

HOWARD AND FAIR TRADING

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

**File Ref: 95140
Decision Ref: D05895**

Participants:

Keith Evender Howard
Complainant

- and -

Ministry of Fair Trading
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - request by applicant for access to copies of notes of discussions said to have been made by named persons - refusal by agency to give information as to the existence or non-existence of the requested documents, in accordance with s.31 of the *Freedom of Information Act 1992* - observations about nature and purpose of s.31.

Freedom of Information Act 1992 (WA) ss31, 32(1), 39, 68(1), 72(1)(b), 74, Schedule 1 Clauses 1, 2, 5

Credit Administration Act 1984 (WA)

Weight and Measures Act 1915 (WA)

Retail Trading Hours Act 1987 (WA)

Motor Vehicle Dealers Act 1973 (WA)

Re EST and Department of Family Services and Aboriginal and Islander Affairs (Information Commissioner, QLD, 30 June 1995, unreported).

DECISION

I confirm the agency's decision, in accordance with s.31 of the *Freedom of Information Act 1992*, without giving information as to the existence or non-existence of documents of the kind requested by the complainant, to refuse access on the basis that if such documents existed they would be exempt under clause 5 of Schedule 1 to the *Freedom of Information Act 1992*.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

6th December 1995

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Ministry of Fair Trading ('the agency') to refuse Mr Howard ('the complainant') access to certain documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. I understand that the complainant has been a director, principal executive officer and secretary of Evender Holdings Pty Ltd ('the company'). The complainant was personally licensed as a motor vehicle dealer trading as Keith Howard Autos in Busselton until, in 1979, the licence was converted from a personal licence of the complainant to one held by the company. The company's application to renew its licence in May 1992 was refused, as was a subsequent application in July 1992.
3. The agency initiated investigations into a number of matters concerning the actions of the complainant and the company. It is also my understanding that the complainant was made aware by the agency of those investigations. The complainant's application in December 1992 for a Yard Manager's Licence was also refused. In July 1993 the complainant and the company were convicted in the Busselton Court of Petty Sessions of the offence of unlicensed dealing in motor vehicles.
4. On 2 November 1994, the complainant applied to the agency for access to documents described in the following terms: "*Ray Lane and Peter Stacey. Copies of discussions between these 2 people. Copy of letter signed by Jim Enright and obtained by Gary Wallace. Other documentation relating to Keith Howard and Evender Holdings Pty Ltd contained in all files held by the Ministry of Fair Trading and the Motor Vehicle Dealers Licensing Board.*" Mr Stacey also operated a motor vehicle dealership in Busselton at that time. Mr Lane, at that time, held the position of Senior Investigations Officer in the agency.
5. After corresponding with the complainant on a number of occasions following receipt of his access application, on 19 May 1995 Mr C. Fitzgerald, FOI co-ordinator of the agency, informed the complainant that a decision on his access application had been made on 18 May 1995, by Ms J. Brazier, Director, Transport and Service Industries of the agency. Ms Brazier determined that the complainant should be given access to one document, being a copy of a letter dated 6 January 1993 from Mr J Enright to the Motor Vehicle Dealers Licensing Board. However, the agency deferred giving access to that document until 30 June 1995 to afford Mr Enright the opportunity to exercise his right to request an internal review of Ms Brazier's decision pursuant to s.39 of the FOI Act.

6. On 19 May 1995, the complainant was also informed that, in relation to the request to inspect copies of any notes of discussions between Mr Lane and Mr Stacey, pursuant to the provisions of s.31 of the FOI Act, the agency neither confirmed nor denied the existence of any such document as a document of the agency, and notified the complainant that if such a document did exist, it would be exempt under clause 5 of Schedule 1 to the FOI Act.
7. On 5 June 1995, the complainant requested internal review of the agency's decision. On 6 July 1995, Dr Chris Whitaker, the Acting Executive Director of the agency, confirmed the initial decision of the agency to neither confirm nor deny the existence of the documents sought by the complainant.
8. On 12 July 1995, the agency informed the complainant that Mr Enright had not applied for a review of Ms Brazier's decision to release a copy of his letter. Accordingly, the agency decided to release that letter to the complainant upon payment of the appropriate fees. Following informal discussions between the agency and my office, the complainant was provided with access to that letter without charge. On 27 July 1995, the complainant applied to the Information Commissioner for external review of the decision of Dr Whitaker in respect of the request for access to copies of any notes of discussions between Mr Lane and Mr Stacey.

REVIEW BY THE INFORMATION COMMISSIONER

9. After receiving the complaint from the complainant, on 2 August 1995 I notified the agency of the complaint, in accordance with my responsibilities under s.68(1) of the FOI Act. Pursuant to my power under s.72(1)(b) of the FOI Act, I required the production to me of the agency's FOI file maintained in respect of the matter. I also sought from the agency further reasons to justify its refusal of access by relying upon the provisions of s.31 of the FOI Act. The agency's FOI file and additional information requested were produced to my office on 9 August 1995.
10. After examining the material provided to me, I formed the preliminary view that the agency had dealt with the complainant's access application in accordance with its obligations under the FOI Act. On 7 September 1995, the complainant was informed of my preliminary view and reasons for that view. He was also provided with the opportunity to reconsider his position and to make further submissions to me about the matter.
11. On 20 September 1995, the complainant responded to my preliminary view. Although the complainant made a number of unsubstantiated claims concerning aspects of the agency's operations, he made no submissions on the matters in issue, nor did he provide any material which might cause me to review my preliminary view of his complaint. In spite of being given more than one opportunity to provide submissions, the complainant has not done so.

CONSIDERATION OF THE MATTER IN ISSUE

12. A decision of the agency pursuant to s.31 of the FOI Act is, by virtue of s.31(2)(b), regarded as a refusal of access to a requested document because the document would, if it existed, be an exempt document. When I am dealing with complaints where an agency has refused to give information of the existence or non-existence of a document in accordance with s.31, s.74(1)(b) of the FOI Act requires that I do such things as I think necessary to avoid the disclosure of information as to the existence or non-existence of a document containing matter exempt under clause 1, 2 or 5 of Schedule 1 to the FOI Act. Further, I am prohibited by s.74(2) from including in this decision any information as to the existence or non-existence of the documents to which access is sought.

13. Section 31 of the FOI Act provides as follows.

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

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

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

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

14. Section 31 of the FOI Act clearly demonstrates that the Parliament of Western Australia recognised that, in certain circumstances, a decision-maker may be confronted with a request for documents which may be exempt from disclosure but, where the character of the document described in the access application is such that the mere acknowledgment of the document's existence, accompanied by a denial of access, would itself reveal exempt matter and thereby cause the damage which the exemption is designed to prevent.

15. The reliance by agencies on s.31 is not without its difficulties for applicants and for my office. Some of those difficulties have been highlighted by the Queensland Information Commissioner in his decision in *Re EST and Department of Family Services and Aboriginal and Islander Affairs* (30 June 1995, unreported), at paragraphs 10-28. Further, whilst the use of s.31 is discretionary, that use should, in my view, be the exception rather than the rule.

16. The use of the “neither confirm nor deny response” can best be illustrated by an example. Suppose a person was preparing to smuggle cigarettes into Western Australia from the eastern states, in contravention of Western Australian taxation laws. Suppose also that, just prior to doing so, that person were to make an access application under the FOI Act to the Police Force of Western Australia (‘the police’) requesting all documents concerning him or her. If the police replied “*We do not have any documents about you*”, that response would disclose to the person that his or her activities had gone unnoticed. However, if the police replied “*We have several documents, but they are exempt under clause 5 of Schedule 1 to the FOI Act*”, that response would convey information to the person that his or her activities had been noticed by the authorities and enable that person to respond accordingly.
17. In order to ensure that the power to respond to an access application in accordance with s.31 is not abused, the Parliament limited s.31 to only those classes of documents which may be particularly sensitive, that is, those documents which are exempt under clauses 1, 2 and 5 of Schedule 1 to the FOI Act, namely, those relating to Cabinet and Executive bodies; inter-governmental relations; and law enforcement, public safety and property security.
18. In clause 5, the term “law” is used in a broad sense and is not limited in its application to the criminal law only. In my view, the exemption extends to laws of many kinds, including civil and regulatory laws. For example, documents held by government agencies which concern the administration of child welfare laws, taxation laws, public health and safety legislation and legislation regulating the conduct of business may all be documents which may be described as documents relating to matters of law enforcement, public safety and property security and may, therefore, be the type of documents to which clause 5 may apply. The term “contravention” includes a failure to comply with a relevant law.
19. The agency is responsible for the administration and enforcement of a number of the statutes of Western Australia including the *Credit Administration Act 1984*, the *Weights and Measures Act 1915*, the *Retail Trading Hours Act 1987* and the *Motor Vehicle Dealers Act 1973*. It is my view that, in administering and enforcing these and other laws of Western Australia, the agency is carrying out regulatory functions. I also accept that in exercising those regulatory functions, the agency from time to time is involved in law enforcement activities, including preventing, detecting, investigating and dealing with contraventions or possible contraventions of the law.
20. I also accept that in carrying out its regulatory functions, the agency obtains documents and information from a number of sources in relation to the enforcement and administration of statutory laws and that the agency may have, from time to time, in its possession all manner of documents which may be characterised as law enforcement documents because they contain matter of the kind referred to in clause 5 of Schedule 1 to the FOI Act.

21. In my view, when dealing with the complainant's access application, it was open to the agency to ask itself whether, if documents of the kind requested by the complainant either existed or did not exist, those documents would be exempt by virtue of clause 5 of Schedule 1 to the FOI Act. If that question is answered in the affirmative then, by virtue of s.31 of the FOI Act, the agency may give the access applicant written notice that it neither confirms nor denies the existence, as a document of the agency, of such a document but that, assuming the existence of such a document, it would be exempt under clause 5.
22. In its initial notice of decision the agency informed the complainant that, in accordance with s.31 of the FOI Act, it would neither confirm nor deny the existence of the documents sought by the complainant and that, if such documents existed they would be exempt under clause 5(1)(e) of Schedule 1 to the FOI Act. In its notice of decision on internal review, the agency informed the complainant that its functions "...include those of a law enforcement agency" and that clause 5 of Schedule 1 to the FOI Act "...specifies exemptions under the [FOI Act] for law enforcement bodies." After citing the provisions of s.32(1), the agency stated that:

"A significant number of the documents on a file dealing with the investigation of an alleged offence are likely to be subject to Schedule 1, clause 5 and may be exempt from disclosure and access accordingly."

The initial decision was confirmed on the basis that if any such documents existed they would be exempt under, *inter alia*, clause 5.

23. I am satisfied, from my examination of the agency's FOI file and the notices of decision provided to the complainant by the agency, that the decision-makers at the agency dealt with the access application in that manner. On the basis of the information currently before me, I am of the opinion that the agency's decision to refuse access without confirming or denying the existence of any documents of the kind requested, on the basis that if they existed they would be exempt, was justified.
24. Accordingly, I confirm the decision of the agency, in accordance with s.31 of the FOI Act, without giving information as to the existence or non-existence of documents of the kind requested by the complainant, to refuse access on the basis that if such documents existed they would be exempt under clause 5 of Schedule 1 to the FOI Act.
