

KIERNAN AND POLICE

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

**File Ref: 94041
Decision Ref: D00994**

Participants:

Maxwell Charles Kiernan
Applicant

- and -

Western Australia Police Force
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - report provided by employee in the conduct of their duties - confidential communications - whether reasonable to expect prejudice of future supply of information of that kind - whether disclosure is in the public interest - factors relevant to public interest - whether agency has discharged its onus under section 102(1).

FREEDOM OF INFORMATION - section 33 - consultation with third parties - Director of Public Prosecutions - confidential information - adverse effect of disclosure - nature of interest of third party.

FREEDOM OF INFORMATION - whether document is an exempt document generally - prohibition on disclosure of document where document established to be an exempt document - FOI Commissioner - no authority to order access to document determined to be an exempt document.

Freedom of Information Act 1992 (WA) ss.4; 21; 30; 74(1)(a); 76(4); 102(1); 102(3); Schedule 1 clauses 3; 5(1)(b); 8.

Freedom of Information Act 1982 (Vic) s.35(1)(b).

Police Force Regulations 1979 (WA) Regulation 603.

Re Read and Public Service Commission (Information Commissioner WA, 16 February 1994, unreported).

Department of Health and Anor v Jephcott (1985) 62 ALR 421.

Richards v Law Institute of Victoria (County Court, 13 August 1984, unreported).

News Corporation Limited v National Companies and Securities Commission 57 ALR 550.

Re Stewart and Victoria Police (1987) 2 VAR 192.

Re Soo Lin Seng and Victoria Police (1988) 2 VAR 329.

Re Low and Department of Defence (1984) 2 AAR 142.

Police Service Board v Morris [1984-1985] 156 CLR 397.

Attorney-General's Department v Cockcroft (1986) 10 FCR 180.

DECISION

The decision of the agency of 31 March 1994 is varied. The document is exempt under clause 5(1)(b).

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

17th June 1994.

REASONS FOR DECISION

BACKGROUND

1. This is an application for review by the Information Commissioner arising out of a decision of the Police Force of Western Australia ('the agency') to refuse Mr Kiernan ('the applicant'), a superintendent of police, access to a document described as a report from a Detective Sergeant to the Assistant Commissioner (Crime).
2. On 22 December 1993, solicitors for the applicant applied to the agency on his behalf, for access to the particular report. Access was refused on 15 January 1994 on the basis that the document was exempt under clause 8(2) of the *Freedom of Information Act 1992* ('the FOI Act'). The applicant requested internal review of this decision on 17 March 1994 and denied that the document was confidential as claimed by the agency. Internal review confirmed the original decision, such decision being made by Chief Superintendent Mott on 31 March 1994.
3. On 11 April 1994, the applicant, through his solicitors, applied to my office for external review of the decision of Chief Superintendent Mott. Although the request for external review was dated 11 April it was not received by my office until 19 April 1994.

THE REVIEW PROCESS

4. On 19 April 1994 I formally advised the agency that I had accepted the complaint for review and I sought production of the original document and the agency FOI file. I considered that my inspection of the disputed document was necessary to fairly dispose of the complaint before me and to test the claims of the agency for exemption based on clause 8(2) of the FOI Act. I was duly provided with these documents on 26 April 1994. I was also provided with further information to support the exemption claimed.
5. This additional information consisted of oblique references to the alleged sensitivity of the document and its relevance to investigations and to the Director of Public Prosecutions ('the DPP'). The information provided only raised further questions about the nature of the exemption claimed by the agency and, on 2 May 1994, I sought further clarification of the basis for the exemption and invited oral submissions from the agency. I subsequently met with two members of the agency's Legal Services Unit and a representative from the Internal Investigations Branch at my office on 5 May 1994.

6. The purpose of this meeting was to seek answers to specific questions about the document following the additional information provided to my office by the agency. I also sought clarification of the interest the DPP was said to have in this document. However, the representatives of the agency were unable to provide a satisfactory explanation on this point. During the course of this meeting the option of edited access was canvassed and the agency representatives agreed to consider the viability of this option.
7. The applicant subsequently confirmed that he was not seeking access to information concerning third parties but he was seeking access to information relating only to himself. He indicated to me that he was prepared to accept edited access to the document in question. This information was passed to the agency to consider during its further deliberations.
8. On 13 May 1994 the agency advised me that it had consulted with both the author of the document and the Assistant Commissioner (Crime). As a result, edited access was not an option and the agency confirmed its original claims for exemption based on clause 8(2) of the FOI Act.
9. At this point I invited further submissions in writing from the agency to support the exemption claimed including the material on which its findings of fact had been based. This material was supplied to me on 27 May 1994 and it indicated, in general terms, that the document may have been relevant to matters then before the courts. Following its receipt I invited the DPP to advise me whether the document was relevant to any current or pending prosecutions and any other interest his office had in its disclosure or non-disclosure.
10. I received a submission on behalf of the DPP on 3 June 1994. On 7 June 1994 I invited the applicant to identify any public interest factors in favour of disclosure. Following receipt of this information on 14 June 1994 I proceeded to a formal decision on this matter as there did not seem to be any further likelihood of reaching a conciliated settlement between the parties.

THE EXEMPTION

11. The agency claimed that the document was exempt under clause 8(2) of Schedule 1 to the FOI Act. Clause 8(2) "**Confidential communications**" is in the following terms:

"(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."

12. As I have stated in previous decisions, in order for matter to be exempt from disclosure, the requirements of both sub-clauses 8(2)(a) and 8(2)(b) must be satisfied and it must be shown that disclosure would, on balance, not be in the public interest. It is not sufficient to establish only that the information was of a confidential nature and obtained in confidence as provided by sub-clause 8(2)(a). Sub-clause (b) must also be satisfied to claim the exemption and the application of the public interest test must be considered. Further, as I stated in my decision in *Re Read and Public Service Commission* (16 February 1994, unreported) the requirement in clause 8(2)(b) that the future supply of information of **that** kind must be prejudiced is a reference to similar information or information of the class or character contained in the case under consideration.
13. Although there is some overlap between the requirements of clause 8(1) and (2), information is inherently confidential if it is not in the public domain. That is, the information must be known by a small number or limited class of persons. Where the person supplying the information specifically requests that the information should not be disclosed, and the person receiving it agrees, then an obligation of confidence arises. In *Department of Health and Anor v Jephcott* (1985) 62 ALR 421, the Full Federal Court held that a source of information is confidential if provided under an express or implied pledge of confidentiality.
14. On the basis of the material provided to me by the agency, I am satisfied the document to which access is sought contains information that was given and received in confidence. Although the report is an official police report, it was created outside the usual hierarchical chain of command. It was provided by its author in response to a specific request from the Assistant Commissioner (Crime) and pursuant to the officer's obligations to provide such a report when requested to do so. It also contains a reference to the author's belief as to its confidentiality. I was also told that the Assistant Commissioner (Crime) forwarded this report to the Internal Affairs Unit for further attention.
15. I am satisfied that the document would be exempt from disclosure under clause 8(2)(a) if that was the sole test. However, as noted above, under clause 8(2)(b) more is required and I am not satisfied the agency has discharged its onus under s.102(1) by showing that the disclosure of this matter could reasonably be expected to prejudice the future supply of that kind of information to the agency. Even if I was satisfied on this point, the agency has not considered the limitations, if any, on the exemption. All factors for and against disclosure should be identified for the benefit of the applicant and in accordance with the principle in s.4(a) which is to assist the public to obtain access. My reasons for reaching this conclusion follow.

The requirements to establish the exemption under clause 8(2)

16. Once it is established that the document is a confidential communication of the type described in clause 8(2)(a), the three "elements" of Part (b) of that clause

must be satisfied to establish a *prima facie* claim for exemption. These "elements" are as follows:

- (i) there must be a prejudice to the future supply of information of the general class or character under consideration in this case;
- (ii) it must be reasonable to expect that degree of harm or injury (prejudice); and
- (iii) the expected harm or injury must result from the disclosure of this document.

17. In my view, the words "*...that kind of information*" in Part (b), in the context of the matter before me, relate to information given by police officers pursuant to their statutory obligations and not to the nature of that information: *Richards v Law Institute of Victoria* (County Court, 13 August 1984, unreported, p.9); *Re Read and Public Service Commission* (Information Commissioner (WA), 16 February 1994, unreported, paras 29-31.)

18. The meaning of "prejudice" was considered by all the judges in *News Corporation Limited v National Companies and Securities Commission* 57 ALR 550. Woodward J. said, at page 561:

"...I think that the words "would, or could reasonably be expected to...prejudice" mean more than "would or might prejudice". A reasonable expectation of an event requires more than a possibility, risk or chance of the event occurring...In my view it is reasonable to expect an event to occur if there is about an even chance of its happening and, without attempting to suggest words alternative to those chosen by the draughtsman, it is in that general sense that the phrase should be read."

19. Applying these tests to the Part (b) of clause 8, in my view the question that should be asked by the agency is thus: "Is it reasonable to expect that disclosure of this document would pose more than a possibility or small risk of harm in the future, to the requirement that police officers obey orders including an order to report on matters relating to the performance of their duties?"

THE CLAIMS OF THE AGENCY

20. It is not disputed that the document is a confidential communication between a police officer and his superior. It is also not disputed that police officers are required, by regulation 603 of the *Police Force Regulations 1979*, to report as required, on matters pertaining to the performance of their duties. Failure to provide such a report when ordered to do so, is a breach of discipline which may subject the officer concerned to a disciplinary charge.

21. Chief Superintendent Mott referred me to the cases of *Re Stewart and Victoria Police* 1987 2VAR 192 and *Re Soo Lin Seng and Victoria Police* 1988 2VAR 329 which he said supported the agency's claim that it was not in the public interest to release confidential documents of this type.

22. The documents in *Stewart's* case consisted of an Internal Investigations Department file containing police reports, police and civilian witness statements, television film and photographs. The Victorian Administrative Appeals Tribunal was satisfied, on the basis of evidence before it, that, whilst police are required to answer questions in relation to matters of discipline, they are less likely to provide full and frank information unless a situation of confidentiality exists. Accordingly, police and civilian witness statements were found to be exempt, *inter alia*, under s.35(1)(b) of the Victorian *Freedom of Information Act 1982* ('the Victorian FOI Act'), which is the equivalent of clause 8(2) with some variation in the wording.
23. In *Soo's* case the document consisted of a record of interview with a police officer following a complaint being made about the officer's arrest of the applicant. The Tribunal relied on the findings in *Re Stewart* and found that suspect police officers would be less likely to co-operate and provide full and frank responses to internal investigators if their responses could be disclosed to outside persons such as complainants. The record of interview was therefore held to be exempt under s.35(1)(b) of the Victorian FOI Act.
24. The decisions in *Stewart* and *Soo* are in contrast with the decision of the Commonwealth Administrative Appeals Tribunal in *Re Low and Department of Defence* (1984) 2 AAR 142 where it was held that documents completed by persons in the performance of their duties, and where no information has been voluntarily provided in addition to that required by the due performance of such duties, there is no breach of confidence in the disclosure of such information.
25. The disputed document in the matter before me is not a record of interview with a suspect officer. It is a report submitted by a Detective Sergeant in accordance with his statutory obligations. This document contains personal information about the applicant and other third parties. Parts of the record of interview in *Soo's* case were disclosed to the applicant but that is not the case in the matter before me although the agency was asked to consider edited access and the applicant indicated his willingness to accept this form of access.
26. Although the author of this document indicated that he would be prepared to face disciplinary charges in the future rather than submit a report which may or may not be released to persons other than police investigators, there is no evidence before me that other officers could reasonably be expected to take the same course of action. From my own experience I know there is a police Code of Ethics which guides police behaviour and a growing awareness among enlightened police officers of the need for professionalism within the Police Force. These matters indicate to me that it is not reasonable to expect the "code of silence" to prevail over statutory obligations.
27. Although I am not bound by the decisions in *Stewart's* case or *Soo's* case, they are distinguishable on their facts. Both cases concerned access to documents that are different to the document in dispute before me. In each case there was evidence before the Tribunals from which it was reasonable to conclude that police officers would not be as full and frank with their answers to questions

without an assurance of confidentiality. The agency in this instance has not provided any material of this nature to enable me to reach the same conclusion.

28. Even if some police officers are prepared to do so, I doubt that those officers would risk other sanctions such as demotion, fines or dismissal for adopting such a stand which is inconsistent with their oath of office. I am prepared to accept that the likelihood of a disciplinary charge could be perceived by some officers to be the lesser risk where the information was self-incriminatory. However, this is not one of those instances.

29. The agency's claim for exemption was presented to me in general terms only. Chief Superintendent Mott in his decision of 31 March 1994 said:

"3. Whilst police officers can by regulation be compelled to report on matters of the kind referred to in the document, if it was known that the contents of such reports were to be made public, then there is a reasonable expectation that they would avoid disclosure of such information to the detriment of the police force and therefore the public.

4. The disclosure of the information in the document could be reasonably expected to prejudice the future supply of information and it would therefore not be in the public interest to release this information..."

30. I accept that it is in the interest of the public that the Police Force has the capacity to fully investigate and deal with allegations against its officers and, therefore, it is in the public interest that the police management have access to information on matters of the kind referred to in this report. However, I find unconvincing the claim that the future supply of information of this type would be prejudiced by disclosure of this document, without some factual basis for such a claim. I have no doubt that Chief Superintendent Mott and other police believe that such a result is likely, but the agency provided no evidence that it is reasonable to expect that that will occur.

31. I therefore sought further information from the agency on this point. In a written response to my request, the agency made the following statements:

"In order to ensure police officers will report upon the activities of their fellow officers when those activities involve corruption or similar conduct, it is necessary for them to have some assurance that the information they supply will be treated with as much confidentiality as the subsequent inquiry will allow. When an officer is compelled...to report on such matters...then the officer would either refuse to provide the information at the risk of being charged or distort the information.

This would not be in the best interests of the Police Force as it would provide a shelter behind which corruption and other illegal activities could flourish. Given the impact corruption and other such activities can

have on a Police Force, it is not in the public interest for such a situation to exist.

In the case of the author of the document, he has indicated that if he had known that the information contained in his report would be released publicly he would have refused to comply with a lawful order and suffered the consequences of a disciplinary charge.

Police officers by nature are reluctant to provide information about a fellow officer when that information could result in the officer facing disciplinary charges but that reluctance can to a degree be overcome by the knowledge that the information they provide will be treated in confidence."

32. Without more, I find these claims unsubstantiated. In my view, an argument for confidentiality as a means to an end, namely, obtaining information about illegal activities, conveniently ignores the existence of other means facilitating the obtaining of such information. The Internal Affairs Unit of the Police Force has the responsibility of investigating such matters and is an exempt agency under the FOI Act. The Official Corruption Commission also exists to receive complaints and information of this type. If a document is confidential and access to it is sought under the FOI Act, then the agency concerned must make out a case for exemption based on the precise wording of the relevant clause. This process requires more attention to detail and to the requirements of s.30 than decision-makers have so far been prepared to provide.
33. The principles of administration and the public interest test are important features of Freedom of Information legislation. Only when the public interest factors have been sufficiently identified and considered, should the agency decide that the exemption, nevertheless, will be claimed. When this occurs, the onus of proof shifts to the applicant in accordance with s.102(3). However, in my opinion, the agency has a duty, in the first instance, to identify the public interest factors that influenced its decision and the weight accorded to these. This information must be provided to the applicant under the requirements of s.30 before the applicant, realistically, can be in a position to discharge his or her onus under s.102(3).
34. There is a public interest in the applicant's right to know which is embodied in the FOI Act itself. There is also a public interest in maintaining the proper workings of government agencies such as the police. Although it is early days for the operation of this legislation in Western Australia, it is unfortunate that agencies continue to focus on the latter aspect of the public interest, whilst ignoring the former. It is also unfortunate that some agencies are not administering the Act in accordance with the requirements of s.4.
35. The agency claimed there is an expectation by police that reports of this type will not be disclosed. It further claimed that, notwithstanding regulation 603, it was reasonable to expect that police officers would avoid the disclosure of such

information if it was known that the contents of such reports were to be made public. Regulation 603 of the *Police Force Regulations 1979* states:

" A member or cadet shall not disobey a lawful order and shall not, without good and sufficient cause, fail to carry out a lawful order."

36. The purpose of this regulation is to secure the obedience to orders: Gibbs C.J. in *Police Service Board v Morris* [1984-1985] 156 CLR 397 at 404. Brennan J. in the same case, citing the comments of Crockett J. in the decision of the Full Court of the Supreme Court of Victoria, from which the appeal to the High Court was instituted, described the requirements of similar legislation in Victoria in the following terms:

"The legislation is designed to regulate and control the activities of what is a disciplined force in such a way as to achieve an effective and efficient organisation in which members are to perform their duties in conformity with a code so as to afford protection to the community and allow the disciplining of members who breach that code."

THE APPLICANT'S SUBMISSION

37. The applicant refuted the claimed confidentiality of the document because part of it had been disclosed to another police officer during a subsequent interview. The fact that there is limited disclosure of a confidential document does not necessarily mean that the document loses its character of confidentiality: *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180. I am satisfied, notwithstanding the partial disclosure in this instance, that this document remains a confidential communication of the type covered by clause 8(2)(a) of the FOI Act.
38. The applicant was invited to identify the public interest factors favouring disclosure of the document and he submitted that, due to current court proceedings, the contents of the document were in the public domain and therefore they were no longer confidential. The public interest factors favouring disclosure were said to be the applicant's right to know what had been said about him and how that allegation had been dealt with by the agency concerned, and the public interest in the applicant's right to defend himself against the allegations made against him.
39. I recognise that there is a public interest in the applicant having access to personal information. That right is specifically recognised in the FOI Act itself in s.21, but the fact that a document contains personal information is only a factor in favour of disclosure of that document. It is not conclusive. I accept that there is a public interest in an individual being informed of allegations made against him or her to an agency and how any such allegation has been dealt with by that agency, particularly in this case where the agency is both the applicant's employer and the Police Force. However, there is no evidence before me that

the contents of this particular document have been revealed in court proceedings or are otherwise in the public domain.

40. I am not satisfied, on the evidence before me, that the claim for exemption under clause 8(2) of the FOI Act has been established by the agency and I find that the document is not exempt under clause 8(2). For this reason, it does not fall to be decided whether disclosure would be, on balance, in the public interest. However, if it is established that a document is an exempt document on any grounds, s.76(4) of the FOI Act does not allow me to make a decision to the effect that access is to be given to the document.

IS THE DOCUMENT EXEMPT FOR ANY OTHER REASON?

41. In the course of investigating this complaint I was referred to the DPP by the agency because it was claimed that the DPP had an interest in this document. I was advised by the DPP of the nature of that interest and its relevance to current or pending proceedings by his office. However, I am unable to describe the nature of that interest without breaching my duty under s.74(1)(a) of the FOI Act.

42. On the basis of that advice, I am satisfied that it is reasonable to expect that disclosure of this document could reveal the investigation of an offence (a contravention or possible contravention of the law), which is within the ambit of clause 5(1)(b).

43. Clause 5 provides, *inter alia*, that matter is exempt matter if its disclosure could reasonably be expected to -

"(b) reveal the investigation of any contravention or possible contravention of the law in a particular case, whether or not any prosecution or disciplinary proceedings have resulted; "

44. The limitations to the exemptions under clause 5 provide as follows:

"Limits on exemptions

(4) Matter is not exempt matter under subclause (1) or (2) if -

(a) it consists merely of one or more of the following -

(i) information revealing that the scope of a law enforcement investigation has exceeded the limits imposed by the law;

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

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

and

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

45. As the limitations do not apply to the document in dispute, there is no scope for the application of the public interest test and I find the document contains exempt matter under clause 5(1)(b) of the FOI Act.
