

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

**File Ref: F2009425
Decision Ref: D0352011**

Participants:

Vincent O'Donoghue
Complainant

- and -

**Legal Practice Board of Western
Australia**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to an investigation under the *Legal Practice Act 2003* or *Legal Profession Act 2008* – clause 5(1)(b) – whether disclosure would prejudice the investigation of a possible contravention of the law – clause 7(1) – legal professional privilege – whether documents privileged – clause 3(1) – personal information – whether any of the limits in clauses 3(2), 3(3) and 3(6) applies – whether disclosure on balance in the public interest – s.24 – whether practicable to edit.

Freedom of Information Act 1992: sections 6(a), 10, 21, 24, 76(1), 102(1) and 102(3); Schedule 1, clauses 3(1), 3(2), 3(3), 3(6), 5(1)(a), 5(1)(b), 5(1)(c), 6, 7(1), 8
Freedom of Information Regulations 1993: regulation 9(1)
Legal Practice Act 2003
Legal Profession Act 2008

Police Force of Western Australia v Kelly and Smith (1996) 17 WAR 9
Re West Australian Newspapers Limited and Western Power [2006] WAICmr 10
Re Apache Northwest Pty Ltd and Department of Mines and Petroleum and Lander and Rogers Lawyers [2010] WAICmr 35
Manly v Ministry of Premier and Cabinet (1995) 14 WAR 550
Esso Australia Resources Ltd v The Commissioner of Taxation (1999) 201 CLR 49
Trade Practices Commission v Sterling (1979) 36 FLR 244
Waterford v The Commonwealth of Australia (1987) 163 CLR 54
Re Page and Metropolitan Transit Authority (1988) 2 VAR 243
Re Potter and Brisbane City Council (1994) 2 QAR 37
Commissioner of Australian Federal Police and Another and Propend Finance Pty Limited and Others [1997] 188 CLR 501

Re Murphy and Queensland Treasury (1998) 4 QAR 446

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

Re Mossenson and Others and Kimberley Development Commission [2006]
WAICmr 3

DPP v Smith [1991] 1 VR 63

DECISION

The agency's decision is varied. I find:

- Documents 1-5, 7-22, 24-30, 32-37, 39-43, 46-56, 58 and 59 are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.
- Documents 23, 31, 38, 57, 60, 62-69, 72-74 and 76 are exempt under clause 7(1).
- Documents 61, 70, 71 and 75 are not exempt under clauses 5(1)(b), 5(1)(a), 5(1)(c), 6, 7(1) or 8.
- Documents 61, 70, 71 and 75 are exempt in part under clause 3(1) but it is not practicable to edit those documents to give access to the information that is not exempt under clause 3(1).

Sven Bluemmel
INFORMATION COMMISSIONER

29 September 2011

REASONS FOR DECISION

1. This complaint arises from a decision made by the Legal Practice Board of Western Australia ('the respondent') to refuse Mr Vincent O'Donoghue ('the complainant') access to documents under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. On 28 August 2009, the agency wrote to the complainant and advised that it had received allegations that he may have infringed the *Legal Practice Act 2003* or the *Legal Profession Act 2008*. The agency invited the complainant to respond to those allegations.
3. By letter to the agency dated 7 September 2009, the complainant denied the substance of the allegations and, on 8 October 2009, he applied to the agency under the FOI Act for access to:

"...all documents, notes and memoranda arising in relation to your investigation of this matter and in particular the nature of the information furnished to the [agency] and the source of that information."

4. On 24 November 2009, the agency notified the complainant that access was refused to all of the requested documents on the ground that they were exempt under clauses 3(1), 5(1), 6(1), 7(1) or 8(2) of Schedule 1 to the FOI Act. Following internal review, the agency confirmed its decision to refuse access on 11 December 2009. Subsequently, on 15 December 2009, the complainant applied to me for external review of the agency's decision.

REVIEW BY INFORMATION COMMISSIONER

5. After receiving this complaint, I required the agency to produce to me the FOI file maintained by the agency in relation to the complainant's access application and the documents the subject of the agency's notices of decision. As a result of an unusually high number of complaints received by my office, which placed significant pressure on its limited resources, this complaint was not dealt with until recently.
6. On 2 September 2011, following further correspondence with the agency and the complainant, I provided both parties with a letter setting out my preliminary view of this complaint. In brief, my preliminary view was that most of the disputed documents were exempt under clauses 5(1)(b) and 7(1), as the agency claimed but that five documents (Documents 2, 61, 70, 71 and 75) were not exempt under clause 7(1) as the agency claimed but that some of the information in those documents was exempt under clause 3(1). In addition, I considered that three documents (Documents 6, 44 and 45) that the agency had found to be outside the scope of the complainant's access application came within its scope.

7. The agency accepted my preliminary view that Documents 6, 44 and 45 are within scope. The agency has agreed to give the complainant access to Documents 44 and 45 but advises that Document 6 is publicly available as it can be downloaded from the internet. Consequently, Document 6 cannot be accessed under the FOI Act pursuant to s.6(a) and the agency is not required to deal with it further. The agency also claims that Documents 2, 61, 70, 71 and 75 are exempt under clauses 5, 6, 7(1) and 8 of Schedule 1 to the FOI Act.
8. The complainant did not accept my preliminary view and made further submissions to me.

THE DISPUTED DOCUMENTS

9. The disputed documents are Documents 1-5, 7-43, 46-51, 51A, 52-73, 73A and 74-76 as described in the agency's schedule of documents attached to its notice of decision dated 24 November 2009 and listed in the appendix to this decision.

THE EXEMPTION CLAIMS

10. The agency makes the following claims for exemption:
 - Documents 1, 3, 5, 8-22, 24-26, 28-30, 32, 34-36 are exempt under clause 3(1).
 - Documents 2, 34, 39-43, 46-51, 51A, 52-56, 58, 59, 61, 70, 71 and 75 are exempt under clause 5.
 - Documents 2, 4, 7, 23, 27, 31, 33, 37, 38, 57, 61, 70, 71 and 75 are exempt under clause 6.
 - Documents 2, 23, 31, 38, 57, 60-73, 73A and 74-76 are exempt under clause 7(1).
 - Document 2, 3, 61, 70, 71 and 75 are exempt under clause 8.

CLAUSE 5 – LAW ENFORCEMENT

11. In its notice of decision dated 24 November 2009, the agency advised the complainant that Documents 34, 39-43, 46-56, 58 and 59 were exempt under clause 5. Clause 5 contains a number of discrete exemptions. The agency identified the relevant exemption provisions in its notice as clauses 5(1)(a), 5(1)(b) and 5(1)(c) but did not clarify whether each of Documents 34, 39-43, 46-56, 58 and 59 was claimed to be exempt under all three of those provisions or only one or two of them.
12. In response to my letter of 2 September 2011, the agency now claims that Documents 2, 61, 70, 71 and 75 are exempt under "clause 5". The agency has again not identified the particular exemption claim under subclause 5(1) that it relies upon for each one of those documents.
13. Section 76(1) of the FOI Act provides that the Information Commissioner has the power to 'stand in the shoes' of an agency's decision maker to review any decision made by the agency and to decide any matter in relation to an access application that could have been decided by the agency. Accordingly, having

examined the disputed documents and the material before me, I have considered whether Documents 1-5, 7-22, 24-30, 32-37, 39-43, 46-56, 58, 59, 61, 70, 71 and 75 are exempt under clause 5(1)(b).

14. Clause 5, insofar as it is relevant, provides:

“5. Law enforcement, public safety and property security

- (1) *Matter is exempt matter if its disclosure could reasonably be expected to —*
- (a) *impair the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law;*
 - (b) *prejudice an 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;*
- ...
- (2) ...
- (3) ...
- (4) *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.*
- (5) *In this clause —*
- ...
- contravention*** *includes a failure to comply;*
- the law*** *means the law of this State, the Commonwealth, another State, a Territory or a foreign country or state”.*

The complainant's submissions

15. The complainant's submissions are contained in his correspondence to me dated 15 December 2009, (undated) April 2011 and 14 September 2011. I understand that the complainant submits, in brief, that:
 - (a) the complaints and allegations made against him lack *bona fides*, are without merit, vexatious, commercially motivated and contrary to law.
 - (b) it is in the public interest to disclose "*details and information which will present [prevent?] the commission of a crime, be it inchoate or otherwise by way of collusion or conspiracy*", which the agency "*may be complicit in...*".
 - (c) the information contained in the disputed documents "*forms part of the complaint [made against him] and as such has already been disclosed*".
 - (d) by claiming exemption the agency is not adhering to the spirit or intent of the FOI Act.

The agency's submissions

16. The agency's submissions are contained in its notices of decision and its correspondence to my office during the course of this external review. I understand from the agency that at the time it commenced its investigation into the allegations made against the complainant in 2009, or shortly after, the complainant was involved in other legal proceedings. I am advised that those proceedings are currently ongoing and that the agency has suspended its investigation until such time as the outcome of that action is known.
17. The agency submitted that disclosure of the relevant documents under clause 5(1)(b) could reasonably be expected to prejudice the agency's ongoing investigation of a contravention or possible contravention of the *Legal Practice Act 2003* or the *Legal Profession Act 2008* because they would reveal the kind of evidence sought and the lines of inquiry being pursued and that the disclosure of information of that kind would hinder the agency's investigation.

Consideration

18. I have considered the parties' submissions and examined all of the material before me, including Documents 1-5, 7-22, 24-30, 32-37, 39-43, 46-56, 58, 59, 61, 70, 71 and 75.
19. With regard to the complainant's submission in (c), the right of access to documents under the FOI Act does not depend on what an applicant knows or claims to know of their content: see *Police Force of Western Australia v Kelly and Smith* (1996) 17 WAR 9 at 14. Although the complainant may have some knowledge about the fact and content of the agency's investigation, *Kelly's* case

makes it clear that clause 5(1)(b) still applies regardless of how much a complainant might know or claim to know about the relevant investigation.

20. From the information provided by the agency, I am satisfied that there is currently on foot an investigation – which is currently suspended – into a contravention or possible contravention of the law, namely the *Legal Practice Act 2003* and the *Legal Profession Act 2008*. The next question is whether the disclosure of the relevant documents in this matter could reasonably be expected to prejudice that investigation.
21. I consider that, on its plain meaning, ‘to prejudice an investigation’ in clause 5(1)(b) means “*to impair the progress or effectiveness of an investigation*”: see *Re West Australian Newspapers Limited and Western Power* [2006] WAICmr 10 at [90].
22. In *Re Apache Northwest Pty Ltd and Department of Mines and Petroleum and Anor* [2010] WAICmr 35 at [142] I considered the standard of proof applicable to clauses 4(2)(b), 4(3)(b) and 5(1) of Schedule 1 to the FOI Act (which all contain the term ‘could reasonably be expected’) and concluded that it requires a person to prove on the balance of probabilities that a certain outcome ‘could reasonably be expected’.
23. In my view, the correct standard of proof to apply to the term ‘could reasonably be expected’ in, among others, clause 5(1)(b) “...*does not have to amount to proof on the balance of probabilities*” but “*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*”: *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550.
24. In this case, the complainant has sought access to documents which relate to the agency’s investigation of the allegations made against him. Having examined Documents 1-5, 7-22, 24-30, 32-37, 39-43, 46-56, 58, 59, 61, 70, 71 and 75, I consider that, until the agency’s investigation is concluded, there are real and substantial grounds to expect that – with the exception of Documents 61, 70, 71 and 75 – the disclosure of those documents would impair the progress or effectiveness of that investigation because, amongst other things, it would reveal the kind of evidence sought, the lines of inquiry being pursued and could otherwise hinder or prejudice the agency’s investigation.
25. In my view, none of the limits on the exemption in clause 5(4) applies. Although the complainant submits in (a) and (b) that the allegations are without merit and that the agency may be complicit in some kind of conspiracy, the complainant has provided me with nothing in support of his assertions and neither of those submissions would satisfy the requirements of the limit on exemption in clause 5(4)(a)(i). Moreover, as consideration of the public interest arises only in the limited circumstances of clause 5(4), it is not open to me to consider broader questions of the public interest in this case.
26. I do not agree with the complainant’s submission in (d) that by claiming exemption the agency is not adhering to the spirit or intent of the FOI Act. The

- right to be given access to the documents of an agency is expressly stated in s.10 of the FOI Act to be “*subject to and in accordance with this Act.*”
27. In my view, the disclosure of Documents 1-5, 7-22, 24-30, 32-37, 39-43, 46-56, 58 and 59 could reasonably be expected to prejudice an investigation of a contravention or possible contravention of the law and, therefore, those documents are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.
 28. However, I am not persuaded that the disclosure of Documents 61, 70, 71 and 75 could reasonably be expected to have that effect. In my opinion, the information in those documents is of a procedural or administrative nature that, if disclosed, could not reasonably be expected to impair the progress or effectiveness of the agency’s investigation. Accordingly, I consider that Documents 61, 70, 71 and 75 are not exempt under clause 5(1)(b).
 29. Although the agency did not directly claim that Documents 61, 70, 71 and 75 are exempt under clauses 5(1)(a) and 5(1)(c), I have also considered those provisions, which are set out in paragraph 14 of this decision. However, it is not evident to me from the face of Documents 61, 70, 71 and 75, or from any of the material before me, that their disclosure could reasonably be expected to impair the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law. Nor, in my view, could their disclosure reasonably be expected to 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. Consequently, I am not satisfied that Documents 61, 70, 71 or 75 are exempt under either clauses 5(1)(a) or 5(1)(c).

CLAUSE 7 – LEGAL PROFESSIONAL PRIVILEGE

30. The agency claims that Documents 2, 23, 31, 38, 57 and 60-76 are exempt under clause 7(1) of Schedule 1 to the FOI Act. As I have found that Document 2 is exempt under clause 5(1)(b), it is not necessary for me to consider whether that document is also exempt under clause 7(1).
31. Clause 7(1) provides:

“Matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege.”
32. In brief, legal professional privilege protects from disclosure confidential communications between clients and their legal advisers, if those communications were made or brought into existence for the dominant purpose of giving or seeking legal advice or for use in existing or anticipated legal proceedings: *Esso Australia Resources Ltd v The Commissioner of Taxation* (1999) 201 CLR 49.
33. Although the rule is most commonly applied to communications between clients and their legal advisers, it also extends to various other classes of documents. In *Trade Practices Commission v Sterling* (1979) 36 FLR 244, Lockhart J of the

Federal Court of Australia held that the privilege extends to other categories of documents, including:

“(d) Notes, memoranda, minutes or other documents made by the client or officers of the client or the legal adviser of the client of communications which are themselves privileged, or containing a record of those communications, or relate to information sought by the client’s legal adviser to enable him to advise the client or to conduct litigation on his behalf.”

34. The complainant has provided me with no submissions in relation to this exemption claim. The agency’s submissions, contained in its notice of decision dated 24 November 2009, are merely that the documents for which the exemption is claimed consist of: *“documents brought into existence for the dominant purpose of seeking legal advice and the advice so provided.”*

Consideration

35. I have examined Documents 23, 31, 38, 57 and 60-76. Documents 23, 31, 38 and 57 are memoranda from the agency’s Legal Research Officer to the agency’s Legal Counsel relating to information sought by the agency’s Legal Counsel to enable her to advise the agency. The agency’s Legal Counsel is listed in the Law Almanac as a certificated legal practitioner.
36. In *Waterford v The Commonwealth of Australia* (1987) 163 CLR 54, the High Court of Australia held that legal professional privilege attaches to confidential communications between government agencies and salaried legal officers in government employment in respect of legal advice, where the advice given is within the professional relationship between the legal officer and the client and the advice is independent in character. That case did not deal directly with the question of salaried legal officers who are employed, as here, directly by a government agency as in-house legal advisers but involved communications between a Commonwealth Government office and the Commonwealth Attorney-General’s office.
37. However, although Brennan J in *Waterford* suggested there was a distinction between in-house lawyers employed by government departments and lawyers employed in a legal office such as the Office of the Commonwealth Attorney General’s office or a State Solicitor’s Office, that distinction was not supported by the other four High Court judges in that case. Since *Waterford*, courts have accepted that legal professional privilege may apply to communications to or from salaried legal advisers employed by statutory authorities where the communications are made for the relevant purpose, the advice is of an independent character and there is a duty to observe professional standards: see for example *Re Page and Metropolitan Transit Authority* (1988) 2 VAR 243 and *Re Potter and Brisbane City Council* (1994) 2 QAR 37.
38. On the information before me, I am satisfied that the agency’s Legal Counsel is an appropriately qualified legal adviser who provides independent legal advice to the agency such that it is capable of attracting legal professional privilege.

39. I am also satisfied that Documents 23, 31, 38 and 57 contain information sought by the agency's Legal Counsel to enable her to advise the agency. Accordingly, I consider that Documents 23, 31, 38 and 57 come within paragraph (d) of *Sterling's* case and would be privileged from production in legal proceedings on the ground of legal professional privilege. Consequently, I consider that Documents 23, 31, 38 and 57 are exempt under clause 7(1) of Schedule 1 to the FOI Act.
40. Documents 60, 62-69, 72-74 and 76 *prima facie* consist of confidential communications between the agency and its legal advisers made for the dominant purpose of giving or seeking legal advice. Consequently, I consider that all of those documents would be privileged from production in legal proceedings on the ground of legal professional privilege and are, therefore, also exempt under clause 7(1).
41. Legal professional privilege extends to any document prepared either by the client or the legal adviser from which the nature of the advice sought or given might be inferred: *Commissioner of Australian Federal Police and Another and Propend Finance Pty Limited and Others* [1997] 188 CLR 501 at 569. Covering letters that do not record legal advice or services will not generally be covered by the privilege: *Re Murphy and Queensland Treasury* (1998) 4 QAR 446 at 456.
42. Documents 61, 70, 71 and 75 are brief communications in the nature of 'covering' letters forwarding legal advice or conveying instructions, although none of those documents attaches or refers to any legal advice or instructions. If disclosed, none would reveal the content of any instructions or legal advice sought or obtained and nor, in my view, could the nature of any legal advice or instructions be inferred. Legal advice relevant to Documents 70 and 75 – but not disclosed in those documents – is contained in Documents 69 and 76 and, in my view, as noted above, that information is privileged as the agency claims. Accordingly, I am not persuaded that Documents 61, 70, 71 and 75 would be privileged from production in legal proceedings on the ground of legal professional privilege.
43. On the information before me, I consider that Documents 23, 31, 38, 57, 60, 62-69, 72-74 and 76 are exempt under clause 7(1) but that Documents 61, 70, 71 and 75 are not exempt under that provision.

ADDITIONAL CLAIMS FOR EXEMPTION

44. On 14 September 2011, the agency advised me that, as well as maintaining its claim that Documents 61, 70, 71 and 75 are exempt under clause 7(1), those documents are also exempt "under Clauses 5 (*Law enforcement - investigative process*), 6 (*Deliberative processes*) and/or 8 (*Confidential communications*) to Schedule 1 of the Freedom of Information Act 1992." However, other than simply making those claims, the agency has provided me with no material or information to explain how the requirements of each of those provisions is

satisfied in this case or – in relation to clauses 5 and 8 – which particular subclause it relies upon.

45. Under s.102(1) of the FOI Act, the agency bears the onus of establishing that its decision is justified or that a decision adverse to another party should be made. I refer to the comments of Owen J, in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at page 573, in relation to a claim for exemption under clause 4(3) of the FOI Act, when he expressed the nature of the onus the agency bears in the following way:

“How can the Commissioner, charged with the statutory responsibility to decide on the correctness or otherwise of a claim to exemption, decide the matter in the absence of some probative material against which to assess the conclusion of the original decision maker that he or she had “real and substantial grounds for thinking that the production of the document could prejudice that supply” or that disclosure could have an adverse effect on business or financial affairs? In my opinion 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.”

46. There is nothing on the face of Documents 61, 70, 71 and 75 to suggest that those documents are exempt under any of the exemptions now claimed. As the agency has provided me with no probative material to support its claims, I am not satisfied that any of those documents are exempt under clauses 5, 6(1) or 8, as the agency claims.

CLAUSE 3 - PERSONAL INFORMATION

47. Documents 61, 70, 71 and 75 are all brief communications. For example, Document 75 consists of two one-line emails. All of those documents contain ‘personal information’, which is defined in the Glossary to the FOI Act as follows:

“...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 fingerprint, retina print or body sample.”*

48. Accordingly, I have considered whether the exemption in clause 3(1) applies to Documents 61, 70, 71 and 75.

49. Clause 3, insofar as it is relevant provides:

- “(1) Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).
- (2) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal personal information about the applicant.
- (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.”
50. The definition of ‘personal information’ makes it clear that any information or opinion about a person, from which that person can be identified, is *prima facie* exempt under clause 3(1). Accordingly, ‘personal information’ can be information that identifies an applicant as well as information that identifies other individuals.
51. 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 exemption recognises that State and local government agencies collect and hold sensitive and private information about individuals, which should not ordinarily be publicly accessible.
52. Having examined Documents 61, 70, 71 and 75, I am satisfied that all contain ‘personal information’ as that term is defined in the FOI Act because that information would identify both the complainant and other people. Most of the personal information in Document 61 and some of the personal information in Documents 70, 71 and 75 is about private individuals who are not officers or former officers of government agencies. All of that information is *prima facie* exempt under clause 3(1).
53. The exemption in clause 3(1) is subject to a number of exceptions which are set out in clauses 3(2)-(6). In the present case, I consider that clauses 3(2), 3(3) and 3(6) are relevant.

Clause 3(2) – personal information about the applicant

54. Clause 3(2) provides that matter is not exempt under clause 3(1) merely because its disclosure would reveal personal information about the applicant (in this case, the complainant). In my view, the use of the term ‘merely’ in clause 3(2), means – according to its ordinary dictionary meaning – ‘solely’ or ‘no more than’ personal information about the applicant: *Re Mossenson and Others and Kimberley Development Commission* [2006] WAICmr 3 at [23].
55. In this case, the only personal information about the complainant in Documents 61, 70, 71 and 75 is contained in the ‘Subject’ line of each document. In my view, the disclosure of that information would ‘merely’ reveal personal information about the complainant and, therefore, the limit on exemption in clause 3(2) applies to that information so that it is not exempt under clause 3(1).

Clause 3(3) – prescribed details

56. Clause 3(3) provides that information is not exempt merely because its disclosure would reveal ‘prescribed details’ about officers or former officers of agencies. The information that is prescribed details is set out in regulation 9(1) of the *Freedom of Information Regulations 1993* and includes the names and job titles of officers and anything done in the course of performing, or purporting to perform, their functions or duties as officers.
57. Documents 61, 70, 71 and 75 all contain prescribed details about officers of agencies, including their names, job titles and things done by them in the course of performing their duties. That information is, therefore, subject to the limit on exemption in clause 3(3) and is not exempt under clause 3(1).
58. However, those documents also contain information about officers of agencies that is not prescribed details, such as direct contact numbers and email addresses. That information is not subject to the limit on the exemption in clause 3(3) and is exempt under clause 3(1): *Re Mossenson* at [39].

Clause 3(6) – the public interest

59. Clause 3(6) provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. Under s.102(3) of the FOI Act, the complainant, as the access applicant, bears the onus of establishing that it would, on balance, be in the public interest for the agency to disclose personal information about other people to him. In the present case, the personal information about private individuals, together with the personal information about officers of agencies that is not prescribed details, in Documents 61, 70, 71 and 75 is the disputed information.
60. Determining whether or not disclosure would, on balance, be in the public interest involves identifying the relevant competing public interests – those favouring disclosure and those favouring non-disclosure – weighing them against each other and making a judgment as to where the balance lies in the circumstances of the particular case.

61. The term ‘public interest’ is not defined in the FOI Act. In my view, it is best described in the decision by the Supreme Court of Victoria in *DPP v Smith* [1991] 1 VR 63, at page 75, where the Court said:

“The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals...”

62. In this case, the complainant has a personal interest in accessing the disputed information but I also understand him to submit – from his submissions in relation to clause 5 – that there is a public interest in disclosing information that may reveal some conspiracy or maladministration by the agency in dealing with the allegations made against him. However, there is nothing in any of the material before me to support that assertion and I give it no regard.
63. In favour of disclosure, I recognise public interests in individuals being able to exercise their rights of access under the FOI Act (subject to the exemptions) and in being able to access their personal information held by government agencies. That latter public interest is recognised in s.21 of the FOI Act, which provides that, when considering the public interest, the fact that a document contains personal information about the applicant must be regarded as a factor in favour of disclosure. Accordingly, I have taken that factor into account.
64. Also in favour of disclosure, I recognise a particular public interest in persons being informed of complaints or allegations made about them and in their being given an opportunity to respond to those allegations before any decision adverse to their interests is made. That is a key requirement of procedural fairness, which agencies are obliged to afford in processes such as that which the agency has undertaken in this case. However, I consider that public interest to have been largely satisfied by the agency providing the complainant with information concerning the substance of the allegations and in his response to that information.
65. Weighing against disclosure in this instance, I take the view that there is a strong public interest in maintaining personal privacy. That public interest is recognised by the inclusion of the exemption provided by clause 3(1). 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.
66. In balancing the competing public interests for and against disclosure, I consider that those favouring non-disclosure outweigh those favouring disclosure in this instance. Accordingly, I am not persuaded that the limit on exemption in clause 3(6) applies to the disputed information in Documents 61, 70, 71 and 75 and I consider that the disputed information is exempt under clause 3(1).

EDITING

67. The complainant submits that the agency is obliged under s.24 of the FOI Act to give him access to “*edited and unedited copies of the documents*”. Section 24 provides:

“24. Deletion of exempt matter

If -

- (a) the access application requests access to a document containing exempt matter; and*
- (b) it is practicable for the agency to give access to a copy of the document from which the exempt matter has been deleted; and*
- (c) the agency considers (either from the terms of the application or after consultation with the applicant) that the applicant would wish to be given access to an edited copy,*

the agency has to give access to an edited copy even if the document is the subject of an exemption certificate.”

68. The application of s.24 was considered by Scott J in *Police Force of Western Australia and Winterton* (1997) WASC 504 at p.16, as follows:

“It seems to me that the reference to the word “practicable” is a reference not only to any physical impediment in relation to reproduction but also to the requirement that the editing of the document should be possible in such a way that the document does not lose either its meaning or its context. In that respect, where documents only require editing to the extent that the deletions are of a minor and inconsequential nature and the substance of the document still makes sense and can be read and comprehended in context, the documents should be disclosed. Where that is not possible, however, in my opinion, s.24 should not be used to provide access to documents which have been so substantially altered as to make them either misleading or unintelligible.”

69. I have reviewed Documents 61, 70, 71 and 75. In my view, the deletion of the disputed information in those documents would leave in the main only the small amount of information about the complainant and some prescribed details. In light of that, I consider that it is not practicable to edit Documents 61, 70, 71 and 75 because to do so would require such extensive editing as to render their meaning unintelligible.

CONCLUSION

70. I find that:

- Documents 1-5, 7-22, 24-30, 32-37, 39-43, 46-56, 58 and 59 are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.

- Documents 23, 31, 38, 57, 60, 62-69, 72-74 and 76 are exempt under clause 7(1).
- Documents 61, 70, 71 and 75 are not exempt under clauses 5(1)(b), 5(1)(a), 5(1)(c), 6, 7(1) or 8.
- Documents 61, 70, 71 and 75 are exempt in part under clause 3(1) but it is not practicable to edit those documents to give access to the information that is not exempt under clause 3(1).

Schedule of Documents

1.	19/11/2008	Internal Board email
2.	19/11/2008	Internal Board email
3.	19/11/2008	Email to Member of Public
4.	19/11/2008	Internal Board email
5.	19/11/2008	Email from Member of Public
7.	20/11/2008	Internal Board email
8.	25/11/2008	Letter to Member of Public
9.	25/11/2008	Memo to File
10.	25/11/2008	Email from Member of Public
11.	25/11/2008	Email from Member of Public
12.	25/11/2008	Email to and from Member of Public
13.	25/11/2008	Email from Member of Public
14.	25/11/2008	Email from Member of Public
15.	26/11/2008	Email from Member of Public
16.	26/11/2008	Email to Member of Public
17.	26/11/2008	Email to Member of Public
18.	26/11/2008	Fax from Member of Public
19.	26/11/2008	Fax from Member of Public
20.	26/11/2008	Email from Member of Public
21.	27/11/2008	Email to Member of Public
22.	28/11/2008	Email from Member of Public
23.	28/11/2008	Memo to Board
24.	28/11/2008	Memo to File
25.	03/12/2008	Email from Member of Public
26.	03/12/2008	Email from Member of Public
27.	08/12/2008	Internal Board email
28.	19/12/2008	Email to Member of Public
29.	07/01/09	Memo to File
30.	23/02/09	Email to Member of Public
31.	05/03/09	Memo to/from Board
32.	17/03/09	Email from Member of Public
33.	17/03/09	Email to/from Board
34.	18/03/09	Letter to Third Party
35.	18/03/09	Email to Member of Public
36.	18/03/09	Email from Member of Public
37.	19/03/09	Email to/from Board
38.	03/04/09	Memo to/from Board
39.	19/03/09	Memo to file
40.	19/03/09	Letter from Third Party
41.	09/04/09	Extract of Minutes
42.	21/04/09	Fax to Third Party
43.	21/04/09	Email to Third Party
46.	21/04/09	Email from Third Party
47.	21/04/09	File notes
48.	22/04/09	Email from Third Party
49.	23/04/09	Letter to Third Party
50.	30/04/09	Letter from Third Party
51.	04/05/09	Letter from Third Party

51A	07/05/09	File notes
52.	Various	Document from Third Party
53.	05/02/09	Document from Third Party
54.	05/02/09	Document from Third Party
55.	09/04/09	Document from Third Party
56.	30/04/09	Document from Third Party
57.	11/05/09	Memo to/from Board
58.	12/05/09	Letter to Third Party
59.	13/05/09	Email to Third Party
60.	22/05/09	Letter to Third Party
61.	25/05/09	Letter from Third Party
62.	27/11/08	Email to Third Party
63.	29/05/09	Email to Third Party
64.	29/05/09	Email to Third Party
65.	29/05/09	Email to Third Party
66.	15/06/09	Email from Third Party
67.	16/06/09	Email to Third Party
68.	31/07/09	Email to Third Party
69.	06/08/09	Email from Third Party
70.	08/08/09	Email to Third Party
71.	28/08/09	Email to Third Party
72.	27/08/09	Email from Third Party
73.	18/09/09	Email from Third Party
73A	18/09/09	Email from Third Party
74.	18/09/09	Email to Third Party
75.	06/10/09	Email to Third Party
76.	02/10/09	Email from Third Party