

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA

**CITATION** : POLICE FORCE OF WESTERN AUSTRALIA -v-  
AYTON [1999] WASCA 233

**CORAM** : WHEELER J

**HEARD** : 21 SEPTEMBER 1999

**DELIVERED** : 5 NOVEMBER 1999

**FILE NO/S** : SJA 1091 of 1999

**BETWEEN** : POLICE FORCE OF WESTERN AUSTRALIA  
Appellant

AND

LESLIE DONALD AYTON  
Respondent

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*Catchwords:*

Freedom of information - Disclosure of confidential document - Public interest test - "Personal information"

*Legislation:*

*Freedom of Information Act 1992*

*Result:*

Appeal dismissed

**Representation:**

*Counsel:*

Appellant : Ms C J Thatcher  
Respondent : In person

*Solicitors:*

Appellant : State Crown Solicitor  
Respondent : In person

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

Nil

**Case(s) also cited:**

DPP v Smith [1991] VLR 63

Hood v Royal Perth Hospital, unreported; FCt SCt of WA; Library No 970658;  
5 December 1997

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

Re Mann and Australian Taxation Office (1985) 7 ALD 698

Re McCarthy and Australian Telecommunications Commission (1987) 13 ALD

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Ministry for Planning v Collins (1996) 93 LGERA 69

**WHEELER J:**

**Background**

1 This is an appeal pursuant to s 85(1) of the *Freedom of Information Act 1992* ("the FOI Act") from a decision of the Information Commissioner made 5 May 1999 which would have the effect of granting to the respondent access to a document entitled *Investigative Practices Review, Interim Comments for Commissioner Falconer* ("the Confidential Comments document").

2 The Confidential Comments document had been the subject of an access application lodged with the Police Force by the respondent in 1997. Access was refused at that time and a complaint pursuant to the FOI Act was determined in favour of the Police Force by the Information Commissioner. A year later, the respondent lodged a further application for access to the Confidential Comments document on the basis that the circumstances which had led the Information Commissioner to find it exempt had changed. The Information Commissioner agreed with that view.

**Nature of Confidential Comments document**

3 The way in which the Confidential Comments document came to be prepared is as follows. In 1997, following certain criticisms of the standard of investigations conducted by the Police Force, a member of the Victorian Police Service was asked to design a "project brief" that focussed on the need to review detective training. Later in 1997, the Management Audit Unit of the Police Force considered that document and identified a number of other issues that also appeared to have an adverse effect on the investigative practices of the Police Force. That Unit prepared a paper for the consideration of the Commissioner of Police, which recommended that an independent assessment of investigative practices be conducted.

4 In due course, the Chief Constable of Strathclyde Police Service in Scotland authorised the secondment of two senior police officers to the Police Force for a period of five weeks to participate in an assessment. Although those officers formed part of the Management Audit Unit Review team, they returned to Scotland before the report of the review could be finalised. Before their departure, on 11 November 1997 the two Strathclyde officers handed to the Commissioner of Police a report

containing their "interim comments" which had been marked "confidential".

5           The Confidential Comments document contained very frank comments which ranged over a number of aspects of the management of the Police Force and what could be broadly described as its organisational "culture", especially at the senior levels.

6           It is a feature of applications of this kind, that it is only in the most extraordinary circumstances that an agency finds it necessary to deny access to a document which contains uniformly complimentary remarks about the agency. Self evidently, therefore, a number of criticisms were made in the Confidential Comments document.

### **The Information Commissioner's findings**

7           The Police Force submitted to the Information Commissioner that access should be refused based on the exemptions contained in cl 3(1) (personal information), cl 6(1) (deliberative processes), cl 8(2) (confidential communications) and cl 11(1)(c) and cl 11(1)(d) (effect on management and industrial relations) of Sch 1 of the FOI Act.

8           In her earlier decision, the Information Commissioner had found that the Confidential Comments document was exempt only under cl 8(2). She did so essentially because, having found that the criteria in cl 8(2) were satisfied, she took the view that, having regard to the stage which had been reached in the reform of the Police Force, and the sensitivity of the task of changing the "culture", the respondent had not been able to persuade her that disclosure would, on balance, be in the public interest.

9           In its submissions in relation to the present complaint, the Police Force took the view that the Information Commissioner had erred in her earlier rejection of some bases of exemption, and sought to have her reconsider those matters. She reached the view that she ought not, in relation to those matters, to arrive at a different decision.

10          Further, in relation to the public interest so far as it related to cl 8 of Sch 1, the Information Commissioner took the view that circumstances had changed since her previous decision, and that the issues dealt with in the Confidential Comments document were no longer of the same sensitivity. She referred to the fact that a number of industrial issues, broadly understood, between members of the Police Union and management of the Police Force appeared to have been resolved and that

what she characterised as "the highly emotional atmosphere" previously existing in relation to certain disputed matters between the Police Union and the management of the Police Force had dissipated. She referred to the general public interest in accountability and to the public interest in the public being informed about views held by experts in a particular field concerning the operations of an agency, so that the public can assess whether the agency is properly managed and whether adequate steps have been taken to address genuine concerns about management.

- 11 Having reached the view that there was no public interest which would be damaged by disclosure, and having regard to the public interest considerations favouring disclosure, the Information Commissioner concluded that "the public interest in accountability in the Public Sector and the goals of openness and transparency that FOI legislation is designed to meet, now outweigh any other public interests that might have once favoured non-disclosure of the disputed document."

### **Grounds of Appeal**

- 12 The grounds of appeal appear to fall into three principal categories. First, there are a number, which are either abandoned by the appellant or which depend upon a particular interpretation of the Information Commissioner's reasons. In relation to those which depend upon a particular interpretation, the appellant quite properly concedes that there is at least some ambiguity in the expression of the reasons, and it appears to me that the interpretation upon which the grounds of appeal are based is in each case not the correct one.

- 13 The second category of grounds of appeal relate to findings pursuant to cl 6(1) and cl 8(2) of Sch 1 and generally assert either that relevant considerations were not taken into account, or that irrelevant considerations were taken into account.

- 14 The third category of grounds of appeal relates to cl 3(1) of Sch 1 and the primary issue arising under that ground relates to the definition of "personal information" under the FOI Act.

### **Grounds which are abandoned or based upon a particular interpretation of the Information Commissioner's reasons**

- 15 Ground A1(viii) is abandoned. Grounds A1(ii) and (iii) take as their premise the proposition that the Information Commissioner found on the evidence before her that the Confidential Comments document contained

bad advice or unsubstantiated opinions. What the Information Commissioner said in relation to this issue was to be found under the subheading "Public Interest" in her reasons and reads, relevantly:

"I recognise that there is a public interest in maintaining the confidentiality of certain kinds of information voluntarily given to government agencies. However, I consider that that public interest is not absolute. For example, I do not consider that confidentiality should prevail over accountability to such an extent that bad advice or unsubstantiated opinions cannot be properly scrutinised or evaluated. In my view, the existence of FOI legislation is a means to ensure that correct and defensible advice and opinions are given to agencies and that there is objective material to substantiate the advice or opinions given to agencies."

16 It seems to me that the Information Commissioner has not made any finding in relation to the substance of the advice or opinions contained in the Confidential Comments document. Rather, she has, in my view, correctly, identified one aspect of the public interest in releasing for public scrutiny documents containing advice to agencies, which is, that public scrutiny of such documents allows for the correction of error where it may exist. It is also, I think, clear from the Information Commissioner's reasoning that there is a general public interest in the availability to members of the public of the opportunity to evaluate advice given to agencies, particularly where the advice concerns a matter of such critical public importance as the proper and efficient functioning of the Police Force. In this context, the Information Commissioner noted that the Commissioner of Police had publicly emphasised the importance of what is described as the "Delta Reform Process" to the Police Force and, ultimately, to the safety and security of the community of Western Australia.

17 So far as ground A1(i) is concerned, it appears to me that the complaint that the Information Commissioner failed to take into account a relevant consideration, namely the context of the document and in particular her previous findings that it was an unsolicited private communication made with an expectation of confidentiality and containing the author's personal observations frankly expressed, is based upon a factual error. Under the heading relating to cl 8(2) in the Information Commissioner's reasons, she referred back to her earlier decision, and expressly incorporated the reasons in paras 53 - 67 of that decision as part of the reasons for decision in the complaint the subject of

the present proceedings. Those paragraphs set out the "context" of the Confidential Comments document in considerable detail, including the manner in which it came to be forwarded to the Commissioner of Police, and the way in which it has been held since he obtained it.

18 It is true, as counsel for the appellant noted, that there is no express reference to that context in the discussion which is set out in the Information Commissioner's reasons under the heading of cl 6. However, it appears to me that that omission is not significant for a number of reasons. First, I do not think it can be said when the Information Commissioner's reasons are read as a whole that she was at any stage unaware of the nature of the document, and of the way in which it came to be made and to be communicated. Provision of a checklist of all the relevant considerations under each of the relevant headings might make the job of a reviewing court somewhat easier, but would result in reasons of enormous length, given the overlap between the various provisions of Sch 1, and would probably result in the end in a lack of clarity. The structure of the reasons as expressed by the Information Commissioner appears to me to be sufficiently clear.

19 Further, the nature of the Confidential Comments document, in the sense of it being a private communication, is generally of greater weight when one considers cl 8 than when one comes to consider cl 6. Although, no doubt, all aspects of the multifaceted "public interest" are relevant to a determination made in respect of any of the exemptions where public interest is referred to, it appears to me that different clauses of Sch 1 are directed to the protection of different types of public interest, and the way in which the public interest factors must be balanced will vary from one clause to another.

20 Some clauses are concerned primarily with personal privacy, others with commercial interests, and others with very broad governmental interests of the type which founds what is generally referred to as "public interest immunity". The considerations which go to make up whatever public interest there may be in either disclosure or non-disclosure, may be balanced differently, depending upon the particular clause in question. To take an example removed from this case, pursuant to cl 5, matter is exempt from disclosure if its disclosure could reasonably be expected to "endanger the life ... of any person" but it is nevertheless not exempt if it falls within one of three specified categories and "its disclosure would, on balance, be in the public interest". It is difficult to see under what circumstances it could be found to be on balance in the public interest to disclose information, which could reasonably endanger the life of any

person. However, if that question ever comes to be faced, I would very much doubt that it will be of any great significance either way that the document in question may have been created and imparted in circumstances where there was an expectation of confidentiality, or that it will be of importance to consider whether the document contains personal observations.

21 To return to this case, if the Information Commissioner took the view that the Confidential Comments document was not exempt pursuant to cl 8, which is expressly designed to protect confidential communications, then it would have been open to her to conclude that the expectation of confidentiality was not of substantial relevance to the question of whether it would on balance be contrary to the public interest to disclose the Confidential Comments document, when that question fell to be considered under the cl 6 deliberative processes exemption.

22 Finally, ground A1(v) asserts that the Information Commissioner took into account an irrelevant consideration, "namely that the lack of media attention in the management of the appellant indicated that the potential for an adverse effect on the appellant's conduct of industrial relations had ceased to exist". Fairly read, it seems to me that the Information Commissioner was not concluding that the absence of media attention in itself suggested that the potential effect on industrial relations had ceased to exist; rather, she was explaining her view that there had been changed circumstances relevant to the public interest by reference to the existence, at the time of her earlier decision, of a number of issues which were causing difficulty in the management of the Police Force and which were at that time receiving media attention, which appeared to have diminished in significance. It seems to me that her discussion of those issues is not to be understood as suggesting that the absence of media attention was of particular significance, but rather that the issues had been, as she put it, "more or less resolved", or were at the very least of less "sensitivity" and that she was referring to the lack of media attention in part as evidence of the resolution of those issues, and in part as evidence of a change of emotional atmosphere concerning those issues, to the extent that they continued to exist.

### **Other Grounds relevant to Clauses 6(1) and 8(2)**

23 Of the remaining grounds of appeal, in my view ground A1(vii) can be shortly disposed of. It was asserted that the Information Commissioner acted unreasonably in finding that the Confidential Comments document



was of historical importance only, when "the Delta Reform Process is still being implemented by the appellant".

24 In relation to this ground, the Information Commissioner has, if anything, been unduly favourable towards the appellant in her assessment of the evidence. There is nothing in the material provided by the appellant which explains with specificity what the Delta program is, what aspects of it are still being implemented, or the way in which the Confidential Comments document and the recommendations which it contains are related to the Delta program or to the particular aspects of that program (whatever they may be) which are yet to be implemented.

25 The Information Commissioner, as I understand it, had considerable experience in the Police Force prior to taking up her present appointment and it may be that that experience, or alternatively, previous submissions made to her in other complaints relating to police documents, together with the information put before her in this case, led her to form the view which I understand she took in her earlier decision. That view was that the substantial reforms of the Delta process, together with the sensitivity at that time of certain "industrial relations" issues, broadly understood, together indicated that it would not be in the public interest to disclose the Confidential Comments document.

26 It is technically correct to assert, as the appellant does, that there was no material before the Information Commissioner which could have led her to the view that the Confidential Comments document was now "of historical importance only" so far as the Delta process was concerned, but, equally, there appears to have been no material before her which would have suggested with any degree of specificity what the relevance of the Confidential Comments document to the Delta Reform Process could have been.

27 Grounds 1A(iv) and (vi) can, I think, be taken together. They assert that the Information Commissioner failed to take into account the relevant consideration that disclosure of the document would be likely adversely to affect the future supply of "independent advice and critical assessment of the kind contained in the document" and that she took into account an irrelevant consideration in noting that the police officers whose views were contained in the document had been informed about the existence and operation of the *FOI Act*.

28 The first contention is, I think, factually inaccurate. A finding to that effect is made in the Information Commissioner's earlier reasons, in

paragraphs that are specifically incorporated in the reasons for the decision presently under consideration. As to the second, it was relevant to take into account the circumstance that the officers whose views are contained in the document had been informed about the operation of the *FOI Act*. That circumstance will, in most cases, be of relatively little weight, because the somewhat elusive nature of the "public interest" test means that it will generally be very difficult to predict with any certainty whether a particular document is likely, ultimately, to be disclosed, and one therefore cannot confidently find that a person "informed" about the *FOI Act* would have had any particular expectation concerning any particular document. However, there is some relevance, for two reasons.

29 First, that circumstance, among others, indicates that this is not a document that was produced or delivered in response to any express assurance of absolute confidence. There is a public interest in ensuring that assurances of that kind, if reasonably and properly made, should be respected. That aspect of the public interest simply does not arise in this case.

30 Further, knowledge of existence of the Act suggests that the authors of the Confidential Comments document were aware that there was some potential for disclosure of the document or of parts of it. If a person has provided a document in circumstances in which they are aware that there is some potential for disclosure, however remote the realisation of that potential may seem to be, then that circumstance detracts to some degree from the force of the conclusion otherwise reached that the disclosure of the document might adversely affect the future supply of information of that kind.

31 There is one general observation that perhaps should be made in relation to this aspect of all of the grounds of the appeal, and of the Information Commissioner's reasoning generally. Much significance was attached in the appellant's submissions to the fact that the Confidential Comments document was an unsolicited communication, containing frank comments, and expressly marked "in confidence". That circumstance was also given substantial attention in the Information Commissioner's reasons. However, it appears to me that insufficient attention has been given to ascertaining the reasons why the Confidential Comments document was provided in confidence. Broadly, a document may be provided confidentially because the author and/or provider of the document has an interest in ensuring that the document is not disclosed. Alternatively, it may be so provided because the provider expects that the person to whom it is provided would wish for confidentiality.

32 The "public interest immunity" cases recognise that individuals may sometimes be less than bold about providing frank advice in circumstances where the advice, if disclosed, may leave them open to criticism, or pressure, or, in the worst case, perhaps even victimisation of some kind. In those sorts of cases, disclosure of the document may well have an effect on the future flow of information of that kind. Where the provider of a document has no such concern, the future supply of such information is unlikely to be affected by disclosure, (although perhaps such information will be less readily sought).

33 In this case, one of the documents provided to the Information Commissioner contains the assertion that the two Strathclyde officers were said to have been "horrified" at the suggestion that their report might be disclosed. However, it is not clear whether that is an indication of any personal concern on the part of those two officers. They are not West Australian officers and they have, as I understand it, returned to Strathclyde. At first blush, it would appear that their interest in maintaining the confidentiality of the Confidential Comments document would be limited, although of course there is always the possibility that they may fear that its release would, for example, expose them to ill-informed criticism. However, an alternative view in this case is that it was confidentially provided because it was thought that the recipient, rather than the authors, may wish to keep it confidential.

34 It seems to have been assumed by the appellant and by the Information Commissioner that the confidence was at least in part for the protection of the authors and that for that reason, disclosure of the Confidential Comments document would tend to prejudice the future supply of information of that kind. It appears to me that that is not an assumption which can invariably be made and that it is desirable in each case that attention be given to the circumstances in which a document is provided and to the reasons, so far as they can be ascertained, why it may have been provided in circumstances of confidence. However, the failure to undertake that examination in this case was, if anything, unduly favourable to the appellant.

### **Clause 3**

35 Ground B1(ii) arises because the names of the two Strathclyde officers were not referred to in the Confidential Comments document. The definition of personal information is relevantly that personal information means:

"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;"

36 Assuming for the moment that the opinions of the authors of the Confidential Comments document fall otherwise within the definition of personal information, the Information Commissioner took the view that the definition meant that the information would only be protected if "anyone reading the disputed document could reasonably ascertain the identity of the author from a reading of that document".

37 Ground B1(ii) asserts that the Information Commissioner acted unreasonably in finding that the names of the authors of the Confidential Comments document could not be reasonably ascertained from extrinsic materials. Put in this form, the ground proceeds on a false premise, since the Information Commissioner expressly acknowledged that because of the media attention given to the visit of the two officers, their identity could be ascertained from extrinsic materials.

38 However, as I understand the ground, it was really directed to the assumption that the information was only protected if a person reading the Confidential Comments document could ascertain the identity of the person from a reading of that document on its own. Put this way, there is substance in the ground, since the definition of personal information refers to an individual whose identity "is apparent". No doubt there would be borderline cases, and no doubt documents will not contain personal information merely because a person about whom information is recorded can be identified, not from the document itself, but from some obscure and lengthy process of cross-referencing and deduction from other materials. However, where it is widely known that two particular individuals are authors of a document, then if disclosure of the opinions contained in the document would be disclosure of information "about" the authors, I think it must be accepted that the disclosure would be disclosure about an individual whose identity is apparent from the document, notwithstanding that reference must be made to other sources to ascertain the names of those individuals.

39 However, the Information Commissioner went on to consider what the position would be were she mistaken about the question of identification, and reached the view that none of the opinions in the

Confidential Comments document is "about the Strathclyde police officers". She said that the only information about them that might be revealed by disclosure of the Confidential Comments document is that at the time of its creation they held the opinions expressed therein, and she took the view that information of that kind did not constitute personal information as defined in the *FOI Act*.

40 The question of what constitutes "personal information" is not free from difficulty. Potentially, a broad reading of the expression "personal information" might undermine, to a very great extent, the object of the Act in ensuring accountability and accessibility of information, since most documents are likely to contain information of some kind about some individual. This is particularly so, if that expression is understood as encompassing information from which the opinions of an individual may be deduced. The problem of the potential breadth of the expression was raised during the course of the parliamentary debate on the Bill in the Legislative Council (*Parliamentary Debates*, Wednesday 2 December 1992, page 7765) but, because the provision was in a form common to other jurisdictions, the matter was not explored in detail, and the debate does not assist.

41 So far as the objects of the Act are concerned, on the one hand one can see a concern with individual privacy, and one can understand the concept that the opinions which a person holds may often be seen as "personal information", as commonly understood; for example, where those opinions touch on matters of political preference or religious belief. One can understand why such opinions might therefore be protected by the *FOI Act*. However, because the great majority of documents will reveal that their authors hold certain opinions concerning the subject matter with which the document deals, a reading of "personal information" which encompassed any information from which the opinion of the author might be deduced, would potentially exempt the majority of documents likely to be sought pursuant to the legislation.

42 Against this background, there are, I think, two reasons for preferring the view taken by the Information Commissioner, that the mere fact that reading of a document may allow one to deduce that the authors hold certain views, does not mean that the document is one the disclosure of which would reveal personal information.

43 First, in the glossary, as I have noted, the definition of personal information is that it means "information ... about an individual". In the ordinary sense, saying that a person is of a certain age, or has certain

financial resources, or that the person has a particular religious or political conviction, is providing information "about" the person. But equally, in ordinary language, a comment which the person makes himself or herself, even if it stems from a religious or political belief, or can lead to an inference of what that belief may be, is not information "about" that person but is information or opinion about the subject matter of the comment, whatever it may be. So, in the Confidential Comments document, the subject matter of the comments is the Police Force - the report is "about" the Police Force - even though it can be deduced from those comments that the authors at a particular time held certain opinions.

44 Further, when the personal information exemption is considered in the context of the whole of the first schedule to the *FOI Act*, it seems to me unlikely that it was intended to extend so far as to exempt any matter from which it may be inferred that the author of a document held particular views. When one turns to the "deliberative processes" exemption in cl 6 of that schedule, one finds that matter is exempt under that heading if its disclosure would reveal, *inter alia*, "any opinion ... that has been prepared or recorded ... in the course of, or for the purpose of, the deliberative processes of ... an agency". This exemption is largely directed to documents which consist of, or contain, opinion or advice.

45 While there is undoubtedly overlap between the various clauses of Sch 1, and while it may often be the case that a document falls to be considered pursuant to a number of those clauses, it nevertheless appears to me that the legislative intent was that the revealing of opinions of authors of documents was a matter which would be exempt, if at all, pursuant to cl 6. Unnecessary duplication within the legislation is avoided if the personal information exemption is not understood as extending to matter from which it may be inferred that an author holds a particular view. In my view, therefore, the Information Commissioner was correct in the view that she reached that the Confidential Comments document did not fall to be considered under the personal information exemption in cl 3. Having reached that view, it is unnecessary for me to consider the further ground of appeal under this heading which asserts that she misapplied the public interest test which is to be found in cl 3(6).

### **Conclusion**

46 For the reasons that I have given, I have formed the view that the appeal must be dismissed.