

CLARKE AND POLICE

OFFICE OF THE INFORMATION COMMISSIONER (WA)

Decision summary issued pursuant to s.76(8) of the *Freedom of Information Act 1992*

COMPLAINT No: 97179

DECISION No: D0011998

PARTIES: Peter Dennison CLARKE

Complainant

POLICE FORCE OF WESTERN AUSTRALIA

Respondent

No. of documents in dispute: 2

Exemption clause(s): Clause 5(1)(b)

In 1993, a motor vehicle owned by Mr Clarke ('the complainant') was sold by another person ('the third party'). However, the complainant did not receive the proceeds of the sale. Subsequently, the third party was charged by police with the offence of stealing and was convicted of that offence in the Fremantle Court of Petty Sessions in April 1997.

By letter dated 25 July 1997, the complainant lodged an access application with the Police Force of Western Australia ('the agency') seeking access under the *Freedom of Information Act 1992* ('the FOI Act') to a document described by the complainant as "a statement made by [the third party]" regarding the theft of the motor vehicle. That request was later changed by the complainant to include a request for access to the statement allegedly made by the person who purchased the complainant's motor vehicle. The agency refused the complainant access to those documents and claimed that they are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.

The initial decision of the agency was confirmed on internal review and, on 24 October 1997, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

I obtained copies of the disputed documents from the agency. On 26 November 1997, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that the disputed documents are exempt under clause 5(1)(b) as claimed by the agency. I received a written submission dated 1 December 1997 from the complainant. Thereafter, a member of my staff met with the complainant in Kalgoorlie on 4 December 1997. I am informed that the complainant believes the police should have charged the third party with more serious offences under the Criminal Code and he seeks access to a copy of the disputed documents in order to pursue his grievances with the police and the third party through any other avenues available to him.

My office also arranged for the complainant to meet with the District Inspector of Police in an attempt to conciliate this complaint. Although the complainant met with the Inspector, who explained police procedures and rules of evidence to him, the complainant remains dissatisfied and has not withdrawn his complaint.

No further submissions or evidence have been received from the complainant. Therefore, I have not been dissuaded from my preliminary view that the disputed documents are exempt. The parties have been fully informed in writing of my reasons for that view. A summary of my reasons follows.

THE DISPUTED DOCUMENTS

There are two disputed documents. One document is a signed witness statement by the person who purchased the complainant's motor vehicle. The second document is a signed statement by the third party. From the material before me, it is apparent that both documents were created by officers of the agency in the course of the investigation into the complainant's complaint concerning the matter involving his motor vehicle. It is also clear that the disputed documents formed part of the police brief of evidence against the third party.

The exemption – clause 5(1)(b)

Clause 5(1)(b) provides:

“5. Law enforcement, public safety and property security

Exemptions

(1) Matter is exempt matter if its disclosure could reasonably be expected to -

(a) ...

(b) 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”.

The decisions in *Police Force of Western Australia v Kelly and Smith* (unreported; Supreme Court of Western Australia; Library No. 960227; 30 April 1996) and *Police Force of Western Australia v Winterton* (unreported; Supreme Court of Western Australia; Library No. 970646; 27 November 1997) make it clear that the exemption applies regardless of the information that is already in the public domain or known to the complainant by other means. If disclosure of the particular document could reasonably be expected to reveal, whether for the first time or not, the identity of the person investigated and the particular matter investigated then the document is exempt.

The complainant’s submissions tended to suggest that public interest considerations should weigh in favour of disclosure of the disputed documents. However, clause 5(1)(b) is subject only to certain limits specified in clause 5(4). I am satisfied that none of those limits applies and it is not open to me to consider whether disclosure of the disputed documents would be in the public interest.

Based on my examination of the disputed documents and the material before me, I am satisfied that the disputed documents were created during the course of an investigation by the agency into a contravention of the law, specifically, the Criminal Code of Western Australia. I am satisfied that the disclosure of those documents could reasonably be expected to reveal that investigation.

In *Police Force of Western Australia v Kelly and Smith* it was the view of Anderson J that the stage which an investigation has reached, or whether the investigation has in fact been completed, is not relevant to whether matter is exempt under clause 5(1)(b). At pages 9-10, by way of comment, His Honour said:

“Even after an investigation has been completed there may be very good operational reasons why there should be no disclosure of it...Of course there may be no need for any secrecy whatever in a particular case and there may be good public interest reasons to give public access to the documents or to give the applicant access to the documents. However, whilst that may be a relevant consideration for the agency in exercising its discretion under s23(1) whether to allow access to the documents to the public or to a particular individual, it cannot help to determine whether the documents are in fact exempt documents under cl 5(1)(b).”

The agency has a discretion to allow access to documents (appropriately edited to remove personal information) which may be technically exempt under clause 5(1)(b). I note that s.3 of the FOI Act makes it clear that the exemptions are not intended to prevent or discourage such discretionary disclosures where that can properly be done. However, s.76(4) specifically prohibits me from making a decision to the effect that access is to be given to a document if it is exempt. That discretion is reserved only for the agency.

Accordingly, for the reasons given to the parties, which I have summarised above, I confirm the decision of the agency. I find that the disputed documents are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER
13 January 1998