

**SALEAM AND POLICE**

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

**File Ref: 97030  
Decision Ref: D01397**

Participants:

**James Saleam**  
Complainant  
  
- and -  
  
**Police Force of Western Australia**  
Respondent

**DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - refusal of access - documents relating to the prosecution and conviction of certain people - reliance upon section 23(2) - whether it is apparent from the nature of the documents as described in the access application that all of the documents are exempt documents - clause 5(1)(b) - documents which contain matter the disclosure of which could reasonably be expected to reveal the fact and content of a particular investigation by police of a contravention or possible contravention of the law - whether previous disclosure of certain matter is sufficient to displace an exemption claim under clause 5(1)(b) - whether there is an obligation under section 24 to give access to edited copies of the documents.

*Freedom of Information Act 1992 (WA)* ss.10, 23(1), 23(2), 24; Schedule 1 clause 5(1)(b), 5(4), 5(5).

*The Criminal Code (WA)*

*Re Pannacchione and Aldwich Holdings Pty Ltd and Police Force of Western Australia* (Information Commissioner, 26 March 1997, unreported, D00997).

*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 to refuse access pursuant to s.23(2) of the *Freedom of Information Act 1992* is confirmed.

B.KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

18th April 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, known as the Police Service ('the agency') to refuse Mr Saleam ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. By letter dated 1 October 1996, the complainant lodged an access application with the agency and sought access under the FOI Act to documents of the agency described generally as copies of statements made to police in 1989 in respect of a certain matter; copies of documents from a prosecution brief concerned with a particular offence of arson; and copies of statements made by certain police officers in respect of another matter.
3. Without identifying any of the requested documents, by letter dated 16 December 1996, the agency's decision-maker refused the complainant access to the requested documents pursuant to s.23(2) of the FOI Act, on the ground that the documents as described in the access application would be exempt documents under clause 5(1)(b) of Schedule 1 to the FOI Act.
4. The agency's decision was confirmed on internal review and, on 24 February 1997, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

### REFUSAL OF ACCESS - SECTION 23(2)

5. Section 23(1) of the FOI Act provides, *inter alia*, that, subject to s.24, an agency may refuse access to a document if the document is an exempt document. Further, s.23(2) of the FOI Act provides:

*“(2) The agency may refuse access to the requested documents without having identified any or all of them and without specifying the reason why matter in any particular document is claimed to be exempt matter if -*

*(a) it is apparent, from the nature of the documents as described in the access application, that all of the documents are exempt documents; and*

*(b) there is no obligation under section 24 to give access to an edited copy of any of the documents.”*

6. If an agency relies upon section 23(2) of the FOI Act and does not identify the requested documents to an access applicant, as the agency has done in this instance, the agency must satisfy the requirements of both paragraphs (a) and (b) of section 23(2). If it can be shown that the documents are of the type described in paragraph (a), then it is necessary to consider the requirements of paragraph (b), that is, whether the agency is obliged under section 24 to give access to an edited copy of any of the documents.
7. In order to determine the first question, I must consider the nature of an exempt document and exempt matter. The term “exempt document” is defined in the Glossary in the FOI Act as meaning a document which contains exempt matter. The term “exempt matter” is defined as meaning matter that is exempt under Schedule 1 to the FOI Act.
8. The complainant seeks access to documents associated with a criminal prosecution in Western Australia some years ago. It is the contention of the agency that documents of the type requested by the complainant would contain matter that is exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. Clause 5(1)(b) provides:

**“5. Law enforcement, public safety and property security**

“(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 meaning of the exemption in clause 5(1)(b) most recently in my decision *Re Pannacchione and Aldwich Holdings Pty Ltd and Police Force of Western Australia* (26 March 1997, unreported, D00997). I repeat the comments concerning clause 5(1)(b) that I made in my reasons for that decision. The interpretation of clause 5(1)(b) has been the subject of two decisions by the Supreme Court of Western Australia. As Information Commissioner, I am bound by those decisions and must apply the law as stated by the Supreme Court when dealing with complaints under the FOI Act. In the case of *Police Force of Western Australia v Kelly and Smith* (Supreme Court of Western Australia, 30 April 1996, unreported, Library No. 960227), Anderson J, after referring to the decision of Owen J in *Manly v Ministry of Premier and Cabinet* (Supreme Court of Western Australia, 15 June 1995, unreported, Library No. 950310), 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 content of the investigation”.*

10. Anderson J also said, at page 9 of that decision:

*“In my opinion the phrase “...if its disclosure could reasonably be expected to...reveal the investigation of any contravention of the law in a particular case...” is apt to include the revelation of the fact of a particular investigation by police of a particular incident involving certain people. I think there is very good reason to accept that Parliament intended that such matter be exempt from access under the Act. It is not difficult to imagine cases in which it would be highly detrimental to good government and inimical to the administration of law enforcement to disclose that a particular criminal investigation is contemplated, has been started or has been completed.”*

11. In that case it was held (at page 13) that, to the extent that any of the documents in dispute in that matter would reveal that there was, had been, or was going to be an investigation by police into the conduct of the respondents in that matter in relation to a specified incident, that document was exempt under clause 5(1)(b) of Schedule 1.
12. The decision in *Police Force of Western Australia v Kelly and Smith* makes it clear that if the agency was conducting, had conducted or was about to conduct an investigation into a contravention or possible contravention of the law and if disclosure of documents connected with that investigation could reasonably be expected to reveal something about the investigation, including the identities of those under investigation and the nature of the matter under investigation, then those documents will be exempt.
13. In this instance, the documents requested by the complainant relate to the prosecution and conviction of certain people of serious criminal offences under *The Criminal Code* of Western Australia. *The Criminal Code* is, in my view, clearly a “law” as defined in clause 5(5), and an investigation into the possible commission of offences under it is clearly an investigation of the kind referred to in clause 5(1)(b). Having considered the nature of the requested documents as described in the complainant’s access application, I am satisfied that any documents fitting that description would be of the type to which clause 5(1)(b) applies.

### **The complainant’s submission**

14. The complainant submits that much of the detail of the investigation has already been revealed through the production of those documents at the trial of the persons concerned; media coverage of the trial; the placement of the documents

in the “District Court Criminal Registry File”; and confirmation to him in various ways by some of the defendants.

15. Further, the complainant also submitted to me that “[i]t is not a question of them revealing an investigation about persons, or the “content” of an investigation (since all documents were part of the Brief of Evidence they are those documents the Police have produced which are held not subject to any privilege) or that I know something of the investigation from other sources. Rather the Police are saying through their literal restatement of judicial interpretation of the Act that releasing copies of these very public documents “reveals” something not already known. No reasonable person could say this is the case here; if judicially challenged, the Police case may fall.”

16. However, Anderson J also said, in the decision cited above, at page 10:

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

17. Therefore, even though some of the matter contained in the disputed documents may already be known to the complainant by other means - through having heard some of it in the course of court proceedings, for example, or media reports - it may still be revealed by disclosure of the documents pursuant to an FOI application.

18. Further, I do not consider that production in a court for the purpose of legal proceedings amounts to public disclosure. Even though proceedings are conducted in open court, as I understand it documents tendered in evidence are made available only to the Court, the parties to the proceedings and their counsel. Although documents may also be shown to witnesses, they are not otherwise available, either during or after the conclusion of the proceedings. I do not consider, therefore, that the limited disclosure in that way of any of the documents sought by the complainant can be said to have the effect that disclosure under the FOI Act to strangers to any proceedings in which they were tendered will not reveal their contents.

19. Having considered the nature of the requested documents as described in the complainant’s access application, I am satisfied that documents of that nature, being statements made to police in respect of a criminal prosecution; copies of documents from a prosecution brief concerned with particular offences of arson; and copies of statements made by police officers in respect of a criminal prosecution in this State, would contain matter the disclosure of which could reasonably be expected to reveal the fact of a particular investigation by police of a particular incident, amounting to a contravention or possible contravention of

the law, involving certain people and something of the content of that investigation. That is, I am satisfied that requested documents are exempt documents under clause 5(1)(b).

20. In his final submission to me the complainant raised a number of additional reasons why he believes he should be given access to the disputed documents. Those reasons relate to the perceived motives of the agency for refusing access, his motives for requesting access and the public interest factors which the complainant considers favour disclosure.
21. Pursuant to s.10(2) of the FOI Act, the complainant's right to be given access is not affected by his reasons for wishing to obtain access or the agency's belief as to what those reasons might be. Although the complainant sought to persuade me that there is a public interest in the disclosure of the requested documents to him for his research purposes, the public interest only arises for my consideration in the circumstances provided in clause 5(4). That is, if the disputed matter consists merely of matter of the type described in clause 5(4)(a)(i)-(iii), then I can consider whether disclosure of that matter would, on balance, be in the public interest. On the basis of the description of the requested documents, and the lack of any evidence from the complainant to persuade me otherwise, I am satisfied that the limits on exemptions in clause 5(4) do not apply and, therefore, the question of where the balance of the public interest lies does not arise for my consideration.
22. Therefore, for the reasons given above, I find that the requested documents as described in the complainant's access application are exempt and, accordingly, the agency has satisfied the requirements of paragraph (a) of s.23(2).

**Is there any obligation under section 24 to give edited access to the documents?**

23. Section 23(2) is subject to the requirements of s.24 of the FOI Act. Section 24 provides:

*"24. If -*

- (a) the access application requests access to a document containing exempt matter; and*
- (b) it is practicable for the agency to give access to a copy of the document from which exempt matter has been deleted; and*
- (c) the agency considers (either from the terms of the application or after consultation with the applicant) that the applicant would wish to be given access to an edited copy,*

*the agency has to give access to an edited copy even if the document is the subject of an exemption certificate.”*

24. Section 24 casts a duty on agencies to consider the option of providing an access applicant with access to an edited copy of a document. In my view, s.24, when read in conjunction with s.23(2), reinforces the general right of access provided by s.10 of the FOI Act and reflects the principle that an access applicant should, wherever possible, be provided with a copy of a requested document with exempt matter deleted. I consider that s.24 prevents the withholding of an entire document where only part of that document is exempt and requires the agency to consider the release of the non-exempt part of that document. Once all exempt matter has been deleted from a document, then, in my view, the document is no longer an exempt document as defined in the FOI Act.
25. Although the agency did not consult with the complainant, I do not consider it was necessary on this occasion as there is nothing in the complainant's access application to suggest that he would wish to be given access to edited copies of the requested documents. Further, given the nature of the particular documents, I am satisfied that it would not be practicable to give access in that form. In my view, in the circumstances of this complaint, there was no obligation under s.24 to give the complainant access to edited copies of the requested documents.
26. Accordingly, for the reasons given, I am satisfied that the decision of the agency in the first instance to refuse access to the requested documents pursuant to s.23(2) of the FOI Act was justified.

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