

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA

**CORAM** : ANDERSON J

**HEARD** : 18 APRIL 1996

**DELIVERED** : 30 APRIL 1996

**FILE NO/S** : SJA 1209 of 1995

**BETWEEN** : POLICE FORCE OF WESTERN AUSTRALIA  
Appellant (Respondent)

AND

MICHAEL CRAIG KELLY  
BRADLEY TERENCE SMITH  
Respondents (Complainants)

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*Catchwords:*

Administrative law - Freedom of information - Investigation by internal investigations branch of police force into possible contravention of the law by two police officers - Application by officers for access to investigation documents - Exemption - Whether disclosure of documents "could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law in a particular case ..." - *Freedom of Information Act 1992* schedule 1 cl 5(1)(b), ss3, 10, 21, 23, 72, 75, 76, 78, 85.

**Representation:**

*Counsel:*

Appellant : Ms C F Jenkins

Respondents : Mr J R Quigley

*Solicitors:*

Appellant : State Crown Solicitor

Respondents : Quigley Coulsen Chenu

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

Broken Hill South Ltd v Commissioner of Taxation (NSW) (1937)  
56 CLR 337

Commonwealth of Australia v John Fairfax & Sons Ltd (1980) 32 ALR 485

Manly v Minister of Premier & Cabinet unreported; SCt of WA; Library  
No 950310; 15 June 1995

News Corporation v National Companies & Securities Commission (1984)  
52 ALR 277

**Case(s) also cited:**

Nil

**Library Number** : 960227

**ANDERSON J:**

This is an appeal under s85 of the *Freedom of Information Act 1992* on questions of law arising out of a decision of the Freedom of Information Commissioner ("the Commissioner") on a complaint relating to an access application. It is common ground that the appellant is an "agency" within the meaning of the Act. By s10 of the Act it is provided that:

"10(1) A person has a right to be given access to the documents of an agency ... subject to and in accordance with this Act."

By s23 it is provided that the agency may refuse access to a document if the document is "an exempt document" and an exempt document means a document that "contains exempt matter". That is to say, matter that is exempt under schedule 1 of the Act.

The respondents are police officers who were on duty together in Fremantle on 25 March 1995. In the course of their duties they were involved in an incident during which a firearm was discharged. On 11 April 1995 the respondent Kelly was charged with an offence under the *Firearms Act 1973* and subsequently both respondents were charged with a number of offences under the *Police Force Regulations 1979*. This followed an investigation by the internal investigations branch of the appellant in the course of which a number of documents came into existence.

On 31 May 1995 solicitors for the respondents made an application to the appellant pursuant to which they sought access to these documents. What was sought was access to:

"All notes, documents, reports, records of interview and other material relating to the incident ... "

The appellant identified 82 documents as being within the access application. Of these full access was granted to 19, edited access was granted to four and access was refused to 59. The documents and parts of documents

to which access was refused were claimed to be exempt under cl 3(1) and 5(1)(b) of schedule 1 to the Act. Those clauses are in the following terms:

**"3 Personal Information**

*Exemption*

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

*Limits on Exemption*

- (2) Matter is not exempt matter under subcl (1) merely because its disclosure would reveal personal information about the applicant.

...

- (6) Matter is not exempt matter under subcl (1) if its disclosure would, on balance, be in the public interest."

**"5 Law enforcement, public safety and property security**

*Exemptions*

- (1) Matter is exempt matter if its disclosure could reasonably be expected to
- (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 ..."

The response of the appellant to the access application was not accepted by the respondents who sought an internal review of the initial decision. This internal review confirmed that decision and on 22 August 1995 the respondents applied to the Commissioner for an external review. On embarking on the external review, the Commissioner required production of the documents to her, as she was entitled to do under ss75(1) and 72(1)(b) of the Act. After examining the documents the Commissioner formed a

preliminary view which she communicated to the parties. This resulted in the appellant releasing one additional document to the respondents but maintaining its claims in relation to the remainder.

The documents ultimately in dispute between the parties and the grounds on which exemption was claimed are conveniently set out in the Commissioner's decision as follows:

"Document	Description	Exemptions
1	Running Sheet from Internal Investigation Branch File.	5(1)(b)
22	Extract dated 25 March 1995 from Police Headquarters Duty Inspector's Telephone Message Book.	3(1)
24-74	Witness statements.	3(1); 5(1)(b)
75	Report to IIB from a Senior Constable dated 6 April 1995.	5(1)(b)
76	Report to IIB from a First Class Constable dated 8 April 1995.	5(1)(b)
77	Report to IIB from an Acting Inspector dated 26 March 1995.	5(1)(b)
78	Report to IIB from a Senior Sergeant dated 10 April 1995.	5(1a)(b)
79	Report to IIB from a First Class Constable dated 9 April 1995.	5(1)(b)
80	Forensic Science Laboratory Report dated 13 April 1995.	5(1)(b)
81	Ballistics report dated 28 March 1995.	5(1)(b)"

As can be seen, the only document in respect to which exemption was claimed exclusively under cl 3 is document 22. The Commissioner found that certain matter in that document was exempt and granted edited access to it. There is no appeal against that decision and no further reference need be made to it.

As to document 1, although exemption was claimed exclusively under cl 5(1)(b) the Commissioner held that parts of the document were exempt

under cl 3(1) but that the remainder of the document was not exempt either under that clause or cl 5(1)(b).

As to documents 80 and 81 the Commissioner held them to be exempt and they too can be put to one side.

As to the remaining documents, ie 24-74, 75, 76, 77, 78 and 79, the Commissioner held that the matter contained in them was not exempt, with some small exceptions.

The appellant's main ground of appeal is that the Commissioner erred in her interpretation of cl 5(1)(b), and applied the wrong test as to whether the documents were exempt under that clause. If that proposition is made good it will dispose of the appeal.

It is, generally speaking, beneficial to good government and in the public interest that there be free public access to governmental records. As Mason J pointed out in *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 32 ALR 485 at 493 "... disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs". It is equally well recognised that in some matters there is a need to protect confidentiality and that sometimes disclosure will be "... inimical to the public interest ..." per Mason J (*ibid*).

At what point the line is to be drawn between the conflicting considerations is now the subject of State and Commonwealth legislation in the form of the various *Freedom of Information Acts* and whether a particular document is on one side of the line or the other has to be determined by reference to the terms of the relevant statute, by applying well settled principles to construe and interpret the statute. Those principles require the words of the Act to be given their ordinary grammatical meaning unless to do so would produce a repugnancy or absurdity or internal inconsistency. In deciding what that meaning is, regard must be had to the Act as a whole and to

its subject matter. *Broken Hill South Ltd v Commissioner of Taxation (NSW)* (1936-1937) 56 CLR 337 per Dixon J at 371.

As regards freedom of information legislation it has been suggested that in deference to the purpose of the legislation the courts should lean towards a wide interpretation of the access provisions and a narrow interpretation of the exemption provisions. However, in *News Corporation v National Companies & Securities Commission* (1984) 52 ALR 277 at 279 Bowen CJ and Fisher J said of the *Freedom of Information Act 1982 (Cwth)*:

"In construing our Act we do not favour the adoption of a leaning position. The rights of access and the exemptions are designed to give a correct balance of the competing public interests involved. Each is to be interpreted according to the words used, bearing in mind the stated object of the Act."

I would respectfully adopt and apply that non-leaning position.

The question therefore is whether the documents under consideration by the Commissioner did, in the terms of cl 5(1)(b), contain matter, "the disclosure of which could reasonably be expected to reveal the investigation of the contravention or the possible contravention of the law in a particular case." If so, cl 5(1)(b) exempts the documents from access.

In forming her opinion against exemption the Commissioner construed cl 5(1)(b) as conferring exemption on documents the disclosure of which will newly reveal or reveal for the first time the investigation of the contravention, so that if the matter in the documents was already known to the person seeking access, the subclause did not exempt the documents. Further, the Commissioner held that the documents will not be exempt under the subclause unless their disclosure will reveal the **content** of the investigation rather than the fact of the investigation.

In so holding, the Commissioner referred to passages in the judgment of Owen J in *Manly v Minister of Premier & Cabinet*, unreported; SCt of WA; Library No 950310; 15 June 1995. His Honour there held:

"A document must *reveal* the investigation before it can be held to be exempt under cl 5(1)(b). ... to 'reveal' is 'to divulge; disclose or to make known': the *Shorter Oxford English Dictionary, 3rd Ed, Vol 1* ...

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 ... 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 ...

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."

As I understand the reasons given by the Commissioner, she has interpreted these passages to mean that if the documents before her revealed no more than that the internal investigation branch of the police force had conducted an investigation into the conduct of the respondents as regards the specific incident at Fremantle on 25 March 1995, the documents were not documents which "reveal the investigation" because the documents did not reveal the content of the investigation. I doubt very much whether the judgment in *Manly's* case was intended to be applied quite like that. 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".



However that may be, I regret to say I cannot subscribe to the proposition implicit in the Commissioner's decision in this case that documents which reveal no more than that internal investigation officers were conducting an investigation into the conduct of the respondents, as regards the firearm incident at Fremantle on 25 March 1995, do not "reveal the investigation" within the meaning of cl 1(5)(b). In my opinion the phrase "... if its disclosure could reasonably be expected to ... reveal the investigation of any contravention of the law in a particular case ..." is apt to include the revelation of the fact of a particular investigation by police of a particular incident involving certain people. I think there is very good reason to accept that Parliament intended that such matter be exempt from access under the Act. It is not difficult to imagine cases in which it would be highly detrimental to good government and inimical to the administration of law enforcement to disclose that a particular criminal investigation is contemplated, has been started or has been completed. It is notorious that many investigations, particularly of large scale criminality, are multi-faceted, lengthy and sensitive and involve considerable personal risk to the officers engaged in them. No doubt it would be highly prejudicial to the practical success of many such investigations to allow or require the fact of them to be disclosed.

Even after an investigation has been completed there may be very good operational reasons why there should be no disclosure of it. For example it may be part of a wider and perhaps incomplete investigation. Of course there may be no need for any 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 s23(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). I shall say a little more about this later in these reasons.

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. Also the Act plainly contemplates that as regards exempt material, the agency may give access to some documents or parts of documents but refuse access to others dealing with the same subject. See ss3(3), 23(1). The interpretation placed on the Act by the Commissioner would mean that once access had been granted to some matter, the disclosure

of which revealed the investigation, no other matter that revealed the investigation could be withheld from disclosure. I do not think that could have been intended.

It would also run counter to the stipulation in cl 5(1)(b) itself, that matter revealing of an investigation remains exempt "whether or not any prosecution or disciplinary proceedings have resulted". Obviously the presentation of a prosecution would reveal both the fact that there had been an investigation and to a large extent the fruits of it. Therefore, to 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.

The Commissioner approached the construction of cl 5(1)(b) especially in the light of s21. That section is in the following terms:

"21 If the applicant has requested access to a document containing 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."

The Commissioner held that s21 limited the operation of cl 5(1)(b) such that if the documents the subject of a claim of exemption under that clause contained personal information about the applicant then (to use her words) "regard must be had to the effects of disclosing the documents to the particular applicant rather than to the world at large."

I am afraid I cannot agree with this proposition. In my opinion, s21 has no role to play in a determination under cl 5(1)(b) whether a document is an exempt document. As to whether a document is or is not an exempt document pursuant to cl 5(1)(b), there are no public interest considerations and the fact that the document may contain personal information about the applicant cannot bear upon the tendency or capacity of the document to reveal the investigation of a contravention or possible contravention of the law. Section 21 seems to me to be exclusively concerned with the exercise of discretion by the agency under s23(1) in determining whether it should refuse access to an exempt document. Section 21 does not provide any criteria for determining whether the document is or is not an exempt document.

In this regard I think the scheme of the Act is quite clear. Whilst the agency is invested by s23(1)(a) with a discretion to decide that access be given to the document, even although it is an exempt document, and whilst the making of that decision will be governed in part by the mandatory requirements of s21, the Commissioner has no such discretion. If it is established that a document is an exempt document it is expressly provided in s76(4) that "... the Commissioner does not have power to make a decision to the effect that access is to be given to the document".

This is not to say that should an agency fail to comply with the requirements of s21 in making a decision pursuant to s23(1)(a), the applicants will be without a remedy. However, the remedy does not lie in the hands of the Commissioner. Once it appears that disclosure of the matter could

reasonably be expected to reveal the investigation of any contravention or possible contravention of the law in a particular case, the matter is exempt and there is no discretion in the Commissioner to waive exemption.

For the above reasons and pursuant to the powers conferred on me by s78 of the Act I determine that, to the extent that any of the subject documents would reveal (whether for the first time or not) that the internal investigation branch of the police force was conducting an investigation or was about to conduct an investigation or had conducted an investigation into the conduct of the respondents as regards the incident at Fremantle on 25 March 1995 in which a firearm was discharged, that document is an exempt document within the meaning of cl 5(1)(b) of schedule 1 to the *Freedom of Information Act 1992*.

Whether the documents fall into that category is a question of fact, which I think is for the Commissioner to resolve. If I have the power to do so, which I think I have, but as to which I will hear counsel, I will remit the application to the Commissioner for determination in the light of these reasons.