

MCGIVERON AND POLICE

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

**File Ref: 96128
Decision Ref: D05796**

Participants:

James Lawrence McGiveron
Complainant

- and -

Police Force of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - police notes - clause 5(1)(b) - law enforcement - what is an investigation - whether disclosure could reasonably be expected to reveal the investigation of a contravention or possible contravention of the law in a particular case.

Freedom of Information Act 1992 (WA) ss. 74(1), 74(2); Schedule 1 clause 5(1)(b).
Police Act 1892 (WA) s. 82B(1)(a).

Re Neville and The State Housing Commission of Western Australia (Homeswest) (Information Commissioner, WA, 15 July 1996, unreported, D04296).

Re MMI Limited and Police Force of Western Australia (Information Commissioner, WA, 13 August 1996, unreported, D04896).

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).

DECISION

The decision of the agency is confirmed. The matter remaining in dispute is exempt matter under clause 5(1)(b) of Schedule 1 to the *Freedom of Information Act 1992*.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

31st October 1996

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 Mr McGiveron ('the complainant') access to documents of the agency requested under the *Freedom of Information Act 1992* ('the FOI Act').
2. On 29 May 1996, officers of the Liquor and Gaming Squad of the agency were in attendance at the Court Wine Bar. It has not been disputed before me that, while on the premises, the officers requested the name and address of the complainant, who was a patron at the wine bar. Following that request, the complainant was taken to City Police Station, where his identity was ascertained. The complainant was then informed that he was free to leave City Police Station. However, it is alleged that the complainant refused and he was arrested and charged under section 82B(1)(a) of the *Police Act 1892* for remaining on the premises.
3. By letter dated 12 June 1996, the complainant's solicitor applied to the agency for access to "...all documents relating to [the complainant] entering the lock-up and being requested to leave, including copies of any documents in relation to his entry of the lock-up, any documentation relating to the reason why he was apprehended and taken to the lock-up, and any documentation relating to his later release". By subsequent correspondence the reference in the access application to "the lock-up" was clarified to mean City Police Station.
4. By letter dated 16 July 1996, the Officer in Charge of Freedom of Information Services in the agency informed the complainant's solicitor that "...one documents [sic] consisting of ten folios..." had been identified. Full access was given to three folios and access refused to seven folios on the basis that material contained in those folios is exempt under clause 5(1)(b) of the FOI Act.
5. By letter dated 26 July 1996, the complainant's solicitor sought internal review of the decision and certain information concerning the officers involved in the incident. On 5 August 1996, an Acting Inspector in the Professional Standards section of the agency informed the complainant's solicitor that he had undertaken an internal review and it was his decision to confirm the initial decision of the agency. He also informed the complainant's solicitor that information concerning the names, ranks and stations of the police officers involved in the incident was not within the ambit of the original access application and access to that information was, therefore, denied.
6. On 27 August 1996 the complainant's solicitor lodged a complaint with the Information Commissioner seeking, on behalf of the complainant, external review of the agency's decision to refuse access to the requested documents.

REVIEW BY THE INFORMATION COMMISSIONER

7. On 28 August 1996 I notified the agency of the complaint before me and required the production to me of the original of each of the documents identified as being within the ambit of the complainant's access application and the agency's FOI file maintained in respect of the access application. Those documents were produced to me on 2 September 1996.
8. After considering the material before me including the disputed documents, I informed both the complainant and the agency on 19 September 1996 of my preliminary view in respect of the complaint. That view was that the documents may not be exempt under clause 5(1)(b) because there did not appear to have been any investigation conducted by officers of the agency. Accordingly, it was my preliminary view that disclosure could not reasonably be expected to reveal the investigation of any contravention or possible contravention of the law in a particular case. Subsequently, I received a further submission from the agency maintaining its claim for exemption for the documents under clause 5(1)(b).
9. A copy of the agency's new submission, edited to delete matter that may be exempt, was forwarded to the complainant's solicitor. The parties were also informed of the then Acting Information Commissioner's view, in light of that submission, that parts of each of the documents may be exempt under clause 5(1)(b), but that the remaining parts of the documents may not be exempt as claimed.
10. The agency subsequently agreed to disclose to the complainant copies of the documents, edited in accordance with the Acting Information Commissioner's preliminary view. The complainant's solicitor, however, informed me that the complainant wished nonetheless to pursue his complaint with respect to the matter remaining in dispute. As the agency has disclosed to the complainant those parts of the documents which, in the Acting Information Commissioner's preliminary view, may not be exempt under clause 5(1)(b), those parts of the document are no longer in dispute. Accordingly, my decision relates only to those parts of the documents which have not been disclosed to the complainant.

THE DISPUTED DOCUMENTS

11. There are 2 documents in dispute in this matter. Document 1 comprises two folios of the running sheet for the Liquor and Gaming Branch for Wednesday 29 May 1996. The document bears two sets of folio numbers: 00549 - 000550 and 001-002. The seven lines of text of the first entry on folio 000549 (001) and the margin note alongside that entry and the last two entries on folio 000550 (002) do not relate to the complainant at all. Those entries are not within the ambit of the access application and, therefore, not in dispute in this matter. That part of Document 1 which is within the ambit of the access application and remains in dispute is that part of the second entry which commences on page 000549 (001) and concludes with the second word of the twelfth line of text on folio 000550

(002). The agency has disclosed the balance of the document to the complainant, by way of the provision of an edited copy.

12. Document 2 comprises five pages of a notebook. The folios of the copy obtained by my office are numbered 003-007 inclusive. The first nine lines of the text on folio 003, being the text with a diagonal line through it, do not relate to the complainant in any way and are not within the ambit of the access application. They are not in dispute. That part of Document 2 which is within the ambit of the access application and remains in dispute is the three lines of text appearing under the date and time on folio 003; the text commencing at the start of the fifth line on folio 004 and concluding at the end of the sixteenth line of text on that folio; and the tenth line of text to the second word on the fifteenth line of text inclusive on folio 006. The agency has disclosed the balance of the document to the complainant.

THE EXEMPTION

13. The agency claims that the matter in dispute in both of the disputed documents is exempt matter under clause 5(1)(b) of Schedule 1 to the FOI Act. Clause 5(1), so far as is relevant, 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;”*

14. I have discussed the scope and meaning of the exemption provided by clause 5(1)(b) in a number of previous decisions, most recently *Re Neville and The State Housing Commission of Western Australia (Homeswest)* (15 July 1996, unreported, D04296) and *Re MMI Limited and Police Force of Western Australia* (13 August 1996, unreported, D04896). In those decisions I applied 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).
15. In that decision, Anderson J, after referring to the decision of Owen J in *Manly v Ministry of Premier and Cabinet* (Supreme Court of Western Australia, 15 June 1995, unreported, Library No. 950310), said at page 8:

“I think 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”.”

16. Further, at page 11, Anderson J said:

“In my opinion, the stipulation that matter, disclosure of which reveals an investigation, is exempt even after a prosecution of the offence investigated, confirms the conclusion that should anyway be reached that cl 5(1)(b) is not limited to new revelations but covers all matter that of itself reveals the things referred to, without regard for what other material might also reveal those things, or when that other material became known, and without regard for the actual state of knowledge that the applicant may have on the subject or the stage that the investigation has reached.”

17. Accordingly, it is clear from the decision in *Police Force of Western Australia v Kelly and Smith* that a document will be exempt under clause 5(1)(b) if its disclosure could reasonably be expected to reveal anything about an investigation into a contravention or possible contravention of the law in a particular case.

THE CLAIMS OF THE AGENCY

18. The agency initially claimed that the matter contained in the disputed documents is exempt under clause 5(1)(b) as the matter is specific to the state and scope of the investigation and demonstrates the extent of the investigation and the precise details of the evidence that has been discovered in the course of the investigation. However, the agency did not describe the nature or the substance of the investigation.
19. In the submission made by the agency to me after receiving my preliminary view, the agency submitted that disclosure of the disputed matter would reveal inquiries undertaken by police officers at the wine bar in relation to a possible contravention of a particular law, which the agency has specified to me, including information obtained and recorded for the purpose of that investigation. The agency further contended that the *“...recording of factual events is the result of an assessment and inquiries by police officers which falls within the definition of investigation...”*. It is the agency’s submission that the documents reveal that an investigation was conducted, the identity of the person investigated and the information ascertained in the process of the investigation and are, therefore, documents of the kind described by Anderson J in *Police Force of Western Australia v Kelly and Smith*.
20. The agency also submitted that the disputed documents form part of a court brief prepared by the officers concerned after the agency had dealt with the access application, and that the court brief contains witness statements and associated materials compiled as a result of further investigations into the matter which

resulted in a court date being set for the hearing of the charge preferred against the complainant.

FINDINGS

21. Initially, it was my preliminary view that the documents could not be exempt under clause 5(1)(b) because their disclosure could not reveal a contravention or possible contravention of the law because there been no such investigation. The Macquarie dictionary defines the term “investigation” as “*to search or inquire into; search or examine particulars of; examine in detail*”. Accordingly, it was my preliminary view that, in order for matter in the disputed documents to reveal an investigation as required by clause 5(1)(b), it is necessary that the documents contain some record of, or refer to, inquiries or searches undertaken by the agency. Based on my examination of the disputed documents, it was my preliminary view that the disclosure of those documents would not reveal any investigation conducted by officers of the agency simply because there had been no such investigation.
22. It appeared to me that the disputed documents merely recorded the factual events which culminated in the complainant being charged, and the nature of the offence with which he was charged, and the circumstances in which the charge was laid. That is, they did not record any inquiries, searches or examinations undertaken by police officers prior to the complainant being charged. Rather, the disputed documents appeared to simply outline the police account of the factual circumstances which resulted in the arrest and subsequent charging of the complainant which was based on the facts themselves - as witnessed by the officers involved in the matter, rather than as a result of any investigation.
23. In its submission in response to my preliminary view, the agency provided certain additional information. That information does not change my view in respect of those parts of the documents which record events at City Police Station, and which have now been disclosed to the complainant by the agency. Further, that information does not change my view as to what constitutes an “investigation” for the purpose of clause 5(1)(b). However, when the documents are reviewed in light of the additional information, it seems to me that the disclosure of the parts of them remaining in dispute could reasonably be expected to reveal the investigation into a contravention or possible contravention of the law.
24. The decision in *Police Force of Western Australia v Kelly and Smith* makes it clear that the scope of the exemption provided by clause 5(1)(b) is very broad. Once it is established that there was an investigation into a contravention or possible contravention of the law in a particular case, and that disclosure of the particular documents in question could reasonably be expected to reveal anything of that investigation, then the documents are exempt.

25. On that point, Anderson J. said, at page 10 of that decision:

“I do not see why any element of novelty or exclusivity should be imported into the “reveal the investigation”. A document may reveal a state of affairs which is also revealed by other things. The same state of affairs may be separately revealed in several documents. I do not think that there is any difficulty in saying that the separate disclosure of each separate document that reveals that state of affairs.”

26. Therefore, even though some of the matter contained in the documents may already be known to the complainant by other means - primarily by his having been present at the time - that matter may still be revealed by disclosure of the documents, and hence, exempt under clause 5(1)(b).

27. Unfortunately, I am constrained by the provisions of s.74 of the FOI Act and, in particular, by ss.74(1)(a) and (2), from revealing exempt matter either in the course of my dealing with this complaint or in my decision and these reasons for decision. Accordingly, I have been limited in how much information concerning the agency’s submission I have been able to give the complainant in order that he may make further submissions, and in how much of the information I can include in these reasons for decision.

28. In light of the decision in *Police Force of Western Australia v Kelly and Smith*, I am in the difficult - and, in my view, unsatisfactory - position of not being able to properly inform the complainant of, nor to include in these reasons for decision, the particular law which was the subject of the police investigation, nor whether the complainant was the subject of that investigation. To do so would be to reveal both the identity of the person or persons being investigated and generally the subject matter of the investigation. However, as I have said, having considered the submission of the agency and reviewed the documents, I am of the view that the disclosure of the disputed matter remaining in the two documents could reasonably be expected to reveal the investigation into a possible contravention of the law.

29. Accordingly, I find those parts of the document to which access has been refused, and which remain in dispute, are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.
