

NEVILLE AND HOMESWEST

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

**File Ref: 96048
Decision Ref: D04296**

Participants:

Robert David Neville
Complainant

- and -

**The State Housing Commission of Western
Australia (Homeswest)**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents relating to an investigation under the *Public Sector Management Act 1994* - clause 5(1)(b) - law enforcement - whether disclosure could reasonably be expected to reveal the investigation of a contravention or possible contravention of the law in a particular case - clause 7 - legal professional privilege.

Freedom of Information Act 1992 (WA) ss.3(3), 74(2), 75(1), 76(4); Schedule 1 clauses 3, 7.

Public Sector Management Act 1994 (WA).

Re Botman and Commissioner for Equal Opportunity (Information Commissioner, WA, 5 July 1996, unreported).

Re Titelius and Ministry of Justice (Information Commissioner, WA, 18 June 1996, unreported).

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

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

Grant v Downs (1976) 135 CLR 674.

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

DECISION

The decision of the agency is confirmed. All the disputed documents are exempt under clause 5(1)(b), except for folios 18-23, 25-38 and 46 of section 4.3 of Volume 4 which are exempt under clause 7 of Schedule 1 to the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

15th 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 State Housing Commission, trading as Homeswest ('the agency') to refuse Mr Neville ('the complainant') access to certain documents requested under the *Freedom of Information Act 1992* ('the FOI Act').
2. In late 1995 the Executive Director of the agency was informed about a possible breach of the *Public Sector Management Act 1994* ('the Act') involving officers of the agency situated in the South Hedland branch of the agency. A departmental inquiry ensued. Consequently, the complainant and another officer were required to respond to certain allegations after being issued with notices to do so by the Executive Director of the agency. In mid December 1995, the complainant and the other officer were charged with serious breaches of discipline under the Act. Both officers denied the charges and, as a result, the agency appointed an independent investigator to conduct a further investigation of the matter.
3. In January 1996, the independent investigator reported on the results of his investigation. Following that report, the charges against the complainant were withdrawn. However, the charges against the other officer remained and, subsequently, that officer's employment in the agency was terminated.
4. On 12 December 1995, the complainant applied to the agency for access under the FOI Act to documents associated with the investigation into the matter involving him and the other officer. On 16 February 1996, the agency refused the complainant access to all documents on the grounds that those documents are exempt under clauses 5(1)(a) and (b) of Schedule 1 to the FOI Act. In addition, the agency also claimed that certain of the documents are exempt under clauses 3 and 7 of Schedule 1.
5. On 27 February 1996, the complainant applied to the agency for internal review and, on 14 March 1996, the internal reviewer of the agency confirmed the initial decision that the documents are exempt under clauses 5(1)(a) and (b), and that certain documents are also exempt under clauses 3 and 7. On 26 March 1996, 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 copies of the disputed documents pursuant to my powers under s.75(1) of the FOI Act. As the agency had described the disputed documents in general terms only and by reference to file volumes and had not identified the

precise number or type of documents in dispute in this matter, for the purposes of my dealing with this complaint I required the agency to prepare a schedule listing and describing the documents to which access had been refused.

7. The agency informed me that it would be prepared to grant the complainant access to some documents when the investigation, so far as it concerned the complainant, had been concluded. Consequently, during the course of my dealing with this matter, the agency granted the complainant access to 53 documents. However, the agency maintains its claims that the remaining documents are exempt and the agency provided further material for my consideration.
8. On 20 June 1996, after examining the disputed documents and considering the material before me, I provided the parties with my preliminary view of this matter and my reasons for that view. It was my preliminary view that the agency's claims for exemption under clause 5(1)(b) are made out. However, it was also my preliminary view that some documents listed on the schedule are not exempt at all; some others are exempt under clause 7; and that other documents are outside the ambit of the complainant's access application.
9. Consequently, the agency withdrew its claims for exemption for those documents in respect of which it was my preliminary view that they may not be exempt, and released copies of those documents to the complainant. In light of my preliminary view that certain other routine administrative documents are outside the ambit of the access application, the complainant did not pursue access to those documents. No other concessions were made by either party. Therefore, this decision concerns the remaining documents which the agency claims are exempt under clauses 3(1), 5(1)(b) and 7 of Schedule 1 to the FOI Act.

THE DISPUTED DOCUMENTS

10. In this instance, the disputed documents have been identified by the agency in general terms only. The agency submits that disclosure to the complainant of the schedule of documents provided for my purposes would disclose exempt matter. I have considered that claim and, pursuant to my obligation under s.74(2) of the FOI Act, on this occasion I shall not identify the specific documents in dispute and shall describe them according to the system used by the agency. The disputed documents are as follows:

Volume 1 - Information Services and Office Accommodation Data

There are 18 documents in dispute on this file. Those documents consist of various computer reports and other reports and notes of material relating to the investigation.

Volume 2 - Confidential Staff Interviews

There are 42 documents in dispute on this file. Those documents record various interviews with officers of the agency and other material relating to the investigation.

Volume 3 - Confidential Staff Interviews

There are 68 documents in dispute on this file. Those documents record various interviews with officers of the agency and other material relating to the investigation.

Volume 4 - Staff, Administrative and Legal Matters

There are 78 documents in dispute on this file. Those documents comprise material relating to the investigation and include 18 documents consisting of various communications between the agency and its legal advisers.

THE EXEMPTIONS

11. The agency claims that, except for 18 documents on Volume 4 which are claimed to be exempt under clause 7, the disputed documents comprising Volumes 1, 2, 3 and 4 are all exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.

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

12. 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;”

13. I have recently discussed the scope and meaning of the exemption in clause 5(1)(b) in my decisions in *Re Botman and Commissioner for Equal Opportunity* (5 July 1996, unreported) and in *Re Titelius and Ministry of Justice* (18 June 1996, unreported). Those decisions apply the law as to the meaning of the exemption in clause 5(1)(b) following the decision of the Supreme Court of Western Australia in *Police Force of Western Australia v Kelly and Smith* (30 April 1996, unreported, Library No. 960227).

14. In *Police Force of Western Australia v Kelly and Smith*, Anderson J. referred to the comments of Owen J. in *Manly v Ministry of Premier and Cabinet* (15 June 1995, unreported, Library No. 950310), 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.” Anderson J. 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”.”

15. Further, it was His Honour’s view that it matters not whether the investigation has been completed. At pages 9 - 10, His Honour said:

“Even after an investigation has been completed there may be very good operational reasons why there should be no disclosure of it...Of course there may be no need for any secrecy whatever in a particular case and there may be good public interest reasons to give public access to the documents or to give the applicant access to the documents. However, whilst that may be a relevant consideration for the agency in exercising its discretion under s23(1) whether to allow access to the documents to the public or to a particular individual, it cannot help to determine whether the documents are in fact exempt documents under cl5(1)(b).”

16. At pages 12 and 13 of that decision, His Honour said that “[o]nce it appears that disclosure of the matter could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law in a particular case, the matter is exempt...”.

17. I have examined all of the disputed documents in this matter. Those documents consist of statements provided by witnesses, documents describing the investigative steps undertaken by the agency and various sources of information used by the agency to gather relevant material for the purpose of the investigation. Based on my examination of Volumes 1, 2, 3 and 4 and other material before me, I am satisfied that the disputed documents were created for the purpose of the investigation into the allegations that had been made concerning the complainant and another officer of the agency.

18. Those allegations concerned a contravention or possible contravention of the *Public Sector Management Act 1994* and that Act is clearly a law of this State and, accordingly, is a law as defined in clause 5(5) for the purposes of the clause 5 exemptions. I am, therefore, satisfied that the disclosure of those documents could reasonably be expected to reveal the investigation into a contravention or possible contravention of the law. Further, I am satisfied that none of the limitations in clause 5(4) applies to the disputed documents.

19. The complainant does not accept that documents recording various interviews with officers of the agency can be exempt because he was invited to attend those interviews and to ask questions of the officers concerned. If the complainant was present during some or all of the interviews with other officers of the agency, that fact might - and, in my view, should - be a relevant matter for the agency to consider in the exercise of its discretion under s.3(3) of the FOI Act to give the complainant access to documents which may technically be exempt, as there seems to be little reason to claim exemption in those circumstances.
20. However, pursuant to s.76(4) of the FOI Act, I do not have that discretion. If it is established that documents are exempt documents, I do not have power to make a decision to the effect that access is to be given to those documents. As I am satisfied that the disclosure of the disputed documents could reasonably be expected to reveal the investigation carried out by the agency into a possible contravention of the *Public Sector Management Act 1994* in a particular case, I find those documents to be exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.

(b) Clause 7 - Legal professional privilege

21. The agency also claims that 18 documents in Volume 4, section 4.3, are exempt under clause 7 of Schedule 1 to the FOI Act. Clause 7 provides that “[m]atter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege.”
22. As I have said in previous decisions involving claims for exemption under clause 7, it is clearly established law in Australia that confidential communications passing between a client and his or her legal adviser need not be given in evidence or otherwise disclosed by the client and, without the client's consent, may not be given in evidence or otherwise disclosed by the legal adviser if made for the sole purpose of enabling the client to obtain, or the adviser to give, legal advice: *Grant v Downs* (1976) 135 CLR 674. A claim for privilege is not limited, in the case of such communications, to communications which have been made for the purpose of existing or contemplated litigation: *Trade Practices Commission v Sterling* (1979) 36 FLR 244.
23. As I have also previously noted, legal professional privilege extends to “[n]otes, memoranda, notes or other documents made by the client or the legal adviser of the client of communications which are themselves privileged, or containing a record of those communications, or relate to information sought by the client's legal adviser to enable him to advise the client...”: *Trade Practices Commission and Sterling* at page 246.
24. The 18 documents (folios 18-23, 25-38 and 46) comprise facsimile cover sheets, memoranda between the agency and its legal advisers, draft correspondence and file notes made by officers of the agency of conversations with one of the agency's legal advisers. I have examined each of those documents. It is quite clear to me from the documents themselves and the context in which they appear

that each of them was prepared for the sole purpose of either seeking or giving legal advice, or records a confidential communication between the agency and its legal advisers for the sole purpose of both seeking and giving legal advice. In my opinion, therefore, those documents would be privileged from production in legal proceedings on the ground of legal professional privilege.

25. The complainant informed my office that he was not seeking access to documents containing legal interpretations, but that it was his contention that he has a right to have access to documents containing personal information about him. However, once it is established that a document is exempt under clause 7, whether or not it contains personal information about the access applicant or whether there is any public interest in disclosing the document is not a relevant consideration.
26. The exemption in clause 7, unlike some of the other exemptions in Schedule 1, is not limited by a “public interest test”. Consequently, there is no scope for my consideration of whether disclosure of the documents would, on balance, be in the public interest. Accordingly, as I am satisfied that the 18 documents in volume 4, section 4.3 would be privileged from production in legal proceedings on the ground of legal professional privilege, I find them to be exempt documents under clause 7 of Schedule 1 to the FOI Act.
27. Although the agency also claims that some of the disputed documents are exempt under clause 3(1), in light of my decision that the documents are exempt under clause 5(1)(b) and under clause 7, I need not consider that claim.
