

NICHOLSON AND FAMILY/CHILDREN

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

**File Ref: 96092
Decision Ref: D05996**

Participants:

Robert Arthur Henry Nicholson
Complainant

- and -

**Department for Family and Children's
Services**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - client file of child - clause 3 - personal information about third parties - public interest factors for and against disclosure - public interest in maintaining privacy - public interest in the administration of justice - clause 7 - legal professional privilege - client/solicitor relationship - legal advice from salaried legal officers - legal advice from office of the Director of Public Prosecutions.

Freedom of Information Act 1992 (WA) ss. 21, 24, 72(1)(b), 74(2), 75(1), 102(3); Schedule 1 clauses 3(1), 3(6), 7, 8(2); Schedule 2 Glossary.

Grant v Downs (1976) 135 CLR 674.

Attorney-General (NT) v Kearney (1985) 158 CLR 500.

Waterford v Commonwealth (1987) 153 CLR 54.

Grofam Pty Ltd v ANZ Banking Group (1993) 45 FCR 445.

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

DECISION

The decision of the agency is confirmed. Documents 1-12, part of Document 13 and Documents 15-19 inclusive are exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*; and parts of Documents 13 and the whole of Document 14 are exempt under clause 7.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

7th November 1996

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Department for Family and Children's Services ('the agency') to refuse Mr Nicholson ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. The complainant is a convicted person serving a sentence in respect of various sexual offences against a child. The complainant maintains that he is innocent of the crimes of which he has been convicted and seeks access under the FOI Act to documents held by the agency concerning the allegations made against him by the child in question.
3. On 10 April 1996, solicitors for the complainant lodged an access application with the agency. The agency provided the complainant's solicitor with a notice of decision on 15 May 1996. The agency decided to give the complainant access to 4 documents, but refused access to other documents on the ground that either those documents are exempt under clause 3(1) of Schedule 1 to the FOI Act, or the documents do not contain any matter which falls within the ambit of the access application in that they contain no specific reference to the complainant.
4. On 12 May 1996, the complainant sought internal review of the agency's decision and attempted to extend the scope of the original application. However, on 10 June 1996, the agency confirmed its initial decision that the requested documents, which in the agency's opinion fall within the ambit of the request, are exempt under clause 3(1). Thereafter, on 17 June 1996, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

5. After receiving this complaint, I obtained the disputed documents and other documents from the agency pursuant to my powers under ss.75(1) and 72(1)(b) of the FOI Act. During the course of my dealing with this matter, it appeared to me that the agency had overlooked 7 documents, consisting of 8 folios, which I considered to be within the ambit of the complainant's access application. When that apparent omission was brought to the attention of the agency, and after further discussions between our respective offices, the agency granted the complainant access in full to 3 additional folios; access to edited copies of 3 other folios; and refused access to 2 other folios. The agency cited clause 7 and clause 8(2) as additional grounds of exemption for some documents.

6. On 17 October 1996, after examining the disputed documents and considering the material before me, I provided the parties with my preliminary view and reasons for that view. A schedule of disputed documents was prepared by my office and a copy was provided to both parties. It was my preliminary view that, except for two documents, the matter claimed to be exempt matter under clause 3(1) of Schedule 1 to the FOI Act may be exempt as claimed by the agency. However, I also considered that the complainant could be given access to edited copies of two documents pursuant to the provisions of s.24 of the FOI Act with exempt matter deleted.
7. In respect of the agency's claims under clause 7, it was my preliminary view that those claims could also be sustained. However, I did not consider the agency's claims for exemption under clause 8(2) in any detail because it was my preliminary view that the documents may be exempt, in any event, under clause 3(1).
8. After being informed of my preliminary view, the agency reconsidered its position and granted the complainant access to edited copies of 2 documents. However, the complainant's solicitor provided an additional submission clearly indicating a desire to pursue this matter and, therefore, requiring me to determine this matter by way of formal decision.

THE DISPUTED DOCUMENTS

9. There are 19 documents or parts of documents in dispute in this matter. All the matter contained in Documents 3-10, 12 and 14-19 and part of the matter contained in Documents 1, 2, 11 and 13 remain in dispute. Those documents and the exemptions claimed by the agency are as follows:

Doc.	Folio No.	Description	Exemption
1	1, 1a & 1b	Intake Form dated 9/11/94	CI 3(1) & 8(2)
2	2	Details of referral dated 9/11/94	CI 3(1) & 8(2)
3	3 - 11	Case notes dated 14/11/94, 15/11/94, 22/11/94, 29/11/94, 30/11/94, 5/12/94, 9/12/94, 10/12/94, 14/12/94, 16/12/94 & 19/12/94	CI 3(1) & 8(2)
4	12	Copy letter to another agency dated 19/12/94	CI 3(1)
5	13 - 17	Case notes dated 21/12/94, 29/12/94, 4/1/95, 18/1/95, 23/1/95, 1/2/95, 8/2/95, 10/2/95 & 27/2/95	CI 3(1)
6	18 - 19	Copy memo to A/Manager Bunbury District dated 13/2/95	CI 3(1)

7	20 - 27	Case notes dated 17/3/95, 20/3/95, 23/3/95, 10/4/95, 2/5/95, 10/5/95, 17/5/95, 25/5/95, & 20/6/95	CI 3(1)
8	28	Letter dated 6/7/95 received by agency Re: counselling services	CI 3(1)
9	29 - 30	File note dated 25/9/95	CI 3(1) & 8(2)
10	31 - 32	File note dated 5/10/95	CI 3(1)
11	33	File note dated 20/10/95	CI 3(1)
12	37	File note dated 19/10/95	CI 3(1)
13	38 - 39	File note dated 19/10/95	CI 3(1) & 7
14	40	File note dated 19/10/95	CI 7
15	45	File note dated 10/11/95	CI 3(1)
16	46	File note dated 14/11/95	CI 3(1)
17	47	File note dated 17/11/95	CI 3(1)
18	48 - 50	Letter dated 16/11/95 received by agency Re: counselling services	CI 3(1)
19	51	File note ("Closing summary") dated 22/2/96	CI 3(1)

THE EXEMPTIONS

(a) Clause 3 (Personal information)

10. Clause 3, so far as is relevant, provides:

“Exemption

(1) *Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).*

Limits on exemption

(2)...

(3)...

(4)...

(5)...

(6) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.”*

11. In the Glossary in Schedule 2 to the FOI Act, "personal information" is defined to mean "...*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."*
12. The disputed documents are held by the agency on the "client file" of the child in question. Those documents relate specifically to the welfare of a child and to the counselling and support services offered to that child by the agency. Based on my examination of the disputed documents, I am satisfied that the matter to which access has been refused is matter which meets the description of "personal information" as defined in the FOI Act about parties other than the complainant. That matter is *prima facie* exempt under clause 3(1). Therefore, the complainant's right under the FOI Act to be given access to that matter depends on whether any of the limits on that exemption applies.
13. I consider that the purpose of the exemption in clause 3(1) is to protect the privacy of third parties. As I have said before, the exemption recognises that government agencies collect and hold a considerable amount of personal information about individuals who, *inter alia*, seek the assistance of those agencies, or obtain benefits or are the subject of the exercise of various powers by government agencies. Although the FOI Act encourages agencies to disclose to an access applicant personal information about himself or herself, it provides safeguards, in the form of exemptions and a duty to consult third parties, against the unfettered disclosure of personal information about other people.
14. In this instance, there is some matter within the documents that could be characterised as personal information about the complainant. However, that matter is so inextricably entwined with personal information about other individuals other than the complainant that it could not, in my view, be disclosed to the complainant without also disclosing personal information about the third parties. For that reason, access to edited copies of the documents, pursuant to s.24 of the FOI Act, is not an option in this instance.

Limitations on exemption

15. There are a number of limits on the exemption provided by clause 3(1). However, it appears to me that the only one that may be relevant is that provided by clause 3(6). Clause 3(6) provides that matter is not exempt matter under clause 3(1) if its disclosure would, on balance, be in the public interest. Pursuant to s.102(3) of the FOI Act, the complainant bears the onus of satisfying me on that point.

16. The complainant's solicitor submits that his client maintains his innocence and that he was convicted solely on the evidence of the child in question. The solicitor submits that there is a greater public interest in having information available to an accused person which could possibly be of benefit to that accused person in establishing his innocence.

Public interest

17. I recognise that there is a public interest in an access applicant such as the complainant being able to exercise his right of access under the FOI Act. That right has some added weight, which is enshrined in s.21 of the FOI Act, if the requested documents contain personal information about an access applicant. Section 21 requires that the fact that matter is personal information about an access applicant must be considered as a factor in favour of disclosure for the purpose of making a decision as to whether it is in the public interest for the matter to be disclosed. However, I consider that there is also a countervailing public interest in maintaining and protecting individual privacy. I also recognise that there is a public interest in the proper administration of justice and in the disclosure of documents which would tend to establish the guilt or innocence of a person.
18. In considering and balancing those competing interests, I must decide where the balance should lie. I have taken into account the particularly sensitive nature of the information contained in the disputed documents and the fact that it largely relates to a child and to other third parties. As I have said before, there is only a minimal amount of personal information about the complainant in the disputed documents.
19. In my opinion, in the circumstances of this matter, the public interest in maintaining the privacy of third parties outweighs the complainant's right of access. Although s.74(2) of the FOI Act limits the information I can disclose in my reasons for decision, I do not consider that the disputed documents contain the kind of information the disclosure of which would advance the public interest in the administration of justice.
20. Accordingly, for the reasons given, I find that the matter remaining in dispute between the parties in Documents 1-12 and Documents 15-19 is exempt matter under clause 3(1) of Schedule 1 to the FOI Act. I need not, therefore, consider the agency's claims for exemption under clause 8(2) in respect of those documents or that matter.
21. In respect of Document 13, the matter that I consider to be exempt under clause 3(1) consists of the first two notes appearing on folio 38 (that is, the entries for 8.30am and 9.20am) and the matter deleted from the penultimate note on folio 38 (for 11.45am). Those entries record telephone conversations between an officer of the agency and an officer of another agency. They do not contain any personal information about the complainant.

22. I do not consider, because of the limit on exemption under clause 3 provided by clause 3(3), that those entries contain exempt personal information about the officer of the other agency. However, I do consider that disclosing that officer's identity and other information in those notes would reveal personal information about another party, which I cannot describe further without disclosing exempt matter. Accordingly, for similar reasons in respect of Documents 1-12 and 15-19, I find the matter deleted from those entries in Document 13 exempt under clause 3(1). Other parts of Documents 13 are claimed to be exempt under clause 7 of Schedule 1 and those claims are dealt with below.

(b) Clause 7 (Legal professional privilege)

23. The agency claims that part of Document 13 and all of Document 14 are exempt under clause 7 of Schedule 1 to the FOI Act. Clause 7 provides:

"7. Legal professional privilege

Exemption

- (1) *Matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege.*

Limit on exemption

- (2) *Matter that appears in an internal manual of an agency is not exempt matter under subclause (1)."*

24. The requirements to establish whether a document would be privileged from production in legal proceedings on the ground of legal professional privilege are well established by case law in Australia, and I have referred to those principles in a number of my formal decisions. Legal professional privilege applies to, *inter alia*, documents created for the sole purpose of use in legal proceedings or for the purpose of giving or obtaining legal advice: *Grant v Downs* (1976) 135 CLR 674. An agency is entitled to claim the privilege in respect of advice obtained from salaried legal officers who are employed within an agency as legal advisers, where the advice given is within the professional relationship between the legal officer and the client, and the advice is independent in character: *Attorney-General (NT) v Kearney* (1985) 158 CLR 500; *Waterford v Commonwealth* (1987) 153 CLR 54.
25. Document 14 is a file note made by an officer of the agency recording a discussion held with a legal officer employed by the agency in its legal section. I have examined that document and I am satisfied that the required solicitor/client relationship exists with respect to that document. Further, it is clear on the face of it that it records a communication for the sole purpose of the agency obtaining legal advice in respect of legal proceedings then on foot. Accordingly, I am satisfied that Document 14 would be privileged from production in legal

proceedings on the ground of legal professional privilege. Therefore, I find that Document 14 is an exempt document under clause 7.

26. Document 13 contains a series of file notes of telephone discussions between an officer of the agency and legal practitioners employed as prosecutors in the office of the Director of Public Prosecutions ('the DPP'); between that officer of the agency and an officer of an external agency; and between that officer and the legal section of the agency. Those parts of the document claimed to be exempt under clause 7 are the notes of discussions between the officer of the agency and the legal practitioners of the DPP's office.
27. The complainant's solicitors submit that:

"it could not be said that the Department of Family and Children's Services was ever a client of the DPP. The privilege does not attach, with respect, simply because there is a communication between a person and lawyers.

A further question is as to whether or not in any event the communication was to the effect of giving advice to the Department. I doubt whether or not that would be the case because the Department has its own internal legal advisers.

There is a difficulty in seeing how the Department could have been the client of the DPP; for example, if I act for a plaintiff in a personal injuries claim and I am in communication with my client's doctor, the doctor is not my client.

In any event I would have thought that the role of the Department with the DPP was to assist the DPP in the conduct of its case."

28. In the case of *Grofam Pty Ltd v ANZ Banking Group* (1993) 45 FCR 445, the Full Court of the Federal Court considered the question of whether legal professional privilege protected communications between the Commonwealth Director of Public Prosecutions and the Australian Federal Police even though the Director of Public Prosecutions was impliedly precluded by statute from giving legal advice. The Full Court held (at p.456) that, where a lawyer is not entitled to give legal advice, but the client holds a genuine belief as to that entitlement, communications between the lawyer and client arising therefrom attract the protection of legal professional privilege.
29. Therefore, whether or not the officer of the DPP was entitled to give legal advice in the circumstances, clearly the agency's officer genuinely believed that there was an entitlement and that belief was reasonably held. In those circumstances, particularly having considered the comments of the Full Federal Court in *Grofam Pty Ltd* at pages 454 and 455 cited above, I am of the view that the required solicitor/client relationship arose and those parts of Document 13 would be privileged from production in legal proceedings on the ground of that privilege.

30. Further, privilege will apply to, *inter alia*, communications between a party's solicitor and a third party if they are made when litigation is contemplated or commenced for the purposes of the litigation, with a view to obtaining advice as to it: *Trade Practices Commission v Sterling* (1979) 36 FLR 244.
31. Accordingly, to use the example suggested by the complainant's solicitor and reproduced in paragraph 27 above, if a legal practitioner acting on behalf of a plaintiff in litigation concerning a personal injuries claim communicates confidentially with the client's doctor, for the sole purpose of the litigation, then the communication will be privileged even though it is not a communication between client and solicitor.
32. At the time of the communications recorded in Document 13, criminal proceedings against the complainant had commenced, prosecuted by the DPP on behalf of the Crown. Having inspected Document 13, I am satisfied that the communications recorded in it were between the legal practitioners of the DPP's office and a third party, the agency, for the purposes of the criminal proceedings and the obtaining of advice as to it.
33. On that basis, I consider that those parts of the document would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find those parts of Document 13 exempt under clause 7.
