

WAGHORN AND OTHERS AND POLICE

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

**File Ref: 94125
Decision Ref: D01195**

Participants:

**Bradley William Waghorn
Jeffrey Alan Christmass**
Complainants

- and -

Police Force of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - clause 7 - legal professional privilege - document containing legal advice from Director of Public Prosecutions - whether "solicitor/client" relationship between the Director of Public Prosecutions and agency - document brought into existence for "sole purpose" of giving or receiving legal advice.

FREEDOM OF INFORMATION - clause 5(1)(b) - refusal of access - internal investigation reports prepared by officers of agency in the course of their duties - confidential communications - records of interview - information provided by third parties - whether reasonable to expect prejudice to future supply of information - whether disclosure in the public interest - public interest in complainants being informed of nature of complaint against them - interpretation of clause 5(1)(b) - reveal an investigation - prior disclosure of exempt information - requirements to establish exemption under clause 5(1)(b).

FREEDOM OF INFORMATION - clause 6 - whether documents form part of the deliberative processes of the agency - prior disclosure of exempt matter - public interest factors for and against disclosure - public interest in complainants being informed of basis of agency's decisions affecting them.

FREEDOM OF INFORMATION - clause 3(1) - refusal of access - personal information about third parties - public interest factors for and against disclosure - requirement to establish exemption under clause 3(1) - public interest in complainants obtaining information about complainants - section 21 - identity of confidential sources of information

Freedom of Information Act 1992 (WA) ss. 15(8); 21; 24; 68(1); 69(4); 72(1)(b); 75(1); 102(1); Schedule 1 clauses 3(1), 5(1)(a), 5(1)(b), 5(1)(c), 5(2), 5(3), 6(1), 6(1)(a), 7, 8, 14; Glossary in Schedule 2.

Criminal Code Act Compilation Act 1913 (WA)

Director of Public Prosecutions Act 1991 (WA)

Freedom of Information Act 1982 (VIC)

Director of Public Prosecutions Act 1982 (VIC)

Director of Public Prosecutions Act 1983 (C'wth)

Grofam Pty Ltd and Others v Australia and New Zealand Banking Group Limited and Others (1993) 117 ALR 669.

Re Easdown and Director of Public Prosecutions; Minister for Police and Emergency Services and Victoria Police (No. 1) and Continental Airlines Incorporated (1987) 2 VAR 102.

Grant v Downs (1976) 135 CLR 674.

Baker v Campbell (1983) 153 CLR 52.

Re Tickner and Police Force of Western Australia (Information Commissioner WA, 7 March 1995, unreported).

Attorney-General's Department v Cockcroft (1986) 10 FCR 180.

Re Read and Public Service Commission (Information Commissioner WA, 16 February 1994, unreported).

Re Waterford and Department of Treasury (No 2) (1984) 5 ALD 588.

Re Veale and Town of Bassendean (Information Commissioner WA, 25 March 1994, unreported).

Re Kobelke and Minister for Planning and Others (Information Commissioner WA, 27 April 1994, unreported).

Re A and Heathcote Hospital (Information Commissioner WA, 9 June 1994, unreported).

Re Hayes and The State Housing Commission of Western Australia (Homeswest) (Information Commissioner WA, 17 June 1994, unreported).

Re Gray and The University of Western Australia (Information Commissioner WA, 23 June 1994, unreported).

Re Manly and Ministry of the Premier and Cabinet (Information Commissioner WA, 16 September 1994, unreported).

Re C and Department for Community Development (Information Commissioner WA, 12 October 1994, unreported).

Re Smith and State Government Insurance Commission (Information Commissioner WA, 5 December 1994, unreported).

Re Edwards and Ministry of Justice (Information Commissioner WA, 12 December 1994, unreported).

DECISION

It is decided that the decision of the agency of 23 August 1994, that Document 8 is exempt under clause 7 of Schedule 1 to the *Freedom of Information Act 1992*, is confirmed.

Further, it is decided that the decision of the agency of 23 August 1994, that parts of Documents 1 and 2 are exempt under clause 5(1)(b) and clause 6(1) is set aside. In substitution it is decided that the Documents 1 and 2 are not exempt.

Further, it is decided that the decision of the agency of 23 August 1994, that the whole of Documents 12 and 13 are exempt under clause 3(1) is set aside. In substitution it is decided that the agency has to give the complainants access to edited copies of those documents with the names and addresses of third parties deleted.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

22 May 1995

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 access to certain documents of the agency which are the subject of an access application under the *Freedom of Information Act 1992* ('the FOI Act') lodged by Messrs B Waghorn and J Christmass ('the complainants').
2. On 9 June 1994, the complainants applied to the agency for access to all notes, letters of recommendation, records of interview, statements and other material relating to the decision to charge the complainants with offences contrary to the *Criminal Code Act Compilation Act 1913*. On 10 August 1994, Acting Senior Sergeant J Ross of the agency made the decision on access. He granted the complainants access in full to some documents and refused the complainants access to a number of other documents, on the basis that those documents were exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.
3. On 12 August 1994, the complainants applied to the agency for internal review of the decision of Acting Senior Sergeant Ross. On 23 August 1994, Acting Chief Superintendent V J Rose, FOI Internal Review Officer of the agency made the decision on internal review. He released further documents in full to the complainants and refused the complainants access, either in part or in full, to 21 other documents. Acting Chief Superintendent Rose advised the complainants that the documents to which access had been refused were exempt under clauses 3(1), 5(1)(b) or clause 7 of Schedule 1 to the FOI Act.
4. On 25 October 1994, the complainants applied to the Information Commissioner for a review of the decision of Acting Chief Superintendent Rose. Although the complainants' application was initially 4 days out of time, after receiving submissions from solicitors for the complainants, the complaint was accepted on 10 November 1994.

REVIEW BY THE INFORMATION COMMISSIONER

5. On 14 November 1994, in accordance with my obligation under s.68(1) of the FOI Act, I advised the agency that this complaint had been accepted for review. In accordance with my authority under s.75(1) and s.72(1)(b) of the FOI Act, I sought the production to me of the requested documents together with the agency's file maintained in respect of this access application. As the agency had not identified the requested documents with sufficient particularity, I also required the production of a schedule listing and describing each document in dispute and the exemptions claimed for those documents. I also required the agency to provide further and better reasons for its decision to deny access including findings on any material questions of fact underlying those reasons and

the identification of the material on which those findings were based. Some of the requested documents were provided to my office on 23 November 1994, the remainder and the additional information requested were provided on 5 December 1994. At that stage, the agency also claimed that the documents in dispute were also exempt under one or more of clauses 5(1)(a), 5(1)(b), 5(1)(c), 6, 7 or 8 of Schedule 1 to the FOI Act.

6. During the course of dealing with this complaint, I was advised by the office of the Director of Public Prosecutions ('the DPP') that several of the documents identified by the agency as coming within the ambit of the complainants' access application had originated from the office of the DPP. As I considered that the office of the DPP might be a body affected by a decision made on this complaint, pursuant to my power under s.69(4) of the FOI Act, I invited the DPP to make submissions to me in respect of the documents in dispute in this matter which originated from the office of the DPP.
7. In the course of dealing with this complaint during December 1994 and January 1995, through conciliation and negotiation, the agency released a number of additional documents or parts of documents to the complainants. On 20 January 1995, after examining the documents remaining in dispute and considering submissions from the agency, the complainants and the DPP, the parties to the complaint were provided with my preliminary views on the complaint and the reasons for those preliminary views.
8. The parties to the complaint were informed that it was my preliminary view that none of the documents were exempt under clause 5(1)(a) of Schedule 1 to the FOI Act; that Documents 4, 5, 6, 7, 9 and 10 on the agency's schedule of documents may not be exempt under any of the exemption clauses claimed; that Document 11 may be exempt under clause 5(1)(b) and clause 6(1); that some, but not all, of the matter contained in Documents 1, 2, and 8 may be exempt under clause 5(1)(b) but not under clause 6(1); and that some, but not all, of the matter contained in Documents 12 and 13 may be exempt under clause 3(1), but not under clause 5(1)(c), of Schedule 1 to the FOI Act.
9. Following receipt of my preliminary view, the agency released to the complainants most of the documents, or parts of documents which, according to my preliminary view, were not exempt documents. However, during that process, the agency inadvertently also released to the complainants matter which I had indicated in my preliminary view may have been exempt matter under clause 5(1)(b) of Schedule 1 to the FOI Act. As a result of the release of that exempt matter, on 22 February 1994, I informed the agency that it was my view that the agency's claim that most of the matter contained in Documents 1, 2 and 8 was exempt matter under clause 5(1)(b) of the FOI Act was no longer sustainable. The agency was invited to reconsider its claims in respect of those documents.
10. The agency subsequently advised me that it maintained its claim that Document 8 is an exempt document under clause 7 of Schedule 1 to the Act. I was also informed that the agency would not consider waiving its privilege in respect of that document. The agency maintained its claim that some of the matter

contained in Documents 1 and 2 was exempt under either clause 5(1)(b) or clause 6(1) of Schedule 1 to the FOI Act. Finally, the agency maintained its claim that the matter edited from Documents 12 and 13 was exempt matter under clause 3(1) of Schedule 1 to the FOI Act.

11. I also received further correspondence from the DPP dated 15 March 1995, in which the DPP submitted, among other things, that Document 8 was brought into existence solely for the purpose of advising the Deputy Commissioner, Mr Ayton as to the proposed prosecution action. Therefore, the DPP also claimed that Document 8 was exempt under clause 7 of Schedule 1 to the FOI Act.
12. In light of these developments, on 16 March 1995, the complainants were informed that, as the agency maintained its claim that Document 8 is an exempt document under clause 7 of Schedule 1 to the Act, I had considered further the agency's claim with respect to that document. The complainants were informed that it was my preliminary view that Document 8 is, *prima facie*, a confidential communication between a client and a lawyer, and that the agency's claim that Document 8 is exempt under clause 7 of Schedule 1 to the FOI Act may be justified.
13. The complainants were further informed that, in forming my preliminary view on this aspect of the matter, I had considered, and taken account, of the decision of the Full Federal Court in *Grofam Pty Ltd and Ors v Australia and New Zealand Banking Group Limited and Ors* (1993) 117 ALR 669 and the decision of the Administrative Appeals Tribunal in Victoria in *Re Easdown and Director of Public Prosecutions; Minister for Police and Emergency Services and Victoria Police (No 1) and Continental Airlines Incorporated* (1987) 2 VAR 102.
14. The complainants were invited to reconsider their complaint in respect of Document 8, taking into account my preliminary view and, if they did not wish to withdraw their complaint in respect of that document, to make such further submissions they might wish to make in relation to this aspect of their complaint. The complainants subsequently advised me that they did not wish to withdraw their complaint and provided further submissions to me. The complainants maintained their claim for full access to copies of Documents 1, 2 and 8 and access to edited copies of Documents 12 and 13. As no further conciliation between the parties seemed likely, I proceeded to a formal decision in respect of the documents remaining in dispute.

THE DISPUTED DOCUMENTS

15. There are five documents remaining in dispute between the parties, namely Documents 1, 2, 8, 12 and 13 on the agency's schedule of documents. Those documents are described as follows:

Document 1 Report from Acting Superintendent Trewin to OIC Internal Investigations Branch, re Waghorn and Christmass, dated 19 August 1993.

- Document 2 Report from Commander Lippe to Acting Deputy Commissioner Ayton, re Waghorn and Christmass, dated 30 November 1993.
- Document 8 Three page letter from the DPP to Mr Ayton, dated 25 March 1994.
- Document 12 Computer print-out relating to Mr Waghorn.
- Document 13 Computer print-out relating to Mr Christmass.
16. Parts of Documents 1 and 2 are claimed by the agency to be exempt under either clause 5(1)(b) or clause 6(1) of Schedule 1 to the FOI Act. The agency asserts that those parts of Documents 1 and 2 which are claimed to be exempt under clause 5(1)(b) would disclose the substances of the investigation which led to the decision to charge the complainants. The agency further claims that those parts of Documents 1 and 2 which are claimed to be exempt under clause 6(1) would, if disclosed, reveal the opinions, advice or recommendations prepared or recorded by Acting Superintendent Trewin and Commander Lippe in the course of, or for the purposes of, the deliberative processes of the agency.
17. Document 8 is claimed to be exempt under clause 7 of Schedule 1 to the FOI Act. The agency asserts that this document is a record of legal advice from the DPP to Mr Ayton and that it would be privileged from production in legal proceedings on the ground of legal professional privilege.
18. Parts of Documents 12 and 13 are claimed to be exempt under clause 3(1) of Schedule 1 to the FOI Act. Those documents contain information about aspects of the personal employment history of the complainants who are employed as police officers in the agency, including, *inter alia*, brief details of various complaints received by the agency about the complainants and the results of agency inquiries into those complaints.

THE EXEMPTIONS

(a) Clause 7 - Legal professional privilege

19. Clause 7 of Schedule 1 to the FOI Act provides:

"(1) Matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege.

Limit on exemption

(2) Matter that appears in an internal manual of an agency is not exempt matter under subclause (1)."

20. As I have said previously, the purpose of this exemption is to ensure that documents which would be protected from production in legal proceedings cannot otherwise be obtained under the FOI Act. The doctrine of legal professional privilege is founded on consideration of high public policy. In the joint judgment of Stephen, Mason and Murphy JJ in *Grant v Downs* (1976) 135 CLR 674 at 685 it was said :

"The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available. As a head of privilege, legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision."

21. In *Grant v Downs*, the High Court considered whether the privilege attached to reports made by officers of the Health Commission of New South Wales following the death of a patient in a psychiatric hospital. In support of the claim, an affidavit was sworn by an officer of the Health Commission to the effect that the documents concerned were brought into existence for a number of purposes - to determine whether any member of the staff was guilty of breaches of discipline, to detect whether there were any shortcomings in the hospital administration and for submission to the legal advisers of the Health Commission in the event that disciplinary proceedings involving staff arose, or coronial proceedings arose, or in the event that a civil claim arising from the death was initiated against the Health Commission. The High Court unanimously rejected this claim to privilege and held that only those documents which are brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings are entitled to immunity from production.
22. After consideration of the matters in issue, Stephen, Mason and Murphy JJ further said, at p688:

"All that we have said so far indicates that unless the law confines legal professional privilege to those documents which are brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings the privilege will travel beyond the underlying rationale to which it is intended to give expression and will confer an advantage and immunity on a corporation which is not enjoyed by the ordinary individual. It is not right that privilege can attach to documents which, quite apart from the purpose of submission to a solicitor, would have been brought into existence for other purposes in any event, and then without attracting any attendant privilege. It is

true that the requirement that documents be brought into existence in anticipation of litigation diminishes to some extent the risk that documents brought into existence for non-privileged purposes will attract the privilege but it certainly does not eliminate the risk. For this and the reasons we have expressed earlier we consider that the sole purpose test should now be adopted as the criterion of legal professional privilege"..

23. Thus, the test to be applied in order to decide whether a document attracts legal professional privilege is the "sole purpose" test. This requires a consideration of whether the document was brought into existence for the sole purpose of giving or receiving legal advice or for use in existing or anticipated legal proceedings: *Grant v Downs, op. cit; Baker v Campbell* (1983) 153 CLR 52.

Does Document 8 meet the "sole purpose test"?

24. The agency claims that Document 8 is a communication between a legal practitioner, the DPP, and a client, Mr Ayton.
25. In their initial submissions to me, the complainants disputed that a solicitor/client relationship existed between the DPP and the agency. The complainants submitted that, as the basis for legal professional privilege is the solicitor/client relationship, that relationship must be established before any privilege can be claimed. Further, the complainants claimed that the provisions of the *Director of Public Prosecutions Act 1991* clearly provide that it is for the DPP to determine whether or not it will prosecute in any given case and that it is not a function of the DPP to advise others as to whether that person or body should prosecute. The complainants submitted that the DPP is merely a statutory body which has been set up predominately to prosecute indictable offences and not to provide advice to the public or the government.
26. However, after receiving and considering my preliminary view in relation to the agency's claim for exemption in respect of Document 8, the complainants, conceded that, for the purpose of considering the application of legal professional privilege in the matter before me, the DPP may be considered a "legal practitioner" and Mr Ayton may be considered "a client", in accordance with the decision of the Full Federal Court in *Grofam* and the decision of the Administrative Appeals Tribunal in Victoria in *Re Easdown*. In addition, the complainants conceded that, as a matter of fact, evidenced by Mr Ayton's letter to the DPP and the DPP's reply, Mr Ayton sought legal advice from the DPP in relation to charges of perjury against the complainants.
27. In *Re Easdown*, the Victorian Administrative Appeals Tribunal ('AAT') considered an application under the Victorian *Freedom of Information Act 1982* for access to various documents. Among other things, the AAT considered whether legal professional privilege applied to legal advice given to the Chief Commissioner of Police of Victoria by the Victorian DPP. In that case, the applicant argued that the provision of legal advice to other people was beyond the power of the Victorian DPP under the provisions of the *Director of Public*

Prosecutions Act 1982(Vic). The AAT determined, notwithstanding that the giving of legal advice by the Victorian DPP might strictly lie outside his statutory functions, the facts of the case established that the advice given by the Victorian DPP was legal advice of the traditional kind, the Chief Commissioner of Police was the client of the DPP and the document satisfied the criteria for legal professional privilege enunciated by the High Court in *Grant v Downs*. Accordingly, the documents in question were held to be subject to legal professional privilege and exempt from disclosure under the Victorian FOI Act.

28. In the case of *Grofam*, the appellants sought discovery of documents including legal advice given by the Commonwealth DPP to the Australian Taxation Office ('the ATO'). The appellants also contended that the Commonwealth DPP had no power under the *Director of Public Prosecutions Act 1983(Cwth)* to give legal advice to the ATO and that the documents could not be covered by legal professional privilege. The full Federal Court after considering the matter, decided that it was unnecessary to express a final view about whether the Commonwealth DPP had power to give legal advice. The Court said that on the facts of the case, the evidence revealed there was an established practice of the ATO seeking advice from the Commonwealth DPP and that it was reasonable to infer that the ATO had a belief that the DPP was authorised to give legal advice to the ATO. Accordingly, the Court held that as a matter of judicial policy, communications between a client and a lawyer, which would normally be privileged, ought to be protected where the client involved genuinely believed that there was an entitlement to give the advice in question.
29. The complainants submitted that despite the existence of a solicitor/client relationship which might otherwise attract privilege, the specific nature of the communications, the circumstances of the advice and the fundamental reasons for the application of legal professional privilege must be taken into account. The complainants further submitted that a consideration of the fundamental reasons for applying privilege amounts to a consideration of the competing public interests factors and that it is incorrect to say that no consideration must be given to the public interest in disclosing a document where it "may" be exempt under clause 7 of Schedule 1 to the Act. The complainants submitted that it is only when a document is established to be exempt under clause 7, that any public interest in favour of disclosure was excluded from consideration.
30. In my view, it is clear from that document, when read in conjunction with a letter from Mr Ayton to the DPP dated 6 December 1993, which letter has been disclosed by the agency to the complainants, that Mr Ayton was seeking advice from the DPP relating to the viability of perjury charges against one or both of the complainants.
31. The DPP submitted it was one of the functions of his office, to provide police with advice and guidance as to the charges to be laid against defendants and that this function is found in Guideline 11 of the *Statement of Prosecution Policy and Guidelines* issued by his office. It was his contention that Document 8 was brought into existence for the sole purpose of advising Mr Ayton as to the proposed prosecution action against the complainants.

32. I am satisfied, from my examination of Document 8 and related documents, the submission of the DPP and the authorities referred to in paragraph 12 above, that Document 8 is a communication between a solicitor and a client and that it was created for the sole purpose of giving legal advice to the client. In my view, Document 8 meets the "sole purpose test" in *Grant v Downs* and is an exempt document under clause 7 of Schedule 1 to the FOI Act. As I am satisfied that the Document 8 meets the requirements of the "sole purpose test" in *Grant v Downs* and is, *prima facie*, an exempt document under clause 7, there is no scope for a consideration of whether there is any public interest in the disclosure of that document.
33. The exemption in clause 7 of Schedule 1 to the FOI Act is not limited by a public interest test. In my view, my function in dealing with complaints under the FOI Act, does not require an investigation of all the circumstances surrounding the creation of the document, as suggested by the complainant, other than is necessary in order to establish an exemption. In this instance, the inquiries my office conducted were sufficient to establish a *prima facie* claim for exemption under clause 7 of Schedule 1 to the FOI Act.
34. The DPP also claimed that Document 8 is exempt because the Office of the DPP is an exempt agency under Schedule 2 to the FOI Act. The FOI Act recognises that, from time to time, documents originating in exempt agencies may be held by other agencies and thus may be accessible under that Act, the test being whether the agency has possession or control of the documents in question. Section 15(8) of the FOI Act requires an agency holding requested documents that originated with or received from an exempt agency, to notify the exempt agency that an access application has been made for those documents.
35. The purpose of this notification is to obtain the benefit of consultation with the exempt agency as to the status of the requested documents. For example, routine documents of an exempt agency or documents dealing with administrative matters of an exempt agency, will not necessarily be sensitive and could be released if requested. Further, clauses 5(2), 5(3) and clause 14 of Schedule 1 to the FOI Act provide that matter is exempt matter if it was created by, or originated in, certain agencies or if it is matter protected by secrecy provisions of certain specified enactments. The office of the DPP is not one of those agencies. For this reason, I reject the submission of the DPP that all documents created by the Office of the DPP, but which are located within the possession or control of an agency dealing with an access application relating to those documents are, for that reason alone, exempt from disclosure under the FOI Act. Their exempt status must be established by reference to one or more of the clauses in Schedule 1 to the FOI Act.
36. However, I find that Document 8 is exempt under clause 7 of Schedule 1 to the FOI Act for the reasons given above.

(b) Clause 5 - Law enforcement, public safety and property security

37. Document 1, which consists of 18 folios, and Document 2, which consists of 11 folios, are claimed to be exempt from disclosure under clauses 5(1)(b) of Schedule 1 to the FOI Act. Those documents are reports prepared by Acting Superintendent Trewin and Commander Lippe, outlining the investigation into allegations of improper conduct against Mr Waghorn and Mr Christmass. As such, the reports contain information and evidence gathered during the investigation and that information forms part of the material relevant to that investigation. 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;"

38. At paragraphs 33-45 of my decision in *Re Tickner and the Police Force of Western Australia* (7 March 1995, unreported), I discussed two possible interpretations of clause 5(1)(b) of Schedule 1 to the FOI Act. I expressed the view, at paragraph 43, that clause 5(1)(b) seeks to protect from disclosure documents that could reasonably be expected to reveal the substance of an investigation, in a particular case, whether or not that investigation has resulted in disciplinary or prosecution proceedings. In my view, the words "in a particular case" mean, in the context of this access application, the investigation into the allegations of improper conduct against Mr Waghorn and Mr Christmass.
39. Applying that interpretation to the circumstances of the matter before me, the parts of Documents 1 and 2 claimed to be exempt under clause 5(1)(b) and which would attract the exemption under that clause, are those parts of Documents 1 and 2 which, if disclosed, could reasonably be expected to reveal the essential material forming the basis of the investigation into the allegations of improper conduct against Mr Waghorn and Mr Christmass.

Application of clause 5(1)(b) to Documents 1 and 2

40. To establish the exemption under clause 5(1)(b), the agency must persuade me that there is a "reasonable expectation" that certain consequences will follow if a particular document were to be disclosed. A reasonable expectation is one based on reason; not irrational, absurd or ridiculous: *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 at 190. Further, it is my view that, in some circumstances, the contents of the documents themselves may provide the evidence for concluding that the required effect could reasonably be expected to result from the disclosure of those documents.
41. Documents 1 and 2 contain information about the background to the investigation, the evidence gathered during the investigation, the issues considered during the investigation and the recommendations made as a result of the investigation. The evidence included the evidence of a number of people, including Mr Waghorn and Mr Christmass, and other witnesses.
42. However, as already noted in paragraph 9, the agency released to the complainants a significant amount of the material contained in documents 1 and 2. In fact, the agency has now released to the complainants, 15 of the 18 folios from Document 1, and 9 of the 11 folios from Document 2. In addition, when the agency first dealt with the access application, the agency released to the complainants full copies of sworn statements of the evidence given to the agency by two of the witnesses. Notwithstanding the release of those statements, the agency claimed that the information in those statements which was also recorded in Documents 1 and 2, is exempt matter under clause 5(1)(b) of Schedule 1 to the FOI Act.
43. Taking into account the amount and substance of material released to the complainants by the agency, both before and after this complaint was made to my office, I do not accept that the claim of the agency that the disclosure of the remainder of the material could reasonably be expected to reveal the substance of the investigation against the complainants. In my view, the information already released to the complainants has fully revealed the matters investigated by the agency. Therefore, on the evidence and material before me, I am not satisfied that the requirements of clause 5(1)(b) have been established. Accordingly, I find that none of the matter contained in Documents 1 and 2 is exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.

(c) Clause 6 - Deliberative processes

44. Although the agency claimed more than one exemption was applicable to Documents 1 and 2, after receiving my preliminary view on those documents, the agency maintained its claim that some parts of each document are exempt from disclosure under clause 6(1) of Schedule 1 to the FOI Act. Clause 6(1) provides:

"6. Deliberative processes

Exemptions

(1) Matter is exempt matter if its disclosure

(a) would reveal -

(i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or

(ii) any consultation or deliberation that has taken place, in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency;

and

(b) would, on balance, be contrary to the public interest."

45. To establish an exemption under clause 6(1), the agency must satisfy both parts (a) and (b) of this exemption. In my decision in *Re Read and Public Service Commission* (16 February 1994, unreported), I accepted the meaning of the phrase "*deliberative processes of...a Minister or agency*" given by the Commonwealth Administrative Appeals Tribunal in *Re Waterford and Department of Treasury (No 2)* (1984) 5 ALD 588 as being correct for Western Australia (see discussion in *Re Read* at paragraphs 14-26). The relevant passages from *Re Waterford* (cited at paragraph 17 in *Re Read*) are as follows:

"As a matter of ordinary English the expression 'deliberative processes' appears to us to be wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency. The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing on one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action. Only to the extent that a document may disclose matter in the nature of or relating to deliberative processes does s.36(1)(a) come into play...

It by no means follows, therefore, that every document on a departmental file will fall into this category. Furthermore, however imprecise the dividing line may appear in some cases, documents disclosing deliberative processes must, in our view, be distinguished from documents dealing with the purely procedural or administrative processes involved in the functions of the agency...

It is documents containing opinion, advice, recommendations etc. relating to internal processes of deliberation that are potentially shielded from disclosure...Out of that broad class of documents, exemption under s.36 only attaches to those documents the disclosure of which is 'contrary to the public interest'..."

46. Documents 1 and 2 were created by Acting Superintendent Trewin and Commander Lippe during the investigation of the matters alleged against the complainants. As noted in paragraph 47, the documents contain information about the background to the investigation, the evidence gathered during the investigation, the issues considered during the investigation and the recommendations made as a result of the investigation. From my consideration of the background to this complaint, and from my examination of the matter contained in Documents 1 and 2, it is clear that they were prepared for consideration by senior officers of the agency. Accordingly, I am satisfied that Document 1 and 2 are deliberative process documents that satisfy the requirements of sub-clause 6(1)(a) of Schedule 1 to the FOI Act. I am also satisfied that the disclosure of those parts of the documents which the agency claims are exempt under clause 6(1) would reveal opinion, advice or recommendations that were obtained, prepared or recorded for the purposes of the deliberative processes of the agency.
47. As I have found that parts of Documents 1 and 2 meet the requirements sub-clause 6(1)(a), the exempt status or otherwise of those parts of the documents must be determined by a consideration of the requirements of part (b) of clause 6(1). That is, those parts of Documents 1 and 2 will be exempt under clause 6(1) if it would, on balance, be contrary to the public interest to disclose them. The onus of persuading me that this is the case lies on the agency by virtue of s.102(1) of the FOI Act.
48. An examination of the information contained in the 15 folios from Document 1, which the agency has already released to the complainants, discloses that the agency has released most of the advice and opinions, and 7 of the 10 recommendations of Acting Superintendent Trewin. The purpose of the exemption in clause 6(1) is to preserve and protect the integrity of the thinking processes of the agency. I recognise a public interest in ensuring that informed decision-making occurs in agencies. However, I also recognise a public interest in individuals affected by decisions of agencies being fully informed of the basis of those decisions.
49. The agency has not identified and weighed public interest factors for and against the disclosure of that document in order to demonstrate that it would, on balance, be contrary to the public interest to disclose that document. In particular, the agency has not considered the public interest in an individual being given access to documents of an agency which contain information about that person. That public interest is recognised and enshrined in s.21 of the FOI Act. In my view, there have been no compelling arguments or material provided to me by the agency which persuade me that the release of this document would, on balance, be contrary to the public interest.
50. Taking into account the fact that the agency has released such an extensive amount of material to the complainants, including matter which in my preliminary view may have been exempt matter, I am not satisfied that the disclosure of the matter contained within the 3 remaining folios of Document 1, which the agency

claims is exempt under clause 6(1) would, on balance, be contrary to the public interest. Accordingly, I find that none of the matter within Document 1 which has not been released to the complainants, is exempt clause 6(1) of Schedule 1 to the FOI Act.

51. Further, taking into the fact that the agency has released 9 folios of the 11 folios from Document 2, including matter which in my preliminary view may have been exempt matter, I am not satisfied that the disclosure of the matter contained within the 2 remaining folios of Document 2, which the agency claims is exempt under clause 6(1) would, on balance, be contrary to the public interest. Accordingly, for reasons similar to those set out above in respect of Document 1, I find that none of the matter within Document 2, which has not been released to the complainants, is exempt clause 6(1) of Schedule 1 to the FOI Act.

(c) **Clause 3 - Personal Information**

52. The agency submits that Documents 12 and 13 are exempt on the ground that they both contain personal information about third parties. The particular matter claimed to be exempt under clause 3(1) of Schedule 1 to the FOI Act consists of the names and addresses of persons who have complained to the agency about the conduct and actions of the complainants as police officers. Clause 3(1) provides:

"3. Personal information

Exemption

- (1) *Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).*

Limits on exemption

- (2)...
(3)...
(4)...
(5)...

- (6) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest."*

53. In the Glossary in Schedule 2 to the FOI Act, "**personal information**" is defined to mean: "*...information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead -*

- (a) *whose identity is apparent or can reasonably be ascertained from the information or opinion; or*

- (b) *who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample."*
54. As I have said on numerous occasions and most recently in *Re Tickner*, at para 18, in my view, the purpose of the exemption in clause 3(1) is to protect the privacy of third parties (see also *Re Veale and Town of Bassendean* (25 March 1994, unreported, at para 34); *Re Kobelke and Minister for Planning and Others* (27 April 1994, unreported, at para 68); *Re A and Heathcote Hospital* (9 June 1994, unreported, at para 23); *Re Hayes and The State Housing Commission of Western Australia (Homeswest)* (17 June 1994, unreported, at para 20); *Re Gray and The University of Western Australia* (23 June 1994, unreported, at para 14); *Re Manly and Ministry of the Premier and Cabinet* (16 September 1994, unreported, at para 46); *Re C and Department for Community Development* (12 October 1994, unreported, at para 22); *Re Smith and State Government Insurance Commission* (5 December 1994, unreported, at para 13); and *Re Edwards and Ministry of Justice* (12 December 1994, unreported, at para 15).
55. In some instances, the mention of a person's name in the context of an agency's document may reveal "personal information" about that individual. However, more is normally required to establish an exemption under clause 3(1). The complainants are prepared to accept access to a copy of Documents 12 and 13 with the names and addresses of third parties deleted. However, the agency claims that disclosure of any part of Document 12 or 13 would reveal exempt matter because disclosure of the substance of the complaints would enable the complainants to identify the particular third parties who had complained.
56. From my examination of documents 12 and 13, I accept that those documents contain personal information about third parties. However, each document also contains personal information about the particular complainant concerned. Section 21 of the FOI Act provides that the fact that matter in a requested document is personal to the applicant, must be considered as a factor in favour of disclosure for the purpose of making a decision as to whether it is in the public interest for the matter to be disclosed, or the effect that the disclosure might have. In my view, the agency has not given consideration to the rights of the complainants to access information personal to themselves.
57. Further, it is my view that deleting the names and addresses of third parties that appear in Documents 12 and 13, adequately addresses the public interest in maintaining the privacy of individuals. Disclosure of Documents 12 and 13 to the complainants in this manner would not, in my view, reveal any other matter of a private nature relating to the third parties.
58. As the complainants have indicated their willingness to receive access to edited copies of Documents 12 and 13, and it is practicable for the agency to provide access in this manner, I consider s.24 of the FOI Act places the agency under a duty to provide the complainants with access to an edited copy of Documents 12 and 13.

59. In the early stages of dealing with this complaint, the agency objected to the release of Documents 12 and 13 on the ground that those documents were also exempt under clause 5(1)(c) of Schedule 1 to the FOI Act. However, in light of my preliminary view, the agency subsequently withdrew its objections to the release of this document on the ground of exemption under clause 5(1)(c). Clause 5(1)(c) is designed to protect the identity of informers. In my view, whilst not accepting that the third parties in this instance could be properly be called "informers" merely because they complained about police, the identity of those parties is adequately protected by the deletion of their names and addresses in the manner described above.
