

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

**File Ref: F1012000  
Decision Ref: D0652000**

Participants:

**Kenneth Adrian Ducker**  
Complainant

- and -

**Education Department of Western Australia**  
Respondent

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - refusal of access - reports relating to inquiries into alleged breaches of Public Sector Standards and the Education Act - clause 5(1)(b) - whether document contains matter the disclosure of which could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law.

*Freedom of Information Act 1992 (WA)* s.3(3); Schedule 1 clauses 5(1)(b) and 5(4)

*Public Sector Management Act 1994* ss.9, 21, 80, 81 and 83

*Education Act 1928* s.7(C)

*Police Force of Western Australia v Kelly and Another* (1997) 17 WAR 9

*Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550

## DECISION

The decision of the agency is confirmed. Document 1 and the matter deleted from Document 2 are exempt under clause 5(1)(b) of Schedule 1 to the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

11 December 2000

## REASONS FOR DECISION

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 Mr Ducker ('the complainant') access to 2 documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. The complainant is an officer of the agency. Following a series of alleged workplace incidents involving the complainant and other officers of the agency in 1997 and 1998, the complainant made a number of informal and formal complaints about the conduct of officers of the agency and certain officers of the agency made informal and formal complaints about the complainant's conduct.
3. I understand that the agency attempted to resolve those complaints. The complainant's complaint about other officers of the agency was referred to the Western Australian Industrial Relations Commission. At a Conciliation Conference held in July 1999, the complainant was represented by an officer of the relevant trade union where it was agreed that an independent inquirer would be selected to investigate the complainant's allegations. The independent inquirer was selected and, subsequently, she conducted inquiries and prepared a report of her investigations [Document 1].
4. The complaints made about the complainant were investigated by Mr Baxter, the Director of the School of Isolated and Distant Education and Ms Tarling, District Organizer, State School Teachers Union of Western Australia, who produced a report on the results of their investigation [Document 2].
5. By letter dated 17 December 1999, the complainant made an application to the agency seeking access to Document 1 and Document 2. The agency granted the complainant access to a copy of Document 2 from which some matter had been deleted and refused him access to Document 1. The agency claimed that Document 1 and the material deleted from Document 2 are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.
6. The complainant applied to the agency for an internal review. On 7 April 2000, the internal reviewer confirmed the agency's initial decision to refuse access under clause 5(1)(b). On 25 May 2000, the complainant made a complaint to the Information Commissioner seeking external review of the agency's decision.

## REVIEW BY THE INFORMATION COMMISSIONER

7. I obtained the disputed documents from the agency. Inquiries were made to determine whether this complaint could be resolved by conciliation between the parties. However, I am satisfied that conciliation is not an option. In the course of

my dealing with this matter, the complainant met with my Senior Investigations Officer and submitted material for my consideration.

8. On 20 November 2000, after considering the material before me which consisted of the disputed documents, the file maintained by the agency in respect of the complainant's access application, a submission from the agency dated 12 July 2000 which has been disclosed to the complainant in edited form, and the complainant's file of documents, I informed the parties in writing of my preliminary view of this complaint. It was my preliminary view that Document 1 and the parts of Document 2 to which access was refused by the agency may be exempt under clause 5(1)(b).
9. The complainant responded and provided further material for my consideration. The complainant submits, among other things, that the investigation into his complaint was meant to be an open and independent investigation but it was neither. The complainant did not withdraw his complaint.

#### **THE EXEMPTION – Clause 5(1)(b)**

10. 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.
11. The scope and meaning of the exemption in clause 5(1)(b) has been the subject of three decisions by the Supreme Court of Western Australia and I am bound by those decisions. The Supreme Court has decided that 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 that a document “must reveal something about the content of the investigation” in order to be exempt under clause 5(1)(b): see *Police Force of Western Australia v Kelly and Another* (1997) 17 WAR 9; *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550.
12. The Supreme Court decisions have also made it clear that the scope of the exemption in clause 5(1)(b) is very broad, and, further, that the exemption can apply regardless of the state of knowledge an access applicant has about the particular investigation. This means that once it appears that disclosure of a document could reasonably be expected to reveal something about the investigation, regardless of what other material might reveal it and regardless of how much the applicant may already know of it, the document will be exempt: *Kelly's* case at pages 14 and 15.

#### **The meaning of “the law” in clause 5**

13. The term “the law” in clause 5 is used in a broad sense and is not limited in its application to the criminal law only. The terms of clause 5(1)(b) clearly contemplate investigations that may lead to disciplinary proceedings, as well as those potentially leading to prosecutions.
14. The complainant is employed by the agency as a public officer and he is subject to the provisions of the *Public Sector Management Act 1994* (‘the PSM Act’). As a statute of the Parliament of Western Australia, the PSM Act is a relevant law for the purpose of clause 5.
15. The complaints made by the complainant were made against persons employed under the *Education Act 1928* (‘the Education Act’). As a statute of the Parliament of Western Australia, the Education Act is also a relevant law for the purpose of clause 5.
16. Under clause 5(5), the term “contravention” which appears in clause 5(1)(b), includes a failure to comply. This means that the kinds of investigations that are potentially covered by the exemption in clause 5(1)(b) include those where a person might have failed to comply with the provisions of a relevant law, such as the PSM Act or the Education Act.

***The complaints made by the complainant against other officers of the agency***

17. The complainant made a complaint against three officers of the agency who are teachers employed under the Education Act alleging that those officers verbally abused him, made threats to him, misused their authority, denied him natural justice and attacked his integrity.
18. Section 7C of the Education Act deals with disciplinary action for misconduct by teachers. Subsection (2) of s.7C describes the acts or omissions that may constitute misconduct under the Education Act. Section 7C(3), (4) and (5) describe the procedures to be followed in investigating allegations of misconduct. Section 7C(12) prescribes a range of penalties that may be imposed if an investigation determines that a teacher is guilty of misconduct.
19. Taking all of that into account, I am satisfied that an inquiry into allegations of misconduct of the kind made by the complainant against a person to whom the Education Act applies would be an investigation into a contravention or possible contravention of the law, within the terms of clause 5(1)(b).
20. I have examined the contents of Document 1 and considered the circumstances in which that document was created. I accept that the author of Document 1 conducted an inquiry into the complaint made by the complainant about the conduct of the three officers referred to in paragraph 17 above. Although there is some overlap between the complainant’s complaint and the counter-complaints made

against him, I am satisfied that Document 1 was created for the purpose of determining whether the complainant's complaint could be substantiated. If it could be substantiated, clearly, in my view, disciplinary action under the Education Act could have ensued.

21. In my view, the inquiries conducted by the independent investigator constituted an investigation into a contravention or possible contravention of the Education Act by the three officers. I consider that disclosure of Document 1 would reveal the fact that there was an investigation and something about the content of that investigation. It would reveal the identities of the persons investigated, the nature of the inquiries undertaken, the persons interviewed, the results of the interviews and the findings and conclusions reached by the investigator. Accordingly, I find that Document 1 is exempt under clause 5(1)(b).
22. Clearly, the complainant is aware of the fact of the investigations and the identities of those the subject of the investigation and he has been specifically informed about some of the findings concerning the complaints. Nevertheless, he does not know the exact contents of Document 1, even though it may contain some information already known to him. However, the exemption in clause 5(1)(b) can still apply in these circumstances. In *Kelly's case*, his Honour Anderson J said, at pages 14 and 15:

*"I do not think it could have been intended that exemption should depend on how much the applicant already knows or claims to know of the matter...In my opinion, the stipulation that matter, disclosure of which reveals an investigation, is exempt even after a prosecution of the offence investigated, confirms the conclusion that should anyway be reached that clause 5(1)(b) is not limited to new revelations but covers all matter that of itself reveals the things referred to, without regard for what other material might also reveal those things or when that other material became known, and without regard for the actual state of knowledge that the applicant may have on the subject or the stage that the investigation has reached".*

23. His Honour further said, at page 15, that "[w]ilst the agency is invested by s.23(1)(a) with a discretion to decide that access be given to the document, even although it is an exempt document...The Commissioner has no such discretion." This means that, whilst the agency may consider and take into account the state of knowledge that the complainant has about the particular investigation before making a decision to either claim exemption for the documents under clause 5(1)(b) or to exercise its discretion under s.3(3) and disclose documents that may be technically exempt, as Information Commissioner I do not have the discretion to do that.
24. The complainant raised a number of "public interest" arguments in support of his claim for access to the disputed documents. However, clause 5(1)(b) is not subject

to a public interest test, except in the very limited circumstances in which clause 5(4) applies. Clause 5(4) provides:

*“Matter is not exempt matter under subclause (1) or (2) if -*

*(a) it consists merely of one or more of the following -*

*(i) information revealing that the scope of a law enforcement investigation has exceeded the limits imposed by the law;*

*(ii) a general outline of the structure of a programme adopted by an agency for dealing with any contravention or possible contravention of the law; or*

*(iii) a report on the degree of success achieved in any programme adopted by an agency for dealing with any contravention or possible contravention of the law;*

*and*

*(b) its disclosure would, on balance, be in the public interest.”*

25. Having examined Document 1, I do not consider that it contains any information of the kind described in paragraphs (i), (ii) or (iii) of clause 5(4)(a). Therefore, it is not open to me to consider whether disclosure of Document 1 would, on balance, be in the public interest.

### ***The complaints made against the complainant***

26. A counter-complaint was made against the complainant by two of the three officers who were the subject of the complainant’s complaints alleging that the complainant made unsubstantiated, false and professionally damaging claims against those two officers. I also understand that, as an employee of the agency, the complainant is subject to the provisions of the PSM Act.
27. Section 9 of the PSM Act contains general principles of official conduct that are to be observed by persons subject to that Act. Those principles include complying with the provisions of the PSM Act, and any other applicable Act governing conduct, and with public sector standards and codes of ethics, and any applicable code of conduct. The Public Sector Standards and Code of Ethics established by the Public Sector Standards Commissioner under the PSM Act are given the force of law by s.21(9) of that Act, as if enacted as part of the PSM Act. Therefore, in my opinion, a breach or failure to comply with any of those would be a breach of, or failure to comply with, the PSM Act and, therefore, for the purposes of clause 5(1)(b) of Schedule 1 to the FOI Act, a contravention of the law.

28. Division 3 of Part 5 of the PSM Act deals with disciplinary matters. Section 80 provides, among other things, that an employee who contravenes any provisions of the PSM Act or any public sector standard or code of ethics, or commits an act of misconduct, commits a breach of discipline. Suspected breaches of discipline may be investigated under s.81 of the PSM Act. Section 83 describes the powers of an employing authority if, following an investigation under s.81, it finds that a breach of discipline has occurred. Those powers include the power to reprimand, to impose a fine, and to charge the person accordingly.
29. In the notes contained in the Code of Ethics document it is stated that a breach of the Code may amount to a breach of discipline and that, “[w]here there are alleged breaches, resolution should first be attempted at the lowest possible level within the public sector body, using standard mechanisms such as customer complaints processes or internal grievance procedures.” I understand that the agency attempted to resolve the counter-complaints made against the complainant through its usual internal grievance procedures.
30. I have examined Document 2, including the parts to which access has been denied, and I have considered the circumstances in which that document was created. In my view, it is clear on the face of Document 2 that it is a “report” relating to a Level 2 grievance. I understand that to mean that the complaint against the complainant was dealt with by the agency in accordance with the standard procedures for resolving internal grievances.
31. However, it appears to me that the alleged misconduct on the part of the complainant was misconduct which would, if established, amount to a breach of the Code of Ethics, in particular, those items relating to “Respect for Persons”. As the Code of Ethics is a law for the purposes of clause 5(1)(b), I am of the view that the investigation conducted by the agency into the allegations made against the complainant was an investigation into a possible contravention of the law. The fact that disciplinary proceedings under the PSM Act did not ensue does not affect the operation of the exemption, which is specifically stated to apply “*whether or not any prosecution or disciplinary proceedings have resulted.*”
32. Even though, in my view, the agency could have claimed exemption under clause 5(1)(b) for the whole of Document 2, the agency has already provided the complainant with access to an edited copy of that document with only a small amount of matter deleted. In my view, disclosure of the matter to which access has been denied could reasonably be expected to reveal an investigation into a possible contravention of the law. It would reveal something of the content of the investigation conducted in the sense described in *Kelly’s* case. Accordingly, I find that the disputed matter in Document 2 is exempt under clause 5(1)(b). The information deleted from the document is not of a kind described in clause 5(4) and, therefore, the limitation on exemption does not apply.



33. Although the complainant disputes the independence of the investigator who created Document 1, and the lawfulness of appointing Mr Baxter and Ms Tarling, those issues are not relevant, in my view, to my determination of whether Document 1 and parts of Document 2 are exempt as claimed by the agency.

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