

DECISION SUMMARY ISSUED BY THE INFORMATION COMMISSIONER (WA)

Decision title and citation: *Re Rakich and The Legal Practitioners Complaints Committee and Legal Practitioner X*
[2002] WAICmr 21

COMPLAINT No: F2002075

DECISION No: D0212002

PARTIES: **Janet Vera RAKICH**

Complainant

THE LEGAL PRACTITIONERS COMPLAINTS COMMITTEE
and **LEGAL PRACTITIONER X**

First Respondent
Second Respondent

No. of documents in dispute: 3

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

In October 2001, Ms Rakich ('the complainant') made a complaint to The Legal Practitioners Complaints Committee ('the agency') about the conduct of two lawyers who had acted on behalf of her sister-in-law in a family dispute involving the wills of her late mother and brother.

On 13 February 2002, the complainant made an application to the agency under the *Freedom of Information Act 1992* ('the FOI Act') for access to the written responses to that complaint from the two legal practitioners. The agency granted access to the response of one of the lawyers, but refused the complainant access to the response of the Second Respondent. The agency claimed that the requested documents are exempt under clauses 5(1)(b) and 7(1) of Schedule 1 to the FOI Act. The agency's initial decision was confirmed following an internal review. Following that, the complainant made a complaint to me seeking external review of the agency's decision.

Review by the Information Commissioner

After receiving this complaint, I obtained the disputed documents and discussions were held with the agency and the complainant. The agency informed me that it had deferred the investigation of the complaint against the Second Respondent until the Supreme Court proceedings commenced by the complainant in respect of her family's wills had concluded to avoid interfering in those proceedings in a way that might affect the rights of one or other of the parties.

The Second Respondent was joined as a party to this complaint and he provided me with submissions in support of his claims that the requested documents are exempt. However, in an effort to conciliate this matter, he offered to withdraw his claims for exemption when the Supreme Court proceedings had concluded (including any appeals) and before the agency recommenced the investigation of the complainant's complaint. However, the complainant rejected that offer.

On 10 June 2002, after considering the material before me, the parties were informed in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that the disputed documents may be exempt under clause 5(1)(b). I received a response in writing from the complainant. However, I am not dissuaded from my preliminary view that the disputed documents are exempt for the reasons given to the parties. A summary of my reasons follows.

The disputed documents

There are three disputed documents, with attachments. Document 1 is a letter dated 6 January 2002 from the Second Respondent to the agency, with an attachment. Document 2 is a letter dated 6 January 2002 from the Second Respondent to the agency, with twelve attachments. Document 3 is a letter dated 25 February 2002 from the Second Respondent to the agency, with four attachments.

Clause 5(1)(b)

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.

Documents can “*reveal an investigation*” even when the fact of the investigation has been revealed through other materials or the investigation has concluded and regardless of how much an applicant knows, or claims to know, about that investigation: *Police Force of Western Australia v Kelly and Anor* (1996) 17 WAR 9.

Consideration

The agency is established by the *Legal Practitioners Act 1893* (‘the Legal Practitioners Act’). Its functions include, among other things, receiving, and conducting inquiries into, complaints concerning alleged unprofessional conduct on the part of any legal practitioner. Under s.28A of the Legal Practitioners Act, the Complaints Committee of the agency may make a finding of illegal or unprofessional conduct, or neglect or undue delay against a practitioner and has the power to impose a penalty, including a fine, or to reprimand the practitioner concerned.

In my view, the Legal Practitioners Act is clearly a ‘law’, as defined in clause 5(5) of Schedule 1 to the FOI Act, for the purposes of the exemption in clause 5(1)(b). Further, I consider that an investigation by the Complaints Committee of the agency into a complaint made against a legal practitioner amounts to an investigation of a contravention or possible contravention of the law, including a failure to comply with the law, within the terms of clause 5(1)(b).

The complainant submits that merely because the agency receives a complaint and invites a response does not mean that there is an investigation and she queried whether any investigation takes place until such time as a response is received or the practitioner declines to respond. The complainant submits that it is only at that point that the agency decides whether the matter is worthy of investigation and the expenditure of resources. I understand her submission to be that, in this case, there was no investigation.

However, I do not accept the complainant’s submission. Having examined the disputed documents and taken into account the information before me, I am satisfied that the complainant made a complaint to the agency about a legal practitioner and that the agency commenced its investigation into that complaint in accordance with its usual procedures, by inviting the legal practitioner to respond in writing. The terms of clause 5(1)(b) clearly apply to investigations that may result in disciplinary proceedings, as well as those potentially leading to prosecution. Accordingly, I consider that an investigation involving disciplinary matters, such as those covered by the Legal Practitioners Act includes such actions as seeking a written response to a complaint. The only question is whether disclosure of the disputed documents could reasonably be expected to reveal that investigation. The exemption can apply if disclosure of a document could reasonably be expected to reveal the fact of an investigation and something about the contents of that investigation.

The complainant also submits that if there was an investigation, disclosure of the disputed documents would reveal nothing about that investigation and that such documents are frequently provided to the person making that complaint and no issue relating to clause 5(1)(b) arises. The complainant claims that the real issue is whether the legal practitioner authorises the disclosure of his or her response.

However, I do not consider consent to be an issue. The question for my determination is whether the documents are exempt as claimed by the agency and by the Second Respondent. I am satisfied that disclosure of the disputed documents could reasonably be expected to reveal something about the content of the investigation conducted by the agency, including the identity of the person under investigation. Accordingly, I find the disputed documents exempt under clause 5(1)(b) and vary the agency’s decision accordingly.

I have also considered whether it would be practicable under s.24 of the FOI Act to give access to edited copies of the disputed documents, but I do not consider that it would. In my view, although some of the attachments do not, on their face, “*reveal an investigation*”, that material, if disclosed, would lose its context. Whilst those attachments would clearly make sense within the context for which they were originally created, they could not be read and comprehended in context of the Second Respondent’s response to the complaint made against him, if the three letters, to which they are attached, were deleted. Accordingly, I do not consider that it would be practicable to give edited access to the disputed documents.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER
19 June 2002