

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

**File Ref: F2002111  
Decision Ref: D0282002**

Participants:

**“G”**  
Complainant  
  
- and -  
  
**Department for Community  
Development**  
Respondent

### **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – request for access to personal information about access applicant – refusal of access – documents relating to apprehension of children – access given to edited copies of requested documents - clause 3(1) – personal information – meaning of personal information – information falling outside scope of access application – clause 7 – legal professional privilege – scope of Information Commissioner’s review

*Freedom of Information Act 1992 (WA)* ss.12, 21, 102(3); Schedule 1 clauses 3, 6 and 7; Schedule 2, Glossary  
*Child Welfare Act 1947*, s.138B.

*Re Humphrey and Humphrey and Public Advocate* [1997] WAICmr 23  
*Esso Australia Resources Ltd v The Commissioner of Taxation* [1999] 74 ALJR 339  
*Attorney General (NT) v Kearney* (1985) 158 CLR 500  
*Waterford v Commonwealth* (1987) 153 CLR 54

## DECISION

The agency's decision is varied.

I decide that:

- the information deleted from Documents 5, 6, 8, 10-13, 17 and 18 falls outside the scope of the complainant's access application;
- the information deleted from Documents 1, 3, 7, 15 and 16 is exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*; and
- Document 8a and Document 9 are exempt under clause 7 of Schedule 1 to the *Freedom of Information Act 1992*.

T.P. KENNEDY  
ACTING INFORMATION COMMISSIONER

30 July 2002

## REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Department for Community Development ('the agency'), to refuse "G" ('the complainant') access to certain documents requested by the complainant under the *Freedom of Information Act 1992* ('the FOI Act'). I have decided not to identify the complainant in this decision, in order to protect his privacy and the privacy of his family.

### BACKGROUND

2. In mid January 2002, the complainant was the driver of a car involved in a motor vehicle accident. Two of the complainant's children were passengers in the car. I understand that, on 25 January 2002, following inquiries into the circumstances of that motor vehicle accident, the agency decided, under s.138B of the *Child Welfare Act 1947*, to place those two children in temporary protective care.
3. By letter dated 7 February 2002, the complainant made an application to the agency for access, under the FOI Act, to: (a) all documents concerning the complainant and issues relevant to the complainant; and (b) without limiting paragraph (a), all documents in any way relevant to the actions of the agency on 25 January 2002 to place the two children in temporary protective care. The complainant's application stated that he had not enclosed an application fee, as his application concerned personal information.
4. On 21 February 2002, the agency's FOI Coordinator wrote to the complainant, confirming that his application was a request for personal information about the complainant. The agency's FOI Coordinator advised him that the scope of paragraph (a) of his access application was very broad and that s.12 of the FOI Act required the complainant to describe the requested documents with sufficient detail to enable the agency to identify those documents. The agency sought the complainant's assistance to clarify paragraph (a) of his access application in more precise terms and asked him to identify exactly what it was that he was seeking access to from the agency's records. The agency suspended processing the complainant's access application until he provided further information to the agency as to the specific documents requested in paragraph (a) of his access application.
5. On 26 February 2002, the complainant wrote to the agency, advising that he considered that his request for documents was clear enough and he then advised the agency that "*In addition to wanting all documents relevant to the seizure of my children on the 25<sup>th</sup> of January and its aftermath, I want all documents you have on my children and me.*" The complainant's response to the agency had the effect of broadening the scope of his initial request, to include a request for documents containing information about his children. On 12 March 2002, the agency advised the complainant that, following receipt of his response, it had decided to deal with his access application in two parts. Part 1 of the complainant's access application related to the documents relevant to the agency's decision to place the two children in temporary protective custody, on 25 January 2002, and Part 2 related to his request for access to all documents held by the agency relating to the complainant and his children.

6. The agency also advised the complainant that, as he had not provided it with enough information to enable the requested documents relating to Part 2 of his access application to be identified, the agency considered the second part of his access application was invalid, because it did not comply with the provisions of s.12 of the FOI Act. The agency again requested him to contact its FOI Coordinator, in order that assistance could be offered to him by the agency to change Part 2 of his access application, so that it complied with s.12. Despite those offers of assistance, I understand that the complainant did not contact the agency in relation to that aspect of the matter.
7. On 12 March 2002, the agency partially transferred Part 1 of the complainant's access application to the Police Force of Western Australia. On 27 March 2002, the agency made its decision on access in relation to the documents in the possession of the agency relevant to Part 1 of the complainant's access application. The agency advised the complainant that its decision on access related solely to Part 1 of his access application and that it had identified eighteen documents within the scope of Part 1 of his access application, which it listed and described in a schedule attached to the notice of decision given to the complainant.
8. The agency granted the complainant full access to three documents, edited access to fourteen documents and refused him access to one document. The agency claimed that some of the information deleted from Documents 1, 3, 5-8, 10-13 and 15-18 was exempt under clause 3(1) of Schedule 1 to the FOI Act or, in the alternative, that it consisted of information that fell outside the scope of the complainant's access application. The agency also claimed that Document 9 was exempt, in full, under clause 7 of Schedule 1 to the FOI Act.
9. The complainant applied for internal review of that decision. After conducting an internal review, the agency's internal review officer confirmed the decision on access. On 11 June 2002, the complainant lodged a complaint with the Information Commissioner, seeking external review of the agency's decision.

#### **REVIEW BY THE INFORMATION COMMISSIONER**

10. The Information Commissioner obtained Documents 1, 3, 5-9, 10-13 and 15-18 from the agency, together with the agency's FOI file in relation to the complainant's access application. After examining that material, the Information Commissioner instructed one of her officers to make further inquiries into this complaint. During those inquiries, the officer invited the complainant to contact her to discuss his complaint, with a view to determining whether the matter could be resolved by conciliation between the parties. The complainant did not respond to that invitation.
11. During the Information Commissioner's inquiries, it was established that there was an attachment to Document 8, (hereafter referred to as Document 8a) which had not been identified by the agency in its decision. The agency produced Document 8a to the Information Commissioner, for her examination, and claimed that it was exempt under clause 7 of Schedule 1 to the FOI Act, on the ground that it referred to the legal advice recorded in Document 9. The agency also claimed that it was exempt under clause 6 of Schedule 1 to the FOI Act.

12. The Information Commissioner also identified three other documents held by the agency, which appeared to fall within the scope of Part 1 of the complainant's access application. Those documents are facsimile letters, with attachments, sent to the agency by the complainant's solicitor, in late January and early February 2002. Following discussions with the Information Commissioner's office, the agency wrote to the complainant, asking him to contact the agency within 7 days, if he sought access to those documents. I am advised by the agency that he did not respond to the agency. In the circumstances, I will not deal further with those three documents in this decision.
13. On 10 July 2002, the Information Commissioner wrote to the parties and informed them of her preliminary view of this complaint, including her reasons. It was the Information Commissioner's preliminary view that the agency's decision to give the complainant access to edited copies of Documents 1, 3, 5-8, 10-13 and 15-18 appeared to be justified, because the information deleted from those documents consisted of personal information about several individuals ("the third parties") which is matter of a kind that is, *prima facie*, exempt under clause 3(1) of Schedule 1 to the FOI Act and because some of that information fell outside the scope of the complainant's access application. It was also the Information Commissioner's preliminary view that Document 8a and Document 9 are documents that would be privileged from production in legal proceedings on the ground of legal professional privilege and may, therefore, be exempt under clause 7 of Schedule 1 to the FOI Act.
14. The Information Commissioner invited the complainant to reconsider his complaint and, if he wished to pursue the matter, to make written submissions to the Information Commissioner, in support of his complaint. On 18 July 2002, the complainant responded and provided further information for the Information Commissioner's consideration, but did not withdraw his complaint. At that stage, sixteen documents remained in dispute between the parties.

#### **Information outside the scope of the complainant's access application**

15. I have examined the terms of the complainant's access application, dated 7 February 2002. Having examined his access application and, taking into account the fact that the complainant did not pay an application fee when he lodged his application with the agency, I am satisfied that the complainant's application was, clearly, an application for access to personal information about him, only.
16. Therefore, when dealing with Part 1 of the complainant's access application, the agency was entitled to identify all of the personal information about him recorded in the requested documents and, where possible, to provide him with access to edited copies of those documents, with all but the personal information about the complainant deleted from the documents. It also follows that any information in the requested documents, which does not consist of "personal information" about the complainant, as that term is defined in the FOI Act, is information that he does not seek access to and it is, in my opinion, information that falls outside the scope of his request.

17. I have examined Documents 5, 6, 8, 10-13, 17 and 18. Having examined those documents, I am satisfied that the complainant has been given access to all of the personal information about him recorded in those documents. The edited documents released to the complainant also include some personal information about his two children. However, the information deleted from Documents 5, 6, 8, 10-13, 17 and 18 consists entirely of personal information about the third parties, which is matter of a kind that is, *prima facie*, exempt matter under clause 3(1) of Schedule 1 to the FOI Act.
18. As the complainant does not seek access to personal information about third parties, it is information that falls outside the scope of his access application and I so find. In light of that finding, I do not consider that Documents 5, 6, 8, 10-13, 17 and 18 contain any information that is in dispute between the parties. Accordingly, I have not dealt further with those documents in this decision.

### **THE DISPUTED DOCUMENTS**

19. Having regard to my finding in paragraph 17, there are seven documents remaining in dispute between the parties. They are Documents 1, 3, 7, 8a, 9, 15 and 16. As each of those documents, except Document 8a, have been described in the schedule previously provided to the complainant by the agency, it is unnecessary for me to further describe them for the purposes of this decision. Document 8a is described in paragraph 33 below.

### **THE EXEMPTIONS**

#### **(a) Clause 3(1)**

20. The agency claims that the information deleted from Documents 1, 3, 7, 15 and 16 is exempt under clause 3(1) or, in the alternative, that it consists of information that falls outside the scope of the complainant's access application. Clause 3, so far as is relevant, provides:

**"3. Personal information**

#### ***Exemption***

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

21. The term "personal information" is defined in the Glossary in Schedule 2 to the FOI Act as meaning information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead, whose identity is apparent or can reasonably be ascertained from the information or opinion or who can be identified by reference to an identification number or other identifying particular, such as a fingerprint, retina print or body sample.

### **Consideration**

22. I have examined the information deleted from Documents 1, 3, 7, 15 and 16. Almost all of the information deleted from those documents consists of personal information about the third parties which, as I have said in paragraph 17 above, is matter of a kind that is, *prima facie*, exempt under clause 3(1). However, a minor amount of the information deleted from those documents consists of personal information about the complainant. Where Documents 1, 3, 7, 15 and 16 contain personal information about the complainant, it comprises only a very minor part of the information deleted from those documents.
23. In my opinion, the personal information about the complainant contained in the information deleted from Documents 1, 3, 7, 15 and 16 by the agency is so inextricably interwoven with the personal information about the third parties, that it would not be possible to provide him with access to the personal information about him without also disclosing the personal information about the third parties. Although he has already been given edited copies of Documents 1, 3, 7, 15 and 16, I consider that giving him access to further edited copies of those documents, in accordance with s.24 of the FOI Act, is not practicable. Therefore, it is necessary for me to consider whether any of the limits on exemption in clauses 3(2)-3(6) applies, such that the personal information about the third parties is not exempt and may be disclosed.
24. The limit on exemption in clause 3(2) does not apply, because the deleted information would not, if disclosed, reveal personal information about the complainant only; it would also reveal personal information about the third parties. The limits provided by clauses 3(3) and 3(4) do not apply, because the deleted information does not consist of prescribed details about public officers. The limit on exemption in clause 3(5) does not apply, because there is no evidence before me that any of the third parties consent to the disclosure of their personal information to the complainant.
25. In my opinion, the only limit on exemption that may apply in this instance, is the limit on exemption in clause 3(6), which provides that matter is not exempt matter under clause 3(1), if its disclosure would, on balance, be in the public interest. Under s.102(3) of the FOI Act, the onus of persuading me that the disclosure of matter that is, *prima facie*, exempt under clause 3(1) would be in the public interest, lies with the complainant.
26. Pursuant to s.21 of the FOI Act, the fact that some of the information deleted from Documents 1, 3, 7, 15 and 16 consists of personal information about the complainant is 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. There is also a public interest in people such as the complainant being able to exercise their right of access under the FOI Act and there is a public interest in individuals obtaining access to personal information about them held by government agencies.
27. However, the Information Commissioner has previously expressed the strong view, in a number of her previous decisions, that the purpose of the exemption in clause 3 is to protect the privacy of individuals and that personal, private information about individual citizens should not generally be accessible by other persons without good cause and that the public interest in the maintenance of personal privacy will only be outweighed by some stronger countervailing public interest, which requires the disclosure of personal and private information about third parties: see *Re Humphrey*

and *Humphrey and Public Advocate* [1997] WAICmr 23. I respectfully agree with that view.

28. In balancing the competing public interests in this matter, including the complainant's right of access to personal information about him under the FOI Act and the third parties' right to their privacy, I consider that the latter public interest should prevail. In my view, the personal information about the complainant in Documents 1, 3, 7, 15 and 16, to which access has been denied, is minimal. Taking into account the minor amount of information deleted; the fact that the complainant does not seek access to personal information about third parties and the fact that the agency has otherwise given him access to all of the personal information about him that is recorded in the requested documents, I find that the information deleted from Documents 1, 3, 7, 15 and 16 by the agency is exempt matter under clause 3(1) of Schedule 1 to the FOI Act.

**(b) Clause 7**

29. The agency claims that Document 8a and Document 9 are exempt under clause 7. Clause 7 provides that matter is exempt if it would be privileged from production in legal proceedings on the ground of legal professional privilege.
30. Legal professional privilege applies to confidential communications between a client and his or her legal adviser which are made or brought into existence either 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] 74 ALJR 339. An agency is also entitled to claim privilege in respect of advice obtained from salaried legal officers who are employed within government as legal advisers, where the advice given is within the professional relationship between the legal officer and the client and the advice is independent in character: *Attorney General (NT) v Kearney* (1985) 158 CLR 500; *Waterford v Commonwealth* (1987) 153 CLR 54.

**The complainant's submission**

31. The complainant submits that he understands that the High Court of Australia has recently narrowed the scope of legal professional privilege in Australia. However, he did not refer the Information Commissioner to any decisions of the High Court in support of that submission. The complainant also queried whether the legal advice contained in Documents 8a and 9 is independent in character.

**Consideration**

32. In the *Esso* case, the High Court of Australia overruled its earlier decision in *Grant v Downs* (1976) 135 CLR 674 and decided that the "dominant purpose" test, and not the "sole purpose test", is now the common law test for claiming legal professional privilege in Australia. In so doing, the High Court broadened the scope of the common law test for claiming legal professional privilege, rather than narrowing it.
33. I have examined Documents 8a and 9. Document 8a is a draft letter, submitted to a legal officer of the agency on 4 February 2002, by another officer at the agency, seeking the legal officer's advice before the final version of that letter was sent to the



complainant's solicitor. Document 9 is an email message from that legal officer to the officer of the agency who sought advice, giving legal advice to that officer.

34. Having examined Documents 8a and 9, I am satisfied that they comprise confidential communications between a salaried legal officer employed by the agency and an officer of the agency, which were made for the dominant purpose of giving or seeking legal advice. On the basis of the evidence before me, including my examination of the documents, I am satisfied that the salaried legal officer was providing legal advice to another officer of the agency, in a professional capacity. In my opinion, the advice given was independent in character and there is nothing in the material before me to indicate otherwise.
35. I am satisfied that Documents 8a and 9 would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I am also satisfied that both those documents are exempt under clause 7 and I so find. In light of that finding, I do not need to consider the agency's claim for exemption under clause 6 for Document 8a.

### **The scope of the Information Commissioner's external review**

36. In his response to the Information Commissioner's preliminary view, the complainant also submitted that the agency's decision that the scope of Part 2 of his access application was too broad, was not justified. He submitted that, as he has requested access to all documents held by the agency about him and his children, he does not accept the agency's claim that the documents described in Part 2 of his access application fall outside the scope of his access application.
37. The complainant's submission indicates a misunderstanding on his part as to the scope of the Information Commissioner's review into his complaint. On 12 March 2002, the agency advised the complainant that it had decided to deal with his access application in two parts. When the agency made the initial decision on access, it confirmed to the complainant that it was dealing with his access application in two parts and that the decision on access, made on 27 March 2002, related solely to Part 1 of his access application.
38. When the complainant applied for internal review, he confined his request to a request for internal review of the agency's claims for exemption under clauses 3(1) and 7. He did not seek internal review of the decision to deal with his access application in two parts. The internal reviewer subsequently confirmed the claims for exemption under clauses 3(1) and 7 and, when the complainant lodged this complaint with the Information Commissioner, he applied for external review of the agency's claims for exemption under clauses 3(1) and 7 only.
39. The complainant did not seek external review of the agency's decision not to deal with Part 2 of his access application. As a result, the Information Commissioner did not consider that issue during the external review process. Accordingly, I consider that the only decision I have to review in relation to this complaint is the complainant's request for external review of the agency's claims for exemption under clauses 3(1) and 7 and I have done that.

40. Finally, having considered all of the material and documents before me, I consider that, in the circumstances of the matter, the agency's decision to deal with the complainant's access application in two parts was justified. By dealing with his access application in that manner, the agency did not delay giving him access to the personal information about him contained in the documents identified as falling within the scope of Part 1 of his access application. If the complainant wishes to pursue his request for access to documents containing personal information about him, as described in Part 2 of his access application, then I can only urge him to follow that matter up with the agency, in accordance with the offers of assistance previously made to him by the agency.

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