# DOOHAN AND POLICE

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

**File Ref: 94036**
**Decision Ref: D01394**

Participants:

**Mr John Doohan**
Applicant

- and -

**Western Australia Police Force**
Respondent

## DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - "deemed" refusal - ambit of applicant's request - personal information - sufficiency of search - relevant documents - power to require further searches - power to give directions - additional searches - additional inquiries - integrity of search - unreasonable to require a detailed examination of each and every document held by the agency - destruction of documents - exempt agency - right to access documents of an exempt agency - allegation of deliberate destruction or concealment of records - allegation of records improperly transferred - offence under s.110 of the FOI Act.

***Freedom of Information Act 1992 (WA)*** ss.10(1); 11; 13; 20; 21; 26; 30; 42; 64; 65(1); 68(1); 72(1)(b); 75; 76(1); 110; Schedule 1 clauses 3 and 5(2); Schedule 2 to the FOI Act.
***Library Board of Western Australia Act 1951*** s.30(2) and (3).

***Re Smith and Administrative Services Department*** (Information Commissioner (QLD), unreported, 30 June 1993).
***Re Anti-Fluoridation Association of Victoria and Secretary, Department of Health*** (1985)
8 ALD 163.

# DECISION

The deemed decision of the agency of 25 March 1994 to refuse access to documents that were created between 1974 and 1984 which contain personal information about the applicant is confirmed.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

5th August 1994

# REASONS FOR DECISION

1. This is an application for review by the Information Commissioner arising out of a deemed refusal of the Western Australia Police Force ('the agency') to provide Mr John Doohan ('the applicant') with access to certain documents which the applicant claims exist, or should exist, within the agency.

## BACKGROUND

2. The applicant claims to have been an active campaigner for civil liberties in Western Australia for a number of years. He claims that during this period he has had frequent contact with members of the agency and with members of Parliament, past Commissioners of Police and the Ombudsman over matters of personal and public concern about certain activities of the agency, and I accept that he has. Consequently, a significant amount of correspondence has been generated between the applicant and various public officers including the agency.

3. On 17 January 1994 the applicant lodged an access application (dated 12 January 1994) under the *Freedom of Information Act 1992* ("the FOI Act") with the agency requesting *"access to all documents, active and inactive relating to myself and held by the Western Australia Police Force within its Departments, Sections or Branches, including Protective Services, anti-Terrorist Units and Internal Investigations Branch; 'documents' being documents as defined by the [FOI]Act."*

4. The applicant particularised his request for documents by reference to various contacts he claimed to have had with the agency since 1974 and by reference to specific cases, people and incidents. He also indicated that the request related to personal information only and that he would accept edited access to the requested documents with personal information about other people deleted.

5. On 27 January 1994, the agency wrote to the applicant stating that, pursuant to its obligations under ss.11 and 20 of the FOI Act, it sought his agreement to redefine his request in the following terms: *"Documents containing personal information relating to Criminal, Traffic, Licensing and Administrative Records."* The agency claimed, and it is supported by a file note on the agency's FOI file in this matter, that on 11 March 1994 the applicant telephoned the agency and indicated that he did not agree to redefine his request, but did agree to an extension, to 30 March 1994, of the permitted period within which the agency must deal with his application.

6. However, the same day, 53 days after lodging his request under the FOI Act, the applicant wrote to the agency as he had not received a notice of decision on his access application within the permitted period of 45 days. In that letter he alleged that an officer of the agency had verbally advised him that no records could be found

and he therefore requested an internal view of the agency's "deemed refusal" to provide access to the requested documents.

7. On 25 March 1994 Chief Superintendent Mott conducted an internal review and granted the applicant edited access to 4 documents and access in full to a further 67 documents described in a schedule supplied to him. The earliest document supplied to the applicant appears to have been one dated 7 May 1984 (some were undated). Chief Superintendent Mott also advised the applicant that the Protective Services Unit is an exempt agency and *"...if any material relating to the applicant existed within that Unit, it would be exempt from the provisions of the Act so far as release of such information is concerned."*

8. By letter dated 8 April 1994 and received at my office on 11 April 1994, the applicant applied to me for external review of the agency's decision of 25 March 1994. In that letter, the applicant claimed that additional documents existed in the agency. He also alleged that records had been withheld without explanation and that records could have been improperly transferred from the agency to an exempt agency.

9. The applicant's complaint to my office, therefore, consisted of three separate issues which overlapped to some degree. The first issue was an apparent "deemed refusal" of access to the documents dated between 1974 and 1984 ('the pre 1984 documents'). The second concerned the sufficiency of search efforts conducted by the agency with respect to the documents actually supplied ('the post 1984 documents'). The third issue was the applicant's allegation of the possibility of conduct which, if it occurred, amounted to an offence under s.110 of the FOI Act.

## JURISDICTION OF THE INFORMATION COMMISSIONER

### (a) The deemed refusal of access to the pre 1984 documents

10. Section 65(1) of the FOI Act specifies the types of decisions of agencies which the Information Commissioner may investigate. Under s.26(2), a decision to refuse access to documents because they cannot be found or because they do not exist, is a refusal of access that is reviewable under s.65(1)(d). However, in this instance, the applicant had not been provided with a notice under s.26(1).

11. The applicant's access application made it clear that he was seeking access to documents containing personal information about him dating from 1974, and he specified particular incidents which he believed would have generated some documentary record. Although the agency attempted to obtain the applicant's agreement to reduce the ambit of this application, the applicant did not agree to

change the terms of his request and it appears that the agency proceeded on the basis of the original request. However, the applicant did not receive the required notice of decision under s.13(1)(b) within the "permitted period". Section 13(2) states that *"[i]f the applicant does not receive notice under subsection (1)(b) within the permitted period the agency is taken to have refused, at the end of that period, to give access to the documents and the applicant is taken to have received written notice of that refusal on the day on which that period ended".*

12. This "deemed refusal" of access was reviewed by Chief Superintendent Mott. He purported to deal with the original request, releasing a number of documents in full and a number with deletions and providing a notice of decision explaining that the matter that had been deleted from the edited documents was deleted because it was outside the scope of the access application, being matter relating to third parties and not to the applicant. However, none of the documents released or referred to in the notice of decision related to the period 1974-1984. In my view, the agency was obliged to provide the applicant with an explanation in relation to the pre 1984 documents. If the documents existed and the decision was to refuse access then those documents should have been addressed in the notice of decision under ss.42 and 30. If the documents no longer existed, could not be found or never existed, a notice of explanation should have been provided under s.26(1). Alternatively, if the agency had refused to deal with that part of the request relating to the pre 1984 documents, the relevant notice under s.20(3) and (4) was required.

13. In any event, no notice of any kind was provided to the applicant in respect of the documents that the applicant alleged existed for that period. On that basis I accepted the complaint from the applicant as a "deemed refusal" of access to the pre 1984 documents which the applicant said are, or should be, held by the agency.

## (b) The sufficiency of search efforts relating to post 1984 documents.

14. On external review of a complaint, the Information Commissioner has specific power under s.26(2) to require an agency to conduct further searches for the requested documents when the agency notifies the applicant, pursuant to s.26(1), that the requested documents do not exist or cannot be found. However, in this case no such notice was issued to the applicant and my power under s.26(2) did not arise. In this instance, I accepted this complaint as a "deemed refusal" of access under s.13(2). In my view, the power to require further searches in these circumstances arises from my power under s.76(1), in the course of dealing with a complaint, to review any decision that has been made by the agency in respect of the access application and to decide any matter that could have been decided by the agency, my power under s.70(4) to determine my procedure and give directions as to the conduct of proceedings.

15. Both the Commonwealth and Victorian Administrative Appeals Tribunals have considered cases where the question of the jurisdiction of the external review body to consider "sufficiency of search" issues has arisen. More recently, the Information Commissioner in Queensland extensively canvassed the relevant authorities on this question in his decision *Re Smith and Administrative Services Department* (Unreported, 30 June 1993) at paragraphs 7-61. He concluded, at paragraphs 60 and 61, that, based on the Commonwealth experience, his review function included *"...the jurisdiction to review, and the power to give directions, in respect of "sufficiency of search issues"..."* I do not consider it is necessary that I analyse in detail the authorities on this issue. With respect, I adopt the reasoning of the Queensland Information Commissioner in *Re Smith.* Western Australia's FOI Act contains provisions which are analogous to those relied upon by the Queensland Information Commissioner. Those are s.76(1) and s.70(4) of the W.A. FOI Act.

16. In my view, the following part of the decision of the Commonwealth Administrative Appeals Tribunal in *Re Anti-Fluoridation Association of Victoria and Secretary, Department of Health* (1985) 8 ALD 163 at 168, cited with approval by the Queensland Information Commissioner in *Re Smith*, at paragraph 58, is relevant to a consideration of my powers in relation to the "sufficiency of search" issue in this complaint:

> *"Section 58 of the Act empowers the Administrative Appeals Tribunal in proceedings under Part VI of the Act not only to review any decision that has been made by the agency in respect of the request but also "to decide any matter in relation to the request that, under this Act, could have been or could be decided by the agency....The expression "to decide <u>any matter</u> in relation to the request" is very broad; it includes, I am satisfied, a preliminary decision as to the extent of the search which should be made for the document. If the Tribunal lacked power to decide that matter, the objects of the Act could be readily frustrated by deliberate inactivity in response to a request for access. I am satisfied that it has that power."...The Tribunal has power under s.43(2) of the Administrative Appeals Tribunal Act 1975 to give directions as to the procedure to be followed at or in connection with the hearing of a proceeding before the Tribunal and by virtue of s.33(1)(a) the procedure is within the discretion of the Tribunal. The nature and the resources of the Tribunal are such that it probably could not in any proceedings undertake a detailed examination of an agency's filing system; but it can make decisions in relation to the making of further searches and inquiries by officers of the agency to enable requested documents to be located; and it can give appropriate procedural directions in relation to evidence by them. Failure to comply with any such decision might be punishable under s.63 of the Administrative Appeals Tribunal Act 1975."*

## THE REVIEW PROCESS

17. On 13 April 1994 I accepted the applicant's complaint and formally notified the agency pursuant to s.68(1) of the FOI Act. Pursuant to ss.72(1)(b) and 75(1) of the FOI Act I required production to me of the documents to which access had been provided by way of edited copies only and the agency's FOI file in this matter.

18. For the purpose of dealing with the first two issues raised by the applicant in his complaint to my office, the questions that must be answered are: are there reasonable grounds to believe that the requested documents exist and, if so, were the searches conducted by the agency to locate these documents reasonable in all the circumstances? In my view, it is not my function to physically search for the documents on behalf of the applicant, nor is it my function to examine in detail the agency's record-keeping system.

19. The applicant described a number of specific instances when he claimed to have had contact with members of the agency over the years and it appeared reasonable to conclude that further documents may exist. I therefore requested further information from the agency on 13 April 1994, detailing the extent of searches undertaken, and invited comments on the applicant's claim that further documents existed, especially those created in the period dating from 1974 to 1989.

20. By letter dated 22 April 1994, received in my office on 26 April 1994, the agency replied to my request and described the searches undertaken. These consisted of a search of the computerised Central Records Index and directing "tracer files" to areas identified as possibly holding files or documents which might fall within the ambit of the applicant's request. The areas checked included Internal Investigations Branch, Tactical Response Group and Chief Office Records (Administrative Records), the latter being the most probable source of non-operational records. The agency submitted that it believed it had fully complied with the applicant's request. The agency asserted that it had provided copies of all the documents it had located and identified as being within the ambit of the applicant's request and had claimed no exemption, deleting only matter that did not come within the terms of the request, that is, matter that related to third parties and not to the applicant.

21. On 4 May 1994 a member of my staff attended at the agency where my officer inspected the record system and the methods adopted by the agency to locate relevant documents. My officer also made inquiries as to the specific incidents raised by the applicant and whether those incidents would necessarily have generated documentation. In response to those specific inquiries, officers of the agency advised my officer that on each occasion on which an officer of the agency had contact with a member of the public, such as in the applicant's case, that did not necessarily mean that that contact lead to the generation of documentation. My officer was also advised that in certain instances it is possible that no documentation was created or prepared as a result of such contact.

22. Based on the agency's evidence and the inquiries by my officer, it appeared to me that the agency had made a reasonable effort to locate all relevant documents. On 6 May 1994 the applicant was advised that one of my officers had attended the agency; he was advised of the inquiries my officer had made in respect of the searches undertaken and that I had formed a preliminary view that the further documents requested by the applicant either did not exist or could not be found. The applicant was requested to advise my office whether, in light of my preliminary view, he wished to pursue his complaint any further. He was also advised of my preliminary view following those inquiries that the incidents to which he referred would not necessarily generate records or documents to the extent that he believed they would.

23. On 16 May 1994 I received the applicant's written advice that he wished to pursue his complaint and that he sought the opportunity to present further relevant information to me. On 26 May 1994 I wrote to the applicant confirming my preliminary view and advising him that, unless more detailed information relating to the documents claimed by the applicant to exist was provided, I could take the matter no further.

24. On 2 June 1994 the applicant supplied my office with a further list of dates, events and police contacts dating from 1974 for which he said documents must exist and which documents had not been supplied to him. By letter dated 10 June 1994 the agency was requested to conduct a further search of its records and I provided a copy of the applicant's list to assist it in this process. I also sought an explanation in writing of the manner in which searches had been conducted and a response to the applicant's allegation that documents had been withheld because they had been directed to an exempt agency.

25. On 24 June 1994 I received an undated letter from the FOI Manager in the agency, in which he informed me that additional searches had been undertaken *"...[w]ith Chief Office Records, Internal Investigation Branch, Tactical Response Group and the Crime Support Unit..."* and that additional inquiries had been made in respect of the pre 1984 documents, but no further documents had been located. He further advised the following:

    *"My discussions with the Officer in Charge, Chief Office Records and Clerk in Charge of document identification, have revealed that the type of documents referred to by the applicant were culled in accordance with Section 30 of the Library Board Act against Retention and Disposal authority in place at that time. Furthermore, I was unable to clearly establish the date of the culling process due to changes in the organisational structure of this Section."*

26. On 1 July 1994 one of my officers spoke with an officer of the Protective Services Unit of the Police Force in relation to the applicant's allegation that documents of the agency relating to the applicant may have been transferred to that unit, an exempt agency, in order to avoid access to those documents under the FOI Act. That matter is addressed at paragraphs 38 to 42 below.

27. On 8 July 1994 the agency responded in writing to the request for further searches in a letter signed on behalf of the Acting Commissioner of Police, and said:

> *"...a retracing of the steps originally made has been conducted. Search tracer files were originally sent out to each section involved and the names and titles of each person involved with those searches is indicated on the advice certificate located on the tracer file.*
>
> *Each person conducting a search is given written instructions on how to implement the search and a copy of these instructions is attached to this letter.*
>
> *The manner in which each section may conduct a search depends on the resources and record keeping method of that section.*
> ...
> *Disposal of all Police Department documents is carried out in accordance with Section 30 of the Library Board Act. The Police Department Policy regarding destruction of documents and related schedules is currently being reviewed and redeveloped as the importance of the treatment of records and documents is an ongoing process.*
> ..."

## FINDINGS

28. Applicants requesting access to documents must rely on the integrity of the search conducted by the relevant agency. In some instances there may be justification for an applicant's belief that further documents should exist and when additional searches uncover documents which were not identified initially it is understandable that an applicant will be sceptical about the record keeping practices in that agency. However, I do not believe that the FOI Act requires agencies to guarantee that their systems are infallible. That would be expecting the impossible. I recognise that documents may not be readily found for a number of reasons including:

- misfiling;
- poor record keeping;
- ill-defined requests;
- proliferation of record systems;

- unclear policies or guidelines;
- inadequate training in record management; and
- non-existence.

29. However, when an agency is unable to locate requested documents an adequate statement or reasons may go some way towards reassuring a sceptical applicant. In my view, the minimum requirement is a brief explanation of the steps taken by the agency to satisfy the request. Such an explanation should include the locations searched, why those locations were chosen and a description of how the search was conducted (for example: computer search, manual search of file series, card index checked).

30. In his correspondence with my office the applicant described the basis for his belief that documents existed which were being withheld from him by the agency. He expressed himself in general terms, of which the following comment is an example:

*"...there are considerably more incidents of my formal contacts with WA Police Force, which must have resulted in police records and records of a personal nature about me and my activities".*

In correspondence dated 8 April 1994 he referred to a particular incident with an officer of the agency and said:

*"...[he] took no notes during the short interview ...If he had a tape recorder running, that record would show the reported interview to be greatly incorrect....I should like to know the full extent of [his] notes, which must exist and which must have been made after he left my place of interview."*

31. Again, on 14 May 1994, in a letter the applicant stated:

*"It is my genuine understanding (and Federal FOI experience) that any record which refers, by name, to me is validly subject to my access application..."*

32. I am satisfied from the agency's explanation that many of the incidents identified by the applicant would not necessarily generate documents containing personal information about the applicant. In the Glossary in the FOI Act, "**personal information**" is defined as meaning "...*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."*

33. The essence of this definition is that for information to be "personal information" it must identify the individual in some way and reveal something about that individual. When the requested information possesses this character it may be exempt under clause 3 of the FOI Act or, where the information is personal to the applicant, s.21 provides that this must be considered a factor in favour of disclosure. There is no question in this case of the applicant being denied access to information that identifies him in some way. In my view, the agency rightly concluded that the applicant was seeking access to documents relating to himself. This is apparent from the written decision of Chief Superintendent Mott.

34. The mere mention of the applicant's name in a document is insufficient, in my view, to constitute "personal information". For this reason, I am of the view that many of the incidents which the applicant says would have, or should have, generated documents about himself, are unlikely to fall within the ambit of the access application. For example, if a document had been created by police because of a specific inquiry and, in the course of that inquiry the applicant had been spoken to by police, had been interviewed or observed somewhere, that document may not contain personal information about the applicant.

35. From my own experience as a former police officer, I am also aware that practices vary amongst members of the agency, some being more inclined than others to take and keep detailed notes. The agency has located and searched some 33 files in diverse locations in order to satisfy this request. In my view, there is no factual basis for the applicant's view that his contacts with the agency over the years would, as a matter of course, generate documents and there is no evidence before me which supports his belief that more documents exist. I am satisfied, therefore, that the searches conducted by the agency to locate relevant documents in this instance have been reasonable and that it would be unreasonable to require a detailed examination of each and every document held by the agency. Further, the FOI Act itself does not require such a course of action.

36. I also accept the explanation from the agency and evidence from the Library Information Service of Western Australia (LISWA) that some documents have lawfully been destroyed under s.30(2) and (3) of the *Library Board of Western Australia Act 1951* which provide as follows:

> *(2) The officer in charge of a public office may destroy or dispose of any public record or class or public records in the custody or under the control of that public office -*
>
> *(a) if the destruction or disposal is in accordance with a Retention and Disposal Schedule with the terms of which an authorized officer of the Board has concurred; or*

> *(b) if the Board has informed that officer in writing that it does not require that public record or that class of public records to be transferred to the Board for inclusion among the State archives,*
>
> *but not otherwise.*
>
> *(3) Before any public records are destroyed or disposed of, the officer in charge of the public office in the custody or under the control of which the public records are shall notify the Board of the intention to destroy or dispose of those public records and in that notification shall specify the nature of the public records concerned."*

37. Although the agency was unable to provide a record of documents that had been destroyed, I subsequently obtained a copy of the Retention and Disposal Schedule from LISWA. That document authorised, in general terms, the destruction, *inter alia*, of records relating to complaints, complaints against police, district complaints (miscellaneous), arrest and assault, warrants and summonses and crime. Various categories of records are described in that schedule and the period for which the records in each category must be retained before destruction is also listed. This period varies according to the class of document, some being held longer than others. It may be helpful if the agency were to obtain a copy of that schedule from LISWA and provide a copy to the applicant as a show of good faith.

## The allegation of an offence under section 110

38. Section 110 provides:

> *"**Destruction of documents***
>
> ***110.** A person who conceals, destroys or disposes of a document or part of a document or is knowingly involved in such an act for the purpose (sole or otherwise) of preventing an agency being able to give access to that document or part of it, whether or not an application for access has been made, commits an offence.*
>
> *Penalty: $5 000 or imprisonment for 6 months."*

39. The penalty attached to this section is an indication of the degree of seriousness with which Parliament views the deliberate destruction or concealment of records. However, to constitute an offence, the evidence must establish that the concealment, destruction or disposal was done with an intent to prevent the agency being able to give access under the FOI Act.

40. In my view, there is no evidence that an offence under s.110 has been committed. The applicant offered as evidence for his belief that documents have been transferred to an exempt agency, the Protective Services Unit, a copy of what he alleged to be the contents of one of the documents supplied to him by the agency. That document is a memorandum dated 4 March 1993 from the Acting Commander (Discipline) to the Officer in Charge, Protective Services. It refers to the applicant's belief that a three volume file on himself exists in the agency and the fact that no such file has been located in the Internal Investigation Branch. The memorandum recommends that the Protective Services Unit confirm no such file exists in their area and that a letter of advice be sent to the applicant.

41. The Protective Services Unit is an exempt agency listed in Schedule 2 to the FOI Act. If such a letter was sent by that Unit to the applicant it is reasonable to conclude that the applicant would already have a copy. If he does not, and a copy exists in that Unit, it is a document created by Protective Services Unit and is exempt under clause 5(2). The applicant's right to be given access to documents of an agency does not include a right to access documents of an exempt agency. Section 10(1) of the FOI Act makes it clear that the general right is qualified to this extent. However, an officer of the Protective Services Unit informed one of my officers that the Unit does not hold any files in relation to the applicant.

42. I am mindful that the suspicions of the applicant arise from a long standing distrust of the agency. I therefore sought express confirmation from the Commissioner of Police that no documents of the agency relating to the applicant have been transferred to the Protective Services Unit for the purpose of preventing access under the FOI Act. The Commissioner gave me that assurance in writing dated 3 August 1994. I therefore find that there is no evidence of an offence under the FOI Act.