

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

**File Ref: F2001092
Decision Ref: D0322001**

Participants:

Barry Charles Ebedes
Complainant

- and -

Office of Energy
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to investigation of gas incident – clause 5(1)(a) – whether disclosure could reasonably be expected to impair the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law – clause 5(1)(b) - whether disclosure could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law - s.102(1) – onus on agency to establish that its decision was justified - clause 3(1) – personal information about third parties – access to edited document by deleting personal information.

Freedom of Information Act 1992 (WA) ss. 30, 102(1); Schedule 1, clause 3; 5(1)(a), 5(1)(b)

Freedom of Information Act 1992 (Qld) s. 42(1)(e)

Gas Standards Act 1972 (WA)

Energy Coordination Act 1994 (WA)

Re Manly and Ministry of the Premier and Cabinet [1994] WAICmr 16

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

Re Boyd and Medical Board of Western Australia [1994] WAICmr 21

Re Simonsen and Edith Cowan University [1994] WAICmr 10

“T” and Queensland Health (1994) 1 QAR 386

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

Attorney-General’s Department v Cockcroft (1986) 10 FCR 180

DECISION

The decision of the agency is set aside. In substitution, save for personal information which may be deleted, it is decided that the disputed document is not exempt under clauses 5(1)(a) and 5(1)(b) of Schedule 1 to the *Freedom of Information Act 1992*.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

7 September 2001

REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Office of Energy ('the agency') to refuse Mr Ebedes ('the complainant') access to a document requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. On 13 March 2001, the complainant's daughter was attending a school camp at Dwellingup. Around 6.45pm, a gas explosion occurred and the complainant's daughter and a teacher received burns from the explosion and both were hospitalised. I understand that shortly after the incident the complainant reported the incident to the agency and inspectors from the agency investigated the incident.
3. On 24 April 2001, the complainant made an application to the agency seeking access under the FOI Act to various documents relating to the incident. The agency granted the complainant access to a copy of a Gas Incident/Accident Report Form and a witness statement made by the complainant's daughter. However, the agency refused access to other information that it held and informed the complainant that providing such information "...may inhibit [the agency's] future ability to investigate such incidents and take action and/or reveal the investigation of a possible contravention of the law."
4. The complainant applied for an internal review of the agency's decision and identified a particular document, being a report of the incident prepared by an inspector of the agency, as the document to which he was seeking access. However, the agency's internal reviewer refused the complainant access to that document and claimed that it was exempt under clause 5 of Schedule 1 to the FOI Act.
5. On 19 July 2001, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

6. I obtained the disputed document from the agency. Inquiries were made to determine whether this complaint could be resolved by conciliation between the parties. However, it could not. I received a submission from the Director of Energy Safety in an email message dated 9 August 2001, which was provided in support of the agency's claim for exemption. A copy of that submission was given to the complainant for his consideration.
7. On 24 August 2001, after considering the material before me, including the disputed document, I informed the parties in writing of my preliminary view of this complaint and my reasons. It was my preliminary view that the disputed document may not be exempt under clause 5. However, I considered that the disputed document contained some personal information about third parties, which was, *prima facie*, exempt matter under clause 3(1), but that it was practicable for the agency to delete that information from the document.

8. The complainant informed me that he would accept access to an edited copy of the document with personal information deleted. The agency did not accept my preliminary view and sought additional time within which to obtain legal advice, prior to responding to my preliminary view. Although the agency was given two extensions of time in which to provide a further submission, none was received.

THE DISPUTED DOCUMENT

9. The disputed document is an investigation report dated 27 April 2001, consisting of a report (folios 57-60) and 4 pages of photographs (folios 53-56). The agency's notices of decision do not comply with the requirements of s. 30 of the FOI Act and do not specify which exemption clause or sub-clause the agency relies upon to justify its decision to refuse access. However, taking into account the claims that the agency made to me, I have identified that clauses 5(1)(a) and 5(1)(b) appear the most likely exemption clauses.

THE EXEMPTIONS

(a) Clause 5(1)(a)

10. Clause 5(1)(a) provides that matter is exempt matter if its disclosure could reasonably be expected to impair the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law. I have previously considered the application of the exemption in clause 5(1)(a) in *Re Manly and Ministry of the Premier and Cabinet* [1994] WAICmr 16 and in *Re Boyd and Medical Board of Western Australia* [1994] WAICmr 21.
11. Similar provisions to clause 5(1)(a) exist in FOI legislation in other Australian jurisdictions, although there are differences in the wording of the equivalent provisions. In my view, s.42(1)(e) in the Queensland *Freedom of Information Act 1992* is the closest equivalent to clause 5(1)(a) of the FOI Act. Section 42(1)(e) provides that matter is exempt if its disclosure could reasonably be expected to prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law.
12. I consider that the exemption in s.42(1)(e) of the Queensland FOI Act is substantially the same as the exemption in clause 5(1)(a): see my decision in *Re Simonsen and Edith Cowan University* [1994] WAICmr 10. Accordingly, it is my view that the word "impair" in clause 5(1)(a) has the same meaning as the word "prejudice" in s.42(1)(e) in the Queensland FOI Act.
13. The meaning of s.42(1)(e) was considered by the Queensland Information Commissioner in the decision of *Re "T" and Queensland Health* (1994) 1 QAR 386. In *Re "T" and Queensland Health*, after concluding that the exemption was capable of applying to any law which imposes an enforceable legal duty to do or refrain from doing some thing, and not merely to a contravention of the criminal law, the

Queensland Information Commissioner made the following comments, at paragraph 32, which I accept are relevant to the interpretation of the exemption in clause 5(1)(a):

“Disclosure of methods and procedures adopted by law enforcement agencies which are obvious and well known to the community (e.g. interviewing and taking statements from witnesses to a crime) is not likely to prejudice their effectiveness, for the purposes of s.42(1)(e) of the Queensland FOI Act. In respect, however, of methods and procedures that are neither obvious nor a matter of public notoriety, the mere fact that evidence of a particular method or procedure has been given in a proceeding before the courts would not preclude an agency from asserting, in the appropriate case, that disclosure under the FOI Act could reasonably be expected to prejudice the effectiveness of that method or procedure in the future...If, however, the revelation of a law enforcement method or procedure in open court in a particular case has been so widely reported as to become a matter of public notoriety, there may be a real question as to whether its disclosure under the FOI Act could be capable of prejudicing its effectiveness.”

14. In my view, the exemption in clause 5(1)(a) is directed at investigative methods and procedures (which must be lawful) to attract the exemption. In order to satisfy the requirement that disclosure could reasonably be expected to impair the effectiveness of investigative methods or procedures, it is incumbent on the agency to explain the precise nature of the prejudice or impairment to the effectiveness of the investigative methods or procedures that it expects to result from disclosure of the disputed document and to satisfy me that the expectation is reasonably based, as opposed to something that is irrational or absurd: see *Attorney-General’s Department v Cockcroft* (1986) 10 FCR 180.

The agency’s submission

15. The agency submits that, when it receives a report of a gas (or electrical) safety incident, if it appears warranted, an investigation is commenced as a regulatory investigation, using the agency’s powers as inspectors under the *Energy Coordination Act 1994*. Officers of the agency interview witnesses, record the outcomes and make a thorough assessment of the incident.
16. The agency claims, without providing any material in support of the claim, that disclosure of documents of the kind in dispute in this matter would destroy its credibility for gathering information, if it became known that access to confidential material about an incident, gathered by the agency’s inspectors, could be obtained merely by making an FOI application and that people would refuse to cooperate with the agency in future. The agency claims that such a result would be a real problem for its role in enforcement and safety regulation.
17. The agency asserts that information of the kind contained in the disputed document was gathered using specific regulatory powers that are not available to ordinary citizens, which allows the agency to carry out its statutory functions as regulators, and not to supply people with material for private litigation purposes.

Consideration

18. I have examined the disputed document. In my view, that document does not disclose any investigative method or procedure adopted by the agency in the discharge of its regulatory functions. The document contains some information about the investigation but the methods or procedures of investigating incidents of the kind that occurred at Dwellingup is one that would be well known to the community. That method or procedure involves interviewing witnesses, examining the equipment concerned and writing a report containing the findings and conclusion of the Gas Inspector. I do not consider that disclosure of a method or procedure that is so routine as the process employed by the agency in this matter could reasonably be expected to impair the effectiveness of the agency's methods or procedures for investigating gas incidents.
19. Further, there is nothing put before me by the agency to establish that information is routinely given in confidence to Gas Inspectors, or that it was given and received in confidence on this occasion. The disputed document is not a confidential communication of that type. It is an internal report compiled by an officer of the agency, pursuant to his duties as such an officer. In my opinion, the agency has failed to discharge the onus on it under s.102(1) of the FOI Act and failed to establish that disclosure of the disputed document could reasonably be expected to result in any impairment or prejudice to the effectiveness of the investigative methods or procedures of the agency. Accordingly, I find that the disputed document is not exempt under clause 5(1)(a).

(b) Clause 5(1)(b)

20. 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.
21. In *Police Force of Western Australia v Kelly and Another* (1996) 17 WAR 9, at 13, Anderson J said that "... 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 [in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550] that the document "must reveal something about the content of the investigation".
22. I accept that the agency investigated the incident at the Dwellingup school camp to determine the cause of the gas explosion. I also accept that the disputed document is the report of that incident compiled by a Gas Inspector of the agency. However, based on my examination of the disputed document, I do not consider that the agency has established that disclosure of the disputed document could reasonably be expected to reveal that there had been an investigation of a contravention or possible contravention of the law.
23. I understand that the agency provides support to the Director of Energy Safety ('the Director') who oversees the safety needs of the State in relation to electricity and gas. I also understand that the Director is responsible for various safety and technical issues under the *Gas Standards Act 1972* and the regulations made under that Act, including

the licensing of electrical and gas operatives and the setting of technical standards. I accept that incidents involving such a volatile substance as gas may arise from time to time and that such matters may be the subjects of an inquiry by the agency. However, I do not consider that those facts necessarily mean that documents arising from such an incident will be exempt under clause 5(1)(b).

24. A document will only be exempt under clause 5(1)(b) if it is established that disclosure could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law, in a particular case. In my view, that result could not reasonably be expected to follow if the disputed document were to be disclosed. Neither the disputed document itself, nor anything put before me by the agency persuades me that that is the case. In the circumstances, I consider that the agency has not discharged the onus on it under s.102(1) of the FOI Act to establish that its decision was justified. Accordingly, I find that the disputed document is not exempt under clause 5(1)(b).

Personal Information

25. Notwithstanding that finding, I consider that the disputed document contains some personal information about third parties, which, in my view, is exempt matter under clause 3(1) of Schedule 1 to the FOI Act. The complainant informed me that he does not seek access to personal information about third parties and I consider that it would be practicable for the agency to delete personal information from the disputed document and to give the complainant access to an edited copy of it. For the benefit of the agency, I have identified the personal information to be deleted from the disputed document in the copy of the disputed document, which accompanied these reasons for decision.
