

NICHOLSON AND POLICE

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

**File Ref: 96123
Decision Ref: D06196**

Participants:

Robert Arthur Henry Nicholson
Complainant

- and -

Police Force of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents relating to investigation and charging of complainant - ambit of access application - section 26 - sufficiency of searches - access refused because documents do not exist - whether reasonable grounds to believe that documents exist or should exist - clause 5(1)(b) - whether documents contain matter which could if disclosed be reasonably expected to reveal the investigation of any contravention or possible contravention of the law - limits on exemption.

Freedom of Information Act 1992 (WA) ss.6, 26; 74(2); Schedule 1 clause 3(1), 5(1)(b), 5(4), 7.

Re Borthwick and University of Melbourne (1985) 1 VAR 33.

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. 960310).

DECISION

The decision of the agency is confirmed. The documents are exempt under clause 5(1)(b) of Schedule 1 to the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

18th 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 Police Force of Western Australia ('the agency') to refuse Mr Nicholson ('the complainant') access to certain documents requested by him under the provisions of the *Freedom of Information Act 1992* ('the FOI Act').
2. By letter dated 10 April 1996, solicitors for the complainant lodged an access application with the agency. The agency made some initial internal inquiries and contacted the complainant's solicitor to determine the nature of the documents requested. The agency concluded, from the discussion with the solicitor on 13 May 1996, that the complainant was seeking access to documents that had already been made available to the complainant in the "prosecution brief" prior to his trial. Consequently, the agency refused access pursuant to s.6 of the FOI Act.
3. By letter dated 23 May 1996, solicitors for the complainant sought internal review of that decision and made it clear to the agency that the complainant was seeking access to documents other than those provided in the prosecution brief, and specified the agency's investigation file, giving examples of various documents that may be included in that file. The agency refused that application on the basis that it went beyond the ambit of the access application which had allegedly been confirmed on 13 May 1996. On 14 June 1996, solicitors for the complainant lodged a complaint with the Information Commissioner claiming that they did not say or imply to the agency that only the prosecution brief was sought, and that if that had been the case the access application would have been pointless.
4. After negotiations between the agency and my office, the agency agreed to deal with the request for internal review, dated 23 May 1996, as a new access application. On 24 June 1996, a decision on access was made by Chief Inspector Rae. Access was refused to the requested documents in accordance with the provisions of s.26 of the FOI Act, on the ground that the agency was unable to locate any documents relevant to the investigation and trial of the complainant, other than those provided to the complainant in the form of the prosecution brief.
5. The agency's decision was subsequently confirmed on internal review on 4 August 1996 and, on 16 August 1996, the complainant lodged his complaint with the Information Commissioner seeking external review of the agency's decision to refuse access to the requested documents, pursuant to s.26 of the FOI Act, on the ground that the documents either do not exist or cannot be found.

REVIEW BY THE INFORMATION COMMISSIONER

6. The preliminary issue to be determined when this matter first came before me on complaint was the ambit of the access application, as the parties were clearly at odds over what had been agreed between them.

The ambit of the access application

7. It is apparent to me from the access application and the application for internal review, and I consider it should have been apparent to the agency, that the complainant was seeking access to all of the documents of the agency, other than the documents comprising the prosecution brief, obtained or created by the investigating officer relating to the inquiries undertaken and the charges subsequently preferred against the complainant by the Director of Public Prosecutions. Although the nature of that request was broad, in my view it is not unreasonable to expect the agency to have in its possession considerably more documents than those provided to the complainant prior to his trial.
8. It appears that there was some misunderstanding on the part of the agency as to the narrowing of the scope of the access application. Had the agency at the time confirmed to the complainant in writing its understanding of the agreement reached in that respect, I would have thought it likely that the misunderstanding would have been cleared up before the application was dealt with and the initial notice of decision sent. However, the agreement was not confirmed in writing and the agency proceeded to deal with the application on its erroneous understanding of its scope. Both the parties and my office may have been saved a considerable amount of unnecessary time and effort had the matter been properly confirmed.
9. In the application for internal review made on behalf of the complainant, following his solicitor's receipt of the initial notice of decision, it was made clear that the complainant was seeking access to documents other than those he already had. In my view, it should have been clear to the agency at that stage, having regard to the terms of the initial access application and the application for internal review, that there may have been a misunderstanding as to the scope of the access application. In my view, it was not reasonable for the agency to merely treat the application for internal review as an expansion of the access application and refused to deal with it, without first discussing it with the complainant's solicitors and clarifying the matter.
10. The principles to be applied in dealing with extensive or ill-defined requests to Victorian agencies were considered by Rowlands J, President, Victorian Administrative Appeals Tribunal in *Re Borthwick and University of Melbourne* (1985) 1 VAR 33, at p.35, in the following terms:

"It must depend on the particular case whether or not a sufficiently precise description is received to permit the respondent, as a practical

matter, to locate the documents sought within a reasonable time and with the exercise of reasonable effort...

A responsibility rests on the applicant to strive to define with as much precision as he can precisely what he wants. Similarly a duty, under the Act, rests on the Freedom of Information Officer to assist the applicant to formulate his request. This among other things requires the Freedom of Information Officer to frankly reveal, subject to the statutory exceptions, the nature and type of documents held. Information may be provided to the applicant by access to indices, by the provision of examples and by helpful dialogue.

The Tribunal may deal with an agency's obstruction by acceding to a more general request than otherwise might seem appropriate. The reason for this is a failure to assist in the manner prescribed by the Act may be remedied by the intervention of the Tribunal to give effect to the objects of the Act.

On the other hand broad, fishing and perhaps perverse requests which are maintained in an ill-defined form despite frank and willing assistance by Freedom of Information Officers may not, as a matter of policy, be supported by the Tribunal."

I agree with and adopt the comments of Rowlands J in respect of the various duties imposed upon Western Australian agencies by the FOI Act when dealing with broad requests.

Sufficiency of search

11. Having agreed, following the intervention of my office, to deal with the request for documents other than those provided to the complainant in the prosecution brief, the agency then issued a notice under s.26 of the FOI Act refusing access on the basis that no further documents as requested exist in the agency. That decision was internally reviewed by the agency and confirmed.
12. As the complaint then involved a refusal of access under s.26(1) of the FOI Act, the issue which arose was whether the agency had taken all reasonable steps to locate documents within the ambit of the complainant's revised access application. That issue necessarily involved the consideration of two questions. The first is whether there are reasonable grounds to believe that the requested documents exists or should exist and are, or should be, held by the agency. In circumstances in which the first question is answered in the affirmative, the next question, in my view, is whether the agency took all reasonable steps to find those documents. In considering those questions, I may require the agency to conduct further searches if necessary.
13. I was not satisfied at that stage that it was reasonable to believe that no further documents existed in the agency which were within the ambit of the access

application, nor that all reasonable steps had been taken to locate relevant documents.

14. My Investigations Officer made inquiries with the investigating detective. Those inquiries revealed that the detective had in his possession a number of documents which appeared to be within the ambit of the complainant's access application, but which had neither been identified nor disclosed to the complainant. Those documents include the investigation file maintained by that officer containing documents other than those identified during the prosecution process, including handwritten notes, letters, staff rosters, computer printouts, apprehension information and facsimile transmissions; and entries on the officer's work journal recording matters associated with the investigation involving the complainant.
15. Further, after my office became involved in this matter and I required the production to me of certain material in the possession of the agency, additional documents within the ambit of the complainant's access application were located by the agency. Those documents are described in general terms as consisting of a hearing date face sheet; brief write-off; copies of witness summonses; internal memoranda; copy of list of witnesses; copy complaint; various bail undertakings; apprehension information; and instructions to prosecutor.
16. Therefore, I am satisfied that the agency has in its possession a number of documents of the type described above, which are, in my view, clearly within the scope of the complainant's access application. Given the foregoing, I consider the searches initially conducted by the agency to locate documents that are within the ambit of the complainant's access application were less than satisfactory. Nonetheless, after my office became involved by way of this complaint the agency provided the complainant with access to some of the additional documents it had subsequently located; granted access to edited copies of others; and refused access to the remainder on the grounds of the exemptions in clauses 3(1), 5(1)(b) and 7 in Schedule 1 to the FOI Act.
17. After considering the material before me, including the documents located by the agency as a result of additional searches conducted and inquiries made with the investigating detective, I was satisfied at that point that all reasonable searches had been conducted and I did not require the agency to conduct any further searches.
18. On 25 October 1996, I informed the parties in writing of my preliminary view in respect of the complaint. It was my preliminary view that the documents to which access is refused are documents which, if disclosed, could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law, and which are therefore exempt under clause 5(1)(b). However, the complainant's solicitor indicated that the complainant wished, nonetheless, to pursue the matter and I must, therefore, determine this complaint by formal decision.

THE EXEMPTION

19. Clause 5(1)(b) of Schedule 1 to the FOI Act 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;”*

20. In *Police Force of Western Australia v Kelly and Smith* (Supreme Court of Western Australia, 30 April 1996, unreported, Library No. 960227), after referring to the comments of Owen J concerning clause 5(1)(b) in *Manly v Ministry of Premier and Cabinet* (Supreme Court of Western Australia, 15 June 1995, unreported, Library No. 950310), Anderson J 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 content of the investigation”.”

21. Further, at page 11, His Honour 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.”

22. From my examination of the requested documents, it is clear to me that the disclosure of those documents would reveal that there was an investigation into a contravention of the law, the person or persons being investigated and the subject matter of the investigation, both generally and in the specific. In my view, the disclosure of the documents could reasonably be expected to reveal the investigation of a contravention or possible contravention of the law in a particular case.

23. The effect of the decision in *Kelly and Smith* is that even though aspects of the investigation may be already known to the complainant, they comprise matter that is exempt under clause 5(1)(b). However, whilst acknowledging that it would be highly prejudicial to the practical success of many investigations, including those of large scale criminality, to allow or require the fact of them to be disclosed, Anderson J observed that this is not always the case. His Honour also said, at pages 9 and 10:

“Of course there may be no need for secrecy whatever in a particular case and there may be good public interest reasons to give public access to the documents or to give the applicant access to the documents. However, whilst that may be a relevant consideration for the agency in exercising its discretion under s.23(1) whether to allow access to the documents to the public or to a particular individual, it cannot help to determine whether the documents are in fact exempt documents under cl 5(1)(b).”

24. The discretion to disclose a document that is technically an exempt document rests with the agency and, if it is established that a document is an exempt document, I do not have power to make a decision that access is to be given to that document. Given this, and in light of the decision in *Kelly and Smith*, and my obligation under s.74(2) of the FOI Act not to include exempt matter in these reasons, I am constrained from detailing my reasons any further. To do so would reveal the person or persons investigated and the subject matter of the investigation.
25. Finally, the solicitors for the complainant, in their final submission, submitted that I had not considered the operation of clause 5(4). Clause 5(4) provides as follows:

“Limits on exemptions

(4) *Matter is not exempt matter under subclause (1) or (2) if -*

(a) it consists merely of one or more of the following -

- (i) information revealing that the scope of a law enforcement investigation has exceeded the limits imposed by the law;*
- (ii) a general outline of the structure of a programme adopted by an agency for dealing with any contravention or possible contravention of the law; or*
- (iii) a report on the degree of success achieved in any programme adopted by an agency for dealing with any contravention or possible contravention of the law;*

and

(b) its disclosure would, on balance, be in the public interest.”

26. The complainant had not previously claimed that clause 5(4) operated to limit the exemption claimed by the agency in this instance, nor did he provide any evidence in respect of it nor make any submissions that it may apply. I have examined the documents in dispute. On the basis of my examination, and in the absence of any material to suggest otherwise, I am of the view that none of those documents contains matter of a type described clause 5(4)(a)(i)-(iii). Therefore, in my view, the limitation in clause 5(4) does not apply to the documents in dispute. Accordingly, I find that those documents are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.

27. As I have found that the disputed documents are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act, I need not consider the agency's claims for exemption under clauses 3(1) or 7.
