

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

**File Ref: F2008293
Decision Ref: D0472008**

Participants:

Stanley Anthony John Alvisse
Complainant

- and -

**Insurance Commission of Western
Australia**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – Coroner’s Court document – whether disputed document accessible under FOI Act – whether disputed document a document of a court – whether disputed document a document of the agency – clause 3(1) – personal information – clause 3(6) – public interest – whether practicable to edit.

Freedom of Information Act 1992 (WA): sections 10(1), 24 and 102(3); Schedule 1, clauses 3(1), 3(3), and 3(6); Schedule 2, Glossary, clauses 4 and 5.

Re Rakich and Guardianship and Administration Board [2000] WAICmr 3

Information Commissioner for Western Australia v Ministry of Justice [2001] WASC 3

DPP v Smith [1991] 1 VR 63

Police Force of Western Australia v Winterton (Supreme Court of Western Australia, 27 November 1997, unreported, Library No. 970646)

Re A and City of Albany and Anor [2008] WAICmr 10.

DECISION

The decision of the agency to refuse access to the disputed document is varied.

I find that the disputed document is exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*.

JOHN LIGHTOWLERS
A/INFORMATION COMMISSIONER

30 October 2008

REASONS FOR DECISION

1. This complaint arises from a decision made by the Insurance Commission of Western Australia ('the agency') to refuse Mr Stanley Alvisse ('the complainant'), access to a document under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. I understand that the complainant sustained injuries in a motor vehicle accident on 23 February 2005. One of the other passengers in the vehicle in which the complainant was travelling died in that accident and a coronial inquiry was held.
3. On 15 July 2008, the complainant applied to the agency under the FOI Act for access to "*all documents (including photographs, plans, diagrams and video evidence) held by the Insurance Commission of Western Australia which are relevant to the issue of liability*" in relation to a claim by him for personal injury.
4. The agency identified 24 documents as coming within the scope of the complainant's application and consulted with a number of third parties. On 13 August 2008, the agency decided to give the complainant access in full to nine documents; access in edited form to 14 documents; and to refuse access to one document on the basis that it was a document relating to a court which was not accessible under the FOI Act.
5. The complainant sought internal review of that decision in respect of the one document to which the agency had denied access. On 12 September 2008, the agency confirmed its original decision in relation to that document and, on 16 September 2008, the complainant applied to me for external review of that decision.

REVIEW BY A/INFORMATION COMMISSIONER

6. Following the receipt of this complaint, I required the agency to produce to me the document in dispute in this matter and the agency's FOI file maintained in respect of the complainant's application. Having examined the material provided to me, my Legal Officer advised both the agency and the complainant that, in her view, the disputed document was exempt under clause 3(1) of Schedule 1 to the FOI Act because it contained personal information about third parties. My Legal Officer also advised that, in her opinion, the agency's claim - that the disputed document is a document relating to a court but is not a "document of" that court and, thus, is not accessible under the FOI Act - was not sustainable.
7. In response to that advice, the agency claimed, in the alternative, that the disputed document is exempt under clause 3(1) but also maintained its original claim. The complainant declined to withdraw his complaint and, on 9 October 2008, provided me with written submissions in support of his claim that the agency should give him access to the disputed document.
8. On 15 October 2008, having considered all of the information then before me, I provided the parties with a letter setting out my preliminary view of the matter and invited both parties to make further submissions to me in support of their respective

positions. My preliminary view was that the document was accessible under the FOI Act but was exempt under clause 3(1). Neither party provided me with further submissions but the complainant advised me that he wished to proceed to a decision.

THE DISPUTED DOCUMENT

9. The document in dispute in this matter is described on the agency's schedule of documents – a copy of which was given to the complainant – as:

“8a – 1 page 30/03/2006 Coroner's Court Record of Investigation of Death”.

10. In the course of its dealing with the complainant's access application, the agency consulted the Coroner's Court of Western Australia which advised, as follows:

“Documents gathered for the purpose of a coronial inquiry are not able to be released to any person or party and as they are Court documents they are exempt from Freedom of Information applications.”

11. I understand from my inquiries with the Coroner's Court that it is the Coroner's practice to give access to documents relating to a coronial inquiry to interested parties only - with the written approval of a deceased person's senior next of kin - and that only documents relating to a coronial inquest, as opposed to an inquiry, are public documents.

IS THERE A RIGHT OF ACCESS TO THE DISPUTED DOCUMENT?

12. In its notice of decision dated 12 September 2008, the agency advised the complainant, as follows:

“Document 8a is a finding of the State Coroner and is not a ‘document of a court’ as defined for the purposes of the Freedom of Information Act (FOI Act) in clause 5 of the Glossary, because it does not relate to matters of an administrative nature concerning the agency.

There is no right of access to this document under the FOI Act, however the Coroner's Court of WA has advised that they [sic] may grant access to some information if you were to seek permission from the ‘Senior Next of Kin’”.

13. Section 10(1) of the FOI Act gives individuals a general right of access to the documents of an agency, other than an exempt agency. Clause 3 of the Glossary in Schedule 2 of the FOI Act provides, among other things, that a court is an agency for the purposes of the FOI Act. Since a court is an ‘agency’, applicants can apply to a court - which is defined in the Glossary to include a ‘tribunal’ - for access to documents held by courts.

14. Clause 5 of the Glossary provides:

“A document relating to a court is not to be regarded as a document of the court unless it relates to matters of an administrative nature.”

15. Previous decisions of the Information Commissioner have held that the effect of clause 5 of the Glossary is to prevent the FOI Act from applying to documents concerning the judicial or quasi-judicial functions of State courts and tribunals, although not to documents concerning the administrative functions of such courts: see, for example, *Re Rakich and Guardianship and Administration Board* [2000] WAICmr 3.
16. I understand the agency to claim that where - as here - an agency which is not a court or a tribunal has possession of a document which originated from a court or tribunal, that document remains a 'document of the court' if it relates to matters of an administrative nature. Alternatively, if that document does not relate to matters of that kind, it is not accessible under the FOI Act.
17. In brief, the agency claims that there is no access under the FOI Act to the disputed document because the right of access to documents of a court is limited to documents relating to matters of an administrative nature and the disputed document does not fall into that category of document.

Documents of an agency

18. In this case, the disputed document is held by the agency. Clause 4 of the Glossary, which is headed "Documents of an agency", relevantly provides:

"Subject to subclause (2), [which is irrelevant for present purposes] a reference to a document of an agency is a reference to a document in the possession or under the control of the agency including a document to which the agency is entitled to access and a document that is in the possession or under the control of an officer of the agency in his or her capacity as such an officer."

19. In *Information Commissioner for Western Australia v Ministry of Justice* [2001] WASC 3, the Supreme Court of Western Australia considered the question of whether documents originating from an exempt agency – in that case, the Parole Board – but held by a non-exempt agency, were accessible under the FOI Act. As previously noted, section 10(1) of the FOI Act states that a person has a right "*to be given access to the documents of an agency (other than an exempt agency) ...*".
20. In my view, that case is a useful guide to the present in which the agency claims that there is no right of access to the disputed document. In *Information Commissioner for Western Australia*, Wheeler J said, at [13]-[20]:

"Some light, I think, is shed on the relevance of an element of control to the understanding of possession by other provisions of the Act. Section 3 sets out the objects of the Act, and subsection (2) of that section sets out how the objects are to be achieved. It provides that the objects are to be achieved, inter alia, "(b) providing means to ensure that personal information held by State and Local Governments is accurate ..." (emphasis supplied). The understanding which appears to inform that subsection is that access will be available, under the provisions of the Act, to personal information "held" by State and Local authorities; the inference is that that expression is

synonymous with the documents being “documents of” State agencies or Local Government authorities.

In similar vein, s 15 relevantly provides:

- “(1) If the agency does not hold the requested documents but knows ... that the documents are held by another agency (other than an exempt agency), the agency has to transfer the access application to the other agency.
- (2) If the agency holds the requested documents but the documents originated with or were received from another agency (other than an exempt agency) and more closely relate to the functions of that other agency, the agency may transfer the access application to that other agency together with copies of the documents.
- ...
- (8) If the agency holds the requested documents but the documents originated with or were received from an exempt agency, the agency has to notify the exempt agency that the access application has been made.

Although other interpretations may be open, it appears to me that the drafter of this provision assumed that for an agency to “hold” documents may be sufficient for the documents to be documents of that agency. It appears to me that s 15 assumes that the documents with which it deals are documents to which the agency holding those documents would otherwise have to give access, were it not for the provisions of s 15.

...

It is important to note that the structure of the Act is that, as Hasluck J noted in **Minister for Transport v Edwards** [2000] WASCA 349 at [53], the Act is not concerned with ownership or authorship of a document, nor with the entitlement to exclusive possession. So, although agencies may be exempt, documents do not remain forever exempt on the basis of their agency of origin or the agency with which they have the closest connection; once they leave an exempt agency, they fall to be dealt with under Schedule 1 of the Act which defines what constitutes “exempt matter” and if they do not fall within that definition then they are no longer protected.

...

It is my view that the various statutory provisions to which I have referred indicate that the better view is that an agency is in possession of documents, so as to make them documents of the agency, when the agency actually physically holds those documents.”

21. In my view, the fact that the disputed documents in the *Information Commissioner’s* case related to an exempt agency rather than – as here – to a court does not detract from the reasoning of Wheeler J in that case. In my opinion, the fact that the agency holds the disputed document means that it is a document of that agency and, consequently, there is a right of access to it under the FOI Act subject to, and in accordance with, the provisions of that Act.

CLAUSE 3 – PERSONAL INFORMATION

22. The agency claims, in the alternative, that the disputed document is exempt under clause 3(1) of Schedule 1 to the FOI Act. Clause 3 provides, insofar as it is relevant:

“3. *Personal information*

Exemption

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

Limits on exemption

- (2) *Matter is not exempt matter under 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) *Matter is not exempt matter under subclause (1) if the applicant provides evidence establishing that the individual concerned consents to the disclosure of the matter to the applicant.*
- (6) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.”*

23. The purpose of the exemption in clause 3(1) is to protect the privacy of individuals about whom information may be contained in documents held by State or local government agencies.

Definition of “personal information”

24. The term “*personal information*” is defined in the Glossary to the FOI Act to mean:

“...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.”*

That definition makes it clear that the exemption in clause 3(1) applies to any information or opinion about a person other than the applicant (who, in this case, is the complainant) from which the identity of that person is either apparent or can reasonably be ascertained.

Consideration

- 25. I have examined the disputed document and carefully considered the complainant’s submissions. In my opinion, the disputed document contains no personal information about the complainant but contains personal information about a number of third parties, because it contains information from which certain third parties’ identities are apparent or could reasonably be ascertained. I consider that all of that information is ‘personal information’, as defined in the FOI Act, which is *prima facie* exempt.
- 26. The exemption in clause 3(1) is subject to the limits on the exemption set out in clauses 3(2)-3(6). In my view, clauses 3(2), 3(4) and 3(5) have no application to this matter.
- 27. The disputed document contains a small amount of information which identifies an officer of an agency. In my view, that information is ‘prescribed details’ as set out in regulation 9(1) of the *Freedom of Information Regulations 1993* with the result that that particular information is not exempt, pursuant to clause 3(3).

Clause 3(6)

- 28. 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 term ‘public interest’ is not defined in the FOI Act but I consider that it has the meaning ascribed by the Supreme Court of Victoria in *DPP v Smith* [1991] 1 VR 63 at page 75, where the Court said:

“The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals ...”

- 29. Determining whether or not disclosure would, on balance, be in the public interest involves identifying the relevant competing public interests - those favouring disclosure and those favouring non-disclosure - weighing them against each other and making a judgment as to where the balance lies in the circumstances of the particular case.

30. Pursuant to section 102(3) of the FOI Act, the complainant bears the onus of persuading me that the limit in clause 3(6) applies to the information about the third parties (other than officers of agencies) in the disputed documents and that the disclosure of the personal information about those persons, without their consent - or, if a third party is dead, the consent of that person's closest relative - would, on balance, be in the public interest.
31. In this case, the complainant has provided me with submissions as to why the disclosure of the disputed document to him would, on balance, be in the public interest.

The complainant's submissions

32. On 2 October 2008, in response to my Legal Officer's letter, the complainant made the following submissions, which I set out, in brief, below:
 - (1) There is a public interest in persons injured in motor vehicle accidents having the same access to information as is permitted to the agency. Relevantly, in this case, the agency has been given access to a copy of the record of investigation into the death of an individual who died in a motor vehicle accident, yet a passenger in the same vehicle has been denied access.
 - (2) The disputed document would be discoverable in any legal proceedings brought by the complainant against the driver of the vehicle or could be produced by means of a subpoena served on the agency in any such proceedings. In light of that, where possible, it is in the public interest to reduce the need for litigation, in circumstances like the present where the disputed document is relevant to the complainant's decision as to whether he will pursue legal proceedings.
 - (3) It would be practicable to edit the disputed document. In *Police Force of Western Australia v Winterton* (Supreme Court of Western Australia, 27 November 1997, unreported, Library No. 970646) the critical document was a document for which legal professional privilege was claimed so that the court's conclusion that the requested documents could not be appropriately edited was based on the fact that the balance of the documents, after editing, would make little or no sense in the absence of the privileged document.
 - (4) In this case the disputed document is a 'stand alone' document which could reasonably be expected to be understood after the deletion of any exempt matter.
33. Favouring non-disclosure of the disputed document, I have consistently taken the view that there is a strong public interest in maintaining personal privacy. That public interest is recognised by the inclusion of the exemption in clause 3(1) and, in my view, may only be displaced by some other, considerably stronger public interest that requires the disclosure of private information about another person: see, for example, *Re A and City of Albany and Anor* [2008] WAICmr 10.
34. Favouring disclosure of the disputed document, I recognise that there is a public interest in persons being able to exercise their rights of access under the FOI Act. That right is subject to the exemption provisions contained in the FOI Act.

35. With regard to the complainant's submission in (1), I understand that it is currently the practice of the Coroner's Court to give a copy of its Record of Investigation of Death only to interested parties or to persons who have obtained the consent of the deceased person's next of kin. Further to my inquiries, I understand that, at the time the disputed document was provided to the agency, that consent was not required. However, I do not accept the complainant's submission that the public interest requires parity of disclosure in this case. I consider that there is a public interest in the State Government's sole Compulsory Third Party insurer in Western Australia for motor vehicle personal injuries having a copy of the disputed document. In my view, the complainant's submission refers to a private, rather than any demonstrable public, interest.
36. In relation to the complainant's submission in (2), I accept that the disputed document is likely to be discoverable in any legal proceedings brought by the complainant against the driver of the vehicle or obtainable by way of a subpoena served on the agency in such proceedings. I also accept that it is in the public interest, where possible, to reduce the need for litigation, although there is nothing before me to establish that the disclosure of the disputed document will achieve that outcome.
37. In balancing the competing interests on the basis of the material before me, I have given more weight to the public interest in protecting the personal privacy of third parties. As I have said, protecting personal privacy is a strong public interest. In this case I am not persuaded that the public interests favouring disclosure counterbalance that strong public interest. Accordingly, I consider that the limit on the exemption in clause 3(6) does not apply in this case.

EDITING

38. Finally, I have considered the complainant's submissions in (3) and (4) in relation to the question of whether it would be practicable to edit the disputed document, pursuant to s.24 of the FOI Act.
39. Having had the advantage over the complainant of viewing that document, I am not persuaded that it would, in fact, be practicable to edit it, in line with the decision in *Winterton*. In that case, Scott J considered the meaning and interpretation of section 24 of the FOI Act and 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."*
40. Even taking into account the fact that the disputed document is a 'stand alone' document and that certain 'prescribed details' relating to an officer of agency are not exempt, I consider that editing to delete all of the information about third parties would result in the loss of both the meaning and the context of that document. In my view, a document which contains, effectively, only the prescribed details referred to would be a document that is unintelligible in context.

CONCLUSION

41. For the reasons stated above, I am not persuaded by the agency's claim that the disputed document is not accessible under the FOI Act because it is a court document that does not relate to matters of an administrative nature. I find that the disputed document is a document of the agency which is exempt under clause 3(1) of Schedule 1 to the FOI Act and I vary the agency's decision accordingly.
