

**PANNACCHIONE & ALDWICH AND POLICE**

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

**File Ref: 96195  
Decision Ref: D00997**

Participants:

**Antonio Vincenzo Pannacchione and  
Aldwich Holdings Pty Ltd**  
Complainants

- and -

**Police Force of Western Australia**  
Respondent

**DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - refusal of access - documents contained on an investigation file - clause 5(1)(b) - whether documents reveal the investigation of a contravention or possible contravention of the law.

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

*Police Force of Western Australia v Kelly and Smith* (Supreme Court of Western Australia, 30 April 1996, unreported, Library No. 960227).

*Manly v Ministry of Premier and Cabinet* (Supreme Court of Western Australia, 15 June 1995, unreported, Library No. 950310).

## DECISION

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

B.KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

26th March 1997

## 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 Aldwich Holdings Pty Ltd and Mr Pannacchione ('the complainants') access to documents requested under the *Freedom of Information Act 1992* ('the FOI Act').
2. Some time in 1996, officers of the agency conducted an investigation into matters arising from a complaint made to the agency by the Potato Marketing Corporation of Western Australia ('the PMCWA'). By letter dated 16 September 1996, solicitors for the complainants sought access to certain documents of the agency associated with that investigation.
3. The agency identified three documents in its possession as being within the ambit of the access application. However, on 11 November 1996, access to those documents was refused on the ground that they are exempt documents under clause 5(1)(b) of Schedule 1 to the FOI Act. The initial decision of the agency was confirmed on internal review.
4. By letter dated 11 December 1996, the complainant sought external review of the agency's decision. However, that letter was wrongly addressed to the agency, rather than the Information Commissioner. It was redirected to my office by the agency. The letter was received in my office on 31 December 1996 and the complaint to me formally lodged on 7 January 1997.

### REVIEW BY THE INFORMATION COMMISSIONER

5. I obtained copies of the disputed documents from the agency, together with the file maintained by the agency in respect of this matter. After examining those documents and considering the material before me, on 14 January 1997, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that the requested documents may be exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. Therefore, the complainants were invited to reconsider their complaint.
6. The complainants' solicitor responded to my preliminary view with a further submission and I was informed that access was sought to one document only, being the original letter of complaint to the agency. Following that advice, and some further negotiations by my office exploring the possibility of the agency providing some information to the complainants to allay their particular concerns, the complainants' solicitor attempted to negotiate the disclosure of that document by persuading the agency to exercise its discretion under s.3(3) of the

FOI Act. However, that attempt was unsuccessful and it remains for me to determine this matter by a formal decision.

## THE DISPUTED DOCUMENT

7. The disputed document is described in the schedule provided to the complainants by the agency as a letter and investigation report, dated 21 May 1996, by Mr B Greay, Industry Security Officer of the PMCWA.

## THE EXEMPTION

8. Clause 5(1)(b) of Schedule 1 to the FOI Act 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;”*

9. I have discussed the scope and meaning of the exemption in clause 5(1)(b) in a number of my decisions following the decision of the Supreme Court of Western Australia in *Police Force of Western Australia v Kelly and Smith* (30 April 1996, unreported, Library Number 960227). In that case, after referring to the comments of Owen J concerning clause 5(1)(b) in *Manly v Ministry of Premier and Cabinet* (Supreme Court of Western Australia, 15 June 1995, unreported, Library No. 950310), Anderson J said, at page 8:

*“...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 investigation”. ”*

10. Further, Anderson J made it clear that documents can “reveal an investigation” even when the fact of that investigation has been revealed through other materials. His Honour said, at pages 10 and 11:

*“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 of the matter...[clause] 5(1)(b) is not limited to new revelations but covers all*

*matter that of itself reveals things referred to, without regard for what other material might also reveal those things, or when that other material became known, and without regard to the actual state of knowledge that the applicant may have on the subject or the stage that the investigation has reached.”*

11. It is my understanding that an investigation was conducted by the agency on the basis of the information contained in the disputed document. I further understand that no charges have been laid against the complainants as a result of that investigation.
12. The complainants’ solicitor claims that the disputed document, being the original letter of complaint to the agency, could not reveal the investigation unless the letter itself included a full investigation of the matters with supporting corroborative evidence which necessitated the investigation by the agency. It is the solicitor’s submission that the letter of complaint cannot reveal the investigation until such time as it had been received by the agency and an investigation by the agency has commenced.
13. I do not consider the scope and meaning of the exemption in clause 5(1)(b) is limited in the manner suggested by the complainant’s solicitor, nor do I consider that the decision in *Kelly and Smith’s* case limits the breadth of that clause in the manner contended by the solicitor. Counsel for the appellant in the *Manly* case argued for a more limited interpretation of the clause and sought to restrict its application to documents or matters that have emanated from the efforts of the investigators. Owen J rejected that argument (see pages 25 and 26) and, in light of the decision in *Kelly and Smith*, I also reject it.
14. In light of the obligations imposed on me pursuant to s.74 of the FOI Act not to reveal exempt matter, I am unable to describe the contents of the disputed document in any detail. However, I have inspected the document in dispute in this matter and considered its contents. Although, clearly, it was created before the commencement of the agency’s investigation, in my view, its disclosure could reasonably be expected to reveal something of the content of the subsequent investigation. It would reveal the subject matter of the subsequent investigation and the identity of the person or persons the subject of that investigation. To that extent, in my opinion, disclosure of the document could reasonably be expected to reveal the agency’s investigation. That investigation was into a possible breach of the provisions of *The Criminal Code*.
15. In addition, disclosure of the document would also reveal the investigations conducted by the PMCWA into possible criminal offences. The exemption provided by clause 5(1)(b) does not require that the relevant investigation have been carried out by a law-enforcement agency. It is apparent from the document itself that the PMCWA carried out a certain amount of the investigation itself and that investigation was into possible contravention of the law as defined in clause 5(5).

16. Therefore, I consider the disputed document contains matter the disclosure of which could reasonably be expected to reveal the investigation of a contravention or possible contravention of the law, even though no prosecution has resulted. Further, I do not consider any of the limits in clause 5(4) applies to that document. Consideration of whether, on balance, disclosure would be in the public interest does not, therefore, arise. Accordingly, I find that the disputed document is exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.

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