OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	File Ref: F2010246 Decision Ref: D0362011

Participants:

Alexander Ronald Mackenzie
Complainant

- and -

Chemistry Centre Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to murder investigation – section 26 – documents that cannot be found or do not exist – whether reasonable grounds to believe that documents exist or should exist – sufficiency of searches – 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, 24, 26(1), 66(5), 66(6), 102(3); Schedule 1, clauses 3(1), 3(2), 3(3) and 3(6); Schedule 2, Glossary
Freedom of Information Regulations 1993: regulation 9(1)
Freedom of Information Act 1992 (Qld)

Mackenzie v The Queen [2004] WASCA 146
Mackenzie v The Queen [2005] HCATrans 227
Re Anti-Fluoridation Association of Victoria and Secretary to Department of Health (1985) 8 ALD 163
Re Leighton and Shire of Kalamunda [2008] WAICmr 52
Re Boland and City of Melville [1996] WAICmr 53
Kirby v Prisoners Review Board (No.2) [2010] WASC 280
Sankey v Whitlam and Ors (1978) 142 CLR 1
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
Fox and Queensland Police Service (2001) 6 QAR 1

Mallard v The Queen (2005) 224 CLR 125
Re Edwards and Ministry of Justice [1994] WAICmr 24
Re West Australian Newspapers Limited and Department of the Premier and Cabinet [2006] WAICmr 23
Re Herbert and Ministry of Housing [2000] WAICmr 41
Police Force of Western Australia v Winterton (1997) WASC 50

DECISION

The agency's decision is varied. I find that:

- The agency's decision to refuse access to the requested documents under s.26 of the FOI Act is justified.

- Documents 1-4 are exempt under clause 3(1) of Schedule 1 to the FOI Act and it is not practicable to edit those documents.

Sven Bluemmel
INFORMATION COMMISSIONER

30 September 2011

REASONS FOR DECISION

1. This complaint arises from a decision made under the *Freedom of Information Act 1992* ('the FOI Act') by the Chemistry Centre Western Australia ('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. On 2 July 2004, the Court of Criminal Appeal dismissed his appeal against conviction: 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 27 January 2010, the complainant applied under the FOI Act to PathWest Laboratory Medicine WA ('PathWest') for access to certain documents relating to the investigation of the murder for which he was convicted. That matter came on external review to my office. In assessing that complaint, I noted that part of the access application should have been transferred to the agency, as some of the exhibits that were collected in the course of the police investigation were submitted to the former Government Chemical Laboratories ('the GCL') for analysis in 1987. The name of the GCL was changed to that of the agency in 1989. Accordingly, PathWest partially transferred the complainant's access application to the agency on 23 April 2010.

5. On 1 June 2010, the agency gave the complainant access to edited copies of five pages (three documents) with the names of individuals deleted. While not specifically stated in the notice of decision, the editing appears to have been undertaken pursuant to clause 3(1) (personal information) of Schedule 1 to the FOI Act.

6. The complainant sought internal review of the agency's decision on the ground that additional documents should exist that fall within the scope of his access application. He did not seek internal review of the agency's decision to give access to edited copies of the three documents. On 29 June 2010, the agency wrote to the complainant clarifying its initial decision but it is not clear whether that letter was its decision on internal review. On 27 July 2010, the complainant applied to me for external review of that 'decision'.

7. Section 66(5) of the FOI Act provides that a complaint to the Information Commissioner is not to be made unless internal review of an agency's decision has been applied for and completed, if internal review is available. However, s.66(6) gives the Information Commissioner a discretion to allow a complaint to

be lodged without internal review having first been sought or completed. In the circumstances of this matter, I allowed the complainant's application for external review under s.66(6) of the FOI Act.

REVIEW BY THE INFORMATION COMMISSIONER

8. Following my receipt of the complainant's application for external review, the agency produced to me its original FOI file maintained in respect of the application. The agency also provided me with an explanation of its document-retention systems in 1987 and its attempts to locate the requested documents.

9. Although the agency's FOI file provided some evidence of the searches and inquiries it had conducted to locate documents within the scope of the application, the specific searches undertaken were not described or recorded in any detail. Accordingly, my officer sought further clarification from the agency about the searches it had conducted in order to locate the requested documents and required additional searches and inquiries to be made. Following those inquiries, four additional documents were located by the agency and provided to me for my examination.

10. On 25 July 2011, having considered the material before me, I provided the parties with a letter setting out my preliminary view of the complaint. My preliminary view was that the agency had taken all reasonable steps to locate the requested documents and – apart from the four additional documents now located – there were no reasonable grounds to believe that additional documents within the scope of the application were or should be held by the agency, pursuant to s.26 of the FOI Act. At that stage, I did not require the agency to conduct any further searches. My preliminary view was that the four additional documents located were *prima facie* exempt under clause 3(1) of Schedule 1 to the FOI Act and it was not practicable to provide the complainant with edited copies of those documents in accordance with s.24 of the FOI Act.

11. I invited the parties to provide me with submissions in response to my preliminary view. The complainant did not accept my preliminary view and his lawyer made further submissions to me on his behalf.

THE REQUESTED DOCUMENTS

12. When PathWest transferred the complainant's access application to the agency, it included the complainant's letters sent to PathWest dated 8 March 2010 and 7 April 2010, in which he had provided specific details identifying the documents he sought. The complainant had clarified in his letter of 8 March 2010 ('8 March Letter') that he sought certain documents in relation to the murder for which he was convicted. In particular, he sought access to copies of the following documents (together 'the requested documents'):

> *"1. All prints, including fingerprints*
> *2. All reports regarding the items collected in this case*
> *3. Any other reports*
> *4. Any other documentation*

At this stage, I shall specifically ask for

A. Full copies of the laboratory working notes on all the below exhibits:

1. Exhibit 1 – Lab No.86G486
2. Exhibit 2 – Lab No.86G487
3. Exhibit 3 – Lab No.86G737
4. Exhibit 4 – Lab No.86G738
5. Exhibit 5 – Lab No.86G739
6. Exhibit 6 – Lab No.86G740
7. Exhibit 7 – Lab No.86G741
8. Exhibit 8 – Lab No.86G742
9. [Item] *referred to in the forensic biology report of 14.3.86*
10. [Item] *referred to in the forensic biology report of 14.3.86*

B. All item examination notes on each of the above listed ten (10) exhibits including:

a. Forensic biology case summary document
b. Incoming exhibits log
c. Evidence Access and Movement
d. Case diary
e. Communication log
f. Copies of emails from forensic biology staff
g. GeneScan results

C. All forensic biology full reports and short reports issued on the above ten (10) exhibits."

13. Although the complainant specified particular documents sought in A-C above, I understand that the scope of the complainant's access application was not limited to those documents, but included any documents falling within his initial request in points 1-4 above.

SECTION 26 – DOCUMENTS THAT CANNOT BE FOUND OR DO NOT EXIST

14. The complainant claimed that not all documents within the scope of his application were identified and that additional documents should exist. Although the agency's decision did not refer to s.26 of the FOI Act, it advised the complainant that it did not hold any further documents within the scope of his access application. In my view, the agency's decision was, in effect, a decision to refuse the complainant access to additional documents under s.26 on the ground that, having taken all reasonable steps to locate those documents, it was not possible to give access to them because those documents either do not exist or cannot be found.

15. Section 26(1) of the FOI Act deals with an agency's obligations when it is unable to locate documents sought by an access applicant or when those documents do not exist. Section 26 provides:

> *"(1) The agency may advise the applicant, by written notice, that it is not possible to give access to a document if –*
>
> *(a) all reasonable steps have been taken to find the document; and*
>
> *(b) the agency is satisfied that the document –*
>
> *(i) is in the agency's possession but cannot be found; or*
> *(ii) does not exist.*
>
> *(2) For the purposes of this Act the sending of a notice under subsection (1) in relation to a document is to be regarded as a decision to refuse access to the document, and on a review or appeal under Part 4 the agency may be required to conduct further searches for the document."*

16. When dealing with an agency's decision to refuse access to documents pursuant to s.26, the questions to be asked are whether there are there reasonable grounds to believe that the requested documents exist or should exist and are, or should be, held by the agency. Where those questions are answered in the affirmative, the next question is whether the agency has taken all reasonable steps to find the documents.

17. The adequacy of an agency's efforts to locate documents are to be judged by having regard to what is reasonable in the circumstances: see *Re Anti-Fluoridation Association of Victoria and Secretary to Department of Health* (1985) 8 ALD 163 and *Re Leighton and Shire of Kalamunda* [2008] WAICmr 52 at [85].

18. I do not consider that it is generally my function or that of my staff to physically search for documents on behalf of a complainant. Provided I am satisfied that the requested documents exist or should exist, I consider that my responsibility is to inquire into whether the agency has taken all reasonable steps to find the documents and, if necessary, to require the agency to conduct further searches.

The complainant's submissions

19. The complainant's submissions are set out in his application to me for external review dated 27 July 2010 and are referred to in a letter from his lawyers, dated 11 August 2011, sent in response to my preliminary view. In brief, the complainant submits as follows:

- There should be more documents than the five pages (three documents) received from the agency. In support of this claim, the complainant submits that he already has more material on the exhibits specified in his 8 March Letter than was given to him by the agency.

- He does not accept that the laboratory reports for exhibits 86G486-87 (Exhibits 1-2) and 86G737-42 (Exhibits 3-8) were compressed into one report. That report – which the agency gave him – seems only to be a list and not a report. The agency must have the originals of individual reports for each of the exhibits specified by him, as well as other reports.

- Due diligence has not been followed by the agency because he has provided various report numbers, or similar, to both PathWest and the agency and is still unable to obtain copies of those reports from either agency.

The agency's submissions

20. In a letter dated 29 June 2010, the agency's FOI Co-ordinator advised the complainant as follows:

> *"...I can only assure* [you] *that the original information as listed in the previous* [notice of decision of 1 June 2010] *only amounted to the five pages. We do not have copies of anything else.*
>
> *In your request, you listed eight Lab Report Numbers corresponding to the eight exhibits. The ChemCentre report for these eight exhibits was combined into one report. That is the two pages of the report dated 22 January 1987. The findings for each exhibit was listed in that report. We do not have any working notes relating to this case...*
>
> *ChemCentre is only involved in chemical analysis and therefore was not involved in determining information relating to fingerprints or biological materials.*
>
> *Again I assure* [you]*... that I sent you our complete holdings."*

Searches conducted by the agency

21. On 4 July 2011, the agency advised my office that, in relation to the terms of the access application, only points 2, 3 and 4 described below were relevant to the agency as it does not assess fingerprints:

> *"1. All prints, including fingerprints*
> *2. All reports regarding the items collected in this case*
> *3. Any other reports*
> *4. Any other documentation."*

22. In effect, the agency's searches related to the laboratory working notes for Exhibits 1-10 with their associated examination notes and all forensic and other relevant reports and documentation.

23. In correspondence with my office dated 10 August 2010, 1 June 2011 and 13 July 2011, the agency provided further information about its document-

retention systems in 1986-1987 and the searches and inquiries made to locate the requested documents. In summary, the agency advised me as follows:

- The laboratory report dated 22 January 1987 for Exhibits 1-2 and 3-8, ('the Laboratory Report'), a copy of which has been given to the complainant, is the only report prepared by the GCL in relation to the eight exhibits as listed in that report ('the eight exhibits'). The Laboratory Report contains the results of examination of the eight exhibits and is not merely a list. It is standard procedure to prepare one report and, in this case, only one report was prepared on those eight exhibits. The WA Police did not request that individual reports be made in relation to each exhibit.

- The eight exhibits were received by the GCL in 1986-1987, just prior to the introduction of electronic recordkeeping of forensic case files and data. Any instrument data created prior to this date was printed on thermal paper which is of poor quality for retention. Instrument data is the data collected from the tests or analysis conducted on the relevant sample or exhibit. In accordance with the GCL's quality retention systems, those data sheets were only retained for three years and then were destroyed, due to their volume. Therefore the agency no longer holds instrument data in relation to any of the eight exhibits.

- At the relevant time in 1986-1987, the instrument data would have been filed with the Laboratory Report. The agency's FOI Co-ordinator has checked the relevant files which contained the Laboratory Report and no instrument data were on those files. Even if they had been retained, it would be difficult to match the instrument data with the relevant exhibit as the instrument data sheets would not have been labelled with the corresponding exhibit and everything would have been filed together in one file. Now instrument data are retained electronically and are filed individually according to the relevant exhibit.

- At the relevant time, staff of the GCL made handwritten notes on cases, in 'laboratory notebooks'. Each laboratory notebook was given a number and labelled with the relevant year and assigned to a particular staff member, to retain notes in relation to any matters which that staff member was dealing with at the time. Accordingly, a laboratory notebook could contain notes relating to a number of different, unrelated cases (i.e. requests for analysis of samples/exhibits received by the agency). In order to locate relevant case notes made in a laboratory notebook relating to a particular exhibit in this matter, it is necessary to identify the staff member who dealt with the relevant case and then inspect each of that person's laboratory notebooks for the relevant time period. In this matter, a staff member was identified as having dealt with the case concerning the eight exhibits and accordingly, all of his laboratory notebooks still retained by the agency for the relevant period were inspected. However, a number of his laboratory notebooks were not located. The agency advised that this is not an isolated case, as there are several other staff members' notebooks that have not been located.

- In relation to 'lost' laboratory notebooks, the agency advised that it moved from East Perth to Bentley in 2009. Prior to that move, all agency officers were asked to deposit any laboratory notebooks not in use, in the central records area of the agency. An audit of outstanding laboratory notebooks not deposited in the central records area of the agency was conducted in late June 2010, at which time all officers were asked to advise which laboratory notebooks were still held by them and their current location. The agency has placed a list on the FOI file of the location of missing notebooks relevant to the Physical Evidence area ('the PE area'). The PE area provides forensic chemistry services to police investigators concerned with the detection, identification and evaluation of items of evidence associated with crime scenes.

- The staff member who dealt with the case concerning the eight exhibits moved to another area of the agency in 2005 and maintains he left all his laboratory notebooks in the cupboard under the work bench in his previous office in October 2007. Despite the office in the old building in East Perth being checked and all staff being questioned from the PE area as to whether they recalled seeing laboratory notebooks in that building, the agency has not been able to locate the missing laboratory notebooks. Notwithstanding, the agency advises that all of the relevant laboratory notebooks that are still held by the agency were inspected and no case notes within the scope of this matter were found.

- The agency advises that the archivist from the Department of Mines and Petroleum ('the Department') was also requested to search his holdings, since at the time the eight exhibits were received by the GCL – and until 1992 – it was a division of the Department. The Department was unable to locate any forensic laboratory notebooks in its records storage area.

- During the course of the external review, a sample register, which logs incoming samples received by the agency ('the Register'), was re-examined by the agency and an extract from the Register, relevant to the access application, was identified together with three additional documents.

- Corresponding files noted in the Register against the eight exhibits were also checked by the agency, as well as adjacent files and no further documents were located other than those already identified.

24. The agency has advised me in relation to each of the complainant's specific requests outlined in points A-C of his 8 March Letter. With regard to A, the agency advised that it dealt with the eight exhibits and that a copy of the Laboratory Report for Exhibits 1-8 was given to the complainant. The agency advised that it did not deal with Exhibits 9 and 10 because those items were not sent to the agency for testing.

25. With regard to B, the agency advised as follows:

    a. *Forensic biology case summary document:* The agency does not prepare biology reports.
    b. *Incoming exhibits log:* Two extracts of the Register were given to the complainant.
    c. *Evidence Access and Movement:* The agency has no records relating to this item.
    d. *Case diary:* The laboratory notebooks were checked for relevant matter falling within the scope of the access application. During searches conducted during the course of this external review, one page from a laboratory notebook was located and provided to my office.
    e. *Communication log:* The agency has no records relating to this item.
    f. *Copies of emails from forensic biology staff:* The agency did not have an email system in 1986-1987 and did not have a computer network until 1988. Any communications in any format relating to the relevant exhibits would have been filed in the case files of Exhibits 1-8, which have already been provided to the complainant. The agency also advises that it has no biology staff.
    g. *GeneScan results:* The agency does not carry out this work.

26. The agency clarified that its forensic reports pertain to chemical analysis and not biological work. The agency advised that biological testing is carried out by PathWest. Consequently, neither the agency nor the GCL has ever employed biology staff and therefore neither has prepared biology reports.

27. Similarly, in relation to C, the agency advised it does not prepare biology reports and therefore has only provided the Laboratory Report on the eight exhibits.

Are there reasonable grounds to believe that the requested documents exist or should exist?

28. I have considered all of the information before me, including the information on the agency's FOI file; the agency's notices of decision; the documents that the agency previously released to the complainant; and the information that the agency and the complainant provided to my office. I have also considered the searches and inquiries the agency has conducted to date.

29. On receipt of the complaint, it appeared on its face that it was reasonable to expect that additional documents of the type requested would exist and would be held by the agency because the requested documents pertain to certain exhibits which were dealt with by the agency and it was reasonable to expect that working notes on those exhibits would exist. However, in light of the inquiries made by my office, I am satisfied that there is no evidence that any further documents exist within the agency other than the four documents that were identified in the course of my dealing with this matter.

30. I accept the agency's submission in paragraph 21 above, that it was only required to deal with points 2, 3 and 4 of the complainant's access application

dated 27 January 2010, as it is not the agency's function to assess prints or fingerprints or conduct biological testing.

31. In relation to the complainant's request for "*A. Full copies of the laboratory working notes on all the below exhibits...*" referred to at paragraph 24 above, I accept that the agency prepared only the Laboratory Report and that it created no individual reports in relation to each of the eight exhibits. I am satisfied that the agency did not receive Exhibits 9 and 10 for testing and therefore does not hold any relevant documents on those items.

32. Although the complainant submits that he has more material on the reports for the exhibits than were given to him by the agency, there is nothing before me to establish that any additional reports on the exhibits exist or should exist, and are, or should be held by, the agency. The complainant has provided me with a number of documents, one of which consists of a biological report in relation to a number of exhibits. However, that report was prepared by another agency and, in my view, is not a document that should be held by the agency.

33. In relation to *"B. All item examination notes on each of the above listed ten (10) exhibits..."*, referred to at paragraph 25, it appears that the only items relevant to the agency were the *"Incoming exhibits log"*, which the agency considered to be its Register and of which relevant extracts were given to the complainant; the *"Case diary"*, which the agency equated to the laboratory notebooks; and the instrument data with respect to the eight exhibits. It is my understanding that GCL was only required to retain instrument data for three years from its creation (in accordance with its document-retention system in 1986-1987) and, therefore, that data no longer exists. Further, I am satisfied with the inquiries made by the agency with respect to the laboratory notebooks, as outlined above. I note that s.26 of the FOI Act does not require agencies to take all steps to locate documents but rather all 'reasonable' steps: see *Re Boland and the City of Melville* [1996] WAICmr 53 at [27]. In my view, the agency has taken all reasonable steps to locate these documents.

34. With respect to "*C. All forensic biology full reports and short reports issued on the above ten (10) exhibits*", I am satisfied with the agency's explanation as outlined in paragraphs 26-27 of this decision that it does not hold any documents relevant to this request.

35. On the information before me, and in light of the agency's further searches now conducted, I do not consider that there are reasonable grounds to believe that additional documents within the scope of the application are or should be held by the agency. I am satisfied that, in the circumstances of this matter, the agency has taken all reasonable steps to locate the requested documents and that further documents either cannot be found or do not exist. Accordingly, I find that the agency's decision to refuse access to the requested documents under s.26 of the FOI Act is justified.

THE ADDITIONAL DOCUMENTS

36. The four additional documents located by the agency, referred to at paragraph 9, are described as follows:

    Document 1 is an extract from the Register, which records exhibits received by the agency on 7 March 1986.

    Document 2 is a case report dated 7 March 1986 prepared by the agency in relation to the exhibits in Document 1.

    Document 3 is a request for analysis dated 30 January 1986 in relation to the exhibits in Document 1.

    Document 4 is an extract of handwritten notes from a laboratory notebook made in relation to the exhibits in Document 1.

THE EXEMPTION – CLAUSE 3 – PERSONAL INFORMATION

37. The agency claims that Documents 1-4 contain personal information about people other than the complainant, which is exempt under clause 3(1) of Schedule 1 to the FOI Act. 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."*

38. 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."*

39. The definition of 'personal information' in the Glossary 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, on its face, exempt information under clause 3(1).

40. 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 a recognition by Parliament that State and local government agencies collect and hold sensitive and private information about individuals, which should not ordinarily be 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 complainant's submissions

41. In his letter to my office seeking external review, the complainant submitted that he wished to prove his innocence and "[t]*here may be crucial facts within those documents."* In response to my preliminary view letter of 25 July 2011, the complainant's lawyer made further submissions (including repeating submissions made in relation to another complaint before me). I have set out, in brief, the submissions relevant to this matter:

    (a) The documents sought contain information about the complainant which is a factor in favour of disclosure.

    (b) The requested documents will, in the complainant's view, provide supporting evidence to substantiate his wrongful conviction and innocence of the charge of wilful murder and appear 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. The complainant seeks to set aside his conviction based on information that may be contained in the documents sought in this matter.

    (c) *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".*

(d) 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

42. Having examined Documents 1-4, I am satisfied that they contain 'personal information', as defined in the FOI Act, about a number of individuals because it is information or opinion that identifies those individuals. In particular, I note that the personal information in Documents 1-4 relates largely to one private individual, not being the complainant. In my view, Documents 1-4 are *prima facie* exempt under clause 3(1) of Schedule 1 to the FOI Act.

43. The exemption in clause 3(1) is, however, subject to a number of limits which are set out in clauses 3(2)-3(6). 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) – personal information about the applicant

44. 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].

45. Having examined Documents 1-4, I note that Document 1 does not reveal any information about the complainant. Documents 2-4 contain a small amount of personal information about the complainant that is inextricably interwoven with personal information about other individuals. Accordingly, 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 the complainant's personal information without also disclosing personal information about the other individuals and, consequently, the limit on exemption in clause 3(2) does not apply to that matter.

Clauses 3(3) – prescribed details

46. Some of the individuals identified in the additional documents are officers or former officers of agencies. Clause 3(3) provides that information is not exempt merely because its disclosure would reveal 'prescribed details' in relation to

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 their functions or duties as officers.

47. The FOI Act makes a distinction between private personal information – such as a person's home address or health details – and information that relates solely to the person's performance of functions or duties for an agency, such as his or her name and job title.

48. Clause 3(3) does not apply to Document 1 because it relates to a private individual and contains no prescribed details about officers of agencies. Documents 2, 3 and 4 contain a small amount of prescribed details 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 not exempt under clause 3(1) by reason of the operation of clause 3(3). However, for the reasons set out in paragraphs 70-72, 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) – the public interest

49. Clause 3(6) provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. 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: see section 102(3) of the FOI Act.

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

51. In my view, 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. Although the complainant has a personal interest in the disclosure of Documents 1-4 to him, I also recognise certain public interests that favour disclosure.

52. 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 their 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".*

53. Accordingly, since Documents 2-4 contain a small amount of personal information about the complainant, as submitted at (a), I have considered that as a factor in favour of disclosure. However, that consideration carries less weight because those documents also contain a large amount of personal information about third parties that is inextricably interwoven with the information about the complainant.

54. The complainant submits at (b) that he needs Documents 1-4 to prove his innocence and, thus, assist in setting aside his conviction. I accept that where there is evidence that the disclosure of documents at issue might assist in proving that individual's innocence, the public interest in disclosure would be a strong one. I also recognise a public interest in prisoners who believe they have identified new material relevant to their convictions being given reasonable assistance to prove their innocence and to pursue legal avenues to regain their freedom.

55. In assessing the weight to be accorded to the public interest in assisting prisoners to prove their innocence, the Qld Commissioner in *Fox and Queensland Police Service* (2001) 6 QAR 1 considered it appropriate to take into account the strength of the Crown case against the applicant in that case and the likelihood that disclosure of the matter in issue would assist the applicant to mount a persuasive case in support of the remedy he proposed to seek. However, in the present case, the complainant has not identified the kind of information that might assist in proving his innocence; or explained how that particular information would provide a reasonable basis for supporting the setting aside of his conviction.

56. On the information before me, it is not evident how Documents 1-4 would assist the complainant to establish that he did not commit the murder for which he was convicted. I consider that the public interest in affording assistance to prisoners to prove their innocence is substantially satisfied by the complainant's previous exercise of judicial appeal mechanisms and the complainant's exercise of his right to apply for documents under the FOI Act and partake in the relevant review processes.

57. 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 question of whether the conviction involved, or had brought about, a miscarriage of justice was an issue considered by Wheeler J in Mackenzie 2004. An application for special leave to appeal was also dismissed by the High Court in Mackenzie 2005.

58. I note that in *Sanderson and Department of Justice and Attorney General* [2009] QICmr 5, the Qld Commissioner said at [66]:

> "*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 and consider that it has a direct application to the present case.

59. I have considered the complainant's submission at (c) that where a person's liberty is at stake there is a strong public interest in disclosure. The decision in *Kirby* 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. In that case, 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*."

60. In my opinion, that case is distinguishable on its facts, although I accept that clause 3(6) of Schedule 1 to the FOI Act involves balancing competing public interests.

61. I also recognise a public interest in the accountability of the Government, its agencies and officers for the performance of their functions relating to forensic services undertaken to assist police investigations and potentially, the courts. However, 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.

62. Moreover, in respect of the complainant's submission at (d), there is no information before me to establish, as the complainant suggests, that the agency is withholding important relevant information in this case similar to the situation in *Mallard v The Queen* (2005) 224 CLR 125. On the information before me, I am not satisfied that the disclosure of Documents 1-4 would assist in making the Government, its agencies and officers more accountable.

63. Weighing against disclosure in the present case is the strong public interest recognised by the FOI Act in maintaining personal privacy. The former Information Commissioner in *Re Edwards and Ministry of Justice* [1994] WAICmr 24 at [15] considered that *"...this exemption is designed to protect the privacy of individuals. The protection of personal privacy is an important feature of the legislation in Western Australia and I consider there to be a strong public interest in maintaining that privacy, subject only to some clearly demonstrated countervailing public interest that requires the disclosure of such information."* I agree with that view.

64. Further, in *Re West Australian Newspapers Limited and Department of the Premier and Cabinet* [2006] WAICmr 23 at [52]-[53], the former A/Information Commissioner said:

> *"The stated objects of the FOI Act are to enable the public to participate more effectively in governing the State and to make the persons and bodies that are responsible for State and local government more accountable to the public (s.3). The purpose of the Act is not to call to account private individuals or to open their private affairs to public scrutiny other than in circumstances where much stronger public interests than the public interest in the protection of personal privacy may require that to occur. The FOI Act, therefore, contains the clause 3 exemption to ensure that the personal privacy of private individuals about whom personal information is contained in government-held documents is not unduly intruded upon.*
>
> *It is in that context that the definition of "personal information" must be construed. As the purpose of the clause 3 exemption is to protect the personal privacy of individuals about whom government-held documents contain personal information, in my view the definition of "personal information" should be construed in a way that achieves that purpose and accords with the objects of the FOI Act..."*

65. I also agree with that view. The public interest in protecting a person's privacy, including the privacy of deceased persons, is acknowledged by the inclusion in the FOI Act of the exemption in clause 3(1). In my view, that public interest carries considerable weight in the application of the public interest test in clause 3(6) and may only be displaced by some other, considerably stronger, public interest that requires the disclosure of private information about another person.

66. In this case, none of the third parties referred to in Documents 1-4 has consented to the disclosure of their personal information and I would describe some of the information contained in Documents 1-4 as graphic and confronting. In my view, this strengthens the case for maintaining the privacy of the third parties concerned.

67. Further, there is nothing before me to show that Documents 1-4 were ever made public or, if they were, to what degree. 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].

68. In view of that, I do not consider that it is in the public interest for sensitive and private information to be placed in the public domain by way of the FOI process in this case, particularly where there is no demonstrable benefit to the public in doing so.

69. 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 of personal information about third parties to him or that the public interest factors in favour of disclosure are sufficient to outweigh the public interest in the protection of personal privacy. Based on the material before me, I consider that the public interests in non-disclosure outweigh those favouring disclosure in this case. I therefore find that Documents 1-4 are exempt under clause 3(1) of Schedule 1 to the FOI Act.

Editing

70. I have considered whether it would be practicable for the agency to edit Documents 1-4 in order to give the complainant access to the prescribed details that, in my preliminary view, are not exempt. 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."*

71. 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."*

72. In my opinion, it is not practicable to give the complainant access to edited copies of Documents 1-4 disclosing only the prescribed details of officers of

agencies because the extent of the editing required would, in my view, render those documents unintelligible.

CONCLUSION

73. I find that:

- The agency's decision to refuse access to the requested documents under s.26 of the FOI Act is justified.

- Documents 1-4 are exempt under clause 3(1) of Schedule 1 to the FOI Act and it is not practicable to edit those documents.

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