

OFFICE OF THE INFORMATION COMMISSIONER (WA)

Decision summary issued pursuant to s.76(8) of the *Freedom of Information Act 1992*

COMPLAINT No: F0081998

DECISION No: D0131998

PARTIES: Zoran Alexander KILPA

Complainant

WESTERN AUSTRALIAN MUSEUM

Respondent

No. of documents in dispute: 1

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

Mr Kilpa ('the complainant') is an employee of the Western Australian Museum ('the agency'). In 1996, he made a complaint that the agency had breached certain Public Sector Standards ('the Standards') relating to human resources management. The agency appointed an independent reviewer to conduct an investigation into the matters of complaint under the *Public Sector Management (Review Procedures) Regulations 1995* ('the Regulations'). Subsequently, the reviewer reported his findings to the agency and to the Public Sector Standards Commissioner. In January 1997, the agency gave the complainant a summary of the independent reviewer's report, but did not give him a copy of the actual report.

By letter dated 29 October 1997, the complainant lodged an application with the agency seeking access under the *Freedom of Information Act 1992* ('the FOI Act') to a copy of the report of the independent reviewer. The agency refused to give access to that document on the ground that it is exempt under clause 8(2) of Schedule 1 to the FOI Act. The agency's initial decision was confirmed following internal review. Thereafter, on 22 January 1998, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

#### Review by the Information Commissioner

A meeting was held with officers of the agency to determine whether this complaint could be resolved through conciliation. Following those discussions, the agency decided to give the complainant access to a copy of the requested document with certain matter deleted. The agency maintained its claim for exemption under clause 8(2) in respect of the deleted matter. The complainant was invited to reconsider his complaint in light of the concession made by the agency. However, the complainant informed my office that he was not prepared to accept access to an edited copy of the document.

On 31 March 1998, I informed the parties of my preliminary view, including detailed reasons for my view. Although the agency claimed exemption under clause 8(2) for the deleted matter, it was my preliminary view that the agency had not established a valid claim for exemption under that clause. Nonetheless, I was of the view that some of the deleted matter may be exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.

Subsequently, the agency released some of the previously deleted matter to the complainant in accordance with my preliminary view. The complainant did not withdraw his complaint, but nothing further was received from him. I am not dissuaded from my preliminary view that the matter remaining in dispute is exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. A summary of my reasons follows.

#### The disputed matter

The disputed document is a three page report of the independent reviewer dated 23 December 1996. The matter remaining in dispute consists of paragraph 2 on page 2 of that report.

#### The exemption

Clause 5(1)(b) provides that matter is exempt matter if its disclosure could reasonably be expected to 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.

I have previously 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* (1996) 17 WAR 9. In that case, after referring to the comments of Owen J concerning clause 5(1)(b) in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550, Anderson J said, at page 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 investigation’.”*

His Honour also 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 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 to the actual state of knowledge that the applicant may have on the subject or the stage that the investigation has reached.”*

Further, in a number of my decisions and most recently in my decision in *Re Henderson and Others and Education Department of Western Australia* (26 August 1997, unreported, D02197), I concluded that the *Public Sector Management Act 1994* (‘the PSM Act’) is a law as defined in clause 5(5) of Schedule 1 to the FOI Act for the purposes of the clause 5 exemptions, being a law of this State. In that case, I also decided that the Standards are subsidiary legislation made under that Act and are, therefore, a law of the State of Western Australia within the meaning of clause 5(5) of Schedule 1 to the FOI Act.

The Standards were established by the Public Sector Standards Commissioner, in accordance with his powers under s.21 of the PSM Act and published in the *WA Government Gazette* also in accordance with s.21.

Among other things, s.9 of the PSM Act requires all public sector bodies and employees to comply with the provisions of the Standards. The term “contravention” in clause 5(5) of Schedule 1 to the FOI Act is defined to include a failure to comply. Section 80(b) of the PSM Act provides that an employee who contravenes a provision of the PSM Act or a public sector standard or code of ethics commits a breach of discipline. If, following investigation or admission, a person is found to have committed a breach of discipline, he or she is potentially subject to one or more of the penalties provided in Division 3 of Part 5 of the PSM Act (see ss. 83, 84, 86). Therefore, in my view, a failure by a public sector body or employee to comply with one or more of the Standards would constitute a “contravention” of s.9 of the PSM Act and would, therefore, be a contravention of the law within the meaning of subclause 5(1)(b) of Schedule 1 to the FOI Act.

It is apparent from the documentation produced to me that the reviewer was selected by the agency for the specific purpose of carrying out an independent review of the complainant’s allegations that there had been breaches of the Standards, as required by the Regulations. In my view, therefore, the reviewer clearly carried out his investigation for the purpose of determining whether there had been a breach of the Standards. For the reasons given, I consider that investigation to have been an investigation for the purpose of determining whether there had been a contravention or possible contravention of the law in that particular case.

Although the complainant may have some knowledge of the fact of the investigation and something of its content, in my view, the disclosure of the disputed matter could reasonably be expected to reveal not just the fact of that investigation, but also something of the content of the reviewer’s investigation, including the specific subject matter of the investigation and perhaps some of the people involved. To that extent, disclosure of the disputed matter could reasonably be expected to reveal the investigation of a possible contravention of the law as required in clause 5(1)(b).

In this instance, based upon my examination of the disputed document, I do not consider that any of the limits in clause 5(4) applies to limit the exemption in clause 5(1)(b). Accordingly, a consideration of whether, on balance, disclosure would be in the public interest does not arise.

I vary the decision of the agency to refuse access to that matter on the basis that it is exempt under clause 8(2) of Schedule 1 to the FOI Act. I find that the matter remaining in dispute is exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.

B. KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER  
8 May 1998