

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA  
IN CIVIL

**CITATION** : S -v- DEPARTMENT FOR CHILD PROTECTION  
AND FAMILY SUPPORT [2017] WASC 305

**CORAM** : SMITH AJ

**HEARD** : 20 SEPTEMBER 2017

**DELIVERED** : 26 OCTOBER 2017

**FILE NO/S** : GDA 6 of 2017

**BETWEEN** : S  
Appellant

AND

DEPARTMENT FOR CHILD PROTECTION AND  
FAMILY SUPPORT  
Respondent

---

**ON APPEAL FROM:**

**Jurisdiction** : OFFICE OF THE INFORMATION  
COMMISSIONER

**Coram** : COMMISSIONER S H BLUEMMEL

**File No** : F 026 of 2017

---

*Catchwords:*

Freedom of information - Whether Information Commissioner's preliminary views incorporated in decision

Freedom of information - Refusal of access to documents containing personal information - Whether relevant that access applicant had knowledge of personal

information - Whether public interest in accountability of Department outweighed public interest in personal privacy - Whether Information Commissioner wrongly exercised discretion - Failure to have regard to material consideration - *Freedom of Information Act* sch 1 cl 3(1) - Meaning of 'if its disclosure would reveal'

*Legislation:*

*Freedom of Information Act 1992* (WA), s 3, s 9, s 10, s 23, s 24, s 32, s 34, s 35, s 74, s 76, s 85, s 102, sch 1 cl 3

*Result:*

Appeal allowed in part

*Category:* A

**Representation:**

*Counsel:*

Appellant : Mr D W Thompson  
Respondent : Mr A Mason

*Solicitors:*

Appellant : Thompson Downey Cooper  
Respondent : State Solicitor for Western Australia

**Case(s) referred to in judgment(s):**

A v Corruption and Crime Commissioner [2013] WASCA 288

Apache Northwest Pty Ltd v Department of Mines and Petroleum [2011] WASC 283

Director of Public Prosecutions v Smith [1991] 1 VR 63

House v The King [1936] HCA 40; (1936) 55 CLR 499

I v Department of Agriculture and Food [2016] WASC 272

Manly v Ministry of Premier and Cabinet (1995) 14 WAR 550

McKinnon v Secretary, Department of Treasury [2006] HCA 45; (2006) 228 CLR 423

Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom  
[2006] HCA 50; (2006) 228 CLR 566  
Osland v Secretary, Department of Justice [2008] HCA 37; (2008) 234 CLR 275  
O'Sullivan v Farrer [1989] HCA 61; (1989) 168 CLR 210  
Police Force of Western Australia v Ayton [1999] WASCA 233  
Police Force of Western Australia v Kelly (1996) 17 WAR 9  
Police Force of Western Australia v Winterton (Unreported, WASC, Library No  
970646, 27 November 1997)  
Vagh v The State of Western Australia [2007] WASCA 17

**SMITH AJ:**

**Background to the appeal**

1           The appellant is the mother of a very young son. In June 2016, she made a complaint to the respondent that her 3-year-old son may have been sexually abused. The respondent investigated the matter and found the report to be unsubstantiated.

2           In August 2016, the appellant requested access to key documents regarding the investigation into allegations of sexual harm against her son. On 11 October 2016, the respondent refused access to one document absolutely and gave the appellant partial access to 15 documents by providing her with copies of documents that were heavily redacted. In this appeal, the appellant does not seek access to the document to which no access was allowed.

3           Pursuant to s 10(1) of the *Freedom of Information Act 1992* (WA) (FOI Act), a person has a right to be given access to the documents of an agency (other than an exempt agency) subject to and in accordance with the FOI Act.

4           Access to the exempt matter was denied by the respondent on the ground that s 32 of the FOI Act applied. Section 32 prohibits an agency from giving access to a document that contains personal information about an individual other than the applicant.

5           Subject to s 24 of the FOI Act (which provides for an exempt matter to be deleted from a document) an agency may refuse access to a document if the document is an exempt document (s 23 of the FOI Act).

6           In the notice of decision given by the respondent on 11 October 2016, the 'personal information' that is said to be contained in the 15 documents was described as follows:

The documents contain a mixture of personal information about the access applicant, her child and a substantial amount of personal information about other people. As the applicant is the primary caregiver for her child I have considered it appropriate to release some of his personal information contained in the documents ...

...

Schedule 1 Clause 3(1) is claimed for material that would reveal personal information about an individual or individuals other than the applicant. Some of this material may have been provided by the applicant, or, may

contain personal information regarding the applicant but is interwoven with third party information and, as such, is intrinsically intertwined. To release such information could identify a third party.

7 The documents were as described by the respondent in the following table:

<b>Doc No</b>	<b>Description</b>	<b>Decision</b>	<b>Exemption</b>	<b>Particulars</b>
1.	Case Note 1/7/16	Edited access	CI 3(1)	Third party and intertwined information removed.
2.	Approved outcome report	Edited access	CI 3(1)	Third party and intertwined information removed.
3.	Case Note 13/7/16	Edited access	CI 3(1)	Third party and intertwined information removed.
4.	Case Note 14/7/16	Edited access	CI 3(1)	Third party and intertwined information removed.
5.	Case Note 18/7/16	Edited access	CI 3(1)	Third party and intertwined information removed.
6.	Discussion	Edited access	CI 3(1)	Third party and intertwined information removed.
7.	Case Note 20/7/16	Edited access	CI 3(1)	Third party and intertwined information removed.
8.	Case Note 21/7/16	Edited access	CI 3(1)	Third party and intertwined information removed.
9.	Email 25/7/16	Edited access	CI 3(1)	Third party and intertwined information removed.
10.	Not in scope on external review			
11.	Case Note 25/7/16	Edited access	CI 3(1)	Third party and intertwined information removed.
12.	Case Note 26/7/16	Edited access	CI 3(1)	Third party and intertwined information removed.
13.	Case Note 2/8/16	Edited access	CI 3(1)	Third party and intertwined information removed

14.	Safety and Wellbeing Assessment	Edited access	Cl 3(1)	Third party and intertwined information removed.
15.	Case Note 8/8/16	Edited access	Cl 3(1)	Third party and intertwined information removed.

8           The appellant sought an internal review of the decision made on 11 October 2016. On 22 November 2016, a reviewer confirmed that decision.

9           The appellant then made a complaint seeking an external review of the decision by the Information Commissioner (the Commissioner) pursuant to s 65 of the FOI Act. On 23 May 2017, the Commissioner confirmed the respondent's decision to give the appellant access to edited copies of the documents.

**The appeal - what constitutes the decision of the Information Commissioner?**

10           The appellant appeals from the decision made by the Information Commissioner on 23 May 2017, pursuant to s 85 of the FOI Act.

11           By letter dated 2 May 2017 (the Preliminary Letter), the Commissioner provided the appellant and the respondent with his preliminary view that the documents were exempt under cl 3 of sch 1 of the FOI Act. The Commissioner invited the appellant to provide any further submissions or withdraw the application by 17 May 2017.

12           By email of 17 May 2017, the appellant provided further submissions to the Commissioner.

13           On 23 May 2017, the Commissioner issued his formal decision. In his formal decision, he stated:

The decision of the agency to give you access to edited copies of documents and to refuse you access to a document is confirmed. For the reasons given in my letter dated 2 May 2017 and in this letter, I find that the disputed matter is exempt under clause 3(1) of Schedule 1 to the FOI Act.

14           The Commissioner directed that his decision be published in note form pursuant to s 76(8) of the FOI Act.

15 In this appeal, counsel for the appellant argued that, in determining whether the Commissioner erred in law in his decision, the Court could only have regard to the reasons given in the decision appealed against; that is, the formal decision of the Commissioner given on 23 May 2017. In particular, it is argued that the views of the Commissioner expressed in the Preliminary Letter should simply be considered as part of the dialogue between the appellant and the Commissioner.

16 I do not agree. Pursuant to s 85 of the FOI Act, an appeal lies to the Supreme Court on any question of law arising out of any decision of the Commissioner on a complaint relating to an access application.

17 Under s 76(2) of the FOI Act, the Commissioner is required to make a decision in writing when dealing with a complaint. Section 76(5) requires the Commissioner to include in that decision his reasons for decision, and findings on material questions of fact underlying those reasons, referring to the material on which those findings were based.

18 In his decision of 23 May 2017, the Commissioner did not depart from any of the preliminary views expressed by him in his Preliminary Letter and he expressly incorporated those preliminary views into the formal decision. The Commissioner referred to the views expressed in the Preliminary Letter in the following pages of the formal decision:

- (1) at page 1 of the formal decision, the Commissioner expressly incorporates the background of the appellant's complaint as set out in the Preliminary Letter;
- (2) also at page 1 of the formal decision, the Commissioner refers to the issues raised by the appellant in her email of 17 May 2017 and states that a number of those issues had been previously raised and considered by him in providing his preliminary view to the parties, and that he does not intend to comment on those issues;
- (3) at page 2 of the formal decision, the Commissioner refers to the appellant's submissions about the 'public interest' in her email of 17 May 2017. The Commissioner then refers to his advice expressed in the Preliminary Letter about what constitutes the 'public interest'; and
- (4) as set out above in these reasons, under the heading 'Decision' at page 2 of the formal decision, the Commissioner expressly incorporates the reasons given in the Preliminary Letter.

19           Consequently, it is clear that the 'decision' the subject of this appeal comprises the findings made by the Commissioner in his formal decision of 23 May 2017, together with the findings expressed as preliminary views by him in his letter to the appellant dated 2 May 2017.

**Relevant provisions of the FOI Act**

20           Pursuant to s 74(1) of the FOI Act, in dealing with a complaint the Commissioner is required to avoid disclosure of an exempt matter.

21           Clause 3 of sch 1 of the FOI Act sets out matters of personal information that are exempt. Clause 3 provides:

- (1) Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).
- (2) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal personal information about the applicant.
- (3) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to -
  - (a) the person; or
  - (b) the person's position or functions as an officer; or
  - (c) things done by the person in the course of performing functions as an officer.
- (4) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who performs, or has performed, services for an agency under a contract for services, prescribed details relating to -
  - (a) the person; or
  - (b) the contract; or
  - (c) things done by the person in performing services under the contract.
- (5) Matter is not exempt matter under subclause (1) if the applicant provides evidence establishing that the individual concerned consents to the disclosure of the matter to the applicant.
- (6) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.



22 Pursuant to s 9 of the FOI Act, 'personal information' is defined in cl 1 of the glossary to mean:

[I]nformation 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.

**The grounds upon which the appellant relied in seeking a review by the Commissioner**

23 The grounds upon which the appellant relied in seeking an internal review of the respondent's decision of 11 October 2016, and to the Commissioner in the external review were summarised by the Commissioner as follows:

- The documents disclosed show serious inaccuracies on the agency's file which were relied upon to conclude that the claims of sexual harm to your son were unsubstantiated.
- You were advised by the police on 25 July 2016 that the matter had been closed. That decision was made without allowing you to provide further information and to speak to the investigating police officer.
- The investigating officer advised that you could ask your son whatever questions you wanted and this advice has done serious damage to your son's case.
- On 26 July 2016 the agency advised you that it had decided that your complaint was unsubstantiated. On 31 July 2016 your son made a second disclosure of sexual harm which you reported to the police on 1 August 2016. The second disclosure was dismissed and never investigated by the agency or the police. You were advised that the second disclosure was not investigated because you had asked your son too many questions, although the second disclosure was different to the first and not related to any questions you asked your son.
- For the reasons set out in your letter received on 23 January 2017, the agency did not investigate your claims properly. For example, the agency relied on your high level of anxiety to dismiss your claims, a large part of contextual evidence regarding your son's behaviour was ignored, the agency misinterpreted information you

provided, you were not able to speak to the case worker or supervisor after the complaint was found to be unsubstantiated. In addition, the agency advised you that if you pursued your complaint the agency would investigate your behaviour towards your son as emotional abuse.

- There are serious inaccuracies and information gaps in the case notes and reports. The agency incorrectly recorded that you were abused as a child and several conversations relating to two different incidents were recorded as one incident. The agency needs to be made aware of these inaccuracies, and of any other inaccuracies in the notes, to determine what factors led to such significant information being recorded inaccurately.
- The information you are requesting is information which has been provided by you, is already known to you, and does not (and cannot) compromise the personal privacy of any third party. You are not asking for any notes relating to information that has been provided by any third parties. You only wish to check that the information you have provided has been recorded correctly.
- The personal privacy exemption is being interpreted and used incorrectly to deny documents to be checked for accuracy by the person providing the information. As there can be no legitimate impingement on any third party's right to personal privacy while checking the facts of information you have provided; non-disclosure of the requested information is obstructing the fulfilment of the objectives of the Act.

24 In relation to matters going to the 'public interest', the appellant submitted (as set out in the Preliminary Letter):

- Disclosure of the requested documents would, on balance, be in the public interest. The 'major reason' is because the public needs the agency to be fully effective and to be able to fulfil its responsibilities to protect the most vulnerable members of our society. The agency cannot do this if case workers are making decisions affecting the safety and welfare of children based on incorrect information.
- There is overwhelming evidence that the child protection system is in a state of crisis.

25 In relation to matters going to the 'public interest', the appellant submitted (as set out in the formal decision):

- Disclosure of the disputed documents is clearly within the public interest as it will allow me to provide a full and thorough complaint to the agency, which may then lead to the improvement of the functioning of the agency, which appears not to be operating

entirely for the good order of society and well-being of its members.

- If the disputed information is not disclosed, the risk is that my formal complaint to the Department will not be full and accurate, that it will not be given the consideration it is due and the agency will not take the appropriate actions to rectify any inadequacies in its procedures. The consequences of this course of action may lead to many children not receiving adequate protection and being unnecessarily exposed to further harm.
- Protecting the well-being of all children is very much in the public interest.

### **Findings made by the Commissioner**

26 The Commissioner made the following findings which are relevant to the issues raised in this appeal:

- (1) Subject to cl 3(2) - cl 3(6) of sch 1, the definition of 'personal information' makes it clear that any information or opinion about a person whose identity is apparent or whose identity can reasonably be ascertained from the information or opinion is, on the face of it, exempt information under cl 3(1).
- (2) To be exempt under cl 3(1), the information need not be in any way 'sensitive' or 'private'.
- (3) The fact that a complainant may know or claim to know the identity of the relevant persons from other sources is not relevant to the determination whether the disputed documents would, if disclosed, reveal the identity of the relevant persons: *Police Force of Western Australia v Kelly* (1996) 17 WAR 9, 14 (Anderson J).
- (4) The purpose of the exemption in cl 3(1) is to protect the privacy of individuals about whom information may be contained in documents held by State and local government agencies.
- (5) To the extent that the information provided by the appellant includes information about third parties, that, on its face, is exempt personal information.
- (6) The disputed information contains personal information about the appellant. However, the exemption in cl 3(2) of sch 1 does not apply because the disputed information also contains personal information about third parties that is inextricably interwoven with

the personal information about the appellant. Disclosure would do more than merely reveal personal information about the appellant.

- (7) Clause 3(5) of sch 1 does not apply. There is no evidence that the third parties consent to the disclosure of their personal information.
- (8) Clause 3(6) of sch 1 provides that matters will not be exempt under cl 3(1) if its disclosure would, on balance, be in the public interest.
- (9) Under s 102(3) of the FOI Act, the access applicant bears the onus of establishing that it would, on balance, be in the public interest for the agency to disclose personal information about other people to the access applicant.
- (10) Determining whether disclosure would, on balance, be in the public interest involves identifying the relevant competing public interest for and against disclosure.
- (11) The term 'public interest' is best described in *DPP v Smith* [1991] 1 VR 63, 75.
- (12) The public interest is not primarily concerned with the personal interests of an individual.
- (13) The question (in determining the public interest) is whether disclosure of the information would be of some benefit to the public generally and whether that public benefit is sufficient to outweigh any public interest in the maintenance of another person's personal privacy.
- (14) There is:
  - (a) public interest in ensuring that the agency is open and accountable in dealing with complaints appropriately;
  - (b) public interest in the person who has made a complaint being informed of what action an agency has taken in relation to a complaint and the findings of an investigation into that complaint;
  - (c) public interest in the maintenance of personal privacy. The public interest in this is strong and may only be displaced by some other strong or compelling public interest that

requires disclosure of personal information about one person to another; and

- (d) strong public interest in the protection of children.
- (15) The complaint by the appellant that the respondent may have inaccurately recorded some information is not within the jurisdiction of the Commissioner.
- (16) On the information before him, the Commissioner was not persuaded the release of the information would promote the purpose of the public interest in the protection of children.
- (17) There is not a public interest in the disclosure of the disputed matter to the appellant that would outweigh the public interest in protecting the privacy of third parties.

### **The grounds of appeal**

27 There are in effect three grounds of appeal. These are:

1. The Commissioner erred in law in finding that the documents to which the appellant sought access were exempt from production under clause 3(1) of Schedule 1 to the [FOI Act] as containing personal information when those documents were records of information given to the Respondent by the Appellant.
2. Further or in the alternative to ground 1 hereof, the Commissioner erred in law in:
  - (a) characterising the public interest bearing on the Appellant's application for access as the public interest in the protection of children, when it should have been characterised as the public interest in the proper conduct and accountability of the Respondent in the performance of its statutory duties; and
  - (b) determining, for the purposes of clause 3(6) of Schedule 1 to the Act that the public interest served in granting the Appellant's application for access was outweighed by the public interest in protecting the disclosure of personal information.

### **Construction of the FOI Act - general principles**

28 In construing a provision in legislation, consideration is to be given to the whole of the particular text, the construction of which is disputed, and of its subject, scope and purpose: *Minister for Immigration and*

*Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50; (2006) 228 CLR 566 [54] (Gummow and Hayne JJ).

29 Justice Edelman in *Apache Northwest Pty Ltd v Department of Mines and Petroleum* [2011] WASC 283 made the following important observations about the scope and purpose of the FOI Act [18] - [19]:

The introduction of freedom of information statutes, such as the FOI Act in 1992, marked a fundamental shift in norms of public administration. The legislation transformed a history of government secrecy into an era of accountability in order 'to reinforce "the three basic principles of democratic government, namely, openness, accountability and responsibility": *Osland v Secretary, Department of Justice* [2008] HCA 37; (2008) 234 CLR 275, 302 [62]. In making this break from the past, the legislation assigned 'very high importance to a public interest in greater openness and transparency in public administration' (303) [66].

The FOI Act is based upon these same principles and falls to be interpreted against this history. The long title of the FOI Act provides, in part, that it is an Act to provide for public access to documents. Section 3(1) provides that its objects are to enable the public to participate more effectively in governing the State and to make the persons and bodies responsible for government more accountable to the public. One means by which those objects are to be achieved by the FOI Act is by 'creating a general right of access to State and local government documents': s 3(2)(a). In *Water Corporation v McKay* [2010] WASC 210 [38], Kenneth Martin J emphasised that the expressed objects in the FOI Act 'form the essential bedrock of open, democratic government'.

30 Pursuant to s 3(2) of the FOI Act, the objects of the Act are to be achieved by:

- (a) creating a general right of access to State and local government documents; and
- (b) providing means to ensure that personal information held by State and local governments is accurate, complete, up to date and not misleading; and
- (c) requiring that certain documents concerning State and local government operations be made available to the public.

31 Public access to documents of government agencies is not untrammelled and is subject to the exceptions set out in s 23(1) of the FOI Act which among other exceptions, empowers an agency to refuse access to an exempt document.

32 It is of importance in this appeal that s 3(3) provides that:

Nothing in this Act is intended to prevent or discourage the publication of information, or the giving of access to documents (including documents containing exempt matter), or the amendment of personal information, otherwise than under this Act if that can properly be done or is permitted or required by law to be done.

33           Consequently, s 24 provides for edited copies of documents to be provided to access applicants, where it is practicable to delete an exempt matter.

### **Ground 1**

34           At the heart of ground 1 of the appeal is a contention that the documents the appellant seeks access to are not exempt documents as access to information contained in the documents could not constitute disclosure within the meaning of cl 3 of sch 1 of the FOI Act. That was said to be because the information within the documents is information known to the appellant, on the basis that it is information the appellant provided to the respondent.

35           In these circumstances, the appellant claims that access to the documents in question would not reveal any personal information about an individual as it is information known to her.

36           This ground of appeal turns on the proper construction of the words 'if its disclosure would reveal' personal information in cl 3(1). Personal information is information about an individual in the ordinary sense, such as whether a person is of a certain age, has certain financial resources or holds a particular religious or political conviction: *Police Force of Western Australia v Ayton* [1999] WASCA 233 [41] (Wheeler J).

37           Having viewed redacted and unredacted copies of the documents, it is clear that the information contained in the documents that has been redacted is information that can be categorised as follows:

- (1) a record of matters stated by the appellant that is personal information about third parties;
- (2) a record of matters stated by third parties that is personal information that is not about the appellant; and
- (3) an analysis of personal information stated by the appellant and third parties that is not personal information about the appellant, or, if it is, it is intertwined with third party personal information.

38 In this appeal, the appellant only seeks access to the personal information that she provided to the Department, about third parties, that has been redacted from the copies of the documents to which she has been given access.

39 The appellant claims that where the application for access has been explicitly limited to the very information provided by her, cl 3(1) can have no application as this information cannot be said to be 'revealed' or 'disclosed' by access within the meaning of cl 3(1).

40 In support of this construction, the appellant relies upon the observations made by Owen J in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 about the construction of the words 'reveal the investigation of any contravention or possible contravention of law', which were in 1995 the words used in cl 5(1)(b) of sch 1 of the FOI Act. In *Manly*, Owen J (at 563 - 564) said:

A document must *reveal* the investigation before it can be held to be exempt under Cl5(1)(b). Counsel for the respondent argued that the words should be given their natural and ordinary meaning and were of broad import. To 'reveal' is 'to divulge; disclose or to make known': see *The Shorter Oxford English Dictionary* (3<sup>rd</sup> ed), Vol 1. Counsel for the appellant argued for a more limited interpretation of the phrase 'reveal the investigation'. He submitted that the legislature intended to protect from disclosure the investigators' file. Counsel argued that a document which came into existence quite independently of the investigation, which did not emanate from the investigators and which became part of the investigators' file only because of that seizure, would not be exempt. The clause was aimed at documents which went to the conduct and course of the investigation.

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. This much seems to have been common ground in the correspondence between the appellant and the Commissioner. A document is not exempt from disclosure simply because it would reveal the fact of the investigation. It must reveal something about the content of the investigation. Paragraphs 35 and 36 show that this is how the Commissioner interpreted the phrase and in my opinion no error is disclosed in that regard.

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. This gives meaning to the exchange between the appellant and the Commissioner as to the extent to which details of the investigation were already in the public domain. 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.

41 However, Owen J's reasoning was disapproved by Anderson J in *Kelly*. After making a number of points about the operational reasons for not disclosing that an investigation is contemplated or has been commenced, Anderson J went on to consider whether if some of the information sought was already in the public domain, it could be said that disclosure of that information would 'reveal the investigation'. His Honour concluded the answer to that proposition is no. At (14 - 15) he found:

In considering the question of whether exemption is lost once the matter has found its way into the hands of the applicant or into public hands, I think it must be remembered that what is under consideration is the right of access to the particular documents of an agency. One would not expect the character of the documents as exempt documents to depend on whether, by some means, the subject matter of the documents, or some of it, had already got out. There is no such qualification in the Act save insofar as the word 'reveal' may be said to connote it. The argument goes that if the matter has already been 'disclosed', so that the investigation has been in that way 'revealed' (regardless of how that may have happened), access to the documents cannot any longer 'reveal' the investigation.

I do not see why any element of novelty or exclusivity should be imported into the phrase '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 there is any difficulty in saying that the separate disclosure of each separate document reveals that state of affairs. Further, I think it would be a very inconvenient construction of the Act, as it would mean that an applicant could overcome a claim of exemption by showing or claiming that he already knew something of the matter from other sources. I do not think it could have been intended that exemption should depend on how much the applicant already knows or claims to know of the matter.

...

[T]o interpret the word 'reveal' as meaning 'first reveal' or 'newly reveal' or 'reveal for the first time' would produce an inconsistency within the clause. 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.

42 Justice Anderson's views in *Kelly* were approved of and preferred to the views of Owen J in *Manly* by Scott J in *Police Force of Western Australia v Winterton* (Unreported, WASC, Library No 970646, 27 November 1997) 18.

43 I respectfully prefer the reasoning of Anderson J to that of Owen J. Whilst Anderson J's observations were made about the statutory context of the words 'reveal the investigation', the point of importance raised by his Honour is that those words are to be interpreted without regard to the state of the knowledge of the person seeking access to documents.

44 It is my opinion that the same point arises in the construction of cl 3(1) of sch 1. There is nothing in cl 3 or in any of the provisions of the FOI Act from which a legislative intention can be inferred that would require a consideration of the knowledge of the person seeking access when determining whether the disclosure of a matter would reveal personal information.

45 When considering whether to disclose personal information, the only views of a person that are to be taken into account are those of the person whom the personal information is about. This is made clear from the following provisions of the FOI Act which provide as follows:

- (1) Pursuant to s 23(1)(a) and s 24, an agency may refuse access to an exempt document unless it is practicable to delete the exempt matter. Where the exempt matter is personal information about a third party, access can be given pursuant to s 32(2) and cl 3(5) if the individual consents. If the third party is a child who has not turned 16, where the pre-conditions in s 32(3) are met, the views of the child's guardian or the person who has custody and control of the child may be obtained for the purposes of s 32(2).
- (2) Similarly, pursuant to s 32(4), if the third party is intellectually handicapped, the views of the person's closest relative or guardian may be obtained for the purposes of s 32(2).
- (3) A third party has a right of review and appeal against a decision to give access to an exempt document containing personal information (see s 34 and s 35).

(4) Where the personal information is about the applicant, s 21 of the FOI Act provides that, where an applicant requests access to a document that contains 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.

(5) Clause 3(2) of sch 1 provides that a matter is not exempt under cl 3(1) merely because its disclosure would reveal personal information about the applicant.

46 When regard is had to these provisions, the scheme of the FOI Act that provides for the disclosure of personal information is clear. If the personal information is not personal information about the person seeking access to the document; that is, if it is about a third party, a determination of whether disclosure of a matter would reveal that personal information is to be assessed without any regard to the knowledge of the person seeking access to the information.

47 It follows therefore, in this matter, that no regard can be had to whether the appellant is the source of the information in determining whether disclosure of information in a document would reveal personal information about an individual.

48 For these reasons, I am of the opinion that ground 1 of the appeal has not been made out.

## **Ground 2**

### **(a) Ground 2(a)**

49 In light of my findings that the decision of the Commissioner comprises the formal decision given on 23 May 2017, when read together with the Commissioner's preliminary views in his letter to the appellant dated 2 May 2017, ground 2(a) must necessarily fall away.

50 This is because when the findings set out in both of those documents are reviewed, it is clear that the Commissioner - when determining whether or not disclosure of the exempt matters would, on balance, be in the public interest - weighed a number of matters of public interest, including the public interest in ensuring that the respondent is open and

accountable in dealing with complaints appropriately (letter dated 2 May 2017, page 2). This matter of public interest, in my opinion, encompasses the public interest in the proper conduct and accountability of the respondent in the performance of its statutory duties.

**(b) Ground 2(b)**

51 Clause 3(6) of the FOI Act deems a matter not to be an exempt matter under cl 3(1) if its disclosure would, on balance, be in the public interest. Pursuant to s 102(3), where cl 3(6) applies, the onus is on the access applicant to establish that disclosure would, on balance, be in the public interest.

52 Matters of public interest are not required to be special or extraordinary, but are matters that are of general interest to the public.

53 The words 'in the public interest' ordinarily require consideration of a number of competing arguments about, or features or 'facets' of, the public interest: *Osland v Secretary, Department of Justice* [2008] HCA 37; (2008) 234 CLR 275 [137] (Hayne J); applying *McKinnon v Secretary, Department of Treasury* [2006] HCA 45; (2006) 228 CLR 423 [55].

54 The approach to determining what is in the 'public interest' was described in *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson and Gaudron JJ) as follows:

[T]he expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view': *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492, 505 (Dixon J).

55 The parties in this matter agree that the test to be applied when assessing the public interest when access is sought to documents under freedom of information legislation is as applied by the Appeal Division of the Full Court of Victoria in *Director of Public Prosecutions v Smith* [1991] 1 VR 63, 75, where their Honours observed:

The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well being of its members. The interest is therefore the interest of the public as distinct from the interest of

an individual or individuals: *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473, 480 (Barwick CJ).

56 The appellant concedes that cl 3(1) is concerned with personal privacy and recognises that this exemption raises a matter of public interest that may be strong enough to displace the myriad of public interests that may be served by allowing public access to the documents of State agencies.

57 The appellant puts the point that in balancing the claims of the competing interests in this case, it is the interests as given effect in the present circumstances that are considered, rather than the interests taken in the abstract. This point is supported by the reasoning of Corboy J in *I v Department of Agriculture and Food* [2016] WASC 272 [68]:

[T]here is a circularity of reasoning in recognising the public interest in an applicant being able to exercise the right to access under the FOI Act when considering the public interest in disclosing exempt matter under cl 3(6). The public interest in access is reflected in s 10 and the provisions for granting access. Clause 3(1) recognises that personal information will be exempt from disclosure notwithstanding the general public interest in access to an agency's documents and the objects of the FOI Act. Clause 3(6) then creates a qualification to cl 3(1). The public interest with which cl 3(6) is concerned is particular to the information that is recorded in the documents sought by the access applicant: is it in the public interest that the information be disclosed notwithstanding that it is personal information that would otherwise be exempt? Parliament has already determined that the general public interest in access to an agency's documents ought not to prevail when it provided that personal information was exempt matter, subject to the particular qualifications in cl 3(2) - (6).

58 It is argued on behalf of the appellant that the Commissioner should have characterised the public interest as the public interest in open and accountable government and specifically in the accountability of the State agency tasked with the protection of children. Had he done so, it is said he would have had to consider whether the public interest in open and accountable government:

- (1) should be given greater weight in a context where the State is tasked with the protection of some of the most vulnerable members of the community, who are by definition unable to look after their own interests; and
- (2) given that greater weight, should outweigh the public interest in maintaining personal privacy.

59 An appeal instituted pursuant to the power conferred by s 85(1) of the FOI Act only lies on any question of law arising out of the decision of the Commissioner on a complaint relating to an access application. An appeal brought under s 85(1) is not by way of a rehearing. It is an appeal in the strict sense.

60 In this appeal, the error of law is claimed to arise from the Commissioner's finding that the public interest served in granting the appellant access to the documents was outweighed by the public interest in protecting personal information from disclosure. Thus, the appellant puts a weighting error argument. The decision of the Commissioner was made pursuant to cl 3(6) of the FOI Act which required the Commissioner to form a view whether, on balance, it is or is not in the public interest to disclose personal information that is otherwise exempt.

61 Plainly, this statutory task is discretionary. It may be that reasonable minds may differ 'on balance' that in the public interest such personal information should be disclosed: *A v Corruption and Crime Commissioner* [2013] WASCA 288 [246] (McLure P). Determination of this issue requires evaluation of the relevant matters of public interest and entails an exercise of an evaluative and factual judgment.

62 A decision of the Commissioner cannot be set aside because a member of this Court would have exercised the discretion in a different way. Error must be demonstrated in accordance with the well-known principles set out in *House v The King* [1936] HCA 40; (1936) 55 CLR 499, 504 - 505 (Dixon, Evatt & McTiernan JJ) where their Honours said:

The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

63 Further, attributing too much or too little weight to a relevant consideration does not give rise to an appealable error unless it amounts to a failure to exercise the discretion entrusted to the decision-maker: *A v Corruption and Crime Commissioner* [248] (McLure P): applying *Vagh v The State of Western Australia* [2007] WASCA 17 [76] (McLure JA).

64 Clearly, the Commissioner had regard to the public interest in ensuring that the agency is open and accountable in dealing with complaints appropriately and to the public interest in the protection of children. Whether he should have given greater weight to these matters in balancing them against the public interest in protecting the privacy of third parties does not give rise to an appealable error.

65 The appellant, however, raises an argument that the Commissioner erred in law in acting on a wrong principle and/or failed to take into account a material consideration. In particular, it is argued the Commissioner (within the context of an argument put in respect of ground 2(a) of the appeal, that the Commissioner wrongly characterised the public interest):

- (1) was led to view that the appellant's application was directed solely to her personal interest in the protection of her own child, rather than to a public interest;
- (2) failed to consider the possibility that the appellant's personal interest in the protection of her own child might be an aspect of a public interest falling with cl 3(6); and
- (3) failed to consider the relevance of the fact that the appellant was seeking access only to the information she herself had provided to the weight to be accorded to the public interest in protecting personal privacy.

66 Whilst the appellant, in this appeal, only seeks access to information that she herself provided to the respondent, the appellant did not seek an external review by the Commissioner on that basis. The appellant sought full access to 16 documents which were said by the appellant to be 'all key documents related to allegations of sexual harm against my son' (page 1 request for external review received by the Office of the Information Commissioner on 23 January 2017).

67 It is not the case that the Commissioner did not have regard to the public interest in the protection of children. Plainly, the appellant has a legitimate personal interest in the protection of her child. However, in

circumstances where the disclosure of personal information related solely to allegations of sexual abuse of the appellant's child and did not go to the protection of children generally, error in the Commissioner's findings about the personal interest of the appellant cannot be demonstrated as the appellant's personal interest in the protection of her child cannot be said to be part of or an aspect of a public interest falling within cl 3(6) of sch 1 of the FOI Act.

68           Whilst the fact that the appellant is the sole source of some of the information that has been redacted is not a circumstance that is relevant in determining whether the information is to be regarded as personal information about a third party, for the purposes of cl 3(1) of sch 1, such a matter could in some circumstances constitute a relevant matter in determining and weighing the public interest, pursuant to cl 3(6) of sch 1.

69           In this matter, some of the information that has been redacted from parts of the 15 documents are statement of matters about third parties that appear as a record of verbatim statements made orally by the appellant. Further, some of the information of this character is not intertwined with other information that is exempt. There is, however, some information of this character that is intertwined with other exempt information not of this character. In respect of this latter class of information, I am not satisfied that the appellant has demonstrated that the Commissioner was in error in finding that the public interest in granting access to this material was outweighed by the public interest in protecting the privacy of third parties.

70           I am, however, of the opinion that where this information (that is a record of oral verbatim statements made by the appellant) is not intertwined the Commissioner erred in failing to have regard to the fact that the person seeking the information is the sole and only source of the information. The character of information of this kind is such that the protection of the privacy of third parties is necessarily rendered substantially irrelevant as the release of this information will not of itself constitute an invasion of their privacy, as it is information known to the person who is the sole and only source of the information. I have used the term 'only source' as the information of this class is information that is a record of what the appellant has said and in that sense are statements of perceptions, opinions and other matters stated by her.

71           Consequently I am of the opinion that the Commissioner erred in failing to have regard to a material consideration. In particular, refusing access to this class of information cannot be said to further the public interest in the maintenance of personal privacy.



*SMITH AJ*

72 For these reasons, I am satisfied that ground 2(b) has been made out and I would allow the appeal. I will hear the parties as to the orders that should be made to give effect to these reasons for decision.