

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

**File Ref: F0422001
Decision Ref: D0222001**

Participants:

**Zel Nominees Pty Ltd
Venetian Nominees Pty Ltd
Galveston Pty Ltd
Mine Exc Pty Ltd
Robinswood Pty Ltd
Grangefield Holdings Pty Ltd**
Complainants

- and -

State Revenue Department
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to payroll tax audit – clause 5(1)(b) – scope and meaning of the phrase “reveal the investigation” in clause 5(1)(b) – limits on exemption – clause 5(4)

Freedom of Information Act 1992 (WA) ss.74(2), 3(3); Schedule 1, Clause 5(1)(b), 5(4)(a)(i), (ii), (iii), 5(5)

Payroll Tax Assessment Act 1971

Taxation Administration Act 1953 (Cth)

Payroll Tax Act 1971

Police Force of Western Australia v Kelly and Another (1997) 17 WAR 9

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

Re Roy Morgan Research Centre Pty Ltd and the State Revenue Department [1999] WAICmr 16

DECISION

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

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

26 June 2001

REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by the State Revenue Department ('the agency') to refuse ZEL Nominees Pty Ltd; Venetian Nominees Pty Ltd; Galveston Pty Ltd; Mine Exc Pty Ltd; Robinswood Pty Ltd and Grangefield Holdings Pty Ltd ('the complainants') access to documents requested by them under the *Freedom of Information Act 1992* ('the FOI Act').
2. In March 1999, the agency notified the complainants that they had each been selected for an audit under the provisions of the *Payroll Tax Assessment Act 1971* ('the Assessment Act'). The audits were conducted by the agency and, at the conclusion of the audits, each complainant was notified that it was liable for payroll tax.
3. Subsequently, solicitors acting for the complainants made application to the agency for access under the FOI Act to various documents on which the assessments that the complainants were liable for payroll tax were based, including the audit reports, internal reports, working papers, and documents obtained by the Commissioner of State Revenue from the Federal Commissioner of Taxation ('the FCT') or the Australian Taxation Office.
4. The agency granted the complainants access to some of the requested documents but refused them access to the remainder on the ground that those documents are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. The agency's decision on access was confirmed following an internal review. On 17 April 2001, the complainants lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

5. I obtained most, but not all, of the disputed documents from the agency, together with the FOI file maintained in respect of the application. The Acting Commissioner of State Revenue informed me that some of the disputed documents described in the access applications were subject to a secrecy provision in the *Taxation Administration Act 1953* (C'wlth) which prohibited him from disclosing those documents to me.
6. I examined and considered the secrecy provisions of ss.13J(2) and (3) of the *Taxation Administration Act 1953*. Section 13J(2) of that Act expressly prohibits a State Taxation officer from disclosing, either directly or indirectly, information obtained from the FCT, except for the purposes of the administration of a State Tax Act. Section 13J(3) provides that, except where it is necessary to do so for the purposes of carrying into effect the provisions of a State Tax Act or a taxation law, a State Taxation officer to whom information is divulged by the FCT, shall not be required to divulge or communicate that information to any court.
7. The complaint before me does not relate to either the administration of a State Tax Act or the carrying into effect of the provisions of a State Tax Act or a taxation law. Accordingly, I accept that, in the specific circumstances of this complaint, the secrecy

provisions of ss.13J(2) and (3) of the *Taxation Administration Act 1953* prevail over the access provisions of the FOI Act and that those secrecy provisions prevent the agency from producing to me, for the purposes of my external review process, those disputed documents provided to the agency by the FCT.

8. Consequently, I required the agency to provide me with additional information about the documents obtained from the FCT, including the circumstances in which those documents were obtained by the agency. I received that further information from the agency on 24 May 2001.
9. On 6 June 2001, after considering the material before me, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that the disputed documents may be exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. The complainants were invited to reconsider the matter, or to make submissions to me in support of their request for access to the disputed documents. The complainants responded, but neither withdrew their complaint nor made further submissions.

THE DISPUTED DOCUMENTS

10. The disputed documents include various notes made by the agency's investigators, papers and other records compiled by those officers during the audit investigations and include several investigation reports which are all dated 30 June 2000. The disputed documents also include the documents that were provided to the agency by the FCT.

THE EXEMPTION

Clause 5(1)(b)

11. Clause 5(1)(b) provides that matter is exempt matter if its disclosure could reasonably be expected to 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.
12. The scope and meaning of the exemption in clause 5(1)(b) has been the subject of three decisions by the Supreme Court of Western Australia and I am bound by those decisions. The Supreme Court has decided that 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 that a document "must reveal something about the content of the investigation" in order to be exempt under clause 5(1)(b): see *Police Force of Western Australia v Kelly and Another* (1997) 17 WAR 9; *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550.
13. The Supreme Court has also made it clear that the scope of the exemption in clause 5(1)(b) is very broad, and that the exemption can apply regardless of the state of knowledge an access applicant has about a particular investigation or the stage the investigation has reached. This means that once it appears that disclosure of a document could reasonably be expected to reveal something about the investigation,

regardless of what other material might reveal it, and regardless of how much the applicant may already know of both the investigation and its subject matter, the document will be exempt under clause 5(1)(b): *Kelly's case* at pages 14 and 15.

The meaning of “the law” in clause 5

14. The term “the law” in clause 5 is used in a broad sense and is not limited in its application to the criminal law only. The terms of clause 5(1)(b) clearly contemplate investigations that may lead to disciplinary proceedings, as well as those potentially leading to prosecutions.
15. I have previously accepted, in *Re Roy Morgan Research Centre Pty Ltd and the State Revenue Department* [1999] WAICmr 16, that the Assessment Act is, by virtue of the provisions of s.2 of the *Payroll Tax Act 1971*, incorporated with - and to be read as one with - the *Payroll Tax Act 1971*. Both those Acts are written laws of the State of Western Australia and are, therefore, “laws” for the purposes of clause 5(1)(b) of the FOI Act.
16. Among other things, the Assessment Act empowers the Commissioner of State Revenue to conduct inquiries for the purpose of determining the liability of an employer to pay tax under that Act. I accept that an audit of the kind conducted by the agency, for the purpose of determining the extent of an employer’s compliance with its obligations for payroll tax and whether offences may have been committed or additional tax is payable, constitutes an investigation into a contravention or possible contravention of the Assessment Act.
17. In clause 5(5) the definition of “contravention” is defined as including a failure to comply. In my view, an audit inquiry by the agency into whether a person or incorporated body is complying with its obligations under the Assessment Act is an investigation into a possible failure to comply with the Assessment Act and is, therefore, an investigation into a contravention or possible contravention of the law within the meaning of clause 5(1)(b).

The agency’s submission

18. The agency submitted that the disputed documents were created as a result of a general audit investigation into the complainants and, as a result of the audits, it was the view of the agency that the complainants were technically in breach of s.35 of the Assessment Act. The agency submitted that it conducted each audit for the purposes of determining whether each complainant had complied with its obligations under ss.3, 6, 7 and 13 of that Act. Under s.35 of the Assessment Act, a person who fails to furnish pay-roll tax returns commits an offence.

The complainants’ submissions

19. The complainants’ legal advisers made submissions to the agency in support of the request for access to the disputed documents. In those submissions, the legal advisers asserted that the disputed documents would only be exempt under clause 5(1)(b) where those documents would, if disclosed reveal that there is or has been an investigation and the general contents of the investigation, such as the identities of the people being

investigated and the subject matter of the investigation. In the circumstances of the present case, it was submitted that disclosure of the disputed documents would not “reveal” the investigation conducted by the agency because the complainants were fully aware of the investigation and had received correspondence from the agency and had had meetings with the agency’s Investigations Officer.

20. It was the submission of the legal advisers that there were several public interest factors weighing in favour of disclosure of the disputed documents, including the public interest in the complainants being able to verify the assessment and decide on the merits of lodging an objection to the assessment.

Consideration

21. I accept that the agency conducted an investigation under the terms of the Assessment Act and that the disputed documents were created or obtained by the agency in the course of that investigation. I have examined the disputed documents produced to me by the agency. I am satisfied that the disclosure of those documents would reveal something about the content of the agency’s audit investigations, including the identity of the organizations being investigated; the subject matter of the investigations and the outcome of those investigations. I am satisfied, therefore, that those documents are documents of the kind that would fall within the terms of the exemption in clause 5(1)(b).
22. Further, whilst I have not examined the documents obtained by the agency from the FCT, having regard to the additional information provided to me by the agency, I accept that those documents were obtained from the FCT during the agency’s audit investigations and that those documents were obtained for the purposes of, and are directly related to, those investigations. I am satisfied, therefore, that the disclosure of those documents could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law in a particular case. Clearly, in my view, those documents are documents of a kind which fall within the terms of the exemption in clause 5(1)(b). However, as I am constrained by s.74(2) of the FOI Act from revealing exempt matter in my reasons for decision, I can only refer to documents that I have not seen in general terms and I cannot give my full reasons for determining that those documents are covered by that exemption clause.
23. I accept that the complainants have some knowledge about these particular audit investigations, including, to some extent, their scope and subject matter. However, the exemption in clause 5(1)(b) can be claimed by an agency and access can be refused to documents, regardless of the actual state of knowledge that an applicant might have about the particular subject matter. In *Kelly’s* case, Anderson J made it clear that documents can “reveal an investigation” even when the investigation has been revealed through other materials or the investigation has concluded. His Honour said at pages 14 and 15 that:

“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...[clause] 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.”

24. The exemption in clause 5(1)(b) is subject to the limits on exemption in clause 5(4) of Schedule 1 to the FOI Act. However, I do not consider that the documents contain, or are likely to contain, any information of the kind described in clauses 5(4)(a)(i), (ii) or (iii). Accordingly, a consideration of whether it would, on balance, be in the public interest to disclose the disputed documents, does not arise for my consideration.
25. Finally, in the circumstances of this matter, I have some sympathy for the complainants who are unable to obtain access to material that may well assist them to understand the decisions made by the agency in respect of their payroll tax liability. Given that the audit investigations are over and the assessments have been issued, I consider this to be a case where the agency could have exercised its discretion under s.3(3) of the FOI Act to disclose documents that may be technically exempt. Among the disputed documents are copies of documents provided to the agency by the complainants. Clearly, no important public interests are likely to be adversely affected by the disclosure of those documents to these complainants. At the very least, the agency could have properly granted the complainants access to their own documents.
26. In any event, the discretion to disclose documents that may be technically exempt, in circumstances where there is no reasonable likelihood of harm rests with the agency alone. It is not within my powers. Accordingly, for the reasons given, I find that the disputed documents are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. I confirm the decision of the agency to refuse access to those documents.
