Ayton and Police Force

OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	**File Ref: F0221999** **Decision Ref: D0081999**

Participants:

Leslie Donald Ayton
Complainant

- and -

Police Force of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – request for access to documents relating to a review of the investigative practices of the agency – clause 3(1) – personal information about third parties – whether document contains personal information – clause 6(1) – deliberative processes of agency – whether disclosure is contrary to the public interest – clause 8(2) – confidential communications – whether information is information of a confidential nature obtained in confidence – prejudice to future supply – whether disclosure is contrary to the public interest – clause 11(1)(c) and clause 11(1)(d) – whether disclosure could reasonably be expected to have a substantial adverse effect on the management of personnel or on the conduct of industrial relations – meaning of "substantial".

FREEDOM OF INFORMATION – document subject to prior decision of Information Commissioner – further access application for same document – whether Information Commissioner can make different decision on same document – public interest considerations when change in circumstances.

Freedom of Information Act 1992 (WA) s.102(3), Schedule 1; clauses 3(1), 3(6), 6(1), 8(2), 11(1)(c) and 11(1)(d).
Interpretation Act 1984 s.32(2).

Harris v Australian Broadcasting Corporation (1983) 78 FLR 236.
Re Healy and Australian National University (AAT, 23 May 1985, unreported).
Re James and Australian National University (1984) 2AAR 327.
Re Waterford and Department of the Treasury (No 2) (1984) 5 ALD 588.
Ministry for Planning v Collins (1996) 93 LGERA 69.
Re Ayton and Police Force of Western Australia [1998] WAICmr 15.

DECISION

The decision of the agency is set aside. In substitution it is decided that the disputed document is not exempt.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

5 May 1999

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Police Force of Western Australia ('the agency') to refuse Mr Ayton ('the complainant') access to a document requested by him under the *Freedom of Information Act 1992* ('the FOI Act').

2. By letter dated 12 November 1998, the complainant lodged an application with the agency seeking access under the FOI Act to a document entitled "*Investigative Practices Review, Interim Comments for the Information of Commissioner Falconer"*.

3. The agency refused the complainant access to the requested document on the ground that it is exempt under clauses 3(1), 6(1), 8(2), 11(1)(c) and 11(1)(d) of Schedule 1 to the FOI Act. The complainant sought internal review of the agency's decision and the internal reviewer confirmed the initial decision of the agency.

4. By letter dated 18 February 1999, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

5. The document requested by the complainant was the subject of a previous access application lodged by him with the agency in November 1997, and a subsequent complaint to me. The complainant's first complaint was decided by formal decision, *Re Ayton and Police Force of Western Australia* [1998] WAICmr 15, in which I found the document exempt under clause 8(2) of Schedule 1 to the FOI Act. The complainant applied again for access to the document on the basis that the circumstances that led me to find it exempt on that earlier occasion have now changed such that the document is no longer exempt.

6. The circumstances leading to the creation of the requested document are described in paragraphs 2-5 of my reasons for decision in *Re Ayton*. In so far as that background is relevant to an understanding of this complaint, it is incorporated by reference as part of the background to this decision.

REVIEW BY THE INFORMATION COMMISSIONER

7. I notified the agency that I had received this complaint and required the production to me of the disputed document. After considering the material before me, including the agency's reasons for its decision to refuse access, on 30 March 1999 I informed the parties in writing of my preliminary view of this complaint.

8. It was my view that circumstances had changed since my decision in *Re Ayton*, but the agency had not proffered any new reasons to establish that its decision to refuse access was justified. Accordingly, on the evidence before me it was my preliminary view that the document may not be exempt.

9. I received another submission from the agency containing further reasons to justify its decision to refuse access based on the exemptions in clauses 3(1), 6(1), 8(2), 11(1)(c) and (d). The complainant was given an edited copy of that submission. He responded to the agency's reasons with his own submission, and did not withdraw his complaint.

THE DISPUTED DOCUMENT

10. The disputed document, dated 11 November 1997, is entitled "*Investigative Practices Review, Interim Comments for the Information of Commissioner Falconer"*. The document bears the words "In Confidence". It is unsigned**.**

THE EXEMPTIONS

(a) Clause 3 – Personal information

11. Clause 3, so far as is relevant, provides:

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

12. In the Glossary in the FOI Act, "personal information" is defined 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".*

13. As it did on the earlier occasion, the agency claims that the disputed document is exempt because its disclosure would reveal personal information, namely, the views and opinions of each of the Strathclyde police officers (the authors of the disputed document) about certain matters. The agency claims that the fact that a person holds a particular viewpoint about a particular issue constitutes "personal information" about that person and that it is, therefore, *prima facie*, exempt under clause 3(1) of Schedule 1 to the FOI Act. In this instance, the agency submits that the balance of the public interest lies in the protection of the privacy of the Strathclyde police officers.

14. Matter will only be exempt, in the first instance, under clause 3(1) if it disclosure would reveal "personal information" as that term is defined in the FOI Act. In my view, the definition makes it clear that information or opinion will only be protected from disclosure if it relates to an individual person (whether living or dead), and the identity of that person is either apparent or can reasonably be ascertained from the information or opinion. Therefore, when considering the agency's claim, I ask myself whether anyone reading the disputed document could reasonably ascertain the identity of the author from a reading of that document.

15. The disputed document is unsigned and it does not mention the authors by name or by other reference. In my view, a person reading that document would not know who wrote it and could not reasonably ascertain the identity of its author from anything contained in the disputed document. I am aware that the visit of the Strathclyde police officers to Western Australia received some media publicity and that the identities of the authors of the disputed document could, therefore, be ascertained from extrinsic materials. However, I do not consider that disclosure of the document itself would reveal that information.

16. In any event, even if it could be said that their identities could reasonably be ascertained from the information contained in the document, as I stated in *Re Ayton*, none of the opinions in the disputed document is about the Strathclyde police officers. The only information about them that might be revealed by the disclosure of the disputed document is that at the time of its creation they held the opinions expressed therein. In my view, that does not constitute personal information as defined in the FOI Act. However, even if I accept the view that an opinion is personal information about the person holding that opinion, which I do not, the exemption in clause 3(1) is subject to the limit on exemption in clause 3(6). For the reasons discussed in paragraphs 56-63 below, in the circumstances of this matter, I do not consider that the public interest in maintaining the privacy of the authors of the disputed document outweighs the public interest in its disclosure.

17. Having reviewed the agency's claims for exemption, both in respect of the first application and the second application, I have been unable to identify any new material of substance to justify the agency's refusal of access under clause 3(1). In fact, it appears that the agency has merely repeated its previous arguments, which I rejected in *Re Ayton*. Therefore, for similar reasons to those set out in paragraphs 17-22 of my decision in *Re Ayton*, I find that the disputed document is not exempt under clause 3(1) of Schedule 1 to the FOI Act.

(b) Clause 11 – Effective operation of agencies

18. The agency also claims exemption for the disputed document under clause 11(1)(c) and (d) of Schedule 1 to the FOI Act. Clause 11, so far as is relevant, provides:

> "***11. Effective operation of agencies***
>
> ***Exemptions***
>
> *(1) Matter is exempt matter if its disclosure could reasonably be expected to -*
>
> *(a)…*
> *(b)…*
>
> *(c) have a substantial adverse effect on an agency's management or assessment of its personnel; or*
>
> *(d) have a substantial adverse effect on an agency's conduct of industrial relations.*
>
> ***Limit on exemptions***
>
> *(2) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest."*

19. To justify its decision to refuse access to the disputed document based on clause 11(1)(c) or (d), the agency must show that disclosure could reasonably be expected to result in either a *"substantial adverse effect"* on the management or assessment of its personnel or on an agency's conduct of industrial relations. As I have stated before, the requirement that the adverse effect must be "substantial" is an indication of the degree of gravity that must exist before a *prima facie* claim for exemption is established: *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236. In the context of the exemption in clauses 11(1)(c) and (d), I accept that "substantial" is best understood as meaning "serious" or "significant": *Re Healy and Australian National University* (AAT, 23 May 1985 unreported); *Re James and Australian National University* (1984) 2 AAR 327 at 341.

Clause 11(1)(c)

20. The agency makes two points in relation to this exemption. Firstly, it submits that the phrase *"an agency's management…of its personnel*" encompasses more than administrative matters. According to the agency, it extends to operational activities as well. In support of that proposition the agency refers to the words of the heading to clause 11 – "*Effective operation of agencies"*.

21. Secondly, the agency submits that disclosure will result in a destabilising effect in the agency caused by disaffection between management and staff resulting from that disclosure. The agency claims that that effect will be both adverse and substantially adverse due to the loss of confidence in management by subordinates. The agency further submits that this will impact on the direction and control of subordinates during the on-going change process and that adverse effects on day to day operations are likely to be serious or significant in nature. In light of this, the agency submits that the disclosure of the disputed document (especially the frank comments made in it) could reasonably be expected to have a substantial adverse effect on the agency's management of its personnel. Finally, for the same reasons expressed in respect of its exemption claim under clause 8(2), dealt with below, the agency claims that disclosure of the disputed document would not be in the public interest.

22. I cannot agree with the agency's first proposition. The heading of clause 11 is not part of the written law (s.32(2) of the *Interpretation Act 1984*). The word "management" in the phrase is used as a noun and the ordinary meaning of the word is *"the process or an instance of managing or being managed; the professional administration of business concerns, public undertakings etc"* (Concise Oxford Dictionary, 8th Edition). In my view, the functions potentially protected by the exemption in clause 11(1)(c) are clearly administrative, as distinct from operational, in nature.

23. In my decision in *Re Ayton*, at paragraph 29, I accepted that disclosure of the disputed document might be expected to have an adverse effect on the agency's management of its personnel. I remain of that view. I consider that the disclosure of a document containing critical comments and observations about management issues in an agency could reasonably be expected to produce some adverse effect. Disclosure might, for example, give rise to some temporary personnel management issues, particularly if the comments were unduly critical or if disclosure might cause embarrassment to an agency or to the Government.

24. However, I do not consider that those expected consequences are likely to be of sufficient gravity to result in any substantial adverse effect on an agency's management of its personnel. Personnel issues between managers and subordinates can and do occasionally surface in any large organisation. They are simply administrative issues that managers must deal with as part of their working responsibilities, and may be viewed by contemporary managers as opportunities for change and improvement, rather than as organisational threats.

25. As I stated in *Re Ayton*, I consider that the particular difficulties described by the agency, however real they might be, could hardly be described as constituting a "substantial adverse effect" on the agency's management of its personnel. Further, in my opinion, the agency has not established that the disclosure of the disputed document could reasonably be expected to cause the adverse effects claimed. In any event, if disclosure were to result in the kind of internal problems suggested, then it seems to me that the agency has at its disposal a number of counter-measures, including more effective internal communications, rejection of the comments or contents of the document, or acceptance of the views with explanations.

26. The complainant disputes the agency's claim that service delivery is likely to be affected by loss of confidence by subordinates in the management of the agency. He cites a 1998 report on an ethical survey conducted by the agency in which it is reported that only 17.4% of members of the agency felt that management decisions were unbiased and only 13.9% felt the same way about members of the Executive Command in the agency. The complainant submits that, in spite of the low level of confidence in management as evidenced by the survey results, there is ample evidence that operational standards remain high.

27. There is some support for the complainant's view that there is no correlation between service delivery and disaffection between management and subordinates. The agency's Annual Report for 1998, at page 5, reports, among other things, an increased clearance rate of offences of 8%; improved clearance rate for assault offences of 87%; a 90% clearance rate for drug offences; and improved clearance rate for graffiti offences. In my view, it can hardly be said that those figures establish any connection between internal management issues in the agency, as evidenced by the reported survey results, and declining service delivery to the community.

28. For the reasons given, I am not satisfied that the adverse effects on the management of its personnel suggested by the agency are either significant or serious, even if they could be expected to follow from disclosure of the document. In *Re Ayton* I found that the document was not exempt under clause 11(1)(c). The agency has not put anything before me on this occasion which changes that view and I am not persuaded that I should now make a decision different to the decision I previously made in respect of the claim for exemption under clause 11(1)(c). In any event, the exemption in clause 11(1)(c) is subject to the limit on exemption in clause 11(2) and I have discussed the public interest in paragraphs 56-63 below. Accordingly, for similar reasons to those given in paragraphs 26-29 of my previous decision, I find that the disputed document is not exempt under clause 11(1)(c).

Clause 11(1)(d)

29. Clause 11(1)(d) is clearly directed at the conduct of industrial relations. The agency submits that disclosure of the disputed document will lead to the Western Australian Police Union of Workers ("the Union"), and its members, being concerned about the extent to which the Commissioner of Police agrees with or relies upon the views expressed in the disputed document. The agency further submits that the fact the Commissioner of Police has not released the document sooner, nor disclosed its contents, has the potential to engender distrust and suspicion in the Union and its members about the views of the Commissioner of Police on the comments expressed in the disputed document. It is claimed by the agency that such distrust and suspicion will aggravate the relationship between the Union (and its members) and the management of the agency, and potentially impede the successful implementation of any future changes designed to improve the agency's investigative practices and procedures.

30. The agency claims that the industrial relations sensitivity has not changed since my decision in *Re Ayton* and that the lack of media coverage of such issues is not an indicator of the current situation. I am informed that the Union continues to express dissatisfaction with outcomes and processes employed by the Commissioner of Police. As an example, the agency informed me that threatened industrial action occurred in the period following my decision in *Re Ayton* and that the threat continues in relation to the Union's opposition to one-man patrols. For those reasons, the agency submits that disclosure of the disputed document could reasonably be expected to have a substantial adverse effect on the agency's conduct of industrial relations, and that disclosure of the disputed document would be contrary to the public interest.

31. If disclosure of the disputed document would only have the effect of engendering distrust and suspicion between the Union and the agency, or of aggravating relations between those parties, then I am not persuaded that either or both of those effects could be considered substantial or adverse, and certainly not "substantially adverse" as required by the terms of the exemption. Industrial issues between the Union and the Commissioner of Police are part of organisational life, and there will naturally be a certain degree of tension between management and the body representing the rank and file membership in respect of industrial issues. It seems to me that the agency's insistence on maintaining the secrecy of the document and the Commissioner's views in respect of its contents is more likely to engender suspicion, particularly given that its existence and the general nature of its contents have been publicly known for some time.

32. The particular industrial issue cited by the agency of one-man patrols is a single issue of dispute between the Union and the agency. It does not indicate to me any serious difficulty in the present conduct of the agency's industrial relations. If industrial action has been threatened in respect of it, then that relates to that issue and not to the document here under consideration. Any industrial action in respect of the issue of one-man patrols will be caused by disagreement over that issue, not by disclosure of the disputed document.

33. There is nothing before me from the agency that persuades me of any reasonably likely causative connection between disclosure of the disputed document and the likelihood of impediments to the implementation of future changes in the agency, if indeed there could be any. To my knowledge, the Delta reform process in the agency has been ongoing for the last 5 years. During that time, there have been a number of significant and controversial changes in the agency, including the changes already underway as recommended in the Investigative Practices Review report. Whilst there may have been some questioning by some individuals of those changes, nothing has been brought to my attention which indicates any significant industrial relations impediment to those changes.

34. There is nothing in the agency's submission that could lead me to the conclusion that disclosure of the disputed document could have serious or significant industrial relations implications for the agency. However, as I have stated previously, the exemption in clause 11(1)(d) is subject to the limit on

exemption in clause 11(2) and I have discussed the public interest in paragraphs 56-63 below. Accordingly, for similar reasons to those given in paragraphs 31-33 of my decision in *Re Ayton*, I find that the disputed document is not exempt under clause 11(1)(d).

(c) Clause 6 – Deliberative processes

35. Clause 6 provides:

> ***"6. Deliberative processes***
>
> ***Exemptions***
>
> *(1) Matter is exempt matter if its disclosure -*
>
> *(a) would reveal -*
>
> *(i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or*
>
> *(ii) any consultation or deliberation that has taken place,*
>
> *in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency;*
>
> *and*
>
> *(b) would, on balance, be contrary to the public interest."*

36. As I stated in *Re Ayton*, the requirements of both paragraphs (a) and (b) must be satisfied in order to establish a valid claim for exemption under clause 6(1). I agree with the view of the Commonwealth Administrative Appeals Tribunal ('the Tribunal') in *Re Waterford and Department of the Treasury (No 2)* (1984) 5 ALD 588 that the deliberative processes of an agency are its "thinking processes", the process of reflection, for example, on the wisdom and expediency of a proposal, a particular decision or course of action: see also the comments of Templeman J in *Ministry for Planning v Collins* (1996) 93 LGERA 69 at 72.

37. However, not all documents fall within this particularly broad exemption. I also agree with the Tribunal's view that:

> "*It by no means follows, therefore, that every document on a departmental file will fall into this category…Furthermore, however imprecise the dividing line first may appear to be in some cases, documents disclosing deliberative processes must, in our view, be distinguished from documents dealing with the purely procedural or administrative processes involved in the functions of an agency...*
>
> *It is documents containing opinion, advice, recommendations etc. relating to the internal processes of deliberation that are potentially shielded from*

> *disclosure...Out of that broad class of documents, exemption under s 36 only attaches to those documents the disclosure of which is* "contrary to the public interest"...*".*

38. I am of the view that it would be contrary to the public interest to prematurely disclose documents while deliberations in an agency are continuing, if there is evidence that the disclosure of such documents would adversely affect the decision-making process, or that disclosure would, for some other reason, be contrary to the public interest. In either of those circumstances, I consider that the public interest is served by non-disclosure. I do not consider that it is generally in the public interest for any agency to conduct its business with the public effectively "looking over its shoulder" at all stages of its deliberations and speculating about what might be done and why. I consider that the public interest is best served by allowing deliberations to occur unhindered and with the benefit of access to all of the material available so that informed decisions may be made.

39. I accept the agency's claim, as I did in *Re Ayton*, that the document contains advice and opinion prepared and recorded in the course of reviewing the agency's investigative practices. That review was conducted by the Management Audit Unit of the agency, with input from the visiting Strathclyde police officers, to identify the structural, systems and staffing reforms considered essential to improve the agency's overall criminal investigation capability.

40. However, as I also stated, in paragraph 42 in *Re Ayton*, that particular deliberative process is at an end. Taking into account that it is now over a year since the announcement of the results of the Investigative Practices Review and the deliberations in the agency concerning the implementation of the recommended reforms have progressed beyond the thinking stages, I am not persuaded that the disclosure of the disputed document could adversely affect the integrity of those deliberations. In fact, there is simply no material before me to explain the current relevance, if any, of the document to any on-going deliberations in the agency. As far as I know the document has been kept under lock and key in the safe of the Commissioner of Police.

41. I have considered the agency's reasons for claiming exemption on this occasion, but there is nothing in its submission that was not before me in *Re Ayton*. For the reasons given in that decision in paragraphs 38-49, I am not persuaded that disclosure of the disputed document would affect the integrity of any deliberative process of the agency and I do not consider that the public interest in the protection of the integrity of those processes requires, in this instance, that the disputed document be withheld.

42. The only other public interest that warrants non-disclosure, according to the agency, is the public interest in the agency being able to perform its operational activities for the public good, without staff being distracted from those duties. The agency submits that there is a public interest in it being able to effectively carry out its functions and operations.

43. I recognise that there is a public interest in the agency operating effectively in the important area of law enforcement. I accept that that public interest is one that is recognised in the FOI Act by some of the exemptions in Schedule 1, and especially by the exemptions in clause 5 dealing with preventing, detecting, investigating or dealing with criminal activities, and with the safety and security of life and property. However, I do not consider that the agency has established that disclosure of the disputed document would, or could reasonably be expected to, adversely affect any of those activities such that it would be contrary to the public interest to disclose it.

44. As I have stated in paragraphs 25-27 above, there is no evidence before me that the operational effectiveness of agency personnel is being, or has been, adversely affected by internal distractions at management level. Further, the agency has not identified any other public interest considerations and I have not been able to identify any that would warrant non-disclosure of the document.

45. The requirement of the exemption that disclosure must be "contrary to the public interest" – together with the onus imposed on the agency by s.102(1) to establish that its decision was justified - indicates that the onus lies on the agency to establish that disclosure of the particular deliberative process matter would be contrary to the public interest. I am not satisfied that the agency has discharged its onus on this occasion. Nothing in the agency's submission goes any way towards meeting that requirement. Therefore, I find that the disputed document is not exempt under clause 6(1).

(d) Clause 8(2) – Confidential communications

46. Clause 8(2) provides as follows:

> ***"8. Confidential communications***
>
> ***Exemptions***
>
> *(1)…*
> *(2) Matter is exempt matter if its disclosure -*
>
> *(a) would reveal information of a confidential nature obtained in confidence; and*
>
> *(b) could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.*

Limits on exemption

(3)...

(4) Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest."

47. In my decision in *Re Ayton*, I concluded that the disputed document satisfies the *prima facie* test for exemption under clause 8(2) of Schedule 1 to the FOI Act. For similar reasons to those expressed in paragraphs 53-67 of that decision, I remain of the view that the *prima facie* test for exemption under clause 8(2) is satisfied. I incorporate the reasons in paragraphs 53-67 as part of these reasons for my decision in this complaint.

48. The complainant claims, however, that circumstances have changed since I made my previous decision, and that disclosure of the disputed document on this occasion would, on balance, be in the public interest, and that the limit on exemption provided by clause 8(4) therefore applies. Pursuant to s.102(3) of the FOI Act, the onus is on the complainant to persuade me on that point.

The complainant's submission

49. The complainant submits that circumstances have changed and a different finding as to the exempt status of the document is now warranted. I summarise the complainant's submission as follows:

- The principles of openness and transparency should create healthy disagreement and, if managed properly, improve the quality of staff/management relationships.
- The passage of time and the changes occurring in the agency following the Investigative Practices Review, and the adoption by the agency of the recommendations in that review, mean that there is now a public interest in the disclosure of the disputed document.
- There has already been significant change in the investigative practices of the agency. Media comment on those changes has ceased and the changes, whether good or bad, have been accepted.
- There is a significant public interest in the successful implementation of positive change in the agency and in how executives in the agency manage that process.
- Public confidence is based on understanding fostered by openness and transparency. False confidence brought about by manipulating the release of information has significant long-term effects on public support for law enforcement.
- Reports or comments critical of the management of public bodies should be released for public scrutiny. Potential executive discomfort, either personal or organisational, is not an excuse to keep documents secret.
- Secret documents kept secret cannot be used in the ongoing change process.
- The public has a right to know about the good things an agency is doing, such as is found in published Annual Reports, as well as how management is performing.

Changed circumstances

50. *Re Ayton* was decided at a time when there were clearly a number of high profile management issues directly impacting on the management of the agency and the Commissioner of Police. Those matters were adverted to in *Re Ayton* at paragraph 88. I did not describe those matters in any detail because they had been aired publicly in the media and were, in my view, sufficiently recent to be well known and understood. At that time, I did not consider that it was necessary for me to mention them in any detail and thereby to possibly add to the media publicity about the agency. Nonetheless, they were decisive in tipping the balance in favour of non-disclosure at that time.

51. I am satisfied that those circumstances no longer prevail. The particular matters that were decisive then included a public vote of "No Confidence" in the Commissioner of Police taken by Union members at a special meeting. The issues that prompted the Union meeting stemmed from the serving of notices on six drug squad detectives requiring them to show cause why the Commissioner of Police should not summarily dismiss those officers. Other concerns related to the powers and investigations of the Anti-Corruption Commission and a perceived lack of natural justice for police officers coming under notice of that body. In addition, there was a general dispute between the Union and the State Government over the amount of salary increases to be paid to police officers, and certain proposed changes to rostering conditions. The circumstances at that time suggested a severe crisis of confidence on the part of the staff of the agency in its management. There followed industrial action in the form of a "work to rule" campaign initiated by the Union, a body not known for resorting to such action.

52. It is my understanding that some of those issues have been more or less resolved. At the very least, the same level of sensitivity and media interest no longer seems to exist. Five drug squad officers have returned to duty; one remains suspended. I understand that police officers have accepted an offer of increased salary with no changes to night shift rosters. I am aware that there are unresolved matters in the agency concerning other members who have been the subject of inquiries conducted by the Anti-Corruption Commission. However, the concerns raised by the Union about the procedures of the Anti-Corruption Commission and other outstanding matters of concern have been progressing through other channels, as I understand it. Although there may still be individual matters of dispute, those matters are not now attended by the highly emotional atmosphere that previously existed. The volatility of the situation that existed then appears to have long since dissipated and nothing before me suggests otherwise.

53. I can find nothing in the FOI Act that prevents an applicant from lodging a subsequent access application for the same documents. Further, there is nothing to prevent an agency from making a different decision on a subsequent application for access to a document to which it has previously refused access. Circumstances may change over time such that the sensitivity of the contents of a document may diminish and the reasons for once withholding it no longer

apply. In addition, an agency always has a discretion to release a document even though it is an exempt document: s.3(3).

54. If a subsequent application is made and dealt with and determined by an agency, and notice of its decision is given, then clearly, in my view, the FOI Act provides the same rights of review and appeal in respect of that decision. That may or may not be the case where the earlier matter was finally decided on appeal to the Supreme Court, but I need not consider that on this occasion as my earlier decision relating to the disputed document was not subject to appeal. If there has been no change of substance in the law or in any of the facts and circumstances that gave rise to the earlier decision, then clearly the subsequent decision will be the same.

55. However, I can find nothing in the FOI Act to prevent me from determining a complaint differently, where circumstances have substantially changed. In my view, it is open to the Information Commissioner to make a different decision upon a subsequent complaint concerning documents previously the subject of a complaint in circumstances where the law has changed, or where the facts have changed. In the circumstances of this matter the law has not changed. However, I am of the view that the facts that influence the weight to be given to the competing interests have now changed.

Public interest

56. I recognise that there is a public interest in maintaining the confidentiality of certain kinds of information voluntarily given to government agencies. However, I consider that that public interest is not absolute. For example, I do not consider that confidentiality should prevail over accountability to such an extent that bad advice or unsubstantiated opinions cannot be properly scrutinised or evaluated. In my view, the existence of FOI legislation is a means to ensure that correct and defensible advice and opinions are given to agencies and that there is objective material to substantiate the advice or opinions given to agencies.

57. On the other hand, as I observed in paragraph 81 in *Re Ayton*, the fact that the disputed document was a private communication between the Commissioner of Police and the Strathclyde police officers in circumstances where there was clearly an expectation of confidentiality carries some weight. However, there was evidence before me then that those police officers were specifically informed about the existence and operation of the FOI Act in this State. That fact has not been disputed and it seems to me, therefore, that the expectation of maintaining confidentiality in this instance is not one that I should consider absolute. In the circumstances of the current complaint, any public interest in maintaining the confidentiality of such communications perhaps carries less weight.

58. I recognise that there is a public interest in the effective operation of the agency, and in maintaining public confidence in the agency's ability to operate effectively. However, as I have already explained, I am not persuaded that either the operational activities of police or the administrative activities of the

police managers are likely to be affected by the disclosure of the disputed document to any significant degree, nor, therefore, that public confidence in the agency is likely to be affected. I acknowledge that it may be difficult to identify or to assess the impact that disclosure is likely to have. However, having carefully considered the agency's claims in this regard, I do not accept that the claimed effects could reasonably be expected to follow from disclosure of the document at this time, particularly given the changed circumstances discussed in paragraphs 50-52 above.

59. Balanced against those public interests, I also recognise a public interest in the accountability of government agencies for their actions. I recognise, as the agency does, that there is a public interest in the public being informed about the views held by "experts" in a particular field concerning the operations of an agency so that the public can assess whether an agency is properly managed and whether adequate steps have been taken by the agency to address any genuine concerns raised about such issues.

60. To some extent, the public interest in accountability has been satisfied by the disclosure of the Investigative Practices Review report, at least so far as that document deals with the same issues that are dealt with in the disputed document. However, as I noted in *Re Ayton* at paragraph 84, there are some matters in the disputed document that do not appear in the public report, including comments and observations about aspects of the Delta reform process. The Commissioner of Police has publicly emphasised the importance of the Delta reform process to the agency and, ultimately, to the safety and security of the community of Western Australia. Given that fact, I remain of the view that there is a public interest in the disclosure of independent advice and assessments made about aspects of that reform process as part of the general public interest in accountability.

61. In my view, accountability means more than merely releasing information that is convenient for an agency to release, or reviewing policies and procedures after complaints have been made. Accountability in public administration means demonstrating, whenever the occasion arises to do so, that the public trust given to elected and appointed officials to act in the public interest is justified by the manner in which those officials perform their public duties.

62. The disputed document is over 15 months old and, I would have thought, now of historical interest only. It contains only the personal opinions of two external officers on some strategic management issues. It would no doubt be of interest to some members of the public and to those working within the agency. I do not consider that its disclosure now would necessarily cause or contribute to any serious distraction of staff from their duties to such an extent that the agency could not function effectively. Therefore, I do not consider that the public interest in the agency continuing to effectively discharge its functions would be adversely affected by disclosure of the disputed document.

63. I acknowledge that the reform process in the agency is continuing. However, I do not consider that that fact is a sufficient justification for non-disclosure. In a considerably less volatile climate than existed at the time *Re Ayton* was decided,

there is nothing before me that suggests to me that disclosure of the disputed document would affect – adversely or otherwise – that change process. Accordingly, although I recognise a public interest in the effective management of change in the agency, I do not consider that that public interest would be damaged by disclosure of the disputed document. Further, I do not believe that any privacy considerations exist to justify non-disclosure.

Conclusion

64. Therefore, in balancing the competing public interests, I have reached the view that the public interest in accountability in the public sector and the goals of openness and transparency that FOI legislation is designed to meet, now outweigh any other public interests that might have once favoured non-disclosure of the disputed document.

65. I am satisfied that the conditions that prevailed when *Re Ayton* was decided have dissipated and are no longer decisive in the balancing process. Accordingly, I consider that disclosure would, on balance, be in the public interest. Therefore, for the reasons given, I find that the disputed document is not exempt under clause 8(2).

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