OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	File Ref: F2010023 Decision Ref: D0282011

Participants:

Alexander Ronald Mackenzie
Complainant

- and -

Western Australia Police
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – running sheet and witness statements – clause 5(2)(a) – whether document created by an exempt agency – clause 7(1) – legal professional privilege – whether draft witness statements are privileged – clause 3(1) – personal information – whether the limits on exemption in clauses 3(2) and 3(3) apply –clause 3(6) – whether disclosure would, on balance, be in the public interest – section 24 – whether practicable to edit documents.

Freedom of Information Act 1992: sections 21, 23, 24, 76(1), 102(3); Schedule 1, clauses 3(1), 3(2), 3(3), 3(6), 5(2)(a) and 7(1); Schedule 2, Glossary
Criminal Procedure Act 2004
Freedom of Information Regulations 1993
Freedom of Information Act 1989 (NSW)
Freedom of Information Act 1992 (Qld)

Mackenzie v The Queen [2004] WASCA 146
Mackenzie v The Queen [2005] HCATrans 227
Esso Australia Resources Ltd v The Commissioner of Taxation (1999) 201 CLR 49
Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd [2009] FCAFC32
Kirby v Prisoners Review Board (No.2) [2010] WASC 280
Sankey v Whitlam and Ors (1978) 142 CLR 1
Re Police Force of Western Australia v Kelly and Smith (1996) 17 WAR 9
Re Weygers and Department of Education and Training [2007] WAICmr 16
Re Mossenson and Others and Kimberley Development Commission [2006] WAICmr 3
McKinnon v Secretary, Department of Treasury (2005) 145 FCR 70
Re Read and Public Service Commission [1994] WAICmr 1
DPP v Smith [1991] 1 VR 63

Sanderson and Department of Justice and Attorney General [2009] QICmr 5
Re Herbert and Ministry of Housing [2000] WAICmr 41
Mallard v The Queen (2005) 224 CLR 125
Head and NSW Commissioner of Police [2010] NSWADT 27
Simring v Commissioner of Police, NSW Police [2006] NSWADT 331
Police Force of Western Australia v Winterton (1997) WASC 504

DECISION

The decision of the agency to refuse the complainant access to certain documents is varied. I find that:

- Document 1 is exempt under clause 5(2)(a) of Schedule 1 to the FOI Act;
- Documents 2(a), 2(b), 3, 4(b), 4(c), 5 and 6(a)-(c) are exempt under clause 7(1); and
- Documents 4(a), 4(d), 6(d) and 7 are exempt under clause 3(1) and that it is not practicable to edit those documents.

Sven Bluemmel
INFORMATION COMMISSIONER

31 August 2011

REASONS FOR DECISION

1. This complaint arises from a decision made under the *Freedom of Information Act 1992* ('the FOI Act') by the Western Australia Police ('the agency'), to refuse Mr Alexander Mackenzie ('the complainant') access to documents.

BACKGROUND

2. In March 2003, the complainant was convicted on three counts, including wilful murder, and sentenced to 25 years' imprisonment. The Court of Criminal Appeal dismissed his appeal against conviction on 2 July 2004: see *Mackenzie v The Queen* [2004] WASCA 146 ('Mackenzie 2004'). The facts as set out in that case state that the complainant was charged with two counts of deprivation of liberty and of unlawful and indecent assault upon a first victim in 1984 and a third count of wilful murder of a second victim in 1986.

3. In April 2005, the High Court of Australia dismissed the complainant's application for special leave to appeal his conviction: see *Mackenzie v The Queen* [2005] HCATrans 227 ('Mackenzie 2005').

4. On 18 August 2009, the complainant applied under the FOI Act to the agency for access to certain documents in relation to the murder for which he was convicted. In particular, he sought access to copies of:

> *"(1) Running Sheets prepared during the original investigation.*
> *(2) Any other Running Sheets.*
> *(3) Any and all statements that were obtained before, during and after the investigation in 1986."*

5. The agency gave the complainant access in full or in part to some documents and refused access to others, citing clauses 3(1), 5(1)(b), 5(1)(c) and 5(2)(a) of Schedule 1 to the FOI Act. The complainant sought internal review in relation to the latter. On 24 November 2009, the agency confirmed its decision in relation to those documents and, on 15 January 2010, the complainant applied to the Information Commissioner ('the Commissioner') for external review of the agency's decision.

REVIEW BY INFORMATION COMMISSIONER

6. On receipt of this complaint I required the agency to produce the originals of the disputed documents to me, together with its FOI file maintained in respect of the complainant's access application.

7. By letter dated 14 April 2011, I advised the parties that, in my preliminary view, the disputed documents were exempt under clauses 3(1), 5(2)(a) and 7(1) of Schedule 1 to the FOI Act. The agency accepted my preliminary view. The complainant did not accept my preliminary view and made further submissions to me.

THE DISPUTED DOCUMENTS AND EXEMPTIONS CLAIMED

8. Document 1 is a running sheet of the Bureau of Criminal Intelligence (folios 108-109).

   Document 2 consists of (a) a typed, unsigned, undated statement (folios 175-182); and (b) a typed, unsigned, undated statement (folios 183-188).

   Document 3 is a typed, unsigned, undated statement (folios 192-196).

   Document 4 consists of (a) a handwritten, signed statement (folios 214-215); (b) a typed, unsigned, undated statement (folios 216-222); (c) a typed, unsigned, undated statement (folios 223-224); and (d) a copy of (a) (folios 225-226).

   Document 5 is a typed, unsigned, undated statement (folios 238-240).

   Document 6 consists of (a) a typed, unsigned, undated statement (folios 258-262); (b) a typed, unsigned, undated statement (folios 263-267); (c) a typed, unsigned, undated statement (folios 268-272); and (d) a typed, signed statement (folios 273-279).

   Document 7 is a typed, signed statement (folios 304-306).

9. The agency now claims that the disputed documents are exempt under clauses 3(1), 5(2)(a) and 7(1) of Schedule 1 to the FOI Act.

CLAUSE 5(2)(a) – MATTER CREATED BY PARTICULAR AGENCIES

10. The agency claims that Document 1 is exempt under clause 5(2)(a) because it was created by an exempt agency, namely the former Bureau of Criminal Intelligence ('the BCI'). Clause 5, insofar as it is relevant, provides:

> "*(2) Matter is exempt matter if it was created by -*
>
> *(a) the Bureau of Criminal Intelligence, Protective Services Unit, Witness Security Unit or Internal Affairs Unit of the Police Force of Western Australia; or*
>
> *(b) the Internal Investigations Unit of Corrective Services.*
>
> ...
>
> *(4) Matter is not exempt matter under subclause (1) or (2) if -*
>
> *(a) it consists merely of one or more of the following -*
>
> *(i) information revealing that the scope of a law enforcement investigation has exceeded the limits imposed by the law;*

(ii) a general outline of the structure of a programme adopted by an agency for dealing with any contravention or possible contravention of the law; or

(iii) a report on the degree of success achieved in any programme adopted by an agency for dealing with any contravention or possible contravention of the law;

and

(b) its disclosure would, on balance, be in the public interest."

The complainant's submission

11. In his application for external review, the complainant states that the agency submits that "*Folios 108 and 109 were refused access as they are of (implied) national security importance"*. The complainant states that this is surprising in view of the fact that they are running sheets. He submits that they may be crucial to proving his innocence and enabling the police to find the real murderer, so that it would be in the public interest to disclose them.

Consideration

12. Having examined Document 1, I accept that, on its face, it was created by the BCI, which is an exempt agency as listed in Schedule 2 to the FOI Act. Therefore, I am satisfied that Document 1 is a document of the kind described in clause 5(2)(a). I am also satisfied that none of the limits on the exemption in clause 5(4) applies in this case. It is thus unnecessary for me to consider whether the disclosure of Document 1 would, on balance, be in the public interest pursuant to clause 5(4)(b). I find that Document 1 is exempt under clause 5(2)(a), as the agency claims.

CLAUSE 7(1) – LEGAL PROFESSIONAL PRIVILEGE

13. The agency now claims that Documents 2(a), 2(b), 3, 4(b), 4(c), 5, 6(a), 6(b) and 6(c) – which are draft witness statements – are exempt under clause 7(1). Clause 7(1) provides: "*Matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege."*

14. In brief, legal professional privilege protects from disclosure confidential communications between clients and their legal advisers, if those communications were made or brought into existence for the dominant purpose of giving or seeking legal advice or for use in existing or anticipated legal proceedings: *Esso Australia Resources Ltd v The Commissioner of Taxation* (1999) 201 CLR 49 at [35]. The former is often referred to as 'advice' privilege and the latter 'litigation' privilege. J D Heydon, *Cross on Evidence* (7th Australian edition) [25210] notes that there is an unresolved controversy as to whether there is a single privilege with two applications, or two privileges with different provinces and functions.

15. An explanation of 'litigation' privilege is set out in *Cross on Evidence* at [25225] as follows:

> *"The rule also protects documents which are not communications provided they are brought into existence for the dominant purpose of preparing for, or for use in, existing or contemplated judicial or quasi-judicial proceedings. This aspect of the rule has been applied to drafts of pleadings, statements from potential witnesses (unless they were unsolicited), surveillance film and other materials which have come into existence as materials for the lawyer's brief. Where the document in its final form is delivered or filed or otherwise given effect to, then it loses any characteristic of confidentiality and no privilege remains for it."*

16. As noted, the cases recognise a difference between draft witness statements and their final form. The latter may have lost privilege by being communicated to an opposing party, read in court or exhibited to the court record. In *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd* [2009] FCAFC 32, the Full Court of the Federal Court said:

> "*Drafts and final proofs are by nature and in fact different documents. A draft may well include information which is not included in a final version of a witness statement given to an opposing party. A draft may well be a 'discussion' document, intended only to be seen and considered by the party's legal adviser."*

17. Having examined Documents 2(a), 2(b), 3, 4(b), 4(c), 5 and 6(a)-(c) and the agency's FOI file, I am satisfied that all of those draft witness statements were created by the agency for the dominant purpose of preparing for contemplated judicial proceedings. None appears to have been unsolicited. In my opinion, those documents are exempt under clause 7(1) because they would be privileged from production in legal proceedings on the ground of legal professional privilege.

CLAUSE 3(1) – PERSONAL INFORMATION

18. The agency claims that Documents 4(a), 4(d), 6(d) and 7 are exempt under clause 3(1) of Schedule 1 to the FOI Act. Those documents are all signed witness statements. Clause 3, insofar as it is relevant, provides:

> ***"3. Personal information***
>
> *(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;
(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) ...

(5) ...

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

19. The term 'personal information' is defined in the Glossary in Schedule 2 to the FOI Act as being:

> "*… 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; 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."*

20. 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, *prima facie*, exempt information under clause 3(1).

21. The exemption in clause 3(1) is intended to protect the privacy of individuals about whom personal information may be contained in documents held by government agencies. The exemption is recognition by Parliament that State and local government agencies collect and hold sensitive and private information about individuals, which should not ordinarily be made publicly accessible except with the consent of the individuals concerned or in circumstances where the disclosure of such personal information would, on balance, be in the public interest.

The agency's submissions

22. In its notices of decision, the agency submits that:

- Documents 4(a), 4(d), 6(d) and 7 are exempt as they contain personal information that would enable a number of third parties to be identified.

- There are strong public interests in protecting the personal privacy of third parties; in protecting the identity of any confidential source of information; and in not prejudicing investigations by law enforcement agencies.

- There is no demonstrable benefit to the public interest in disclosing Documents 4(a), 4(d), 6(d) and 7.

The complainant's submissions

23. In his letter to my office seeking external review, the complainant stated that he would accept access in edited form to the disputed documents and submitted that he wished to prove his innocence and "[t]*here may be crucial facts within those documents.*" In response to my letter of 14 April 2011, the complainant's lawyer made, in brief, the following submissions:

    (a) Many of the cases cited in my letter to the complainant of 14 April 2011 relate to FOI applications in the civil arena and not to criminal matters.

    (b) The information sought is information that the complainant would be entitled to, pursuant to the disclosure provisions of the *Criminal Procedure Act 2004* ('the CP Act').

    (c) The information sought will, in the complainant's view, provide supporting evidence to substantiate his wrongful conviction and innocence of the charge of wilful murder and appears to be properly admissible in any legal proceedings that may be brought to challenge the basis of the complainant's conviction in the Western Australian Court of Appeal.

    (d) Whilst the complainant was unsuccessful in his appeal to the Court of Appeal, in Mackenzie 2004, both Malcolm CJ and Wheeler J expressed concerns about the interview between a police officer and the complainant. In addition, whilst the complainant's application to the High Court to seek leave to appeal was unsuccessful in Mackenzie 2005, Hayne J "*in declining leave to appeal confirmed that* [the complainant] *contended that his admissions were involuntary*." Both of those decisions emphasise the importance of putting evidence before a court that may be relevant to the voluntariness of a confession. The disputed documents are relevant to the complainant's contention that he did not commit the murder for which he was convicted.

    (e) *Kirby v Prisoners Review Board (No.2)* [2010] WASC 280 is authority for the proposition that where an application is made under the FOI Act, the court should balance the public interest in not disclosing the document and the public interest in the administration of justice. In that case, Martin CJ stated, at [15]:

        > *"Where a person's liberty is at stake ... production is more likely to be ordered"*.

(f) In the High Court case of *Sankey v Whitlam and Ors* (1978) 142 CLR 1 at [36], Stephen J stated:

> "*The public interest that no innocent man should be convicted of a crime is so powerful that it outweighs the general public interest that sources of police information should not be divulged, so that, exceptionally, such evidence must be forthcoming when required to establish innocence in a criminal trial.*"

(g) The public interest in exposing a case where there may have been a wrongful conviction of an individual resulting in a long term of imprisonment and where an individual's liberty is at stake overrides any other general public interest consideration. The recent case involving Mr Andrew Mallard is an example of the type of miscarriage of justice that may occur as a result of the withholding of important relevant information where the police strongly resist disclosure.

Consideration

24. I have examined Documents 4(a), 4(d), 6(d) and 7 and I am satisfied that each would, if disclosed, reveal personal information – as that term is defined in the FOI Act – about the complainant, private individuals and officers of government agencies. All of that information is *prima facie* exempt under clause 3(1) of Schedule 1 to the FOI Act.

25. An access applicant's right of access to documents of an agency under the FOI Act is not an unfettered right. Section 10(1) provides that 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. That means that the right of access is subject to, among other things, the exemption clauses in Schedule 1.

26. It is clear from the circumstances of this matter that the complainant is likely to be aware of the identities of most of the persons referred to in Documents 4(a), 4(d), 6(d) and 7. However, the Supreme Court in *Police Force of Western Australia v Kelly and Smith* (1996) 17 WAR 9 at 14 noted that what is under consideration in dealing with an application under the FOI Act is the right of access to particular documents and that their character as exempt documents does not depend on what the applicant knows or claims to know of their content. In that case, Anderson J said:

> "*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 ... 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 that it could have been intended that exemption should depend on how much an applicant already knows or claims to know of the matter.*"

I agree with that view, although the question of what the complainant knows may be relevant to the operation of clause 3(6): see *Re Weygers and Department of Education and Training* [2007] WAICmr 16 at [22]-[23].

27. In the present case, I consider that the limits on the exemption in clauses 3(2), 3(3) and 3(6) are relevant to this matter.

Clause 3(2)

28. Clause 3(2) provides that matter is not exempt under clause 3(1) merely because its disclosure would reveal personal information about the applicant (in this case, the complainant). The use of the word 'merely' in clause 3(2) means, according to its ordinary dictionary meaning, 'solely' or 'no more than' personal information about the applicant: see, for example, *Re Mossenson and Others and Kimberley Development Commission* [2006] WAICmr 3 at [23].

29. Having examined Documents 4(a), 4(d), 6(d) and 7, I consider that all of the personal information about the complainant contained in them is inextricably interwoven with personal information about other individuals. Disclosure of that information would do more than 'merely' reveal personal information about the complainant. In the circumstances, it is not possible for the agency to give access to that information without also disclosing personal information about the other individuals and, consequently, the limit on exemption in clause 3(2) does not apply.

Clause 3(3)

30. Clause 3(3) provides that information is not exempt merely because its disclosure would reveal 'prescribed details' in relation to government officers or former officers of agencies. The information that is prescribed details is set out in regulation 9(1) of the *Freedom of Information Regulations 1993* and includes the names and positions of officers or former officers and anything done in the course of performing or purporting to perform functions or duties as officers.

31. The FOI Act makes a distinction between private personal information – such as an officer's home address or health details – and information that relates solely to the officer's performance of their functions for an agency, such as his or her name and job title. In the present case, I consider that Documents 4(a), 4(d), 6(d) and 7 contain a small amount of personal information about officers of agencies including their names, job titles and things done by them in the performance of their functions as officers. In my opinion, that information is 'prescribed details' and is not exempt under clause 3(1) by reason of the operation of clause 3(3). However, for the reasons set out in paragraphs 66-70, I consider that it is not practicable to give the complainant access to that information, pursuant to s.24 of the FOI Act.

Clause 3(6)

32. Clause 3(6) provides that matter will not be exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. Section 102(3) of the

FOI Act provides that the complainant 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 him.

33. The application of the public interest test in clause 3(6) involves identifying the public interest factors which favour disclosure and the public interest factors which favour non-disclosure and weighing those factors against each other, in order to determine where the balance lies.

34. I understand that the complainant has a personal interest in the disclosure of Documents 4(a), 4(d), 6(d) and 7 to him. However, the public interest is a matter in which the public at large has an interest, as distinct from the interest of a particular individual or individuals: see *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70; *Re Read and Public Service Commission* [1994] WAICmr 1 and *DPP v Smith* [1991] 1 VR 63.

35. With regard to (a) of the complainant's submissions, I note that this matter falls under the FOI Act and most of the cases that have a bearing upon the application of that Act relate to civil, rather than criminal, matters. In my view, the fact that this complaint concerns a criminal conviction is relevant to the question of public interest and I accept that where a person's liberty is at stake, and there is evidence that the disclosure of requested documents under the FOI Act might assist in proving that person's innocence, the public interest in disclosure would be a strong one.

36. Favouring disclosure, I acknowledge a public interest in individuals being able to exercise their rights of access under the FOI Act (subject to the exemptions) and in being able to access their own personal information which is held by a government agency. That latter public interest is recognised in section 21 of the FOI Act, which provides:

> "*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".*

Accordingly, I have taken that factor into consideration in favour of disclosure in this case.

37. I also recognise a public interest in the accountability of the Government, its agencies and officers for the performance of their functions relating to police investigations and court processes. In that regard, the complainant submits in (d) that the court in Mackenzie 2004 expressed concerns about an interview between the complainant and a police officer and that, in Mackenzie 2005, he contended that his admissions were involuntary; and the court noted the importance of putting evidence to a court that may be relevant to the voluntariness of a confession.

38. In the present case, the complainant exercised his right to appeal against both his conviction and sentence but the Court of Appeal in Mackenzie 2004 unanimously dismissed those appeals. The complainant also exercised his right to apply to the High Court of Australia in Mackenzie 2005 for special leave to appeal, raising the issues of the voluntariness of his admissions obtained in a police interview and the exercise of discretion to exclude that interview in circumstances where the complainant was not taken before a justice as soon as reasonably practicable. In that case, Hayne J said:

> "*The applicant did not contend at his trial that admissions which he made in a video-recorded interview were made involuntarily. He therefore gave no evidence at trial that he had not said what he did in the free exercise of a choice to speak or not speak. Although he now contends that these admissions were involuntary there is no sufficient evidentiary foundation for that contention to warrant a grant of special leave on that issue.*
>
> *Insofar as the applicant contends that evidence of the admissions he made should have been excluded as unfairly obtained, we see no reason to doubt the conclusions reached by the Court of Criminal Appeal."*

39. In light of that, I understand that the question of involuntariness was considered and dismissed by the High Court. In my view, the public interest in government accountability is significantly reduced by the fact that the complainant took part in a formal trial process and that questions raised by the police investigation were examined when he exercised his rights of appeal.

40. Moreover, in respect of the complainant's submission in (g), there is no information before me to establish, as the complainant suggests, that the police is withholding important relevant information in this case similar to the situation in *Mallard v The Queen* (2005) 224 CLR 125.

41. In particular, I note that Documents 4(a), 4(d), 6(d) and 7 do not include the video tapes of the police interview, to which the question of voluntariness relates.

42. On the information before me, I am not satisfied that the disclosure of Documents 4(a), 4(d), 6(d) and 7 would assist in making the Government, its agencies and officers more accountable.

43. The complainant further submits at (c) that he needs Documents 4(a), 4(d), 6(d) and 7 to prove his innocence and, thus, assist in the identification and prosecution of the real killer.

44. I recognise a public interest in prisoners who have identified new material relevant to their convictions being given reasonable assistance to prove their innocence and to pursue all legal avenues to regain their freedom. However, in this case, the complainant has not identified the kind of information in the four witness statements that would assist in proving his innocence; how that particular information would provide a reasonable basis for pursuing a legal remedy; or precisely what that legal remedy might be.

45. In *Sanderson and Department of Justice and Attorney General* [2009] QICmr 5 at [66], the Queensland Information Commissioner ('the Qld Commissioner') – in relation to a similar matter – said:

> "*The mere assertion by an applicant that information is required to establish pursuit of a legal remedy will not be sufficient to give rise to a public interest consideration that ought to be taken into account.*"

I agree with that view.

46. I consider that the public interest in the complainant's right to pursue a legal remedy is substantially satisfied by his previous exercise of judicial appeal mechanisms.

47. In (b), the complainant submits that he would be entitled to be given access to Documents 4(a), 4(d), 6(d) and 7 under the CP Act and therefore there is, impliedly, a public interest in his obtaining access to those documents under the FOI Act.

48. From my consideration of the CP Act, I understand that the complainant's entitlement to access the requested information arises only in the context of disclosure by the prosecutor once criminal proceedings are on foot. Moreover, in my opinion, Documents 4(a) and 4(d) do not comply with the formalities required by Schedule 3, clause 4(5) of that Act, so that it is not evident to me that the complainant would have ever been entitled to unfettered access to those particular documents.

49. There is no information before me to establish whether the complainant ever had access to Documents 4(a), 4(d), 6(d) and 7 or whether any of those documents was exhibited or read in open court. There is nothing in Mackenzie 2004 or Mackenzie 2005 to indicate that those documents, or any information contained in them, were ever placed in the public domain.

50. Even if the complainant did have access to some or all of Documents 4(a), 4(d), 6(d) and 7 in the course of his trial, I do not consider that necessarily equates to the public disclosure of those documents or that, in the absence of any other factors favouring the disclosure of those documents, such access significantly reduces the privacy interests of third parties whose identities could be ascertained by the disclosure of those documents.

51. In *Re Saleam and Police Force of WA* [1997] WAICmr 13, the former Commissioner noted the limited nature of the disclosure of information such as witness statements in the course of court proceedings and said at [18]:

> *"... I do not consider that production in a court for the purpose of legal proceedings amounts to public disclosure. Even though proceedings are conducted in open court, as I understand it documents tendered in evidence are made available only to the Court, the parties to the proceedings and their counsel. Although documents may also be shown to*

witnesses, they are not otherwise available, either during or after the conclusion of the proceedings."

52. The FOI Act imposes a general protection for documents of a court where those documents are not of an administrative nature and accords protection for the existing access regime for court records, where the expectation is that decisions regarding the relevant information are made by the judiciary. In my view, parties involved in judicial proceedings have the expectation that such information will only be disclosed under the established systems and procedures and I consider that disclosure under the FOI Act may serve to undermine general confidence in the judicial system. This position is consistent with Parliament's treatment of court records under the FOI Act.

53. Disclosure under the FOI Act is considered to be potentially 'disclosure to the world at large' because no restrictions or conditions can be attached to the disclosure of the documents or their further dissemination by a successful access applicant, other than those that apply under the general law: *Re Herbert and Ministry of Housing* [2000] WAICmr 41 at [21]. I do not generally consider that it is in the public interest for sensitive and private information to be potentially placed in the public domain by way of the FOI process – even where it is established that part or all of that matter has been disclosed under the court process – particularly where the third parties concerned have not been consulted and where there is no demonstrable benefit to the public by doing so.

54. In light of the complainant's submission in (b), my office made inquiries with the Supreme Court of Western Australia, which advised that its general court procedure in respect of witness statements is as follows:

- witness statements are usually filed in Court by the Director of Public Prosecutions and then form part of the Court record.

- Those statements are retained on the relevant Court file after the conclusion of the proceedings and to obtain a copy, a person needs to write to the Principal Registrar and provide reasons for requesting the documents.

- It is likely that a prisoner, as a party to the proceedings, would be able to obtain a copy of documents that were used in the course of his or her trial.

From that advice, I understand that the complainant does have alternative means of accessing any witness statements used at his trial. In my view, in the event that it is established that there is a public interest in the disclosure of the four witness statements to the complainant, that would reduce the weight to be given to that public interest.

55. I have considered the complainant's submissions in (e) and (f) in relation to the decisions in *Kirby* and *Sankey*. The former concerned a claim of privilege for public interest immunity in the context of decisions by the Prisoners Review Board to suspend and then cancel Mr Kirby's parole and the latter considered the principles governing such a claim. In *Kirby*, Malcolm J noted, at [4] that:

> "[t]*he general rule is that the court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it. However, the general rule will not apply where the court is of the opinion that the public interest in the fair administration of justice outweighs the interest giving rise to the immunity*."

56. In my opinion, those cases are distinguishable on their facts, although I accept that clause 3(6) of Schedule 1 to the FOI Act involves a similar balancing process when assessing competing public interests. As noted, I accept that where a complainant's liberty is at stake, and there is evidence that the disclosure of disputed documents might assist in proving that individual's innocence, the public interest in disclosure would be a strong one. However, in the present case, it is not evident that the disclosure of Documents 4(a), 4(d), 6(d) and 7 would assist the complainant to establish that he did not commit the murder for which he was convicted or to obtain any legal remedy.

57. Weighing against disclosure, I accept the agency's submission that there is a public interest in the willingness of members of the public to come forward with information relevant to investigations by law enforcement agencies that could be undermined by the disclosure of their personal information under the FOI Act without their consent. In my opinion, the initial reluctance of the first - surviving - victim to give evidence concerning the two charges concerning her may support that submission.

58. Although I accept that there may be a public interest in protecting the identity of a confidential source of information, the agency has provided me with no information in support of its submission that the disclosure of Documents 4(a), 4(d), 6(d) and 7 would reveal such a person's identity.

59. In particular, favouring non-disclosure, is the strong public interest recognised by the FOI Act in maintaining personal privacy. That public interest is acknowledged by the inclusion in the FOI Act of the exemption in clause 3(1) and, in my view, that public interest may only be displaced by some other, considerably stronger, public interest that requires the disclosure of private information about another person.

60. In this case, none of the third parties referred to in Documents 4(a), 4(d), 6(d) and 7 has consented to the disclosure of their personal information, some of which is sensitive and confronting. I accept that the disclosure of that personal information was necessary for the purpose of the police investigations and court processes involving the complainant. However, in my opinion, those third parties should now have a reasonable expectation that no further disclosure of their personal information will occur unless required by this or another Act or subsequent legal proceedings and that there is no potential for their statements to be placed in the public domain where there is no demonstrable benefit to the public by doing so.

61. To assist in my deliberations, I have considered relevant cases in other jurisdictions which relate to the disclosure of witness statements. In *Head and NSW Commissioner of Police* [2010] NSWADT 27 at [20]-[21, the Tribunal referred to the case of *Simring v Commissioner of Police, NSW Police* [2006] NSWADT 331, in which the applicant sought access under the *Freedom of Information Act 1989* (NSW) to, among other things, victim and witness statements provided in the context of criminal proceedings brought against him. The applicant sought those statements on the basis that they would expose that he had been wrongly convicted and because they were crucial to his appeal against conviction. In balancing the competing public interests, the Tribunal in *Simring* said, at [29]:

> "*Documents B1-8 were prepared for the purpose of the investigation and subsequent prosecution of the applicant. The information contained in the documents is particularly sensitive. The proceedings against the applicant have concluded. Having regard to the nature of the information contained in the documents and the limited purpose for which the information was provided, I am satisfied that disclosure of the information would be an intrusion into the personal privacy of persons identified in the documents which would not be outweighed by any public interest in access to information held by a government agency."*

62. In *Sanderson*, the Qld Commissioner came to a different conclusion and found that in balancing competing public interests, those favouring disclosure outweighed those favouring non-disclosure in the particular circumstances. In that case, the applicant was convicted of manslaughter and imprisoned. His appeal against conviction was dismissed and his appeal against sentence refused. The applicant sought access under the *Freedom of Information Act 1992* (Qld) to, among other things, two witness statements made by the principal witness in the relevant court proceedings to assist him obtain a petition for pardon from the Governor. The applicant stated that the first statement had resulted in his arrest for murder and the second in the principal witness being charged with accessory to murder.

63. In my opinion, *Sanderson* is distinguishable on its facts from the present case in which the complainant confessed and was ultimately convicted, following the submission of similar fact evidence. In *Sanderson*'s case, the complainant did not confess but was apparently convicted on the evidence of a person who was charged with being an accessory to the relevant murder.

64. Moreover, the Qld Commissioner – in considering the public interests in disclosure – found that the witness statements provided evidence of value to an assessment of merit for a petition of pardon; there was a reasonable basis for pursuing that remedy; and that the privacy interests of third parties were significantly reduced because the applicant had previously had full access to the witness statements, which had also been read in open court, exhibited to the court record and referred to in the judgment of the Court of Appeal. By contrast, none of those findings is pertinent to the present case.

65. In weighing the competing public interests, I am not satisfied that the complainant has established that there is a compelling public interest that requires the disclosure to him of personal information about third parties contained in Documents 4(a), 4(d), 6(d) and 7 or that the public interest factors in favour of disclosure are sufficient to outweigh the public interests in the protection of personal privacy and the willingness of members of the public to volunteer information relevant to investigations by law enforcement agencies. Based on the material before me, I consider that the public interests in non-disclosure outweigh those favouring disclosure in this instance. I therefore find that Documents 4(a), 4(d), 6(d) and 7 are exempt under clause 3(1) of Schedule 1 to the FOI Act.

Editing

66. The complainant advised that he was prepared to accept access to documents in edited form and submits that he and his legal advisers should be allowed to decide whether it is practicable to edit Documents 4(a), 4(d), 6(d) and 7.

67. Section 24 of the FOI Act provides:

> *"If -*
>
> *(a) the access application requests access to a document containing exempt matter; and*
>
> *(b) it is practicable for the agency to give access to a copy of the document from which the exempt matter has been deleted; and*
>
> *(c) the agency considers (either from the terms of the application or after consultation with the applicant) that the applicant would wish to be given access to an edited copy,*
>
> *the agency has to give access to an edited copy even if the document is the subject of an exemption certificate."*

68. The Supreme Court of Western Australia in *Police Force of Western Australia v Winterton* (1997) WASC 504 considered the meaning of s. 24 of the FOI Act. In that case, Scott J said, at page 16:

> "*It seems to me that the reference in s24(b) to the word 'practicable' is a reference not only to any physical impediment in relation to reproduction but also to the requirement that the editing of the document should be possible in such a way that the document does not lose either its meaning or its context. In that respect, where documents only require editing to the extent that the deletions are of a minor and inconsequential nature and the substance of the document still makes sense and can be read and comprehended in context, the documents should be disclosed. Where that is not possible, however, in my view, s24 should not be used to provide access to documents which have been so substantially edited as to make them either misleading or unintelligible."*

69. Section 24 imposes no obligation on the agency – or on external review, the Information Commissioner – to consult with an access applicant in relation to the editing of documents. The reality is that only the agency or the Information Commissioner is in a position to examine the document in question and assess whether it would be practicable in the sense described by Scott J in *Winterton* to give access in edited form.

70. In my opinion, having examined Documents 4(a), 4(d), 6(d) and 7, it is not practicable to give the complainant access to edited copies of those documents disclosing the prescribed details of officers of agencies because the extent of the editing required would, in my view, render those documents unintelligible.

CONCLUSION

71. I find that:

- Document 1 is exempt under clause 5(2)(a) of Schedule 1 to the FOI Act;
- Documents 2(a), 2(b), 3, 4(b), 4(c), 5 and 6(a)-(c) are exempt under clause 7(1); and
- Documents 4(a), 4(d), 6(d) and 7 are exempt under clause 3(1) and that it is not practicable to edit those documents.

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