

BOTMAN AND EQUAL OPPORTUNITY

OFFICE OF THE INFORMATION
COMMISSIONER (W.A.)

File Ref: 96080
Decision Ref: D04096

Participants:

Miriam Kay Botman
Complainant

- and -

Commissioner for Equal Opportunity
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - section 31 - refusal by agency to give information as to the existence or non-existence of the requested documents, in accordance with s.31 of the *Freedom of Information Act 1992* - refusal of access - clause 5(1)(b) - law enforcement.

Freedom of Information Act 1992 (WA) s. 31; Schedule 1 clauses 5(1)(b), 5(5), 14(1)(a).
Equal Opportunity Act 1984 (WA) ss. 80, 83, 84.

Re Mineralogy Pty Ltd and Department of Resources Development (Information Commissioner, WA, 5 January 1996, unreported).

Manly v Ministry of Premier and Cabinet (Supreme Court of Western Australia, 15 June 1995, unreported, Library No. 950310).

Police Force of Western Australia v Kelly and Smith (Supreme Court of Western Australia, 30 April 1996, unreported, Library No. 960227).

DECISION

Without giving information as to the existence or non-existence of documents of the kind requested by the complainant, I confirm the decision of the agency to refuse access on the basis that if such documents existed they would contain matter that is exempt matter under clause 5(1)(b) of Schedule 1 to the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

5th July 1996

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Commissioner for Equal Opportunity ('the Commissioner') to refuse Mrs Botman ('the complainant') access to documents requested by her under the *Freedom of Information Act 1992* ('the FOI Act').
2. On 24 April 1996, the complainant lodged an access application with the agency seeking access to documents relating to a matter between a named individual and the Education Department which had allegedly been dealt with by the agency.
3. On 7 May 1996, the Commissioner made the decision on access. Without giving information as to the existence or non-existence of documents of the kind requested by the complainant, the Commissioner refused access pursuant to section 31 of the FOI Act on the basis that if such documents existed they would contain matter that would be exempt matter under clause 5(1)(b) of Schedule 1 to the FOI Act. In addition, the agency also informed the complainant that if such documents existed, they would be exempt under clause 14(1)(a) of Schedule 1 to the FOI Act.
4. As the decision on access was made by the principal officer of the agency, internal review was not available to the complainant. On 16 May 1996, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

INFORMATION AS TO THE EXISTENCE OF CERTAIN DOCUMENTS

5. Section 31 of the FOI act provides:

“31. (1) Nothing in this Act requires the agency to give information as to the existence or non-existence of a document containing matter that would be exempt matter under clause 1, 2 or 5 of Schedule 1.

(2) If the access application relates to a document that includes, or would if it existed include, exempt matter of a kind referred to in subsection (1), the agency may give written notice to the applicant that the agency neither confirms nor denies the existence, as a document of the agency, of such a document but that, assuming the existence of such a document, it would be an exempt document and, where such a notice is given-

(a) section 30 applies as if the decision to give such a notice were a decision referred to in that section; and

(b) *for the purposes of this Act, the decision is to be regarded as a refusal of access to the document because the document would, if it existed, be an exempt document.*”

6. I discussed the application of s.31 of the FOI Act in my decision in *Re Mineralogy Pty Ltd and Department of Resources Development* (5 January 1996, unreported). As I said in that decision, at paragraph 27, the discretion to rely upon the provisions of s.31 and to neither confirm nor deny the existence of documents requested by an access applicant arises in two situations. The first situation is when the requested documents actually exist in an agency and those documents contain matter that is exempt matter under clauses 1, 2 or 5 of Schedule 1 to the FOI Act. The second situation arises if the requested documents do not exist in the agency concerned but would, if they existed, contain matter that is exempt matter under clauses 1, 2 or 5. In either case, it must be apparent from the description of the documents requested by the access applicant that, if documents of that description existed in the agency, those documents would be exempt.

7. Without confirming or denying the existence of any documents of the type requested by the complainant, the agency claims that, if documents of that type existed, those documents would be exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. Clause 5(1)(b) provides:

“5(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;”

8. In *Manly v Ministry of Premier and Cabinet* (15 June 1995, unreported, Library No. 950310), a decision of the Supreme Court of Western Australia, Owen J. said, at page 25, that in order to be exempt under clause 5(1)(b) a document *“...must reveal something about the content of the investigation”*. Further, in *Police Force of Western Australia v Kelly and Smith* (30 April 1996, unreported, Library No. 960227), another decision of that Court also dealing with the scope and meaning of the exemption in clause 5(1)(b), Anderson J., after referring to the *Manly* decision, said, at page 9:

“...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 investigation”.”

9. Therefore, before accepting that the agency's decision under s.31 of the FOI Act was justified, I must be satisfied that, assuming the existence of documents of the kind requested by the complainant, such documents would contain matter that is exempt matter under clause 5(1)(b) of Schedule 1 to the FOI Act. In my opinion, that question requires a consideration of the role and function of the agency and the identification of the relevant "law" for the purposes of clause 5(1)(b).
10. The *Equal Opportunity Act 1984* ('the EO Act') prohibits, among other things, certain acts of discrimination on the grounds of sex, marital status or pregnancy, family responsibility or family status, race, religious or political conviction, impairment or age, and establishes the Office of the Commissioner and the Equal Opportunity Tribunal.
11. For the purpose of giving effect to the EO Act and pursuant to s.80 of the EO Act, the Commissioner may carry out investigations, research and inquiries relating to allegations of discrimination or sexual harassment of the kinds rendered unlawful by the EO Act. Under s.83 of the EO Act, a complaint may be lodged with the Commissioner alleging that a person has committed a contravention of the EO Act and, pursuant to s.84, the Commissioner has a duty to investigate each complaint lodged with the agency under s.83 of the EO Act.
12. In clause 5 "the law" is defined as meaning, *inter alia*, "...the law of this State...". The EO Act is a law of this State, accordingly, I am satisfied that the EO Act is a relevant law for the purpose of clause 5. Further, taking into account the role of the Commissioner, I am satisfied that a contravention or possible contravention of the EO Act is a contravention or possible contravention of the law for the purposes of clause 5(1)(b).
13. Clearly, if the Commissioner had received a complaint alleging a contravention or possible contravention of any of the provisions of the EO Act, documents would be created in the course of, and for the purposes of, the Commissioner investigating that complaint. I am satisfied that, in those circumstances, the documents could reasonably be expected to reveal the investigation of a contravention or possible contravention of the EO Act, whether or not any prosecutions or disciplinary proceedings have resulted. That is, if the agency had in its possession documents relating to the investigation of a particular complaint made under the EO Act, those documents would contain matter that is exempt matter under clause 5(1)(b) of Schedule 1 to the FOI Act.
14. In her access application the complainant requested access to "...all records involving the decision by..." the Commissioner in respect of a matter described by the complainant as a named person versus the Education Department. From the terms of the access application, it is clear that the complainant sought access to all documents concerning a complaint she believed had been made to, investigated and dealt with by the Commissioner. For the reasons given above, I consider that any such documents, if they were to exist within the agency, would be exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.

15. Therefore, without giving information as to the existence or non-existence of documents of the specific type requested by the complainant, I confirm the decision of the agency to refuse access to such documents on the basis that, if such documents existed, those documents would be exempt documents because they would contain exempt matter under clause 5 of Schedule 1 to the FOI Act.
16. In light of my decision, there is no need for me to consider the application of clause 14(1)(a) to the requested documents.
