

Participants:

Ljiljana Maria Ravlich
Complainant

- and -

Attorney General
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - Ministerial correspondence - clause 4(2) of the Glossary - whether document a 'document of an agency' where the agency is a Minister - clause 3(1) - personal information - clause 3(3) - whether disputed matter is 'prescribed details' - clause 3(6) - whether disclosure would, on balance, be in the public interest.

Freedom of Information Act 1992: sections 10(1) and 39(3)(a); Schedule 1, clauses 3(1), 3(3) and 3(6); Schedule 2, Glossary, clauses 1 and 4(2)

Interpretation Act 1984

Freedom of Information Regulations 1993: regulation 9(1)

Minister for Transport v Edwards [2000] WASCA 349

Minister for Planning v Taweel (unreported; Supreme Court of WA; Library No 960654, 13 November 1996)

Re Taweel and Ministry for Planning [1996] WAICmr 18

Re Kobelke and Minister for Planning [1996] WAICmr 43

Re Mahoney and City of Melville [2005] WAICmr 4

DECISION

The decision of the agency is varied. I find that:

- Document 14 is a document of the agency within the meaning of clause 4(2) of the Glossary to the *Freedom of Information Act 1992*.
- Document 14 and the disputed information in paragraph 3 on page 1 of Document 11 are exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*.

Sven Bluemmel
INFORMATION COMMISSIONER

29 January 2010

REASONS FOR DECISION

1. This complaint arises from a decision made under the *Freedom of Information Act 1992* ('the FOI Act') by the Attorney General to refuse Hon Ljiljanna Ravlich MLC ('the complainant') access to documents.

BACKGROUND

2. In November 2008, the complainant applied to the Attorney General under the FOI Act for access to all documents between the Attorney General and any other Minister since 23 September 2008.
3. For the purposes of the FOI Act, a Minister is an 'agency'. In relation to an agency that consists of one person, the principal officer of that agency is that person (see clause 1 of the Glossary in Schedule 2 to the FOI Act).
4. On 23 January 2009, the Attorney General identified 14 documents within the scope of the access application and decided to grant the complainant access in full to 10 documents but to refuse access in full or in part to four documents. Since s.39(3)(a) of the FOI Act provides that there is no right of internal review for decisions made by the principal officer of an agency, the complainant applied directly to the Information Commissioner on 10 March 2009 for external review of the Attorney General's decision.

REVIEW BY THE INFORMATION COMMISSIONER

5. Following the receipt of this complaint, I obtained the originals of the disputed documents and the FOI file maintained in respect of the complainant's application from the Attorney General's office.
6. The Attorney General's notice of decision did not comply with the provisions of s.30(f) of the FOI Act, so it was necessary for me to obtain additional information from the Attorney General's office in order to understand the claims made by the Attorney General in relation to the documents in dispute.
7. Originally, Documents 10, 11, 12 and 14 in the document schedule attached to the Attorney General's notice of decision were in dispute. In the course of my dealing with this complaint, the Attorney General gave the complainant access to one additional document (Document 12) and the complainant withdrew her complaint in relation to another document (Document 10) and also in relation to certain information that had been deleted from Document 11.
8. On 8 January 2010, I provided the parties with a letter that set out my preliminary view of the complaint. My preliminary view, with regard to Document 14, was that it was a 'document of the agency' and, thus, potentially accessible under the FOI Act. However, it was also my preliminary view that Document 14 was exempt under clause 3(1) of Schedule 1 to the FOI Act. In relation to Document 11, my preliminary view was that certain information in Document 11 was exempt under clause 3(1) but that other information was not exempt under that provision.

9. In response to my preliminary view, the Attorney General gave the complainant access to the information in Document 11 that I considered was not exempt under clause 3(1) but maintained his claim that Document 14 is not a ‘document of the agency’, although the Attorney General provided me with no further submissions on that issue. The complainant made no further submissions to me but declined to withdraw her complaint.

THE DISPUTED MATTER

10. Document 14 is a memorandum from the Attorney General to a Minister dated 16 October 2008. Document 11 is a memorandum dated 26 September 2008 from the Attorney General to the Premier (who is also the Minister for Public Sector Management) regarding staff appointments to the Attorney General’s office.
11. The Attorney General claims that the disputed information in Document 11 is exempt under clause 3(1). The Attorney General also claims that Document 14 is not a document of an agency as defined in clause 4(2) of the Glossary to the FOI Act and, consequently, the access provisions of the FOI Act do not apply to Document 14. In the alternative, the Attorney General claims that Document 14 is exempt under clause 3(1).
12. The matter remaining in dispute is all of Document 14 and the last column in paragraph 3 of Document 11 under the heading “Recommended Level” on page 1 (for all officers with the exception of the Chief of Staff).

CLAUSE 4(2) OF THE GLOSSARY TO THE FOI ACT

13. I have considered whether Document 14 is a ‘document of an agency’ for the purposes of the FOI Act. The term ‘documents of an agency’ is defined in clause 4 of the Glossary to the FOI Act, which provides, insofar as it is relevant, as follows:
- “(1) *Subject to subclause (2), a reference to a document of an agency is a reference to a document in the possession or under the control of the agency including a document to which the agency is entitled to access and a document that is in the possession or under the control of an officer of the agency in his or her capacity as such an officer.*
- (2) *Where the agency is a Minister a reference to a document of an agency is a reference to a document that –*
- (a) *is in the possession or under the control of the Minister in the Minister’s official capacity; and*
- (b) *relates to the affairs of another agency (not being another Minister),*

and includes a document to which the Minister is entitled to access and a document in the possession or under the control of a member of the staff of the Minister as such a member, but does not include a document of an agency for which the Minister is responsible.”

14. The right of access to documents created by s.10(1) of the FOI Act is a right of access to “*documents of an agency (other than an exempt agency) subject to and in accordance with this Act*”. Clause 1 of the Glossary to the FOI Act defines ‘agency’ to include a Minister. Accordingly, the right of access under s.10(1) to documents held by a Minister is governed by clause 4(2) of the Glossary, which sets out the following conditions for access:

- The requested documents must be in the possession or under the control of the Minister in his or her official capacity.
- Those documents must relate to the affairs of another agency (except where that agency is another Minister).
- Those documents include documents which the Minister is entitled to access and documents in the possession or under the control of a member of the Minister’s staff.
- Those documents do not include documents of an agency for which the Minister is responsible.

The Attorney General’s submissions

15. The Attorney General submits that, although Document 14 relates obliquely to the affairs of two agencies, it primarily relates to the affairs of a third party and does not, therefore, come within paragraph (b) of clause 4(2) of the Glossary.

Consideration

16. In *Minister for Transport v Edwards* [2000] WASCA 349, Hasluck J considered the meaning of the final words of clause 4(2) of the Glossary and noted at [54] – [57]:

“The notion embedded in the final words whereby the documents an agency ‘does not include the documents of an agency for which the Minister is responsible’ can be regarded as simply a restatement of the basic rule that an application for access should be directed to the party that is actually in possession of the subject documents.

On this reading of clause 4(2) the reason for the final words becomes clear. Absent the final words, it might be thought by a student of constitutional law, or by a citizen familiar with the Westminster style of government, that it might be appropriate to direct an application for access to a document held by a government department to the Minister responsible for that department on the ground that he is responsible for

the operations of the department and for documents in its possession or under its control.

In fact, in this new and special area of the law, the provisions of the FOI Act relieve the Minister of the burden that might otherwise attach to him as the responsible Minister. The emphasis is placed upon the fact of possession or control rather than upon the subtleties of constitutional law. If the document is in fact in the Minister's possession or under his control, then he must deal with an application for access directed to him in respect of the document in question. On the other hand, if the document is held not by the Minister, but by an agency for which he is responsible, then it will not be regarded as a document of the Minister."

17. Hasluck J did not follow the reasoning of Parker J in *Minister for Planning v Taweel* (unreported; Supreme Court of WA; Library No 960654, 13 November 1996) – a case which also considered the meaning of clause 4(2) of the Glossary to the FOI Act. In *Taweel*, Parker J favoured a narrow interpretation of that provision which was not followed by Hasluck J on the basis that to do so would result in the position that a provision in a glossary was being relied upon to cut down substantially a right of access created pursuant to the objects and substantive provisions of the FOI Act.
18. In *Edwards*, Hasluck J also referred, at [48] to the fact that s.18 of the *Interpretation Act 1984* requires preference to be given to the construction of a written law that would promote the object underlying the law to a construction that would not promote that object. I agree with the reasoning of Hasluck J in *Edwards* and with his view that much of what was said in *Taweel* is *obiter dicta*.
19. I have examined Document 14. I am satisfied that, on its face, Document 14 is a document in the possession or under the control of the Attorney General (who is a Minister of State) in his official capacity. In my opinion, Document 14 'relates to' the affairs of the Attorney General, a Minister and a third party, as well as to a government agency.
20. I do not accept the Attorney General's submission that Document 14 does not come within paragraph (b) of clause 4(2) of the Glossary because it primarily relates to the affairs of a third party. In my opinion, the words 'relates to' in that paragraph are not qualified by degree or in any other way. That view is supported by two previous decisions of this office.
21. In *Re Taweel and Ministry for Planning* [1996] WAICmr 18, the former A/Information Commissioner stated, at [20] – [23]:

"In my view, it is not a requirement of clause 4(2) of the Glossary that a document held by a Minister relate exclusively to the affairs of some other agency in order for it to be accessible under the FOI Act. Were that the case, very few, if any, documents held by a Minister in his official capacity would be "documents of an agency" and subject to the operation of the

FOI Act. That result would clearly not accord with the objects and intent of the FOI Act”.

22. The former A/Commissioner also said at [26]:

“Applying the ordinary meaning to the words in clause 4(2), and having regard to the objects and intent of the FOI Act, I consider that the phrase “relates to the affairs of another agency” means that documents in the possession or under the control of a Minister must be documents that can be properly characterised, in a general sense, as documents relating to the business (in the broad sense of that word) of another agency in the performance of its functions, in order for those documents to be accessible under the FOI Act”.

23. In *Re Kobelke and Minister for Planning* [1996] WAICmr 43, the former Information Commissioner, in considering clause 4(2)(b), said at [18]:

*“In my view, the phrase “relates to the affairs of” in clause 4(2) denotes a relationship between two or more things. I consider that those words should be interpreted in the context in which they are found and in accordance with the object and intent of the FOI Act set out in s.3 of that Act. Taking into account those objects and intent and the fact that Parliament clearly intended certain documents held by a Minister to be accessible under the FOI Act, I am of the view that the phrase “relates to the affairs of” should be given a broad interpretation: see *Re Wiseman and Department of Transport* (1985) 4 AAR 83.”*

24. I agree with those comments in *Re Taweel* and *Re Kobelke* and consider that, provided the document in question relates to the affairs of another agency (not being another Minister) it is not relevant whether or not it also relates to the affairs of other Ministers or whether it relates more to the latter than the former.

25. In my view, the fact that Document 14 relates to the affairs of another government agency (that agency not being another Minister nor an agency for which the Attorney General is responsible) brings it within the category of documents that are documents of an agency - where the agency is a Minister - pursuant to clause 4(2) of the Glossary. Accordingly, I find that Document 14 is a document of an agency (in this case, a Minister), which is, therefore, potentially accessible under the FOI Act. In light of that, I have considered below whether Document 14 is exempt under clause 3(1) as the Attorney General submits in the alternative.

CLAUSE 3 - PERSONAL INFORMATION

26. The Attorney General claims that Document 14 and the disputed information in Document 11 are exempt under clause 3(1). Clause 3(1) relevantly provides as follows:

“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) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to –*
- (a) *the person;*
 - (b) *the person’s position or functions as an officer; or*
 - (c) *things done by the person in the course of performing functions as an officer.*
- (4) ...
- (5) ...
- (6) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.”*

27. In the Glossary to the FOI Act, the term ‘personal information’ is defined to mean:

“... information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead –

- (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 finger print, retina print or body sample”.*

28. In my view, the purpose of the exemption in clause 3(1) is to protect the privacy of individuals about whom information may be contained in documents held by State and local government agencies. The definition of ‘personal information’ in the Glossary makes it clear that any information or opinion about a person - whether living or dead - from which that person can be identified is *prima facie* exempt information under clause 3(1).

The Attorney General's submissions

29. In his notice of decision, the Attorney General claimed that the information deleted from Document 11 is exempt under clause 3(1) because “[t]hird party consultation was sought under Division 3 Section 32(1) [and] (2) of the FOI Act and therefore, text contained within Document 11 [is] exempt under Clause 3 of Schedule 1.”
30. Following my office's request for reasons why that information was claimed to be exempt under clause 3(1), the Attorney General made, in brief, the following submissions, insofar as they relate to the remaining information in dispute in Document 11:
- The disputed information in Document 11 is not ‘prescribed details’ that should be disclosed and, therefore, the limit on the exemption in clause 3(3) does not apply.
 - The relevant third parties object to the disclosure of their personal information and there is no public interest in disclosure that would outweigh the strong public interest in the maintenance of personal privacy in the present case.

Consideration

31. Having examined Document 14 and the disputed information in Document 11, I consider that all of that matter contains personal information as defined in the Glossary about third parties. In my opinion, all of that matter is *prima facie* exempt under clause 3(1) because its disclosure would identify particular individuals. I also consider that the only limits on exemption relevant to this matter are clauses 3(3) and 3(6) of Schedule 1 to the FOI Act.

Clause 3(3)

32. Clause 3(3) provides that information is not exempt merely because its disclosure would reveal prescribed details relating to an officer's (or former officer's) employment. In my view, the use of the word ‘merely’ in clause 3(3), means - according to its ordinary dictionary meaning - ‘solely’ or ‘no more than’ prescribed details.
33. Regulation 9(1) of the *Freedom of Information Regulations 1993* (‘the Regulations’) sets out those prescribed details, as follows:

“In relation to a person who is or has been an officer of an agency, details of -

- (a) *the person's name;*
- (b) *any qualifications held by the person relevant to the person's position in the agency;*
- (c) *the position held by the person in the agency;*

- (d) *the functions and duties of the person, as described in any job description document for the position held by the person; or*
- (e) *anything done by the person in the course of performing or purporting to perform the person's functions or duties as an officer as described in any job description document for the position held by the person".*
34. Regulation 9(1) relates to individuals who are or have been officers of 'an agency'. That is, it is not restricted to the prescribed details that relate to the agency which is a party to this external review but may also cover prescribed details relevant to officers or former officers of other agencies.
35. In my view, a small amount of information in Document 14 relates to current officers of agencies, as defined in the FOI Act, although most of the information relates to a third party who is a former officer of an agency.
36. I also consider that the disclosure of Document 14 would do more than 'merely' reveal prescribed details about that former officer because the relevant information goes well beyond the kind of information listed in (a)-(e) of regulation 9(1) of the Regulations. In my opinion, that information is personal information about the third party that does not amount to prescribed details and, therefore, the limit in clause 3(3) does not apply to that information.
37. With regard to Document 11, the disputed information concerns recommended levels for officers proposed to be employed in the office of the Attorney General.
38. The Attorney General submits that none of the disputed information in Document 11 is prescribed details because:
- Prescribed details mean the title or nature of the position that the person holds rather than the recommended level for that position.
 - At the time of the creation of Document 11, the levels described were recommended levels only and the persons referred to may or may not have been ultimately engaged at those levels (if they were ultimately engaged at all).
 - The disputed information is not merely prescribed details in relation to an officer of an agency.
39. I have examined the disputed information in Document 11. Although the information could be said to broadly relate to the position of an officer of an agency, the information is not merely information of the kind described in paragraphs (a)-(e) of regulation 9(1) of the Regulations. Therefore, I accept that the level of appointment to a position is not a prescribed detail referred to in regulation 9(1). In consequence, I consider that the disputed information in paragraph 3 on page 1 is not covered by the limit on exemption in clause 3(3).

Clause 3(6)

40. Clause 3(6) provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. The application of the public interest test in clause 3(6) involves identifying the public interest factors for and against disclosure and weighing them against each other to determine where the balance lies.
41. Section 102(3) of the FOI Act provides that the onus is on the access applicant (in this case, the complainant) to establish that the disclosure of personal information about third parties would, on balance, be in the public interest.
42. The complainant provided me with no submissions in relation to clause 3(6). Notwithstanding this, I have set out some of the public interests which appear to me to be relevant to this issue.
43. Favours non-disclosure of the disputed information, I recognise that there is a strong public interest in maintaining personal privacy. That public interest is recognised by the inclusion in the FOI Act of the exemption in clause 3(1) and, in my view, that public interest may only be displaced by some other, considerably stronger, public interest that requires the disclosure of private information about another person.
44. Favours disclosure, I recognise that there is a public interest in the complainant being able to exercise her right of access under the FOI Act. I also recognise that there is a public interest in the openness and accountability of government.
45. With regard to Document 14, I consider that, on balance, the right to personal privacy of the third party outweighs the public interests favouring disclosure in this case. In my view, it would not be practicable to edit Document 14 to provide only the small amount of information that, in my view, is prescribed details about other persons because that information would be deprived of its essential context.
46. In relation to the disputed information in Document 11, I agree that in general there is a greater public interest in the disclosure of work-related information about senior officers than in the disclosure of information concerning more junior officers, commensurate with the responsibilities and rewards given to the former.
47. In *Re Mahoney and City of Melville* [2005] WAICmr 4, the complainant applied for documents relating to, amongst other things, the performance assessment of the Chief Executive Officer of a local government. In considering the operation of clause 3(6), the former A/Commissioner said, at [77]-[78]:

“In this case, very broadly, the competing public interests are essentially the accountability of the local authority and the personal privacy of the

individuals concerned. In cases such as this, where the individuals are public officers, the balance can be a fine one”.

48. I consider that there is a public interest in the proper scrutiny of appointments to senior government positions and a public interest in maintaining community confidence that people appointed to such positions, who may exercise significant governmental functions and powers, are appropriately qualified to do so. I consider that the higher the seniority of the position in question, the stronger the public interest will be in disclosing information relevant to an appointment, although I take the view that the weight to be given to the public interest is different for unsuccessful, as opposed to successful, applicants.
49. I also consider there is a public interest in the accountability of government agencies, particularly Ministers, for the appointments they make which are funded from the public purse.
50. As noted in *Re Mahoney*, the balancing of the competing public interests in these cases can be a fine one. In light of my preliminary view communicated to the parties in January 2010, the Attorney General disclosed the information relevant to the appointment of his Chief of Staff. In my view, that substantially satisfies the public interests in accountability and the maintenance of community confidence in the system of appointment to Ministers’ offices. However, the information remaining in dispute in Document 11 does not relate to senior appointments and I do not consider that there is a similar strong public interest in disclosing the recommended levels for those staff positions.
51. Having weighed the public interests for and against disclosure, I consider that the public interests in personal privacy outweigh those favouring disclosure in this case. In my view, the limit on exemption in clause 3(6) does not apply to Document 14 or to the disputed information in Document 11; and that matter is therefore exempt under clause 3(1).

CONCLUSION

52. I find that:
 - Document 14 is a document of an agency (the Attorney General) within the meaning of clause 4(2) of the Glossary to the FOI Act.
 - Document 14 and the disputed information in paragraph 3 on page 1 of Document 11 are exempt under clause 3(1) of Schedule 1 to the FOI Act.
