

HAYES AND JUSTICE

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

**File Ref: 95223
Decision Ref: D01296**

Participants:

Rohan James Hayes
Complainant

- and -

Ministry of Justice
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - psychological reports re management of prisoner - clause 6(1) - deliberative processes of agency - whether disclosure contrary to public interest.

Freedom of Information Act 1992 (WA) ss. 72(1)(b), 75(1), Schedule 1 clauses 1(a), 1(d)(i), 5(1)(e), 5(1)(h), 6(1), 11(1)(b).

Re Schibeci and Western Australian Health Promotion Foundation (Healthway) (Information Commissioner, WA, 19 January 1996, unreported).

Re Waterford and Department of the Treasury (No 2) (1984) 5 ALD 588.

Minister of State for Immigration and Ethnic Affairs v Teoh (1995) 128 ALR 353.

DECISION

The decision of the agency is varied. The documents are exempt under clause 6(1) of Schedule 1 to the *Freedom of Information Act 1992*.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

9 February 1996

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Ministry of Justice ('the agency') to refuse Mr Hayes ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. The complainant is a prisoner in Casuarina Prison. On 13 June 1995, the Aboriginal Legal Service of WA (Incorporated) applied to the agency on behalf of the complainant and sought access to certain documents. On 11 September 1995, the agency granted the complainant access to one document, and refused access in full or in part to other documents on the ground that those documents are exempt under clauses 1(a), 1(d)(i) and 11(1)(b) of Schedule 1 to the FOI Act.
3. The complainant sought internal review of the agency's decision in respect of two documents, being reports dated 21 February 1995 and 26 May 1995. On 17 October 1995, Mr Peter Nella, the agency's internal review officer, confirmed the initial decision that the two documents are exempt under clause 11(1)(b) of Schedule 1 to the FOI Act.
4. On 3 November 1995, the complainant lodged an application for external review with the Information Commissioner.

REVIEW BY THE INFORMATION COMMISSIONER

5. On 8 November 1995, I notified the agency that I had received this complaint. Pursuant to my authority under ss.75(1) and 72(1)(b) of the FOI Act, I obtained copies of the disputed documents together with the agency's FOI file maintained in respect of this matter. After determining that there were, in fact, 4 documents in dispute, and after examining those documents and considering submissions, on 9 January 1996, I provided the parties with my preliminary view and reasons for that view. It was my preliminary view that two documents may not be exempt under clause 11(1)(b); one document may be exempt under that clause; and that the complainant should be provided with an edited copy of another document with matter exempt under clause 5(1)(e) deleted from that document. Although the agency did not make the claim, it was also my preliminary view that three documents may be exempt, in any case, under clause 6(1) of Schedule 1 to the FOI Act.
6. After receiving my preliminary view, the agency decided to grant the complainant full access to the document which, in my preliminary view, contained matter that was exempt under clause 5(1)(e) of Schedule 1 to the FOI Act. However, the agency maintained its claims that the three remaining documents are exempt. I also received a further submission from the complainant's solicitors in response

to my preliminary view that those three documents may be exempt under clause 6(1).

THE DISPUTED DOCUMENTS

7. The three documents remaining in dispute between the parties are reports on the complainant by a psychologist. For the convenience of the parties I refer to the documents by the numbers used in my preliminary view. Document 3 is the one that was released following my preliminary view and is no longer in dispute. Document 1 is a report dated 26 May 1995, containing hand-written notes on the first page. Document 2 is a copy of Document 1 with an additional hand-written note on it. Document 4 is a report dated 21 February 1995.

THE EXEMPTIONS

8. Clause 6, so far as is relevant, 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."

9. The meaning and purpose of the exemption in clause 6(1) has been the subject of a number of my formal decisions, and was most recently discussed in my decision in *Re Schibeci and Western Australian Health Promotion Foundation (Healthway)* (19 January 1996, unreported), at paragraphs 10 and 11.
10. There are two parts to the exemption in clause 6(1) and the requirements of both paragraphs (a) and (b) of that exemption must be satisfied. The case that is most often referred to when considering the meaning of the phrase "deliberative processes" is *Re Waterford and Department of the Treasury (No 2)* (1984) 5 ALD 588. In that case, the Commonwealth Administrative Appeals Tribunal said, at paragraphs 58-60:

"58. As a matter of ordinary English the expression 'deliberative processes' appears to us to be wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency. "Deliberation" means "the action of deliberating; careful consideration with a view to decision": see the *Shorter Oxford English Dictionary*. The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action. Deliberations on policy matters undoubtedly come within this broad description. Only to the extent that a document may disclose matter in the nature of or relating to deliberative processes does s.36(1)(a) come into play...

59. It by no means follows, therefore, that every document on a departmental file will fall into this category...Furthermore, however imprecise the dividing line may first appear 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 the agency...

60. 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'..."

11. I consider that the exemption in clause 6 is designed to protect the "thinking processes" of an agency so that it may take advice and obtain opinion and deliberate upon the wisdom of certain courses of action, in the case of this agency, in response to the many decisions that must be made in administering, *inter alia*, the prison system in Western Australia.
12. I am satisfied, from my own examination of the disputed documents that each of them contains advice and opinion obtained, prepared or recorded in the course of, or for the purposes of, the deliberative processes of the agency, namely, making decisions about the welfare and management of the complainant, taking into account the requirement to also maintain a secure and safe prison system. Therefore, I am satisfied that the content of the documents meets the requirements of paragraph (a) of clause 6(1).

Would disclosure be contrary to the public interest?

13. It was the submission of the complainant's solicitors that the complainant had been subjected to unnecessarily harsh and degrading treatment in the prison system and that the agency should be accountable for its decisions with respect to

the complainant. The solicitors submitted, *inter alia*, that the objects of the FOI Act would be frustrated by non-disclosure; the documents contain personal information about the complainant and that fact must be considered as a factor in favour of disclosure; the complainant denies that he performed the test to which Document 4 refers and he should be able to scrutinise that document to determine its veracity; the psychological tests based upon an American Western model are inappropriate for use on Aboriginal prisoners and that it is in the public interest to subject the test and its results for the complainant's scrutiny; and that I am bound to apply the International Human Rights Convention to which Australia is a signatory when assessing the public interest.

Consideration of submissions

14. Firstly, with respect to the complainant's submission that I am bound to apply the International Convention on Human Rights, it is my understanding in accordance with the decision of the High Court of Australia in *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353, that domestic legislation is to be interpreted, so far as the construction of the legislation permits, in accordance with any treaty to which Australia is a signatory, to ensure that the legislation is in conformity and not in conflict with the established rules of international law.
15. If it were the case that disclosure of the disputed documents would reveal a breach of human rights, then that fact may be a matter for me to consider in applying the balancing test as to where the public interest lies. However, in this case, there is no evidence before me to establish that the disputed documents reveal any breach of human rights, or that the failure to provide the complainant access to these documents is in itself a breach of human rights. I am not satisfied that a consideration of whether it is in the public interest for the disputed documents to be disclosed requires me to apply the terms of any international convention.
16. In respect of the complainant's submission concerning the scrutiny of psychological tests, I accept that there may be a public interest in the test, the results of which form the basis of Document 4, being scrutinised in order to determine whether it and similar psychological tests being administered are appropriate for use on Aboriginal prisoners. However, I am not persuaded that Document 4 - which is not a record of the test itself but a report prepared on the basis of the test results - would provide sufficient detail about the test to serve that purpose. Further, even if it did so, I am not persuaded that disclosure to the complainant of the details of the test and his results would be an appropriate means to satisfy that public interest, if there is one. In my view, that is a broader issue more appropriately taken up in another forum.

The competing public interests that must be balanced

17. I recognise that there is a public interest in people being able to access personal information about themselves which is held by government agencies. Section 21 of the FOI Act requires me to consider the fact that the information sought is personal information about the access applicant to be a factor in favour of disclosure for the purpose of making a decision as to whether it is in the public interest for the matter to be disclosed. I have duly considered it in this instance. There is also a public interest in people being informed as fully as possible of the basis upon which decisions directly affecting them have been made by government agencies and also a public interest in people being able to exercise their rights of access under the FOI Act.
18. Having examined the disputed documents, I do not consider that their disclosure would necessarily assist the complainant to understand the reasons for the decisions that have been made by the agency in respect of his welfare and future management. In any event, I am satisfied that, as a result of the discussions that have taken place between officers of the agency and the complainant, as evidenced in the documents to which the complainant has been granted full access, the complainant has been informed of, and should therefore be aware of, the reasons for those decisions. Accordingly, I consider that the public interest in the complainant being informed of the reasons for those decisions of the agency affecting him has already been satisfied and does not require disclosure of the disputed documents.
19. Further, balanced against those public interests, I also consider that there is a public interest in the maintenance of the security of prisons, and the safety of those within them, both prisoners and staff. Those public interests are recognised in the exemptions provided by clause 5(1)(e) and (h) of Schedule 1 to the FOI Act. There is material before me that indicates that the complainant has a long history of violence against others, both inside and outside the prison system. There is also recent evidence to suggest that the complainant has been physically violent with, and has made certain threats of violence to, prison staff. In my view, it is reasonable to expect that the disclosure of the disputed documents could result in violent behaviour by the complainant, resulting in harm to either the complainant or to other people with whom the complainant may come into contact. Accordingly, in this instance, I consider that the public interest in maintaining a safe and secure prison environment weighs against disclosure of the documents.
20. Clearly, there is a public interest in maintaining the ability of prisons to properly assess and develop strategies for the management of prisoners, particularly difficult ones. I consider that disclosure of the disputed documents may be contrary to that public interest in this instance. The complainant is a long term prisoner, the management of whom appears to have been a matter of some difficulty. The disputed documents contain information relating to the behaviour of the complainant and opinions of the author of the reports which if disclosed, in my view, would reveal to the complainant certain information provided to the prison management in order to assist it to determine how best to manage the complainant. In my view, if that information was disclosed to the complainant it

may lessen the effectiveness of, or render ineffective, any management strategy introduced on the basis of it.

21. In addition, disclosure of the documents could, in my view, reasonably be expected to enable the complainant - and any other prisoner to whom he were to disclose the contents of the documents - to distort the outcome of any future assessment, whether formal or informal, of the prisoner conducted by psychologists in the prison, because the prisoner would then be aware of certain behaviours and indicators looked for by the assessors and know how those behaviours and indicators are interpreted and assessed.
22. No conditions can be attached to the use of documents to which access has been given under the FOI Act. Disclosure to the complainant would be, in effect, disclosure to the whole prison population and, indeed, to the world. Therefore, the ability of the agency to properly assess prisoners and determine their management could be reasonably expected to be impaired. In my view, the public interest in maintaining the agency's ability to assess and manage prisoners favours the confidentiality of such professional advice to the prison management and it weighs against disclosure of the disputed documents.
23. Taking all of those matters into account, and having balanced the competing public interests, I consider that the public interest factors against disclosure, including the public interest in the agency maintaining its ability to manage the prison in a responsible manner, whilst having due regard to individual needs within that system, outweighs the public interest factors favouring disclosure of the disputed documents. In my view, in this instance, the disclosure to the complainant of the disputed documents has the potential to jeopardise both his welfare and the safety and security of others and, accordingly, I consider that their disclosure would be contrary to the public interest.
24. Therefore, I find that the disputed documents are exempt under clause 6(1) of Schedule 1 to the FOI Act. Document 4 may also be exempt under clause 11 of Schedule 1. However, as I have determined that all the documents are exempt under clause 6, it is not necessary that I determine that question or any of the agency's other claims.
