

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

**File Ref: F1451998  
Decision Ref: D0021999**

Participants:

**Leo Francis Morrissey**  
Complainant  
  
- and -  
  
**Police Force of Western Australia**  
Respondent

**[Decision title and citation: Re Morrissey and Police Force of Western Australia [1999] WAICmr  
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## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – witness statement – clause 5(1)(b) – matter which could reasonably be expected to reveal the fact and content of a particular investigation by police of a contravention or possible contravention of the law –section 23(2) – whether apparent from nature of document as described in access application that document is exempt – section 26 – whether documents exist - whether the searches undertaken by the agency were sufficient.

***Freedom of Information Act 1992 (WA)*** ss.3(3), 23(2), 26, 74; Schedule 1 clause 3(1), 5(1)(b), 5(4).

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

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

*Re Campbell and Police Force of Western Australia* [1998] WAICmr 26

*Re Kilpa and Western Australian Museum* [1998] WAICmr 14

*Re Kilpa and Western Australian Museum* [1998] WAICmr 12

*Re Stubbs and Department for Family and Children's Services* [1998] WAICmr 4

## DECISION

The decision of the agency to refuse access to:

- (a) the disputed document on the ground that it is exempt under clause 5(1)(b) of Schedule 1 to the *Freedom of Information Act 1992*; and
- (b) the additional requested documents on the ground that all reasonable steps have been taken to locate them and they either do not exist or cannot be found,

is confirmed.

B.KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

25 February 1999

## REASONS FOR DECISION

### BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Police Force of Western Australia ('the agency') to refuse Mr Morrissey ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. In June 1997, in the Court of Petty Sessions Fremantle, the complainant was convicted of assault. The conviction resulted from an incident that occurred at the Fremantle offices of the Legal Aid Commission on 12 February 1997. Subsequently, the complainant filed in the Supreme Court of Western Australia an appeal against his conviction. I understand that the Supreme Court dismissed the appeal.
3. By letter dated 25 May 1997, received at the agency on 29 May 1998, the complainant lodged an access application with the agency seeking access to a copy of the notes taken on the day of the incident by the police officer who investigated the matter, and various other documents including video recordings, audio recordings or any other documents recording the police interview of the person assaulted by the complainant.
4. By letter dated 16 July 1998, the agency informed the complainant that, at the time of the investigation into the incident, the police officer had only made notes of the names and addresses of witnesses and full statements were obtained at a later date. The agency also advised that, despite its searches, no other documents described in the access application had been found, save for a typed statement consisting of 3 pages made by a third party. The agency's decision was to refuse access to the statement on the ground that it was exempt under clause 5(1)(b) of Schedule 1 to the FOI Act and to refuse access to the notes of the police officer on the basis that such a document does not exist.
5. The complainant sought internal review of the agency's decision and, by letter dated 26 August 1998, the internal reviewer confirmed the initial decision. By letter dated 12 October 1998, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

### REVIEW BY THE INFORMATION COMMISSIONER

6. I accepted the complaint and obtained the FOI file maintained by the agency in respect of the complainant's access application. I also obtained a copy of the typed statement. The agency was not able to produce the original statement in response to a notice issued by me for its production, and subsequent inquiries by my office established that the original typed statement is no longer held by the agency. The agency holds a copy of the document only. That copy is itself a document of the agency for the purposes of the FOI Act.

7. I received a submission from the complainant in support of his complaint, with which were included copies of two documents obtained by him from another source. The complainant informed me that one of those documents is a copy of the typed statement to which he has been denied access by the agency.
8. On 15 December 1998, after considering all of the material before me, I notified the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that the copy of the typed statement may be exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. It was also my preliminary view that the matter identified by the agency contained in the police officer's notebook may also be exempt under clause 5(1)(b) and clause 3.
9. The complainant sought my clarification of certain matters raised in my preliminary view, including the sufficiency of the agency's searches. My office made further inquiries about the extent of the searches conducted by the agency. As a result of those inquiries I was informed by an officer of the agency that another document had been created by him on the day of the incident, that document being a handwritten statement by the third party who gave the typed statement. However, the agency informed me that the handwritten statement cannot be located in the agency. I advised the complainant of that information and also that, on the basis of my examination of them, the notes of the police officer do not contain any information other than the names and contact details of third parties. Finally, I also addressed a number of matters raised by the complainant in order to clarify them for him. The complainant responded with another submission.

## **THE DISPUTED DOCUMENT**

10. The disputed document is a copy of a typed and signed witness statement made by a third party and dated 17 February 1997.

## **THE EXEMPTION**

11. The agency claims that the disputed document is exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. 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 -*
  - (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;”*

12. The scope and meaning of the exemption in clause 5(1)(b) was considered by the Supreme Court of Western Australia in *Police Force of Western Australia v Kelly and Smith* (1997) 17 WAR 9. In the *Kelly and Smith* case, after referring to the comments of Owen J concerning this clause in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550, Anderson J said at 13:

*“... 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 stipulated by Owen J that the document “must reveal something about the content of the investigation”.”*

*“In my opinion, the phrase “...if its disclosure could reasonably be expected to... reveal the investigation of any contravention of the law in a particular case...” is apt to include the revelation of the fact of a particular investigation by police of a particular incident involving certain people. I think there is very good reason to accept that Parliament intended that such matter be exempt from access under the Act.”*

13. The fact that the existence of an investigation into a contravention of the law might already been known by a complainant, or otherwise be information that is in the public domain, does not preclude a claim for exemption under clause 5(1)(b). Anderson J made it clear, at pages 14-15 of the decision in *Kelly and Smith* that the exemption may still apply, even where the substance of the investigation has been revealed in prosecution proceedings, when he said that:

*“...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.”*

14. The fact that an investigation has concluded – and that both the fact of it, and, through the concluded prosecution, substantially the content of it, are known to the particular applicant, as in this case – might be a factor that persuades an agency to exercise its discretion under s.3(3) of the FOI Act and grant access to a particular document that is technically exempt. That was certainly the view of the complainant. However, an agency may decide not to exercise its discretion in that manner and to claim the exemption. That discretion is not available to the Information Commissioner. I must apply the law, as interpreted by the Supreme Court, to the facts as I find them. If the document is exempt then the Information Commissioner does not have the power to make a decision to the effect that access to it is to be given.

15. In this instance, the disputed document is a witness statement prepared in the course of an investigation into a possible contravention of the law, namely the offence of assault. The disclosure of that document would clearly reveal that investigation in the sense described by Anderson J in paragraph 12 above. Therefore, I find that the disputed document is exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.
16. The complainant submits that he is in possession of a copy of a three page typed statement made by a third party and dated 17 February 1997 which he obtained from the Crown Solicitor's Office ('the CSO') in the course of his Supreme Court appeal against the assault conviction. He submits that, therefore, there is no reason for the agency to refuse him access to the disputed document.
17. In light of the complainant's submission, the agency was invited to consider agreeing to inform the complainant of at least that information and, if it were a copy of the same document – and nothing I have said is to be taken to confirm that it is or is not – to consider whether it might exercise its discretion to release it. However, the agency was not prepared to agree to the complainant being informed whether or not the document he has is a copy of the disputed document, even though no apparent harm could follow from giving that information and even though the agency gave no good reason for refusing to agree. Unfortunately, that refusal by the agency has only fuelled the complainant's speculation that the agency is hiding some wrongdoing.
18. I consider that my obligations under the FOI Act do not allow me to confirm whether or not the document in the complainant's possession is a copy of the disputed document. Section 74 of the FOI Act prohibits me from disclosing exempt matter in the course of dealing with a complaint, or in my decision or reasons for decision on a complaint. I consider that to confirm whether or not the disputed document is a copy of the document given to the complainant by the CSO would be to reveal something of the content of the disputed document, which I have found to be exempt.
19. Finally, although there may be a public interest in settling this issue, none of the prerequisites for the limit on exemption in clause 5(4) applies in this instance. Therefore, whether or not there is a public interest in disclosure of the disputed document does not arise for consideration.

## SUFFICIENCY OF SEARCH

20. Section 26 of the FOI Act deals with the requirements of an agency in circumstances in which it is unable to locate the documents sought by an access applicant. That section provides:

*"Documents that cannot be found or do not exist*

26. (1) *The agency may advise the applicant, by written notice, that it is not possible to give access to a document if -*
  - (a) *all reasonable steps have been taken to find the document; and*

(b) *the agency is satisfied that the document -*

(i) *is in the agency's possession but cannot be found;*

*or*

(ii) *does not exist.*

(2) *For the purposes of this Act the sending of a notice under subsection (1) in relation to a document is to be regarded as a decision to refuse access to the document, and on a review or appeal under Part 4 the agency may be required to conduct further searches for the document."*

21. I have discussed, in a number of my formal decisions, the question of the sufficiency of an agency's search for documents. Most recently I discussed the issue in my decisions in *Re Campbell and Police Force of Western Australia* [1998] WAICmr 26, *Re Kilpa and Western Australian Museum* [1998] WAICmr 14, *Re Kilpa and Western Australian Museum* [1998] WAICmr 12, and *Re Stubbs and Department for Family and Children's Services* [1998] WAICmr 4.
22. If a complainant raises the issue of the existence of a document which has not been identified by the agency, in my view, there are two questions which are required to be answered. The first question to be answered is whether there are reasonable grounds to believe that the requested document exists or should exist and is, or should be, held by the agency. In circumstances where the first question is answered in the affirmative, the next question, in my view, is whether the agency has taken all reasonable steps to find the document and is satisfied that it is in the agency's possession but cannot be found or that it does not exist.
23. In this case, the agency was not able to locate certain of the documents described by the complainant in his access application. In particular, after conducting its searches, the agency was not able to locate any additional notes taken by the police officer who investigated the assault apart from the names and contact details of a number of witnesses. The agency was also not able to locate the handwritten statement of the third party from which the typed statement was later prepared, nor the original of the disputed document.

### **Existence of the document**

24. Firstly, in respect of additional notes taken by the police officer who investigated the assault, the agency has advised that there are no further notes in existence. In respect of the handwritten statement, the agency acknowledges that such a document once existed. However, at present it is unable to locate it and the agency is not able to confirm whether that document still exists in the agency, but cannot be found, or it has been destroyed. Similarly, in respect of the typed statement, a copy of which is the disputed document in this matter, the

agency acknowledges that an original typed statement must have once existed and may still exist, but the agency cannot presently locate it.

25. Therefore, I must firstly determine whether it is reasonable to expect that each of those three documents exists, or should exist, but cannot be found, before I consider whether the searches undertaken by the agency were sufficient and the agency has taken all reasonable steps to locate the documents, but they cannot be found.

### ***The notes***

26. The complainant provided my office with what appears to be an extract from the record of his interview with the police officer who investigated the assault. In the record of interview excerpt, the police officer is noted as having informed the complainant that he had spoken to witnesses about the assault and, further, that he had “... *spoken to them in relation to the matter and recorded things in (his) notebook which backs up what (a third party) ...*” has said in relation to the assault. The complainant questions the agency’s advice that no contemporaneous notes were made by the police officer on the day of the assault before the complainant was charged, on the basis of the police officer’s statement in the record of interview.
27. My office made inquiries into this issue. One of my officers attended at the Fremantle Police Station and examined the relevant documents held at the Police Station in relation to the arrest and charging of the complainant. One of the documents examined by my officer was the original notebook of the police officer concerned. That examination included an examination of the pages on either side of the pages containing the entries that record the names and contact details of the witnesses. My officer informs me that no further information of the type described by the complainant is recorded in the notebook.
28. My officer also spoke with the police officer concerned in order to clarify the apparent inconsistency between the comment contained in the extract from the record of interview with the complainant and the outcome of my officer’s inquiries. The police officer acknowledged that the comment contained in the record of interview was a bit misleading. The police officer confirmed that he had made certain inquiries with a number of third parties and he had been provided with certain information from a number of those third parties. However, the police officer advised my officer that he did not record that additional information in his notebook and that the only information he recorded at the time was the name and contact details of each of those third parties. I have examined copies, verified by my officer, of the relevant pages of the notebook and the only notes on those pages are names and addresses.
29. In the circumstances, the complainant’s contention that additional information must have been recorded by the police officer in his notebook initially appeared to be reasonably based. However, on the basis of the examination of the notebook and my officer’s discussions with the police officer, I am satisfied that no other contemporaneous notes of the incident were made by the officer in his notebook and, therefore, that no document exists that contains the additional

notes sought by the complainant. Accordingly, I find that the requested document does not exist.

***The handwritten statement***

30. As previously stated, the agency acknowledges that a handwritten statement of the third party from which the disputed document was prepared should exist. The officer concerned recalls taking a handwritten statement at the time and it appears that that document should exist, but the agency has not located it.

***The original typed statement***

31. Clearly, as the disputed document is a photocopy of a typed statement, the original typed statement must at least once have existed and should still exist.

***Conclusion***

32. As I have found that the additional notes sought by the complainant do not exist, I do not consider it to be necessary to inquire any further into the steps taken by the agency to locate them. I consider that the agency's deemed refusal of access to the requested additional notes was justified. However, as I am of the view that both the handwritten statement and the typed statement once existed, and that it is reasonable to expect that at least the typed statement should still exist, I turn now to the question of whether the agency has taken all reasonable steps to locate those documents.

***Sufficiency of the searches***

33. The agency informs me that it conducted an extensive search of its record keeping systems, including making inquiries with the relevant officers of the agency. The only document found by the agency consists of a copy of the typed statement.
34. I am informed by the agency that both the handwritten statement and the original typed statement were attached to the prosecution brief and submitted to the Fremantle prosecuting branch and then referred to the CSO. At the time of the access application, the brief was with the CSO which was acting on behalf of the agency in the complainant's appeal against his conviction. No other possible locations for the document in the agency could be identified by the agency in order to conduct further searches. The agency advised that it had made inquiries with the CSO which had not been able to locate the original handwritten statement. My office has also made inquiries with the CSO which conducted a further search of its file and confirmed that neither the original handwritten statement nor the typewritten statements could be found.
35. Pursuant to section 26(2) of the FOI Act, I may require an agency to conduct further searches, if necessary, to satisfy myself that the agency has acted reasonably and in accordance with its obligations under the FOI Act. However, before I take such action, I consider that I must first be satisfied that the agency

has not, in the first instance, conducted a reasonable search of its record keeping systems and taken all reasonable steps to locate the document.

36. In the circumstances of this matter, I did not require the agency to conduct additional searches. I am satisfied that the agency has taken all reasonable steps to locate the documents, but they cannot be found. On that basis, I confirm the agency's deemed decision to refuse access to the handwritten statement and to the original of the typed statement.
37. Notwithstanding that those documents cannot be located, both documents are clearly documents of the kind described in s.23(2) of the FOI Act. That is, it is apparent, from the nature of the documents as described in the access application, that if they still exist they are exempt documents under clause 5(1)(b) for the reasons I have given in paragraphs 11 - 15 above in respect of the disputed document.
38. As stated earlier in these reasons, following the decision of Anderson J in *Police Force of Western Australia v Kelly and Smith* (1997) 17 WAR 9 (a case concerning an application by those under investigation for access to, *inter alia*, witness statements), it seems that it is not relevant how much the applicant may already know about the fact or substance of an investigation, even through prosecution proceedings resulting from it, when considering whether a particular document, if disclosed, would reveal the investigation. The documents would clearly be exempt under clause 5(1)(b).
39. The complainant alleges that the fact that the original typed statement and the handwritten statement are missing leaves it open for the agency to concoct and use – although for what purpose the complainant does not specify – a false statement. That is not a matter for me. My role in respect of those documents is to determine whether the agency was justified in its decision, deemed to be a refusal of access, to advise the complainant in writing that it is not possible to give access to the documents because all reasonable steps have been taken to locate them but they cannot be found or do not exist. For the foregoing reasons, I find that that decision of the agency was justified.

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