

KOBELKE AND MIN. PREMIER/CABINET

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

**File Ref: 97185
Decision Ref: D0061998**

Participants:

John Charles Kobelke
Complainant

- and -

Ministry of the Premier and Cabinet
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to investigation of alleged breach of Public Service Commission Administrative Instruction – clause 5(1)(b) – whether disclosure could reasonably be expected to reveal the investigation of a contravention or possible contravention of the law in a particular case – whether Administrative Instruction is a “law” per clause 5(5) – whether there was an investigation – section 31 – initial refusal by agency to give information as to the existence or non-existence of the requested documents.

Freedom of Information Act 1992 (WA) s. 31, Schedule 1 clause 5(1)(b), 5(5).

Public Sector Management Act 1994

Public Service Act 1978 s.19

Interpretation Act 1984 s.42

Re Howard and Ministry of Fair Trading (Information Commissioner WA, 6 December 1995, unreported, D05895);

Re Mineralogy and Department of Resources Development (Information Commissioner WA, 5 January 1996, unreported, D00296);

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

Police Force of Western Australia v Kelly and Another (1996) 17 WAR 9.

DECISION

The decision of the agency is confirmed. The requested documents are exempt under clause 5(1)(b) of Schedule 1 to the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

4 February 1998

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Ministry of the Premier and Cabinet ('the agency') to refuse Mr Kobelke ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. The background to this complaint is as follows. On 22 October 1996, Hon. A J G MacTiernan, MLC, addressed a Parliamentary Question to the Leader of the House representing the Premier, Hon. N F Moore, in relation to an article which I understand was published in the *Sunday Times* newspaper on 20 October 1996. In that article, Mr Neil Bartholomaeus, Chief Executive Officer, WorkSafe Western Australia Commission ('WorkSafe'), was reported to have made certain comments about Ms MacTiernan. Ms MacTiernan asked Mr Moore whether the Premier was aware of the *Sunday Times* article; whether the Premier acknowledged that the statements attributed to Mr Bartholomaeus were *prima facie* evidence of a blatant and gross breach of the Public Service Commission Administrative Instruction No.728 and what action the Premier proposed to take to investigate the matter.
3. On 23 October 1996, Mr Moore replied to Ms MacTiernan's question, advising her that the Premier was aware of the *Sunday Times* article and that he had requested the Public Sector Management Office ('the PSMO') to provide him with a report on the matter ('the PSMO report'). On 6 November 1996, Ms MacTiernan asked Mr Moore a further Parliamentary Question relating to that report. In particular, Ms MacTiernan asked Mr Moore whether the report had been completed and, if so, whether the Leader of the House would table the report. Ms MacTiernan also asked Mr Moore, if the report had not been completed, what the cause of the delay in finalising the report was and whether it would be completed and tabled before Parliament was prorogued. In reply, Mr Moore advised Ms MacTiernan that the report had been completed; that he had not been able to discuss the matter further with the Premier; but that he would do so as soon as possible and advise Ms MacTiernan accordingly.
4. By letter dated 15 September 1997, the complainant lodged an application under the FOI Act seeking access to documents described as being "...all documents relating to the Public Sector Management Office Report provided to the Premier on Mr Neil Bartholomaeus in relation to his conduct in 1996 when he publicly criticised the State Opposition with respect to a Disallowance Motion in the Parliament."
5. By letter dated 2 October 1997, the agency's decision-maker, Mr K Jones, refused access to the requested documents pursuant to s.31 of the FOI Act. Without confirming or denying the existence of any documents relating to the complainant's access application, Mr Jones informed the complainant that, if any

such documents did exist then, by virtue of the terms of the complainant's access application, he considered that they would be exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.

6. By letter dated 4 October 1997, the complainant sought internal review of the agency's decision on access. By letter dated 17 October 1997, the agency's internal reviewer Mr G Moore, confirmed the agency's initial decision on access. By letter 22 October 1997, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

7. I required the agency to produce to me for my inspection the FOI file maintained by the agency in relation to the complainant's access application. On 7 November 1997, a preliminary meeting was held with officers of the agency to discuss the particular difficulties I face when dealing with a refusal of access pursuant to s.31 of the FOI Act. Taking into account the history of the matter and its particular circumstances, the agency was asked to reconsider its decision to rely on that section.
8. A preliminary meeting was also arranged with the complainant for Wednesday, 12 November 1997. However, before that meeting took place and before I had received a response from the agency, on 11 November 1997, a copy of the PSMO report was tabled in Parliament by the Premier.
9. On 12 November 1997, I met with the complainant and discussed the procedures to be followed in dealing with his complaint. I also explained, in general terms, the difficulties I face in reviewing a decision to refuse access based on s.31 of the FOI Act. I have previously discussed those difficulties in my decisions in *Re Howard and Ministry of Fair Trading* (6 December 1995, unreported, D05895) and *Re Mineralogy and Department of Resources Development* (5 January 1996, unreported, D00296), as well as in my Annual Report for 1996/97.
10. After the PSMO report had been tabled in Parliament, I asked the agency again to reconsider its reliance on s.31. However, the Director-General of the agency informed me that the agency was of the view that s.31 had been appropriately cited in this matter and gave reasons for that view. It was also submitted that the agency considered that any decision on its part to waive its entitlement to refuse access pursuant to s.31 had the potential to expose the agency to claims of arbitrariness and subjectivity in its application of the FOI Act.
11. By letter dated 26 November 1997, I informed the parties of my preliminary view of this complaint, including my reasons. Without giving any information as to the existence or non-existence of documents of the kind requested by the complainant, it was my preliminary view that, if the requested documents existed, they would be exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. Therefore, the decision of the agency to refuse access pursuant to s.31 of the FOI Act appeared to be justified.

12. However, I also informed the agency that I did not consider that it could expect to be subjected to claims of arbitrariness and subjectivity as claimed, especially in circumstances where the PSMO report, which clearly identifies the existence of other documents, had already been made public by being tabled in Parliament. In my view, the issue was not whether the agency was, at the relevant time, legally entitled to refuse access pursuant to s.31 of the FOI Act (I consider that it was as the only criterion for the use of that section is that the requested documents, if they exist, would be exempt under clause 1, 2 or 5 of Schedule 1). Rather, the question was whether the continued reliance on the technical correctness of that decision was within the spirit and intent of the FOI Act, given the facts as outlined above. If, at the time the agency received and dealt with the complainant's access application, the circumstances were such that there were reasons why it was considered essential to conceal the fact of the investigation by the PSMO then, in my opinion, any necessity to further conceal that fact had been negated by the tabling of the PSMO report in Parliament on 11 November 1997.
13. By letter dated 5 December 1997, the complainant submitted that the exemption in clause 5(1)(b) did not apply to the requested documents and provided arguments in support of that submission. By letter dated 12 December 1997, the agency responded to my preliminary view by waiving its reliance on s.31 of the FOI Act. That is, it acknowledged the existence of the requested documents, but reiterated its claims that those documents are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act and provided submissions on that. Following that concession, I was able to deal with this complaint in a more satisfactory manner by being able to inform the complainant of the nature of the documents in dispute, and to more fruitfully discuss the competing claims of both parties in respect of those documents.
14. Finally, having examined the documents identified by the agency as falling within the ambit of the complainant's access application which were produced to me, it appeared to me that some of those documents contained information that was already a matter of public record. Following consultations between my office and the agency, the agency released a number of those documents to the complainant.

THE DISPUTED DOCUMENTS

15. As a result of the tabling of the PSMO report in Parliament and the subsequent release of other documents to the complainant by the agency, 62 documents remain in dispute between the parties ('the disputed documents'). Those documents consist of, *inter alia*, correspondence, memoranda, briefing notes and other documents related to the subject matter of the complainants' access application. However, 20 of those documents appear to be almost identical to others, save for the fact that they appear to be drafts, or they may have handwritten corrections or annotations written on them.

THE EXEMPTION

16. The agency claims that the disputed documents are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. Clause 5(1)(b) provides:

“(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”.

17. I have discussed the scope and meaning of the exemption in clause 5(1)(b) in a number of my formal decisions following the decision of the Supreme Court of Western Australia in *Police Force of Western Australia v Kelly and Another* (1996) 17 WAR 9. In that case, after referring to the comments of Owen J. 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’.”

THE COMPLAINANT’S SUBMISSIONS

18. The complainant submits that clause 5(1)(b) does not apply to the disputed documents and that there are no grounds for an exemption. In summary, the complainant submits:

- (i) there was no “investigation” under the *Public Sector Management Act 1994* (‘the PSM Act’);
- (ii) if there was an investigation, it must relate to a contravention or possible contravention of the law and this did not;
- (iii) the term “investigation” should be construed narrowly so that it is confined to criminal investigations carried out by law enforcement agencies and so as to exclude administrative investigations;
- (iv) there may well be some documents that are not part of the investigation and those documents should be disclosed; and
- (v) a distinction should be drawn between documents properly in the public arena and documents made known to an applicant by other means.

The agency's submissions

19. The agency submits that:

- (i) clause 5(1)(b) should not be read narrowly;
- (ii) the exemption covers disciplinary proceedings, and disciplinary proceedings need not have been commenced for the exemption to apply; and
- (iii) Administrative Instruction No. 728 is a relevant law for the purposes of clause 5(1)(b), and the investigation was of a possible contravention of that law.

A CONTRAVENTION OR POSSIBLE CONTRAVENTION OF THE LAW

20. In clause 5 the term “the law” is used in a broad sense and is not limited in its application to the criminal law only. The term is defined in clause 5(5) to mean the law of this State, the Commonwealth, another State, a Territory or a foreign country or state. The definition does not limit it to the criminal law only and the terms of the exemption clause itself clearly contemplate investigations that may lead to disciplinary proceedings, as well as those potentially leading to prosecutions.
21. In my view, therefore, the exemption clearly extends to laws of many kinds, including regulatory laws. For example, documents relating to investigations under taxation legislation, public health and safety legislation and legislation regulating the conduct of public sector employees, including Chief Executive Officers, may all be documents which fall within the scope of the exemption.
22. In order to determine whether the disputed documents may be exempt under clause 5(1)(b) of Schedule 1 to the FOI Act, it is necessary to consider whether the alleged conduct is capable of amounting to a contravention or a possible contravention of the law. In this case, Ms MacTiernan asserted that statements allegedly made by Mr Bartholomaeus were *prima facie* evidence of a blatant and gross breach of the Public Service Commission Administrative Instruction No. 728. It is therefore necessary to decide whether a breach of Administrative Instruction No. 728 could be a contravention or possible contravention of “the law” within the meaning of clause 5(5) of Schedule 1 to the FOI Act.
23. Administrative Instructions were originally published by the former Public Service Commissioner pursuant to his authority under s.19(1) of the *Public Service Act 1978* (‘the Public Service Act). Section 19(2) of the Public Service Act further provided that Administrative Instructions were subsidiary legislation, but that s.42 of the *Interpretation Act 1984* did not apply to them. The PSM Act repealed the Public Service Act. However, clause 5 of Schedule 5 of the transitional provisions in the PSM Act provides, among other things, that the Administrative Instructions that were in force under s.19 of the Public Service Act immediately before the commencement of clause 5, continue in force with such modifications as are necessary, until repealed.

24. Clause 5(5) of Schedule 1 to the FOI Act defines “the law” to include the law of this State. The law of this State clearly includes the written law and that term is defined in s.5 of the *Interpretation Act 1984* to include subsidiary legislation. The term “subsidiary legislation” is also defined in the *Interpretation Act 1984* to include, among other things, regulations, orders and other instruments made under any written law and having legislative effect. Administrative Instructions were made under a statute enacted by the Parliament of Western Australia and have continued in force by virtue of clause 5 of Schedule 5 to the PSM Act. In my view, they are subsidiary legislation and fall within the definition of “the law” in clause 5(5).
25. Administrative Instruction No. 728 states, among other things, that public servants who are empowered to make public comment should confine themselves to providing such information as is necessary to explain government policy or to provide factual, explanatory and background material pertinent to the question at hand. That Instruction also states that public servants who are empowered to make public comment should not give their personal views on matter of government policy nor should they publicly criticise any political party, its actions or its policies.
26. In my view, an investigation by the PSMO into an alleged breach of Administrative Instruction No. 728 by Mr Bartholomaeus, or by any other public sector employee, would, of its nature, be an investigation to determine whether there had been a contravention or possible contravention of the law within the terms of clause 5(1)(b).

The meaning of the term “investigation”

27. The complainant submits that there was no investigation under the PSM Act. The term “investigation” is not defined in either the FOI Act, the *Interpretation Act 1984* or in any of the FOI legislation in other Australian jurisdictions. The fundamental rule of statutory interpretation is that plain words must be given their plain meaning. The *Australian Concise Oxford Dictionary, 2nd Edition* defines the word “investigation” as meaning: “*the process or an instance of investigating; a formal examination or study*”. In the same source the term “investigate” is defined as meaning “*inquire into; examine; study carefully; make an official inquiry into; make a systematic inquiry or search*”. Further, “inquire” means “*seek information formally; make a formal investigation*”.
28. Nothing in clause 5(1)(b) or elsewhere in the FOI Act appears to me to limit the operation of that clause to investigations involving the criminal law only. In my opinion, the term “investigation” according to its ordinary dictionary meaning applies to the many kinds of formal inquiries normally associated with law enforcement activities. In those instances, investigators have a number of statutory and common law powers, including powers of entry, search, seizure and arrest at their disposal. However, I also consider that the term is equally capable of applying to less formal, but official inquiries into other matters that involve the gathering of information. In the latter case, an inquiry might involve nothing more formal than seeking a report about a particular matter (being a

contravention or possible contravention of the law) as the basis for action or decision.

29. Further, the terms of the exemption clause itself clearly contemplate investigations that may lead to disciplinary proceedings, as well as those that may lead to prosecutions: see *Police Force of Western Australia v Winterton* (unreported; Supreme Court of Western Australia; Library No. 970646; 27 November 1997). Taking into account the decision in *Winterton*, the exemption in clause 5(1)(b) would clearly extend to documents relating to inquiries concerning the conduct of public servants, including senior public servants such as Chief Executive Officers, which may be a disciplinary matter.
30. I do not consider that there is any justification for adopting the “narrow” interpretation of the term “investigation” as submitted by the complainant. A narrow construction of the term “investigation” may be an acceptable approach if, for example, the ordinary meaning of that term were ambiguous, or if it produced an absurdity in the legislation. However, in my view, no such situation arises in the case of clause 5(1)(b). It does not appear to me that Parliament intended to limit the application of clause 5 to criminal law investigations. That conclusion seems apparent from the reference to disciplinary proceedings and from the definition of “the law” in clause 5(5). Providing an inquiry or investigation concerns a contravention or possible contravention of a law, it would come within the terms of clause 5(1)(b).
31. In his submission the complainant drew a distinction between the functions of the police in conducting investigations and non-law enforcement investigations that are not clearly identified as investigations at the outset. He said:

“It would not be unheard of for the response to some form of complaint to be loosely called an “investigation” by an agency, when it is about looking into existing procedures or even if relating to the performance of a particular officer. Such an “investigation” would be about, for example, improving procedures or performance, but with no expectation that there is likely to be a need to take any prosecution or disciplinary action due to a possible breach of the law. Such a so-called investigation would not, therefore, be caught by clause 5(1)(b).

In comparison, the functions of police and other law enforcement bodies are going to frequently fall within the category of being an investigation into the possible contravention of the law.

My concern is that if my reasoning is not followed, agencies could claim an exemption under clause 5(1)(b) for any document that could, however indirectly, lead to prosecution or disciplinary proceedings. Government agencies undertake many types of activities which may be called an “investigation”, or that they describe as such. These activities may, even indirectly, indicate that there has been a potential breach of the law and consequently be exempt from disclosure pursuant to clause 5(1)(b) (and section 31).

I strongly believe that the exemptions in the FOI Act are not intended to protect these types of documents from disclosure.”

32. I share the concerns of the complainant about the breadth of clause 5(1)(b) and the potential that exists for its abuse, especially when it may be used in conjunction with s.31. If Parliament did not intend clause 5(1)(b) to be interpreted and applied in the manner decided by the Supreme Court, then the remedy lies with Parliament. I must apply the law as enacted by the Parliament and subsequently interpreted by the Supreme Court. However, for the reasons set out above, I do not consider that the application of clause 5(1)(b) depends on the proper characterisation of an inquiry as an investigation at the outset, nor does it depend on the expectation of proceedings, disciplinary or otherwise, at its conclusion. The question is whether the particular document could reasonably be expected to reveal an investigation or inquiry concerning a contravention or possible contravention of the law. That question necessarily involves the identification of the relevant law.
33. From my examination of the disputed documents, which the complainant has not seen, it is clear that the PSMO conducted inquiries into the allegation Ms MacTiernan made against Mr Bartholomeaus and reported its findings to the Premier. In my view, those inquiries need not have been formally conducted under the provisions of the PSM Act to come within the terms of clause 5(1)(b). It is enough if there was an inquiry for the purpose of determining whether there had been a breach or possible breach of Administrative Instruction No. 728 for the exemption to apply. Therefore, in the circumstances of this matter, I consider that there was an investigation into a contravention or possible contravention of the law, namely, Administrative Instructions made under the Public Service Act.

Reveal the investigation

34. During the course of my meeting with the complainant he submitted that it was abundantly clear from the previous discussions in Parliament and following the tabling of the PSMO report in Parliament on 11 November 1997 that the facts of the matter are publicly known. However, in *Kelly and Another*, Anderson J made it clear that documents can “reveal an investigation” even when the fact of the investigation has been revealed through other materials or is publicly known. At page 14 of that decision, Anderson J said:

“One would not expect the character of the documents as exempt documents to depend on whether, by some means, the subject matter of the documents, or some of it, had already got out. There is no such qualification in the Act save insofar as the word “reveal” may be said to connote it. ...I do not see why any element of novelty or exclusivity should be imported into the phrase “reveal the investigation”. A document may reveal a state of affairs which is also revealed by other things. The same state of affairs may be separately revealed in several documents. I do not think there is any difficulty in saying that the separate disclosure of each

separate document reveals that state of affairs. Further, I think that it would be a very inconvenient construction of the Act, as it would mean that an applicant could overcome a claim of exemption by showing or claiming that he already knew something of the matter from other sources. I do not think it could have been intended that exemption should depend on how much the applicant already knows or claims to know about the matter.”

35. Thus, the exemption in clause 5(1)(b) may apply to a document or documents regardless of the applicant’s knowledge about the investigation, or the extent of information about the investigation that may already be in the public domain. As to the question of the disclosure of documents that are not part of the investigation, the answer to that question depends on whether disclosure of such documents could reasonably be expected to reveal the investigation in the sense described by the Supreme Court of Western Australia. That is, if they could reasonably be expected to reveal that there is or was an investigation, the identity of the person investigated and generally the subject matter of the investigation, then they can be said to reveal the investigation, whether or not they are documents created in the course of the investigation. Having inspected the disputed documents, I am of the view that their disclosure could reasonably be expected to reveal something of the content of the PSMO investigation.

CONCLUSION

36. I am satisfied that Administrative Instructions form part of “the law” for the purposes of clause 5(1)(b) and that there was an investigation by the PSMO into a contravention or possible contravention of Administrative Instruction No. 728. I am also satisfied that the disclosure of the disputed documents could reasonably be expected to reveal that investigation. Accordingly, I find that the disputed documents are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.
