

**DECISION SUMMARY ISSUED BY THE INFORMATION COMMISSIONER (WA)**

**Decision title and citation:** *Re Coulson and Department of Conservation and Land Management* [1999] WAICmr 6

**COMPLAINT No:** F0011999

**DECISION No:** D0061999

**PARTIES:** Sallie COULSON

Complainant

**DEPARTMENT OF CONSERVATION  
AND LAND MANAGEMENT**

Respondent

**No. of documents in dispute:** 19

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

In January 1998, Ms Coulson, ('the complainant') was involved in a protest demonstration against logging in the State forests in the southwest of Western Australia. The complainant had climbed the King Jarrah Tree in the Lowden State Forest near Bunbury and positioned herself approximately 30 metres above the ground. As a result of her actions, the Department of Conservation and Land Management ('the agency') subsequently charged the complainant by summons with a breach of the *Forest Management Regulations 1993* ('the Regulations').

The complainant lodged an access application with the agency in October 1998, seeking access, under the *Freedom of Information Act 1992* ('the FOI Act') to specific documents. The agency identified 22 documents and refused the complainant access to those documents on the ground that they are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. The agency's initial decision was confirmed on internal review. On 6 January 1999, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision on access.

#### **Review by the Information Commissioner**

I obtained the disputed documents from the agency. In the course of my review, my office consulted with the agency. As a result of those discussions, the agency reconsidered its decision and granted the complainant access to most, but not all of the disputed documents, either in full or in part. Thereafter, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that the documents, or parts of documents remaining in dispute between the parties, may be exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.

The complainant was invited to reconsider her complaint. The complainant did not withdraw her complaint but lodged a submission in support of her request for access to all of the disputed documents. However, nothing in the complainant's submission has dissuaded me from my preliminary view that the disputed documents are exempt under clause 5(1)(b). A summary of my reasons follows.

#### **The disputed documents**

There are 19 documents (4 in full and 15 in part) remaining in dispute in this matter. The disputed documents are described in a document schedule provided to the complainant by the agency. They consist of various notes, briefing notes, situation reports, letters and inter-agency memoranda dealing with aspects of the protest demonstration.

#### **The exemption – Clause 5(1)(b)**

Clause 5(1)(b) provides as follows:

“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 scope and meaning of the exemption in clause 5(1)(b) has been the subject of three decisions by the Supreme Court of Western Australia: *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550; *Police Force of Western Australia v Kelly and Another* (1996) 17 WAR 9; and *Police Force of Western Australia v Winterton* (unreported, Supreme Court of Western Australia, Library No. 970646, 27 November 1997).

Two questions arise from the terms of the exemption. They are, firstly, whether the investigation by the agency into the alleged breach of the Regulations by the complainant was “an investigation into a contravention or possible contravention of the law”; and, secondly, whether the disclosure of the disputed documents could reasonably be expected to “reveal” that investigation.

The Regulations were made under the *Conservation and Land Management Act 1984* and are “subsidiary legislation” within the meaning of that term as defined in the *Interpretation Act 1984*. The Regulations were published in accordance with the requirements of s.41 of the *Interpretation Act 1984* and are, therefore, a “law” as defined in clause 5(5) of Schedule 1 to the FOI Act for the purposes of the clause 5 exemption.

The Regulations prescribe a number of offences. In particular, regulation 128D(3) of the Regulations provides that it is an offence to camp in a State Forest or a timber reserve, other than in a marked camping area, without authorisation. In my view, unauthorised camping would constitute a contravention of regulation 128D(3) and would, therefore, be a contravention of the law within the meaning of clause 5(1)(b) of Schedule 1 to the FOI Act. In my view, an investigation by the agency to determine whether a particular person had camped illegally in a State forest would be an investigation to determine whether that alleged conduct amounted to a contravention of regulation 128D(3) and would, therefore, be an investigation into a contravention or possible contravention of the law within the meaning of clause 5.

The agency claims that disclosure of the disputed documents could reasonably be expected to reveal something about the investigation it conducted into the protest demonstration in the Lowden State Forest and, in particular, something about its investigation into the alleged breach of the Regulations by the complainant.

The application of the exemption in clause 5(1)(b) requires that the disclosure of the disputed document could reasonably be expected to reveal the particular investigation. It is not sufficient that the documents merely reveal the fact that there has been an investigation. They must reveal, in the words of Anderson J in *Kelly*, ...*the fact of a particular investigation of a particular incident involving certain people*” (at page 13).

Anderson J also said, at pages 14 and 15 of the *Kelly* case that:

*“I do not think that it could have been intended that exemption should depend on how much the applicant already knows or claims to know about the matter... [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.”*

I have examined the disputed documents. I consider that the disclosure of those documents would reveal the fact of the agency’s investigation into the protest demonstration in the Lowden State Forest and something of the content of that investigation. In my opinion, the disputed documents fall within the terms of the exemption in clause 5(1)(b).

### **Limits on exemption**

Clause 5(4) operates to limit the exemption in clause 5(1)(b), if the matter claimed to be exempt is information of the kind described in clause 5(4)(a)(i), (ii) or (iii) and its disclosure would, on balance, be in the public interest. Having examined the disputed documents, I do not consider that they contain any matter of the kind described in subparagraphs (i), (ii) or (iii) of clause 5(4)(a). Accordingly, the limit does not apply and there is no scope for me to consider whether disclosure of the requested documents would, on balance, be in the public interest.

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

B. KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER  
19 April 1999