

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

**File Ref: F2004046  
Decision Ref: D0182004**

Participants:

**Darren Wayne Spackman**  
Complainant  
  
- and -  
  
**Department of Environment**  
Respondent

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access and edited access – documents relating to Crown land and tourism development – clause 5(1)(b) – whether disclosure of requested matter could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law – clause 7(1) – legal professional privilege – whether communications privileged – clause 10(4) – whether disclosure of disputed information would reveal information about the commercial affairs of an agency and could reasonably be expected to have an adverse effect on those affairs.

*Freedom of Information Act 1992*: Schedule 1, clauses 5(1)(b), 5(5), 7(1), 10(4)

*Country Areas Water Supply Act 1947*

*Land Administration Act 1997*: section 267(2)(c)

*Police Force of Western Australia v Kelly and Another* (1996) 17 WAR 9

*Re Cumming and Others and Metropolitan Health Service Board and Another* [2000] WAICmr 7

*Esso Australia Resources Ltd v The Commissioner of Taxation* (1999) 168 ALR 123

*Commissioner of Australian Federal Police and Another v Propend Finance Pty Ltd and Others* [1997] 188 CLR 501

*Waterford v The Commonwealth of Australia* (1987) 163 CLR 54

*Re O'Neil and Department of Environment* [2004] WAICmr 10

*Trade Practices Commission v Sterling* (1979) 36 FLR 244

*Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550

## DECISION

The decision of the agency is varied.

I find that:

- Documents 15, 22 and 34 and the disputed information in Documents 1, 11 and 14 (as set out in paragraph 24) are exempt under clause 5(1)(b);
- Documents 7, 9, 12, 18, 29, 32, 45 and 46, and the disputed information in Document 39, are exempt under clause 7(1) ; and
- the disputed information in Document 62 is not exempt under clause 10(4).

D A WOOKEY  
A/INFORMATION COMMISSIONER

2 November 2004

## REASONS FOR DECISION

1. This complaint arises from a decision made by the Department of Environment ('the agency') to refuse Mr Spackman ('the complainant') access, and to give access in edited form, to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').

## BACKGROUND

2. I understand that the background to this complaint is as follows:
  - King Location 715 is currently unallocated Crown land. It is described in Town Planning Scheme No.7 of the Shire of Wyndham-East Kimberley ('the Shire') and in the Lake Kununurra Foreshore Draft Management Plan as a "Tourism Development Site".
  - Part of Reserve 41812 is within a Water Reserve proclaimed under the *Country Areas Water Supply Act 1947* and a draft Water Source Protection Plan has been developed for this Water Reserve. I note that Reserve 41812 is a foreshore reserve on Lake Kununurra jointly vested in the Shire and the Water and Rivers Commission and set aside for the purpose of "Foreshore and Recreation".
  - A 'P1' Reserve is a protection area afforded the highest level of protection to minimise the risk of contaminating the drinking water source and within which development is generally not permitted. Most of King Location 715 is within a priority protection P1 Reserve area of the draft Kununurra Water Source Protection Plan.
  - In or around 2002, Kimberley Eco Houseboats (Celliston Nominees Pty Ltd) sought to lease a portion of Reserve 41812, adjacent to King Location 715, for a commercial boat service facility. The complainant is the owner and operator of Kimberley Eco Houseboats and a director of Celliston Nominees Pty Ltd.
3. I understand from the documents released to the complainant that the Shire supported the granting of the lease to Kimberley Eco Houseboats but that it was opposed by the agency because of its concerns as to the impact on the only public drinking water source for Kununurra. I also understand from those documents that, in September 2003, the agency considered that the complainant may have breached section 267(2) of the *Land Administration Act 1997* by undertaking clearing on Reserve 41812.
4. On 10 November 2003, the complainant applied under the FOI Act to the agency for access to documents:

*"[r]elating to all matters associated with*

*King Location 715*

*Reserve 41812  
PI Reserve (Kununurra)  
Interim water protection plan  
Clearing of foreshore reserve 41812  
Kimberley eco houseboats  
And any document relating to Darren Spackman  
All documents from 2000 to current date.”*

5. By 10 December 2003, the scope of the complainant’s access application had been reduced to “*all the documents related to the 2 matters: landclearing and ecoboats ... from 2000 onwards.*”
6. On 19 January 2004, the agency provided the complainant with a document schedule listing 92 documents and gave him access in full or in part to some documents; refused him access to other documents; and advised him that a decision in respect of some documents was awaiting further advice from third parties consulted by the agency. The agency gave the complainant access to edited copies of two additional documents on 2 February 2004.
7. The complainant sought an internal review of the agency’s decision and queried whether there were further documents that came within the scope of his application. On 4 March 2004, the agency confirmed its decision of 19 January 2004 and advised the complainant that his query concerning additional documents was being dealt with separately. On 19 March 2004, the complainant applied to me for external review of the agency’s decision.

#### **REVIEW BY A/INFORMATION COMMISSIONER**

8. Following my receipt of the disputed documents and the agency’s FOI file, I advised the agency that its notices of decision to the complainant were deficient and, as a result, I lacked the necessary information to deal with this complaint. Consequently, I required the agency to provide me with further relevant information. In the meantime, my Legal Officer contacted the complainant, who agreed to withdraw his complaint in respect of 22 of the documents.
9. Thereafter, the agency provided me with information relevant to the exemptions claimed and withdrew or altered its claims in respect of certain documents and information. The agency also dealt with the claim that additional documents should exist and released further documents to the complainant following consultation with third parties.
10. On 17 August 2004, I informed the parties, in writing, of my preliminary view of this complaint. In light of my preliminary view, the complainant withdrew his complaint in relation to 4 documents and the agency gave the complainant access to additional documents and information. However, the complaint could not be completely conciliated at that point.

## THE DISPUTED DOCUMENTS AND INFORMATION

11. The following documents and information remain in dispute:

- Document 1 is a briefing note dated 10 December 2003 to the Minister for the Environment ('the Minister'). The agency claims that part of sentence 1 in paragraph 4 on page 2 is exempt under clause 5(1)(b).
- Document 7 is a series of emails dated 4, 5 and 13 November 2003 between officers of the agency and the agency's Legal Services section. The agency claims that Document 7 is exempt under clause 7(1).
- Document 9 is a series of emails dated 6 and 7 November 2003, with attachments, between officers of the agency, which the agency claims is exempt under clause 7(1).
- Document 11 is a briefing note dated 3 November 2003 to the Minister with attachments. The agency claims that paragraph 2 on page 2 is exempt under clause 5(1)(b).
- Document 12 is a facsimile dated 31 October 2003 from the Crown Solicitor's Officer ('the CSO') to the agency, which the agency claims is exempt under clause 7(1).
- Document 14 is a briefing note dated October 2003 to the Minister. The agency claims that pages 1-4 and 8-9 are exempt under clause 5(1)(b).
- Document 15 is a briefing note dated 13 October 2003 to the Minister, which the agency claims is exempt under clause 5(1)(b).
- Document 18 is a letter dated 30 September 2003 from the agency to the CSO, which the agency claims is exempt under clause 7(1).
- Document 22 is an internal email dated 19 September 2003, which the agency claims is exempt under clause 5(1)(b).
- Document 29 is a series of internal emails dated 14 and 15 September 2003, which the agency claims is exempt under clause 7(1).
- Document 32 is a series of internal emails dated 15 September 2003, which the agency claims is exempt under clause 7(1).
- Document 34 is a series of emails dated 1 September 2003 between the agency and the Department of Land Information ('DOLI'), which the agency claims is exempt under clause 5(1)(b).

- Document 39 is a series of internal emails dated 14 August and 15 July 2003. The agency claims that the last two emails dated 15 July 2003 are exempt under clause 7(1).
- Document 45 is a series of internal emails dated 15 and 16 July 2003, which the agency claims is exempt under clause 7(1).
- Document 46 is a Legal Advice Instruction Form dated 14 July 2003, which the agency claims is exempt under clause 7(1).
- Document 62 is a series of emails dated 12 December 2002 between the agency and DOLI. The agency claims that the amount referred to in the second line of the third paragraph in the first email is exempt under clause 10(4).

## **THE EXEMPTIONS**

### **(a) Clause 5(1)(b) - Law enforcement, public safety and property security**

12. The agency claims that Documents 15, 22 and 34 are exempt in full and Documents 1, 11 and 14 are exempt in part under clause 5(1)(b) of Schedule 1 to the FOI Act. Clause 5(1)(b) provides that information is exempt 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.
13. The scope and meaning of the exemption in clause 5(1)(b) were determined by the Supreme Court of Western Australia in *Police Force of Western Australia v Kelly and Another* (1996) 17 WAR 9. In that decision, the Supreme Court made it clear that clause 5(1)(b) protects from disclosure a wide range of documents associated with an inquiry or investigation into an alleged contravention or possible contravention of the law. Documents which reveal the fact of the investigation, the identity or identities of the person or persons being investigated and something of the subject matter of the investigation will be exempt under clause 5(1)(b). It is also clear from that case that the exemption can apply regardless of how much an applicant may know, or claim to know, about an investigation or whether or not the applicant may have obtained information about an investigation from other disclosed documents or other sources.
14. It is clear from the documents released under the FOI Act by the agency to the complainant that he is aware that the agency has been or is conducting an investigation into his clearing of an area of the Lake Kununurra foreshore encompassing parts of Reserve 41812 and King Location 715.

### ***The agency's submissions***

15. The agency submits that the disclosure of Documents 15, 22 and 34 and the disputed information in Documents 1, 11 and 14 could reasonably be expected to reveal the investigation of a possible contravention of section 267(2)(c) of

the *Land Administration Act 1997* and other specified legislation. The agency also submits that the disclosure of this matter would reveal operational details of the manner in which the investigation was conducted.

16. The agency says that it advised the complainant on 13 September 2003 that his actions in clearing without authorisation may be in breach of the law and notes that an investigation into that matter, which commenced on 26 August 2003, is still on-going.

### ***Consideration***

17. The two questions which arise from the terms of clause 5(1)(b) are whether there was “*an investigation of any contravention or possible contravention of the law*” and, if so, whether the disclosure of each of Documents 15, 22 and 34 or the disputed information in Documents 1, 11 and 14 could reasonably be expected to ‘reveal’ that investigation.
18. In *Re Cumming and Others and Metropolitan Health Service Board and Another* [2000] WAICmr 7, the former Information Commissioner considered the meaning of the word ‘investigation’ and accepted, at paragraph 21, that it should be given its plain meaning. The *Australian Concise Oxford Dictionary* (2<sup>nd</sup> edition, 1992) defines ‘investigation’ to mean “*the process or an instance of investigating; a formal examination or study*” and defines ‘investigate’ as meaning “*inquire into; examine; study carefully; make an official inquiry into; make a systematic inquiry or search*”. Further, from the same source, ‘inquire’ means “*seek information formally; make a formal investigation*”. It was decided in *Re Cumming* that clause 5(1)(b) applies to official inquiries - which are not limited to law enforcement officials - of varying degrees of formality, which might involve nothing more formal than the gathering of information as the basis for a decision. I agree with that view.
19. I have examined Documents 15, 22 and 34; the disputed information in Documents 1, 11 and 14; the agency’s FOI file; and the additional information and documents provided to me by the agency. On the material before me, I accept that the agency conducted an investigation or investigations into a possible contravention of the *Land Administration Act 1997* and the other statutes referred to by the agency.
20. Clause 5(5) of Schedule 1 to the FOI Act defines ‘the law’ to mean, among other things, the law of this State and the Commonwealth and defines the term ‘contravention’ to include a failure to comply. In applying the exemption in clause 5(1)(b), the expression ‘the law’ is used in a broad sense and is not limited in its application to the criminal law only. The *Land Administration Act 1997* and the other statutes referred to by the agency are clearly relevant ‘laws’ within the meaning of clause 5(5).
21. The second question for my determination is whether the disclosure of Documents 15, 22 and 34, and the disputed information in Documents 1, 11 and 14 could reasonably be expected to ‘reveal’ the investigation or investigations conducted by the agency.

22. In *Kelly*'s case, Anderson J said, at page 13:

*"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...of a particular incident involving certain people."*

23. At pages 14 and 15, his Honour said:

*"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... [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."*

24. Having examined the relevant documents, I consider that the disclosure of Documents 15, 22 and 34 and the disputed information in Documents 1, 11 and 14 could reasonably be expected to 'reveal' an investigation by the agency in the sense described in *Kelly*'s case. In my opinion, the disclosure of:

- Documents 15, 22 and 34;
- the first two sentences in paragraph 2 and the whole of paragraph 4 on page 2 of Document 1;
- paragraph 2 on page 2 of Document 11; and
- pages 1-4 and 8-9 of Document 14,

could reasonably be expected to reveal the identity of the person under investigation, the general subject matter of those investigations and operational details relating to those investigations. Consequently, I find that Documents 15, 22 and 34 and the disputed information in Documents 1, 11 and 14 is exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.

**(b) Clause 7 - Legal professional privilege**

25. The agency claims that Documents 7, 9, 12, 18, 29, 32, 45 and 46 are exempt in full and that Document 39 is exempt in part under clause 7 of Schedule 1 to the FOI Act. Clause 7(1) provides that matter is exempt if it would be privileged from production in legal proceedings on the ground of legal professional privilege.

26. Legal professional privilege protects from disclosure confidential communications between clients and their legal advisers if made or brought into existence for the dominant purpose of giving or seeking legal advice or for use in existing or anticipated legal proceedings: *Esso Australia Resources Ltd v The Commissioner of Taxation* (1999) 168 ALR 123.

27. The privilege is concerned with confidential communications and seeks to promote communication with a legal adviser, not to protect the content of a particular document. In *Commissioner of Australian Federal Police and Another v Propend Finance Pty Ltd and Others* [1997] 188 CLR 501, Toohey J observed, at p.525:

*“... privilege does not attach to a piece of paper. It attaches to a communication, written or oral, and it is the communication that is at issue. While it is natural to speak of legal professional privilege in terms of documents, it is the nature of the communication within the document that determines whether or not the privilege attaches.”*

### ***The agency’s submission***

28. The agency submits that the documents subject to this exemption claim are confidential communications between the agency - as ‘the client’ - and its legal advisers, which were made for the purpose of obtaining legal advice. The agency has identified its legal advisers as Ms J Hebiton, Legal Officer, and Mr J Hassett, Senior Adviser, with the State Solicitor’s Office (‘the SSO’). I understand that Ms Hebiton is currently on secondment to the agency from the SSO.

### ***Consideration***

29. In *Waterford v The Commonwealth of Australia* (1987) 163 CLR 54, the High Court of Australia held that government agencies may claim legal professional privilege in respect of confidential communications between salaried legal officers employed by an office such as the SSO and officers of an agency, if:
- the communications are made for the purpose of giving or receiving legal advice or for use in existing or anticipated legal proceedings;
  - there is a professional relationship between the legal officer and the client agency; and
  - the legal advice is independent in character.
30. Clearly, in my view, in the circumstances of this matter, the requisite professional relationship exists between Mr Hassett and the agency. In my recent decision in *Re O’Neil and Department of Environment* [2004] WAICmr 10, after reviewing the law relating to legal professional privilege and salaried legal officers in government, I accepted that the particular circumstances of Ms Hebiton’s secondment to the agency from the SSO do not affect the fact that an independent, professional lawyer/client relationship exists between that legal officer and the agency. For the reasons I gave in that case, at paragraphs 23-32, I accept that a lawyer/client relationship can and does exist between the Legal Officer, Ms Hebiton, and the agency, even though the Legal Officer is presently working in the agency.

31. Having considered the circumstances in which the communications contained in Documents 7, 9, 12, 18, 29, 32, 39, 45 and 46 were made, I accept that the relationships between the agency and the two legal officers in this case are professional lawyer/client relationships.
32. I have examined Documents 7, 9, 12, 18, 29, 32, 39, 45 and 46. Documents 7, 9, 39 and 45 are a series of emails between officers of the agency and the Legal Officer. There are two attachments to Document 9 which are a draft letter submitted to the Legal Officer for advice and an extract from a document relating to a matter referred to in the draft letter. Documents 12, 18, 29 and 32 are communications in the form of facsimiles and letters between the agency and the SSO and Document 46 is a Legal Advice Instruction Form attaching a briefing note to the Minister.
33. In my opinion, Documents 7, 9, 12, 18, 29, 32, 45 and 46, together with the disputed information in Document 39, are all confidential communications between the agency and its legal advisers for the purposes of seeking or giving legal advice. Therefore, they are privileged communications.
34. Each of the attachments is a document prepared for submission to the legal advisers for advice or on which advice has been given. Whether or not the originals were prepared for the dominant purpose of seeking legal advice, the copies attached to Document 9 were clearly prepared for submission to the Legal Officer for legal advice. They were prepared for a privileged purpose and formed part of the privileged communication, and are, therefore, subject to legal professional privilege: see the *Propend Finance* case, cited above. Although most of the emails are copied to other individuals, those persons are all officers of the client agency involved in the obtaining or receiving of legal advice on behalf of the agency, so that the confidentiality of those communications is retained.
35. Accordingly, in my view, Documents 7, 9, 12, 18, 29, 32, 45 and 46 and the disputed information in Document 39 would be privileged from production in legal proceedings on the ground of legal professional privilege and I find that they are exempt under clause 7(1).

**(c) Clause 10 - The State's financial or property affairs**

36. The agency claims that Document 62 is exempt in part under clause 10(4) of Schedule 1 to the FOI Act.
37. Clause 10, so far as it is relevant, provides:

***"10. The State's financial or property affairs***

***Exemptions***

- (1) ...
- (2) ...

- (3) ...
- (4) *Matter is exempt matter if its disclosure -*
  - (a) *would reveal information (other than trade secrets or information referred to in subclause (3)) concerning the commercial affairs of an agency; and*
  - (b) *could reasonably be expected to have an adverse effect on those affairs.*
- (5) ...

***Limit on exemptions***

- (6) *Matter is not exempt matter under subclause (1), (2), (3), (4) or (5) if its disclosure would, on balance, be in the public interest."*

38. The exemption provided by clause 10(4) is directed at protecting certain of the activities of government agencies and instrumentalities from adverse effects so that their competitive position will not be undermined. Whereas FOI legislation in other jurisdictions uses the expression "business, professional, commercial or financial affairs", the exemption in clause 10(4) is concerned only with information relating to the commercial affairs of an agency. Nevertheless, I consider that the commercial affairs of an agency may also include its business and financial affairs.

***The agency's submissions***

39. The agency initially claimed that Document 62 was exempt in full because it would reveal information concerning the commercial affairs of the former Department of Land Administration ('DOLA') - now DOLI - and LandCorp. The agency advised that Document 62 contains details of land transactions that those agencies envisage undertaking and refers to money to be raised and the basis of payment for reserves required for operational purposes. The agency submitted that the disclosure of that information would not only adversely affect the land transaction being undertaken in this instance, but would also disclose the policy foundation upon which the State and its agencies undertake aspects of property negotiations.

40. However, following the receipt of my preliminary view, the agency advised me that it had reversed its decision and was now claiming only that certain information in Document 62 was exempt under clause 3(1). Some time later the agency advised me that it had given the complainant access to Document 62 in full, with the exception only of the first three words on line 2 of paragraph 3 of the first email from DOLA to the agency. I understand that the agency claims that that information is exempt under clause 10(4).

***Consideration***

41. To satisfy the requirements of clause 10(4), the agency must show that the matter under consideration is information about the commercial affairs of an agency (not necessarily the agency) and also that disclosure of that

information could reasonably be expected to have an adverse effect on those affairs.

42. I understand that LandCorp is the State's land and property development agency which operates for the purposes of, among other things, providing major regional infrastructure developments; disposing of surplus government land assets; and providing consultancy services to government agencies. I understand that the core business of the DOLI is to provide land and property information.
43. Based on my inspection of Document 62, I consider that the disclosure of the disputed information would reveal information about the commercial activities of DOLI. Accordingly, I consider that the requirements of paragraph (a) of clause 10(4) are satisfied in respect of the disputed information in Document 62. However, that alone is not sufficient to establish a *prima facie* claim for exemption. The requirements of clause 10(4)(b) must also be satisfied.
44. The agency has not explained the nature of the expected adverse effects claimed. It is not clear to me how the disclosure of the disputed information could reasonably be expected to adversely affect the commercial affairs of DOLI. In my view, the agency has simply asserted that an adverse effect could reasonably be expected if that information were disclosed.
45. Pursuant to section 102(1) of the FOI Act, the onus is on the agency to establish that its decision to refuse the complainant access to the disputed matter in Document 62 was justified or that a decision adverse to another party should be made.
46. I refer to the comments of Owen J, in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at page 573, in relation to a claim for exemption under clause 4(3) of the FOI Act, when his Honour expressed the nature of the onus the agency bears in the following way:

*“How can the Commissioner, charged with the statutory responsibility to decide on the correctness or otherwise of a claim to exemption, decide the matter in the absence of some probative material against which to assess the conclusion of the original decision maker that he or she had “real and substantial grounds for thinking that the production of the document could prejudice that supply” or that disclosure could have an adverse effect on business or financial affairs? In my opinion it is not sufficient for the original decision maker to proffer the view. It must be supported in some way. The support does not have to amount to proof on the balance of probabilities. Nonetheless, it must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasonable decision maker.”*

47. In the absence of any probative material from the agency in support of its claim for exemption, I find that the disputed information in Document 62 is not exempt under clause 10(4).

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