

KELLY & SMITH AND POLICE

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

**File Ref: 95166
Decision Ref: D05695**

Participants:

**Michael Craig Kelly
Bradley Terrance Smith**
Complainants

- and -

Police Force of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - clause 3(1) - refusal of access - documents held by agency related to investigation - witness statements - personal information about third parties - public interest factors for and against disclosure - requirement to establish exemption under clause 3(1) - public interest in complainants obtaining access to documents containing information about complainants - section 21.

FREEDOM OF INFORMATION - clause 5(1)(b) - refusal of access - internal investigation reports prepared by officers of agency in the course of their duties - confidential communications - records of interview - information provided by third parties - whether reasonable to expect prejudice to future supply of information - whether disclosure in the public interest - public interest in complainants being informed of nature of complaint against them - interpretation of clause 5(1)(b) - reveal an investigation - prior disclosure of exempt information - requirements to establish exemption under clause 5(1)(b).

Freedom of Information Act 1992 (WA) ss. 15(8); 21; 24; 68(1); 69(4); 72(1)(b); 75(1); 102(1); Schedule 1 clauses 3(1), 5(1)(a), 5(1)(b), 5(1)(c), 5(2), 5(3), 6(1), 6(1)(a), 7, 8, 14; Glossary in Schedule 2.

Criminal Code Act Compilation Act 1913 (WA)

Director of Public Prosecutions Act 1991 (WA)

Freedom of Information Act 1982 (VIC)

Director of Public Prosecutions Act 1982 (VIC)

Director of Public Prosecutions Act 1983 (C'wth)

Grofam Pty Ltd and Others v Australia and New Zealand Banking Group Limited and Others (1993) 117 ALR 669.

Re Easdown and Director of Public Prosecutions; Minister for Police and Emergency Services and Victoria Police (No. 1) and Continental Airlines Incorporated (1987) 2 VAR 102.

Grant v Downs (1976) 135 CLR 674.

Baker v Campbell (1983) 153 CLR 52.

Re Tickner and Police Force of Western Australia (Information Commissioner WA, 7 March 1995, unreported).

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

Re Read and Public Service Commission (Information Commissioner WA, 16 February 1994, unreported).

Re Waterford and Department of Treasury (No 2) (1984) 5 ALD 588.

Re Veale and Town of Bassendean (Information Commissioner WA, 25 March 1994, unreported).

Re Kobelke and Minister for Planning and Others (Information Commissioner WA, 27 April 1994, unreported).

Re A and Heathcote Hospital (Information Commissioner WA, 9 June 1994, unreported).

Re Hayes and The State Housing Commission of Western Australia (Homeswest) (Information Commissioner WA, 17 June 1994, unreported).

Re Gray and The University of Western Australia (Information Commissioner WA, 23 June 1994, unreported).

Re Manly and Ministry of the Premier and Cabinet (Information Commissioner WA, 16 September 1994, unreported).

Re C and Department for Community Development (Information Commissioner WA, 12 October 1994, unreported).

Re Smith and State Government Insurance Commission (Information Commissioner WA, 5 December 1994, unreported).

Re Edwards and Ministry of Justice (Information Commissioner WA, 12 December 1994, unreported).

DECISION

The decision of the agency varied. It is decided that:

- Documents 19, 20, 21 and 23 are outside the ambit of the access application;
- Documents 80 and 81 are exempt under clause 5(1)(b) of Schedule 1 to the *Freedom of Information Act 1992*;
- The matter deleted from Document 22 is exempt matter under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*; and
- The matter described in the schedule attached to this decision is exempt matter under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*;

but, the remaining documents and parts of documents are not exempt.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

24th November 1995

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Police Force of Western Australia ('the agency') to refuse Constable Smith and First Class Constable Kelly ('the complainants') access to certain documents and parts of documents requested by the complainants under the *Freedom of Information Act 1992* ('the FOI Act').
2. On 31 May 1995, solicitors acting on behalf of the complainants lodged an access application with the agency seeking access to documents relating to an incident which allegedly occurred in Fremantle on 25 March 1995, whilst the complainants were on duty. That incident received considerable publicity at the time in both the print and electronic media because it concerned the alleged discharge of a firearm in a public place by one of the complainants. The circumstances surrounding that incident were investigated by the Internal Investigations Branch ('the IIB') of the agency. On 11 April 1995, First Class Constable Kelly was charged by summons with an offence under the *Firearms Act 1973*. Further, on 28 April 1995 and 5 May 1995, both complainants were charged with a number of disciplinary offences under the *Police Force Regulations 1979*.
3. On 29 June 1995, Chief Inspector M J B Rae, Officer in Charge, Freedom of Information Unit of the agency, advised the complainants that 82 documents had been identified as coming within the ambit of their access application. The agency granted full access to 19 documents; access to edited copies of 4 documents; and refused access to 59 other documents. The documents and parts of documents to which access was refused were claimed by the agency to be exempt under clauses 3(1), 5(1)(b) and 8(2) of Schedule 1 to the FOI Act.
4. On 2 August 1995, the complainants sought internal review of the decision of Chief Inspector Rae. That review was undertaken by Acting Commander J Hawkes, FOI Review Officer in the agency. On 8 August 1995, Acting Commander Hawkes confirmed the agency's original decision that access was refused to 59 documents and that access would only be given to edited copies of 4 other documents. The agency claims that the requested documents and parts of those documents to which access was refused are exempt under clauses 3(1), 5(1)(b) and 8(2) of Schedule 1 to the FOI Act. On 22 August 1995, the complainants applied to the Information Commissioner for external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

5. On 25 August 1995, in accordance with my statutory obligation under section 68(1) of the FOI Act, I notified the agency that I had accepted this complaint for review. Pursuant to my authority under ss.75(1) and 72(1)(b) of the FOI Act, I

required the production to me of the originals of the requested documents, together with the agency's file maintained in respect of this access application. Those documents were delivered to my office on 30 August 1995.

6. On 5 September 1995, after I had examined the requested documents and considered the submissions of the parties, I formed the preliminary view that 4 documents identified by the agency as being within the ambit of the complainants' access application were, in fact, outside the ambit of that application; other documents identified by the agency may be exempt under clause 5(1)(b) of Schedule 1 to the FOI Act; parts of documents may be exempt under clause 3(1) of Schedule 1 to the FOI Act; but that the majority of the documents, on the information then before me, were not exempt. The parties were provided with my preliminary view and reasons for that view.
7. After receiving my preliminary view, the agency released one additional document to the complainants but maintained its claims in relation to the remainder and, on 13 September 1995, provided a further submission for my consideration. At that stage of the proceedings, the agency withdrew its claims under clause 8(2) of Schedule 1 to the FOI Act. The complainants also provided me with a further submission in support of their claims that access should be provided to all documents including those documents which, in my preliminary view, I considered to be outside the ambit of the access application.

THE DISPUTED DOCUMENTS

8. There are 64 documents remaining in dispute between the parties. Those documents are listed and described on a schedule provided to the complainants by the agency. The disputed documents are identified in this decision using the same document number assigned to each document by the agency. I propose to deal with this complaint in two parts. The first part deals with the 4 documents identified by the agency as being within the ambit of the complainants' access application in the first instance, but which, following receipt of my preliminary view, are claimed by the agency to fall outside the ambit of that access application. The second part deals with the remaining documents for which exemption is claimed by the agency under clauses 3(1) and 5(1)(b) of Schedule 1 to the FOI Act.

1 DOCUMENTS OUTSIDE THE AMBIT OF THE ACCESS APPLICATION

9. In their access application dated 31 May 1995, the complainants sought access by way of copies of documents consisting of, *inter alia*, "...all notes, documents, reports, records of interview and other material relating to the incident in Fremantle on Saturday, 25 March 1995 involving Constable Smith and First Class Constable Kelly..."

10. The agency originally identified Documents 19, 20, 21 and 23 on its schedule as being within the ambit of the complainants' access application. The agency granted the complainants access to edited copies of Documents 19, 20 and 21 from which matter claimed to be exempt under clause 3(1) of Schedule 1 to the FOI Act had been deleted. However, the agency refused the complainants access to Document 23.
11. Document 19 is a list of contacts with members of the motoring public made by the complainants during their rostered duties. It appears to be a standard agency form entitled "Daily Contact Return and Occurrences" which contains a record of vehicle registration numbers and driver details and records the times and locations of the complainants' contact with those vehicles. The last entry records the complainants' meal period at 2230 hours.
12. From my examination of Document 19, I consider that it is not related to the incident in Fremantle. It merely records things done by the complainants in the hours preceding the incident in Fremantle. Whilst that document may be relevant to the IIB inquiry, I do not consider that it can be said that it falls within the ambit of the access application, as it does not relate to the incident itself. Although the complainants are in possession of an edited copy of Document 19, I find Document 19 to be outside the ambit of the complainants' access application. Accordingly, the decision of the agency to refuse access to part of that document is confirmed.
13. Documents 20 and 21 are copies of infringement notices issued by one or other of the complainants. From my examination of those documents, neither relates to the incident in Fremantle. Both documents may be relevant to the IIB investigation since they record something that was done by the complainants in the course of their rostered duties before the alleged incident, but neither document is related to the incident itself. The agency provided the complainants with access to edited copies of Documents 20 and 21 from which matter claimed to be exempt under clause 3(1) had been deleted. However, in my view, Documents 20 and 21 are outside the ambit of the access application and I find accordingly. Therefore, I confirm the decision of the agency to refuse access to the remaining parts of those documents.
14. Document 23 is a list of the numbers of contacts made by various police officers including the complainants over a period of 4 months between 30 November 1994 and 25 March 1995. It appears to me to be a document created from other material in the agency in order to compare the output of work performed by the complainants working together with that of each of the complainants working with some other officer of the agency. In my view, taking into account its contents, I consider that Document 23 is also outside the ambit of the access application. Therefore, I confirm the decision of the agency to refuse access to that document.

2. DOCUMENTS WITHIN THE AMBIT OF THE ACCESS APPLICATION

15. The documents remaining in dispute and the exemptions claimed by the agency are as follows:

Document	Description	Exemptions
1	Running Sheet from Internal Investigation Branch file.	5(1)(b)
22	Extract dated 25 March 1995, from Police Headquarters Duty Inspector's Telephone Message Book.	3(1)
24-74	Witness statements.	3(1); 5(1)(b)
75	Report to IIB from a Senior Constable, dated 6 April 1995.	5(1)(b)
76	Report to IIB from a First Class Constable, dated 8 April 1995.	5(1)(b)
77	Report to IIB from an Acting Inspector, dated 26 March 1995.	5(1)(b)
78	Report to IIB from a Senior Sergeant, dated 10 April 1995.	5(1)(b)
79	Report to IIB from a First Class Constable, dated 9 April 1995.	5(1)(b)
80	Forensic Science Laboratory Report dated 13 April 1995.	5(1)(b)
81	Ballistics report dated 28 March 1995.	5(1)(b)

THE EXEMPTIONS

(a) Clause 3 - Personal information

16. The agency claims that parts of Document 22 and all of Documents 24-74 inclusive, *inter alia*, under clause 3(1) of Schedule 1 to the FOI Act. 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)."

17. In the Glossary in Schedule 2 to the FOI Act, "**personal information**" is defined 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-*
- (a) *whose identity is apparent or can reasonably be ascertained from the information or opinion; or*
 - (b) *who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample."*
18. Document 22 is an extract from a message book maintained at Police Headquarters by the Duty Inspector. That book records the time and date of various complaints received by the agency, the names and addresses of the people making those complaints, and the action taken by the agency in respect of those complaints. The matter in dispute in Document 22 consists of the name and address of the person making a complaint about the incident in Fremantle on the 25 March 1995. In my view, that matter is personal information as defined in the FOI Act and, therefore, *prima facie*, exempt matter under clause 3(1) of Schedule 1 to the FOI Act.
19. Documents 24-74 contain personal information, including the names and addresses of the persons providing those statements. The personal information includes employment details, telephone numbers, medical ailments, living arrangements and, in some cases, the documents contain personal information about other third parties. In my view, that information is, *prima facie*, exempt matter under clause 3(1) of Schedule 1 to the FOI Act.
20. The exemption in clause 3(1) is subject to the limitation provided in clause 3(6). That is, personal information is not exempt matter under clause 3(1) if its disclosure would, on balance, be in the public interest. The onus of persuading me that the disclosure of personal information about a third party or third parties would, on balance, be in the public interest lies on the complainants under s.102(3) of the FOI Act.

The public interest

21. In my view, there are a number of competing public interests that require consideration in dealing with this complaint. The claims of the agency have focussed primarily upon the right to privacy of the witnesses. I have previously stated in a number of my decisions that there is a strong public interest in protecting and maintaining individual privacy and that that public interest will only be displaced by a stronger countervailing public interest. I also recognise that there is a public interest in maintaining the general ability of the agency to

obtain information from the public and in its ability to obtain all relevant information when investigating complaints against its officers and possible criminal offences.

22. However, I also recognise that there is a strong public interest in the administration of justice, and also a public interest in the complainants being able to exercise their rights of access under the FOI Act. In my view, the interests of justice and, accordingly, the due and proper administration of the law require that in matters such as these where there are a number of important competing public interests, each document must be examined individually and a balance struck between those competing interests to decide the question of disclosure. I consider the fact that a criminal charge has been preferred against one complainant, together with the fact that both complainants have been served with Defaulter Sheets under the *Police Force Regulations 1979*, to be relevant to my determination of where that balance should lie.
23. Ordinarily, the confidentiality of communications to agencies such as the police and the right to privacy of individuals whose personal information is contained in documents held by such agencies may shift the balance against disclosure. However, at the point in an investigation or in an inquiry where a decision is made to prefer charges, including criminal charges and charges of a disciplinary nature against a person or persons, I consider the balance to shift towards the broader public interest in ensuring the proper administration of the law. In my view, the practices and procedures of agencies are crucial in deciding whether the interests of justice are served in any particular instance by non-disclosure of documents, or whether disclosure is necessary to bring a sense of fairness and justice to a determination of the issues between the parties.
24. In respect of Document 22, I consider the proper administration of justice would not be advanced by disclosing to the complainants the name and address of the person making the report to the agency. The substance of the allegations against the complainants has already been disclosed to them in the edited copy of Document 22 to which they have been given access. In my view, the disclosure of Document 22 in that form adequately meets the public interest that requires the disclosure of documents containing allegations against the complainants. Therefore, on balance, I consider that the public interest in maintaining the privacy of people who provide information to the agency about incidents which require investigation by officers of the agency, outweighs the public interest in the complainants being able to exercise their rights of access under the FOI Act. I find the matter deleted from Document 22 to be exempt matter under clause 3(1) of Schedule 1 to the FOI Act.
25. The agency claims that four witnesses who were contacted by the agency during the process of the agency dealing with the complainants' access application, indicated that they did not want their personal information released to the complainants. It is not clear, from the information before me from the agency, exactly what personal information those witnesses did not wish to be disclosed to the complainants. Further, during their records of interview with the complainants, the IIB investigators identified two potential witnesses by name, including one of those witnesses contacted by the agency. Therefore, it appears to me that some of the matter in Documents 24-74 for which the agency claims exemption under clause 3(1), may have already been disclosed to the complainants by officers of the agency.

26. The agency also informed me that one witness was reluctant to provide an investigator with a statement and only did so after being persuaded by the investigator to relate his version of events. The document concerned is Document 24. The agency concluded that it would have been almost certain that that witness would have declined to give a statement if the witness had known that the statement may be released under the FOI Act.
27. In respect of Documents 24-74, I consider it would have been apparent, particularly through the agency's own media releases and the external media coverage of the incident in Fremantle, that the police were investigating the incident. Clearly, it was in contemplation that witness statements might be used by police in charging one or both of the complainants with possible criminal or disciplinary offences, or both. In my view, the reality is that the witnesses interviewed by the IIB investigators were potential witnesses at a hearing before a court or for disciplinary proceedings and those witnesses were aware or should have been aware of that fact.
28. The complainants submit that personal information about the witnesses who will be called by the prosecution to testify at the hearing of the charge against First Class Constable Kelly and in any disciplinary proceedings against both complainants that are scheduled to follow that hearing, will be disclosed at those hearings. The complainants submit, therefore, that the disclosure of the names and addresses of the witnesses would, on balance, be in the public interest. However, the complainants also indicated to me that they would accept access to edited copies of Documents 24-74 with personal information deleted if I determined that personal information about the witnesses was exempt matter under clause 3(1).
29. It is my understanding that a witness in court proceedings is required to state his or her name but that other personal information about the witness may not necessarily be disclosed in an open court, unless that personal information is relevant to some point in issue. I also consider it unlikely that personal information about witnesses that is not relevant to the disciplinary charges against the complainants, would be disclosed during a disciplinary hearing, which is not held in public. In light of the competing claims of the parties, the issue for my determination is whether, and in what circumstances, the disclosure of the statements of witnesses who are able to provide information that is relevant to a matter to be heard by a court or disciplinary board or tribunal, would be in the public interest.

Analysis of claims

30. In *Carew v Carone* [1991] 5 WAR 1, Murray J considered an appeal against the appellant's conviction in the Court of Petty Sessions for a contravention of s.54 of the *Police Act 1892*. Prior to the hearing in the Court of Petty Sessions the appellant's solicitors requested from the police the name and address of the other party involved in the incident for which the appellant was convicted. The Police Prosecuting Branch advised the appellant that it was not its policy to supply the

name and address of any witnesses or co-accused. Among other things, the appellant argued that, because the police refused to disclose the name and address of the potential witness, a substantial miscarriage of justice had occurred.

31. Murray J. found, on the facts of that case, that a miscarriage of justice had not occurred. However, at p.14 of the decision, His Honour discussed the policy of the Police Prosecuting Branch in refusing to provide the names and addresses of any witnesses and expressed the view that the policy is wrongly based. His Honour said:

“I can for myself see no reason why such an inquiry should not be answered by revealing the name and last known address of the individual concerned. That person would in my view have no power to demand that his or her privacy be preserved from such an inquiry and so the approach ought to be that the identity of the witness should be revealed unless there is a positive reason to suppose, upon good grounds, that if the individual’s identity is disclosed he or she may in the context of the particular matter be endangered physically or be otherwise subject to harassment or intimidation or otherwise exposed to harm. In such a case it would be proper to consult the witness and refuse to divulge that person’s identity unless with his or her consent. Such an approach would seem to me to strike a proper balance between the interests of justice and the interests of the individual concerned...”

32. The case of *Carew v Carone* arose pre-FOI. That is, it arose prior to the enactment of the FOI Act which gives every person a statutory right of access to documents held by State and local government agencies, subject to a legitimate claim for exemption being established in accordance with the requirements of the FOI Act. Quite clearly, that right of access includes the right to access Documents 24-74.
33. In this instance, my office contacted the witnesses to determine if any of them objected to the disclosure of his or her statement under the FOI Act. Of 45 letters sent, 22 did not respond to my invitation and 2 letters were returned unopened. Eighteen witnesses objected to the release of their statements, particularly the disclosure of personal information such as names, addresses and occupations, 2 agreed to access to edited copies of their statements and 1 was ambivalent. Some witnesses expressed concern and fear at the possibility of victimisation or harassment by the complainants and their “friends” in the agency. Whilst I acknowledge that those fears may be genuinely held, there is no material before me to support any claims that the complainants are likely to harass or intimidate the witnesses who provided statements to the IIB investigators.
34. In relation to Documents 24-74, given the nature of the Fremantle incident as witnessed by the media coverage at the time, I consider that some, if not all, of the witnesses who provided statements to the IIB investigators could reasonably have expected to be required to give evidence in relation to this matter. Accordingly, I sought from the agency a list of witnesses proposed to be called to give evidence against the complainants. Although the agency provided me

with that list, it refused to provide a list of witnesses to the complainants in spite of being asked for such a list by the complainants' solicitor.

35. As charges, both disciplinary and criminal, have been preferred against the complainants, for the reasons given in paragraphs 21-23 above, I consider there to be a public interest in the disclosure to the complainants of the names and statements of proposed witnesses who are able to testify about what happened in Fremantle on the night in question. Further, I consider that the interests of justice are not advanced by tactics of the agency which can only be described as "trial by ambush". In my view, disclosure of witness statements, including the names of witnesses, is desirable for a fair determination of the charges against the complainants. Therefore, in respect of the proposed witnesses nominated by the agency, I consider that the public interest in the proper administration of justice between the parties in both the disciplinary and criminal proceedings outweighs the public interest in maintaining the privacy of those witnesses. I find that the names of the persons who provided Documents 25, 46, 47, 50-52, 56, 63, 65 and 66 to the IIB, are not exempt under clause 3(1). Document 52 is a copy of Document 25.
36. However, those considerations do not apply to other personal information in those documents. In my view, disclosure of private information other than the names, is not required for the proper administration of justice. I consider that the private information of third parties bears little or no relevance to the issues that will be determined by the court and at the disciplinary hearings against the complainants. Therefore, I also find that any other personal information about the witnesses or other third parties in Documents 25, 46, 47, 50-52, 56, 63, 65 and 66, is exempt matter under clause 3(1). The matter that I find to be exempt matter under clause 3(1) of Schedule 1 to the FOI Act is described in the schedule attached to this decision.
37. Document 24, although described by the agency as a witness statement, is in fact a file record of notes of a conversation between an officer of the IIB and an alleged witness. From my examination of the document, it appears that the particular witness did not wish to provide police with a statement and notes were made of the conversation between the investigator and that person. I consider that personal information about that third party, namely, the first two lines only in Document 24, is exempt matter under clause 3(1) and find accordingly.
38. The remaining statements, namely Documents 26-45, 48, 49, 53-55, 57-62, 64 and 67-74 inclusive, are statements of witnesses who may not be required to give evidence against the complainants. The complainants are willing to accept access to edited copies of those documents from which personal information has been deleted. In respect of those statements, as the witnesses are unlikely to be required to give evidence, I consider the public interest in maintaining personal privacy and the public interest in maintaining the ability of the agency to obtain relevant information during an investigation outweighs the public interest in the complainants being able to exercise their rights of access to those documents. Accordingly, I find the names, addresses and other personal information in those documents to be exempt matter under clause 3(1). The matter in Documents 26-

45, 48, 49, 53-55, 57-62, 64 and 67-74 inclusive that I find to be exempt under clause 3(1) is also described in the schedule attached to this decision. However, as the agency claims that Documents 24-74 are also exempt for other reasons, the status or otherwise of those documents is considered in paragraphs 53-56 below.

39. Although the agency did not claim an exemption for Document 1 under clause 3(1), I am satisfied, from my examination of that document, that it contains personal information about third parties. The personal information about third parties consists of names, addresses, telephone numbers and places of employment of the third parties contacted during the course of the investigation. In my view, that information is, *prima facie*, exempt matter under clause 3(1). I consider that it is practicable under s.24 of the FOI Act for the agency to delete exempt personal information consisting of names, addresses, telephone numbers and employment details, from Document 1 and to provide the complainants with access to an edited copy of that document.
40. However, the personal information in Document 1 includes personal information about some of the proposed witnesses. As I have found, at paragraphs 35 above, that the names of the proposed witnesses only are not exempt matter, the names of those proposed witnesses should not be deleted from Document 1. The agency's claims under 5(1)(b) for Document 1 are considered in paragraphs 51 and 52 below.

(b) Clause 5(1)(b)

41. Each of the disputed documents is also claimed by the agency to be exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. Clause 5(1)(b) provides:

"5. Law enforcement, public safety and property security

Exemptions

(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;"

42. As I have said before, the particular wording of the exemption in clause 5(1)(b) of the FOI Act is unique in FOI legislation. No other FOI legislation in Australia provides exemption for documents that could "reveal" an investigation, nor do the words "*whether or not any prosecution or disciplinary proceedings have resulted*" appear in any other FOI legislation dealing with law enforcement exemptions.

43. In my view, clause 5 is intended to protect the public interest in law enforcement and other regulatory bodies being able to effectively carry out their functions without interested bystanders or possible suspects knowing in advance what those inquiries are likely to be. I also consider that the inclusion of the words “*whether or not any prosecution or disciplinary proceedings have resulted*” is an indication that the exemption may apply regardless of the outcome of an investigation, and requires the decision-maker to make a decision on access based upon his or her examination of each document. Further, in some instances, the contents of the documents themselves can provide real and substantial grounds for expecting that disclosure might “reveal an investigation” and the documents thus may, *prima facie*, be exempt from disclosure under clause 5(1)(b) of Schedule 1 to the FOI Act.
44. The phrase “could reasonably be expected” in the opening words of the exemption in clause 5 also appears in several other exemptions in the FOI Act and in FOI legislation in other jurisdictions. In *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180, the Full Federal Court discussed the meaning of the phrase “*could reasonably be expected*” in the context of s.43(1)(c)(ii) of the Commonwealth FOI Act. Bowen CJ and Beaumont J said, at p.190, that the phrase simply requires a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect certain consequences to follow from disclosure.
45. The scope of the exemption and the meaning of the words “reveal the investigation” in clause 5(1)(b) of Schedule 1 to the FOI Act arose for consideration by the Supreme Court of Western Australia in *Manly v Ministry of Premier and Cabinet* (15 June 1995, unreported). Owen J said, at p.25 of the judgment:
- “I think the clause is aimed at the specifics of the investigation, and not at the mere fact that there is or has been an investigation...A document is not exempt from disclosure simply because it would reveal the fact of an investigation. It must reveal something about the content of the investigation.*
- I also think that it would be wrong to test the coverage of the clause by looking at the document in isolation. It must be considered in the light of the surrounding circumstances and in view of what else is known to the parties and the public...The exemption applies if disclosure of that document would reveal the investigation. There must be something in the document which, when looked at in the light of the surrounding circumstances, would tend to show something about the content of the investigation. If that material is already in the public arena then it could not properly be said that the disclosure of the document would reveal the investigation.”*
46. As I have said, one of the complainants has been charged with an offence against a particular provision of the *Firearms Act 1973*; both complainants have been charged with offences against particular provisions of the *Police Force*

Regulations 1979. I accept that “the law” as defined in clause 5, in this instance, includes the disciplinary provisions of the *Police Force Regulations 1979*. I accept, therefore, that the disputed documents concern the investigation of a possible contravention of the law in a particular case, the particular case being the incident at Fremantle which gave rise to the creation of the documents.

47. Many of the disputed documents which are claimed by the agency to be exempt under clause 5(1)(b) contain personal information about the complainants, a fact for which the agency appears to have had little regard. When a document is claimed to be exempt under one or more of the clauses in Schedule 1 to the FOI Act and that document also contains personal information about the access applicant, I consider that a decision-maker must have regard to the effect of s.21 of the FOI Act.

48. Section 21 provides:

“21. If the applicant has requested access to a document containing personal information about the applicant, the fact that matter is personal information about the applicant must be considered as a factor in favour of disclosure for the purpose of making a decision as to -

(a) whether it is in the public interest for the matter to be disclosed; or

(b) the effect that the disclosure of the matter might have.”

49. In my view, s.21 limits, to some extent, the potentially broad operation of clause 5(1)(b). That is, if a document contains personal information about an applicant and that document is also related to an investigation into any contravention or possible contravention of the law involving the applicant, then, when considering whether the expected effects of disclosure are reasonably based, regard must be had to the effects of disclosing the documents to the particular applicant rather than to the “world at large”. That is, the question is to be decided by considering whether disclosure could reasonably be expected to reveal anything about the content of the investigation to the particular applicant that is not already known by that applicant. In my view, if it has already been revealed to the applicant then it may not be revealed by disclosure of the document.

50. Applying all of those tests to the matters before me, to establish an exemption under clause 5(1)(b), the agency must persuade me that it is reasonable, as distinct from something irrational, absurd or ridiculous, to expect that disclosure of the disputed documents to the complainants would reveal something about the content of the investigation into the incident involving them at Fremantle. In the circumstances of this case, the reasonableness of that expectation is to be judged by having regard to the information already in the public domain and to the information that has already been disclosed to the complainants by the investigating officers of the agency.

Document 1

51. Document 1 is the Running Sheet attached to the front of the IIB file. It records the steps taken by IIB investigators during the investigation into the Fremantle incident. In my view, Document 1 is an administrative document recording the time, date, places and people visited in the course of the investigation. Those details are only briefly recorded in that document. The agency claims that the information contained in Document 1 is not known to the complainants as they are not versed in the procedures employed by the IIB and, on the basis of the complainants' experience, they would only be able to speculate as to the course of the investigation. In view of the contents of that document, the agency maintains that clause 5(1)(b) applies to exempt Document 1 from disclosure.
52. From my examination of the contents of Document 1, I consider that it merely details the various steps taken by the investigators from IIB. It does not record the substance of that investigation, nor does it record the actual evidence gathered by the investigators. I consider that disclosure of the information in Document 1 could not reasonably be expected to reveal anything of the content of the investigation that is not already known to the complainants or could reasonably be expected to be known by the complainants due to the nature of their work. Therefore, I find that Document 1 is not exempt under clause 5(1)(b).

Documents 24-74

53. I have examined Documents 24-74 inclusive, together with the documents released to the complainants by the agency. It is clear from my examination of all of those documents that a considerable amount of the information contained in the witness statements has already been put to each complainant during his interview with the IIB investigators. However, the agency claims that only a summary of the contents of those witness statements was put to the complainants and not the specific recollections of each witness. From my examination and comparison of the disputed documents with the documents already released to the complainants, it is apparent that significantly more information than merely a summary of the matters investigated and the information provided by witnesses has been put to both complainants.
54. Taking into account the fact that the officers of the agency involved in the incident in question on 25 March 1995 were identified by name in the press and other media, I am satisfied from my examination of Documents 24-74, that each of those documents contains personal information about one or both of the complainants. For the reasons given in paragraphs 41-50 above, in order to determine whether disclosure could reasonably be expected to reveal to the complainants something about the content of the investigation, I consider that the claim of the agency must be tested by reference to the information already known by the complainants.

55. The extent of the complainants' knowledge of the investigation is evidenced by material before me including information that is in the public domain through media reports, copies of which have been supplied to my office. In addition, the material to which the complainants have been granted access includes the records of interview between the complainants and the investigators, particulars of the disciplinary charges against each of them and details of the criminal charge against First Class Constable Kelly. From my examination of that material, I consider that disclosure of Documents 24-74 would not reveal anything of the content of the investigation that is not already known by the complainants, other than the names and addresses of witnesses.
56. Accordingly, I find that the disclosure of Documents 24-74 to the complainants could not reasonably be expected to reveal the investigation into a contravention or possible contravention of the law in this particular case. Therefore, I find that Documents 24-74 are not exempt under clause 5(1)(b).

Documents 75-79

57. The agency claims that each of the police officers making the statements comprising Documents 75-79 had contact with the complainants during and immediately following the incident in question. It is the submission of the agency that those police officers were directly involved in the incident and that they provided evidence pertaining to the behaviour of the complainants and their apparent physical and mental states. The agency contends that the disclosure of that information would reveal the substance of the investigation and that, therefore, those documents are exempt under clause 5(1)(b).
58. Documents 75-79 are reports from police officers to IIB. In my view, the police officers making those reports were not directly involved in the incident. Those officers were on duty in the vicinity and had contact with one or both of the complainants following the reported incident. The reports of those police officers are made pursuant to the officers' duty under the *Police Force Regulations 1979* to provide such reports. Although they contain some personal information about the officers making the statement, that matter is not, by virtue of clause 3(3) of Schedule 1 to the FOI Act, exempt matter. I accept the agency's claim that the reports contain confidential information given and received in confidence. However, on the agency's admission, those documents also contain personal information about the complainants.
59. Documents 75 and 76 consist of reports from police officers who were on duty in Fremantle in the vicinity of the incident involving the complainants. Taking into account the documents released to the complainants and the personal information about the complainants in those documents, for the reasons given in paragraphs 41-50 above, I do not consider that disclosure of Documents 75 and 76 could reasonably be expected to reveal anything about the content of the investigation that is not already within the knowledge of the complainants. Therefore, I find those documents are not exempt under clause 5(1)(b).

60. Document 77 is a report from an Acting Inspector in the Traffic Branch who was on duty in Midland on the night in question. Document 77 clearly contains personal information as defined in the FOI Act about the complainants. From my examination of that document, and taking into account the information about the investigation that has already been put to the complainants in their records of interview or otherwise revealed in the documents disclosed to them, I am not persuaded that the disclosure of Document 77 could reasonably be expected to reveal anything of the content of the investigation. I find Document 77 is not exempt under clause 5(1)(b).
61. Document 78 is a report to IIB from a senior sergeant on duty at Fremantle Station on the night in question. Document 78 also contains a considerable amount of personal information about the complainants. For the reasons already given in relation to Documents 75, 76 and 77, on the material before me, I am not persuaded that disclosure of Document 78 could reasonably be expected to reveal anything of the content of the investigation that is not already known to the complainants. Accordingly, I find that Document 78 is not exempt under clause 5(1)(b).
62. Document 79 is also a report submitted to IIB by a police officer, not directly involved in the incident, who was on duty at Fremantle Station. It is also a report submitted pursuant to the officer's statutory duty to report on such matters as required. For similar reasons to those given in relation to Documents 75, 76, 77 and 78, I am not persuaded that disclosure of Document 79 could reasonably be expected to reveal anything of the content of the investigation that is not already known to the complainants. Therefore, I find that Document 79 is not exempt under clause 5(1)(b).
63. However, from my examination of Document 79, I consider that Document 79 contains, in addition to personal information about the complainants, personal information about a third party. However, I am unable to describe the nature of that personal information without breaching my duty under s.74(2) of the FOI Act. Nevertheless, I am satisfied that the personal information about the third party is, *prima facie*, exempt matter under clause 3(1).
64. If a document contains personal information about a person, and that document is the subject of an access application under the FOI Act by some other person, an agency may provide access to that document with personal information deleted in accordance with the provisions of s.24 of the FOI Act. An agency may decide to delete all of the personal information from which that person could be identified. Alternatively, in some instances, the protection of individual privacy may be achieved by deleting the name only and providing access to the remaining information if the identity of the person to whom the information relates is not able to be ascertained from that information itself. I consider the provision of access to copies of documents with names deleted to be in accordance with the spirit and intent of the FOI Act.

65. In this instance, the third party named in Document 79 supplied a witness statement to investigators but has not been nominated by the agency as a proposed witness against the complainants. For the reasons given in paragraphs 34-38 above, I consider the name of the third party in Document 79 is exempt matter under clause 3(1) and it should be deleted under the provisions of s.24 of the FOI Act.
66. I also note that Documents 75, 76, 78 and 79, but not Document 77, each contain the paragraph referred to in my decision in *Re Brown and Police Force of Western Australia* (14 July 1995, unreported), at paragraph 11 of that decision. Except for Document 77, those documents also contain additional words to the effect that the reports are submitted on a confidential basis and they are not to be disclosed to anyone under the FOI Act or otherwise. In my view, the inclusion of such statements goes towards establishing the confidential nature of the documents but no more. Those statements are not sufficient to establish an exemption under clause 8(2) of the FOI Act, nor are they capable of ousting the legal right of access to documents of the agency, including reports submitted by police officers pursuant to a legal duty to provide such reports.
67. The FOI Act creates an enforceable right of access to documents of State and local government agencies. The Police Force of Western Australia is an agency for the purposes of the FOI Act. Clearly, therefore, the intent of Parliament was that documents of the agency be subject to the access provisions of the FOI Act, and they are. The only way in which a document of the agency may be withheld from an applicant seeking to exercise his or her rights under the FOI Act is by the establishment of a valid claim for exemption under one or more of the clauses in Schedule 1 to the FOI Act, and not by statements to that effect contained within the document. Such statements cannot override the statutory right of access to those documents given by the FOI Act.

Documents 80 and 81

68. Documents 80 and 81 contain information about the ballistics examination of the weapon and the forensic examination of evidence taken from the scene of the incident and from the officers concerned. Clearly, both complainants are aware of what forensic samples were taken from their persons. However, neither is aware of the results obtained from an analysis of those samples. From my examination of those documents, and taking into account that the results of the ballistic and forensic tests are not in the public domain nor known to the complainants, it is my view that disclosure of those documents could reasonably be expected to reveal something about the content of the investigation.
69. The complainants submitted that disclosure of Documents 80 and 81 would not reveal the investigation to any significant degree. In my view, the exemption in clause 5(1)(b) does not require a finding about the degree to which an investigation could be revealed if the documents were to be disclosed. For the reasons given above, I consider that disclosure of Documents 80 and 81 could

- reasonably be expected to reveal something about the content of the investigation that is not in the public domain and that is not known to the complainants.
70. The argument put to me by the complainants' solicitor was that the complainants should, as a matter of fairness, have access to all material pertinent to their case. It was the submission of the solicitor that if the case against the complainants were to be tried in the superior courts, the information in Documents 80 and 81 would be provided to the complainants as a matter of course. It is open to the agency to exercise its discretion under s.3(3) and not claim an exemption for documents which may technically be exempt. That view was put to the agency, by my office, early in the proceedings but it was rejected. The information in Documents 80 and 81 consists of a report describing the scientific tests and the results of those tests on the samples collected. If that information were crucial to the decision to proceed against the complainants by way of disciplinary or criminal charges then, in my view, there is a public interest in the complainants having access to that material.
71. However, the issue of the public interest does not arise for my consideration in the context of applying the exemption in clause 5(1)(b) to Documents 80 and 81. On the material before me, including my own examination of those documents, I find that their disclosure could reasonably be expected to reveal the investigation into a contravention or possible contravention of the law in a particular case. I find Documents 80 and 81 to be exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.

SCHEDULE OF MATTER EXEMPT UNDER CLAUSE 3(1)

DOCUMENT

EXEMPT MATTER

- 1 (18 folios) Folio 3, under the heading "COMMENTS" - line 1, last 3 words; line 2, the name; line 5, the name; line 7, the name;
- Folio 4, under the heading "COMMENTS" - line 8, third, fourth, fifth and sixth words; line 10, the name; line 14, the name; line 16, second and third words; lines 17, 18, 19, 21, 22, 23 and 32, the names, wherever occurring;
- Folio 5, under the heading "COMMENTS" - lines 17 and 18, the names;
- Folio 7, under the heading "COMMENTS" - lines 1, 2, 6, 7, 9, 12, 13, 22 and 31, the names;
- Folio 8, under the heading "COMMENTS" - line 1, second, third and fifth words; lines 3, 16, 22, 24, 25 and 26, the names, wherever occurring;
- Folio 9, under the heading "COMMENTS" - lines 2, 4, 5, 7, 13, 15 and 18, the names, wherever occurring; line 20, the address; line 21, the name; line 22, last word; lines 23, 28, 30 and 31, the names, wherever occurring.
- Folio 10, under the heading "COMMENTS" - lines 3, 6, 7, 9 and 14, the names, wherever occurring; line 14 last word; line 15, first word; lines 20, 24, 28 and 30, the names.
- Folio 11, under the heading "COMMENTS" - lines 18 and 19, the address and telephone number; line 20, last word; line 21, first word; line 22, the address; line 25, the address; line 26, the name; line 32, the telephone number;
- Folio 13, the name in line 1 of the paragraph entry commencing 1455;
- Folio 14, the paragraph entry commencing 1545, line 1, the name, wherever occurring; the paragraph entry commencing 1600, lines 1 and 2, the name and address; the first 4 words of line 6 and the first word of line 8; the paragraph entry commencing 1625, the names.
- Folio 16, under the heading "COMMENTS" - in lines 1, 3, 4, 6, 8, 9, 10, 12 and 14, the names and addresses wherever occurring;
- Folio 17, under the heading "COMMENTS" - the name in lines 1 and 2;
- Folio 18, under the heading "COMMENTS" - line 22, the name, line 27, last two words; line 30, last word; line 31, first word.
- 24 The first sentence of Document 24, except for the name "Inspector Boyd".
- 25 Paragraphs 1 and 2, all text; paragraph 3, the second and fifth names; paragraph 39, all text.
- 26 The witness name, wherever occurring; paragraph 1, all text; paragraph 3, line 1, last two words and all text in line 2; paragraph 4, the name.
- 27 The witness name, wherever occurring; paragraphs 1, 2, 3 and 4, all text; paragraph 5, line 3, words 5 and 6; paragraph 6, all text; paragraph 7, last word; paragraph 12, first sentence, all text.
- 28 The witness name, wherever occurring; paragraph 1, all text; paragraphs 2, 3, 5, 8, 9, 10 and 11, the names; paragraph 2, the address.

- 29 The witness name, wherever occurring; paragraph 1, all text; paragraph 2, lines 3 and 4; paragraphs 3 and 12, the names, wherever occurring; paragraph 3, the address.
- 30 The witness name, wherever occurring; paragraph 1, all text; paragraphs 2, 17 and 19, the names.
- 31 The witness name, wherever occurring; paragraph 1, all text.
- 32 The witness name, wherever occurring; paragraph 1, all text; paragraph 2, the last 3 words of the first sentence.
- 33 The witness name, wherever occurring; paragraph 1, all text; paragraphs 2 and 21, the names.
- 34 The witness name, wherever occurring; paragraphs 1 and 2, all text; paragraph 3, the name, in line 1; paragraph 4, the name; page 2, paragraph 2, the names in line 1; the witness signature at the end of page 2.
- 35 The witness name, address and telephone number, wherever occurring; paragraphs 1 and 2, the name.
- 36 The witness name, wherever occurring; paragraphs 1 and 2, all text; paragraph 4, the name in line 3.
- 37 The witness name, wherever occurring; paragraph 1, all text; paragraph 2, the name in line 3.
- 38 The witness name, wherever occurring; paragraph 1, all text; paragraph 2, the name, in lines 2 and 3; paragraph 15, last five lines; paragraphs 18 and 21, the names.
- 39 The witness name, address and telephone number, wherever occurring; paragraph 1, the name in line 5.
- 40 The witness name, wherever occurring; paragraph 1, all text.
- 41 The witness name, wherever occurring; paragraph 1, all text; paragraphs 2, 3 and 13, the names.
- 42 The witness name, wherever occurring; paragraph 1, all text; paragraphs 2 and 4, the names.
- 43 The witness name, wherever occurring; paragraph 1, all text; paragraph 2, the name in lines 2 and 3; paragraph 14, the name.
- 44 The witness name, wherever occurring; paragraph 1, all text; paragraph 2, the name in line 3.
- 45 The witness name, wherever occurring; paragraphs 1, 2 and 3, all text; paragraphs 5 and 20, line 3, the name.
- 46 Paragraph 1, all text.
- 47 Paragraph 1, all text; paragraph 3, the third, fourth and fifth names.

- 48 The witness name, wherever occurring; paragraph 1, all text; paragraph 2, line 5, last two words.
- 49 The witness name, wherever occurring; paragraphs 1 and 2, all text; paragraph 3, line 2, last word; paragraph 3, line 3, first and fifth words.
- 50 Paragraph 1, all text; paragraph 2, the first and fifth names.
- 51 Paragraphs 1 and 2, all text; paragraph 3, the second and fifth names; paragraph 4, second name.
- 52 (Copy of document 25) Same as for Document 25.
- 53 The witness name, wherever occurring; paragraph 1, all text; paragraph 15, line 5, the name; paragraph 20, the name in the first sentence and all of the text of the second sentence.
- 54 The witness name, age, date of birth, occupation, address and telephone numbers; paragraphs 1, 2, 4, 5, 15, 17, 18 and 19; the names.
- 55 The witness name, wherever occurring; paragraph 1, all text; paragraph 5, first sentence.
- 56 Paragraph 1, all text; paragraph 2, the names; paragraphs 5 and 19, the names; the witnesses signature, wherever occurring.
- 57 The witness name, wherever occurring; paragraph 1, all text; paragraph 2, lines 4, 5 and 6; paragraph 4, the name in lines 4 and 7.
- 58 The witness name, wherever occurring; paragraph 1, all text; paragraph 2, lines 3 and 4; paragraph 4, the name in line 2.
- 59 The witness name, age, date of birth, occupation, addresses and telephone numbers; paragraph 2, last word of line 2; paragraph 2, lines 3, 4 and 5, all text; paragraph 4, first word.
- 60 (Copy of Document 27) Same as for document 27.
- 61 The witness name, wherever occurring; paragraphs 1 and 3, all text; paragraphs 2, 12, 23 and 24; the name.
- 62 The witness name, wherever occurring; paragraph 1, all text; paragraphs 2 and 13, the name.
- 63 Paragraphs 1 and 2, all text; paragraph 6, lines 2, 3 and 4; the attachment to Document 63, all three signatures appearing thereon.
- 64 The witness name, wherever occurring; paragraph 1, all text; paragraph 2, lines 1,2 and 3; paragraph 2, line 7, fourth word; paragraph 3, last word; paragraph 6, line 3, the name; paragraphs 7, 11, 14 and 15, the name.
- 65 Paragraphs 1, 2 and 3, all text; paragraph 43, line 5, third and fourth words.
- 66 Paragraphs 1 and 2, all text.
- 67 The witness name, wherever occurring; paragraphs 1 and 2, all text.

- 68 The witness name, wherever occurring, the address and the telephone numbers.
- 69 The witness name, wherever occurring; paragraph 1, all text.
- 70 The witness name, wherever occurring; paragraph 1, all text; paragraph 2, lines two and three.
- 71 The witness name, wherever occurring; paragraph 1 all text; paragraph 2, lines 3 and 4; paragraphs 22, 23, 25, 26, 27, 28 and 30, the names; paragraph 47, line 1, first six words; paragraph 47, line 3, second word; paragraph 56, first line, all text; paragraph 56, last sentence, all text; paragraph 57, first two words of line 1; paragraph 59, first two words of line 1; paragraph 61, last two words of line 2.
- 72 The witness name, wherever occurring; paragraphs 1 and 2, all text; paragraph 13, the names.
- 73 The witness name, wherever occurring; paragraph 1, all text.
- 74 The witness name, wherever occurring; paragraph 1, all text; paragraph 2, last line; paragraph 3, line 2, last word; paragraph 3, lines 3 and 4, all text; the witness signature wherever occurring.
- 79 Page 2, paragraph 3, line 2: the witness name, being words 7 and 8. All other references to that witness name, wherever occurring in Document 79.
