

**Decision D0212013 - Published in note form only**

***Re Bentley and Department of Corrective Services [2013] WAICmr 21***

**Date of Decision: 29 August 2013**

***Freedom of Information Act 1992***: section 31; Schedule 1, clause 5(1)(h)

In December 2012, Mr Christopher Bentley ('the complainant'), a serving prisoner, applied to the Department of Corrective Services ('the agency') for access under the *Freedom of Information Act 1992* ('the FOI Act') to certain security reports.

The agency refused access to the requested documents under s.31 of the FOI Act. Section 31 provides that agencies are not required to give information as to the existence or non-existence of a document containing matter that would be exempt under clauses 1, 2 or 5 of Schedule 1 to the FOI Act. In this case, the agency considered that if the requested documents existed they would be exempt under clause 5(1)(h) because their disclosure could reasonably be expected to facilitate the escape of any person from lawful custody or to endanger the security of any prison. The complainant sought internal review of the agency's decision. The agency – again without confirming or denying the existence of any requested documents – confirmed its initial decision. On 29 April 2013, the complainant applied to the Information Commissioner for external review of the agency's decision.

Following receipt of the complaint, the agency produced its FOI file to the Commissioner, together with information and material relevant to the matters for the Commissioner's determination.

In August 2013, the Commissioner provided the parties with a letter setting out his preliminary view of the complaint. On the information before him, the Commissioner was satisfied that if documents of the type requested by the complainant did exist they would contain matter that is exempt under clause 5(1)(h). The Commissioner's preliminary view was that, in the circumstances, the agency was entitled to rely upon s.31 of the FOI Act.

Section 74(2) of the FOI Act places an obligation on the Commissioner not to include exempt matter in a decision on a complaint or in reasons given for the decision. Therefore, the Commissioner was limited in providing the complainant reasons for his preliminary view and the evidence before him which supported those reasons. The Commissioner recognised that s.74(2) of the FOI Act placed the complainant at a considerable disadvantage in endeavouring to make meaningful submissions. These difficulties were recognised by Owen J in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550, at pp. 556-557.

The complainant responded to the Commissioner's letter by making additional submissions to the effect that his treatment as a prisoner in Western Australia is being adversely affected by the information he claims is contained in the documents the subject of his access application. The Commissioner considered the complainant's submissions to be public interest arguments. The complainant did not provide any evidence to support his claims in that regard. The Commissioner considered that none of the limits on the exemption in clause 5(4) applied in this case, therefore the public interest was not relevant to the application of clause 5(1)(h).

Having reviewed all of the information before him, the Commissioner confirmed the agency's decision to refuse access without giving information as to the existence or non-existence of any requested documents in accordance with s.31 of the FOI Act because, if they existed, those documents would be exempt under clause 5(1)(h) of Schedule 1 to the FOI Act.