

Decision D0222009 – Published in note form only

Re ‘P’ and Department of Environment and Conservation [2009] WAICmr 22

Date of Decision: 1 September 2009

Freedom of Information Act 1992: section 74; Schedule 1, clause 5(1)(b).

Given the circumstances of this matter, and my obligations under s.74(1) of the *Freedom of Information Act 1992* (‘the FOI Act’), I have decided not to identify the complainant in these reasons for decision.

The complainant is an officer of the agency. In 2008 certain allegations were made against the complainant by another officer of the agency. The agency wrote to the complainant informing him of the substance and detail of those allegations, including the identity of the officer who made the allegations. In that letter, the agency also advised the complainant of the agency’s grievance resolution process and what actions he needed to take at that point in time. The agency engaged the services of an external independent investigator who investigated the complaints. The agency wrote to the complainant informing him of the outcome of that investigation. I understand that the complainant has now appealed that outcome to the Public Sector Standards Commissioner.

In January 2009, the complainant applied to the agency for access under the FOI Act to documents relating to the grievance and subsequent investigation. The agency identified 20 documents as coming within the scope of the complainant’s access application. It granted him access to an edited copy of one document and refused him access to the balance of the documents under clauses 4(3), 5(1)(a), 5(1)(b) and 8(2) of Schedule 1 to the FOI Act. That decision was varied on internal review; the agency decided to release a number of documents to the complainant but refused access to nine documents under clauses 5(1)(a) and (b) of Schedule 1 to the FOI Act. The complainant made a complaint to the Information Commissioner seeking external review of the agency’s decision in respect of those nine documents.

The Information Commissioner obtained the disputed documents from the agency, examined them and made further inquiries into the complaint. The Information Commissioner considered that the disputed documents could be categorised as being documents relating to an investigation by the agency into whether or not there had been contraventions or possible contraventions of the law, as defined in clause 5(5) of Schedule 1 to the FOI Act. The Information Commissioner was also satisfied that the disclosure of the disputed documents could reasonably be expected to prejudice the investigation. For those reasons, the Information Commissioner finds that the disputed documents are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.

Section 74(1) of the FOI Act requires the Information Commissioner to ensure that exempt matter is not disclosed during the course of dealing with a complaint and section 74(2) places a further obligation on the Commissioner not to include exempt matter in a decision on a complaint or in reasons given for a decision. The Information Commissioner noted that the Supreme Court in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at 556-557 had recognised the difficulties faced by complainants and the constraints placed on the Information Commissioner by the FOI Act but took the view that section 90 - and by implication section 74 - should be construed strictly according to its tenor.

In the particular circumstances of this case, the Information Commissioner was constrained from providing the complainant with a description of the documents; detailed reasons; and the evidence before the Information Commissioner which supported those reasons, because to do so would breach section 74(2) of the FOI Act.