption clauses in the FOI Act, and in this instance in clause 11(1)(c), indicate the degree of gravity of the claimed adverse effect required to establish the exemption (see also: my comments in *Re Rindos; Re Jones and Shire of Swan* (9 May 1994, unreported); *Re Healy and Australian National University* (Commonwealth Administrative Appeals Tribunal, 23 May 1985, unreported) and *Re James and Australian National University* (1984) 2 AAR 327 at 341).

36. The agency's claims for exemption under clause 11(1)(c) are substantially similar arguments to those that were before me in *Re Rindos.* I dealt with those claims at paragraphs 59-68 of that decision and my view of those claims has not changed. In the notice of decision dated 22 July 1994, the FOI Co-ordinator of the agency set out a number of effects which he claimed would follow from the disclosure of the disputed document. In particular, he said:

> *"To effectively manage and assess its personnel, the University must always be in a position whereby it may request and/or receive information relevant to its employees. For information to be honest, unambiguous and meaningful, the University must be in a position where it can guarantee total confidentiality of the information received. Without that assurance the value of the reports received could be seriously eroded to a point where they may be inimical to the University's ability to manage or assess its personnel. By virtue of the seniority of his position in this University, Professor Hill had frequent access to the Vice-Chancellor and acting Deputy Vice-Chancellor. This access provided both him and them with the opportunity to discuss the circumstances of his employment. Whereas information received regarding Professor Hill was and is confidential to the Vice-Chancellory, the Vice-Chancellor has spoken in detail with Professor Hill with regard to any information received and which related to him. There has never been any attempt to keep from Professor Hill the import of information relating to him. What the University has done and continues to exercise the right to do, is to deny physical access to documents which have been requested and received in confidence. The strength of the information relating to staff and the manner in which the University chooses to disseminate that information are integral to the University's success. Any attempt to subvert this right must be contrary to the interests of the public."*

37. The complainant disputes the agency's claims that he has been apprised of any information received which related to him. I consider it is one thing to claim that the opportunity existed for the complainant and the Vice Chancellor to discuss matters relating to his performance, and an altogether different thing to claim that the opportunity existed to discuss the contents of a secret document whose existence was not acknowledged by the agency until some time after the complainant accepted redundancy.

38. I understand the agency to be arguing that disclosure of the document could reasonably be expected to have a substantial adverse effect on its management or assessment of its personnel because its ability to obtain relevant information about its staff will be damaged. For the reasons given at paragraphs 21-30 above in respect of the claim for exemption under clause 8(2), I reject that argument.

39. I further understand the substance of the agency's argument is that it must receive information about staff members in confidence in order to properly assess the performance of its members of staff, and that it must be trusted to deal with the information received in a responsible manner that ensures candid and honest comments will continue to be forthcoming. However, as I have said before, the cloak of confidentiality may be used as a device to conceal improper practices as well as to advance proper ones. Whilst I am not suggesting that the agency's personnel practices are improper, I consider the statements quoted in paragraph 36 above, do not provide "real and substantial grounds" for finding that the disclosure of the disputed document could have a substantial adverse effect on the agency's management or assessment of its personnel, in circumstances where the relevant staff member is no longer employed within the agency: see comments of His Honour Owen J in *Manly v Ministry of Premier and Cabinet* (Supreme Court of Western Australia, 15 June 1995, unreported), at p.44.

40. Therefore, I am not satisfied that the disclosure to the complainant of the disputed document, which is 5 years old and contains a considerable amount of personal information about the complainant, could reasonably be expected to have a substantial adverse effect on the management or assessment of personnel by the former employer of the complainant. Accordingly, I find the disputed document is not exempt under clause 11(1)(c) of Schedule 1 to the FOI Act.

41. However, as the disputed document also contains some personal information about third parties that is, *prima facie*, exempt matter under clause 3(1) and the complainant does not seek access to that information, I also find that it is practicable to provide the complainant with access to an edited copy of the disputed document from which the following exempt matter has been deleted:

    - The first 11 words of the fifth sentence in paragraph 3; the sixth sentence and the eighth sentence in paragraph 3; and

    - All of the fourth paragraph.

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