OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	**File Ref: F2005010** **Decision Ref: D0172005**

Participants:

Post Newspapers Pty Ltd
Complainant

- and -

Town of Claremont
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to visit to agency by the Macro Task Force – search warrant – non-disclosure of information as to existence or non-existence of documents – clause 5(1)(b) – whether disclosure could reasonably be expected to prejudice the investigation of any contravention or possible contravention of the law.

Freedom of Information Act 1992 (WA) ss.10, 74(1), 74(2), 76(5), 90; Schedule 1, clauses 3(1), 5(1)(b), 5(4), 5(5).

Criminal Code (WA) s.272

Manly v Ministry of Premier and Cabinet (1995) 14 WAR 550.
News Corporation Limited and Others v National Companies and Securities Commission (1984) 57 ALR 550.
Attorney-General's Department v Cockcroft (1986) 10 FCR 180; 64 ALR 97.

DECISION

The decision of the agency is confirmed. The requested documents, other than those that have been disclosed to the complainant by the agency, are exempt under clause 5(1)(b) of Schedule 1 to the *Freedom of Information Act 1992*. The matter claimed to be exempt under clause 5(1)(b) and deleted from the documents that have been disclosed is also exempt under clause 5(1)(b).

D A WOOKEY
A/INFORMATION COMMISSIONER

21 October 2005

REASONS FOR DECISION

1. This complaint arises from a decision made by the Town of Claremont ('the agency') to refuse Post Newspapers Pty Ltd ('the complainant') access to documents on the ground that the requested documents are exempt under clause 5(1)(b) of Schedule 1 to the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. In an application dated 1 October 2004, the complainant applied under the FOI Act to the agency for access to *"…all files, correspondence and council records relating to the Macro Task Force visit last week."*

3. On 13 October 2004, the agency refused the complainant access to all of the requested documents, without identifying or confirming the existence of any, on the ground that "the information described" was exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. The complainant sought internal review of that decision and, on 19 November 2004, the Chief Executive Officer of the agency ("the CEO") confirmed the initial decision, but identified and confirmed the existence of one document – a search warrant – as within the scope of the access application.

4. By letter dated 17 January 2005, which was received at this office on 19 January 2005, the complainant applied to the Information Commissioner for external review of the agency's decision.

REVIEW BY THE A/INFORMATION COMMISSIONER

5. I issued and served on the agency notices requiring the production to me of certain documents relevant to the complaint including the agency's FOI file relating to the complainant's access application and any documents the subject of the agency's notices of decision in response to the access application. My Senior Investigations Officer attended at the agency and examined the original of the agency's FOI file, and obtained true copies of relevant documents from that file. My Senior Investigations Officer also held discussions with a number of agency staff members about the manner in which the access application was dealt with and the circumstances relating to the search warrant being executed on the agency. Inquiries were also made with officers from the WA Police Service about that matter.

6. After making those inquiries, my Senior Investigations Officer wrote to the complainant on 18 February 2005 and gave the complainant his view of this matter based on the information then available to him. In summary, my Senior Investigations Officer advised the complainant that, without giving any information as to whether the requested documents exist or do not exist in the agency, he was of the view that such documents would, if they existed, be exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. Accordingly, he

was of the view that the decision of the agency to refuse access to documents of that kind may have been justified.

7. In light of his view, my Senior Investigations Officer invited the complainant to reconsider whether it wished to pursue its complaint. By letter dated 1 March 2005, the complainant confirmed that it wished to pursue its complaint and provided a brief submission arguing why, in its view, it would be in the public interest to disclose documents that fall within the scope of the access application. At that stage of proceedings, it had become apparent that this complaint could not be conciliated.

8. I inspected the true copies of the documents obtained from the agency's FOI file, the search warrant itself and a number of other documents relating to its execution, including internal emails and file notes. I directed that further inquiries be made with the agency to clarify certain issues and, as a result, two additional file notes were identified and produced to me. On 29 June 2005, I informed the parties of my preliminary view of this complaint. It was my preliminary view that the agency's claim for exemption under clause 5(1)(b) had been established. I gave the complainant written reasons for my preliminary view and I invited the complainant to either withdraw the complaint or provide me with further submissions and information on issues relevant to my determination of this matter.

9. The complainant confirmed that it wished to pursue the complaint and provided further submissions for my consideration. In those submissions, the complainant asserted that it was aware of *"an email briefing sent by the Town of Claremont to its Mayor and councillors alerting them to the existence of the warrant and to the Macro Task Force's attendance …"*. The complainant submitted that "[a]*s the Macro Task Force has no objection to disclosure of the facts of the existence of the warrant and Macro's attendance on the offices, the suppression of this email cannot be justified under clause 5(1)(b)"*. As it seemed that such a document would be within the scope of the access application but had not been produced to me, further inquiries were made with the agency to ascertain whether any such document existed and whether all relevant documents had been identified and produced to me.

10. As a result of those inquiries, the agency identified and produced hard copies of an additional 10 documents: one identified as the email referred to in the complainant's submissions; three recording external enquiries – including one from a member of staff of the complainant – seeking information relating to the Macro Task Force visit; and six recording an exchange of emails between the agency's CEO and another person. As those documents appeared to me to be within the scope of the access application, the agency was asked to make a decision on access to them. The agency's CEO decided to give the complainant full access to one of them and access to edited copies of the others, with some of the matter deleted claimed to be exempt under clause 5(1)(b) and some under clause 3(1) of Schedule 1 to the FOI Act.

THE REQUESTED DOCUMENTS

11. As I have indicated, other than the search warrant itself, the agency did not initially identify to the complainant, or confirm or deny the existence of, any documents it may have which are within the scope of the access application. On internal review, the CEO confirmed the existence of a search warrant. On external review by my office, the agency identified and produced to my office a number of other documents relating to the execution of the warrant. Those documents include emails, electronic diary notes and file notes, among others. As outlined in paragraph 10 above, it also subsequently identified and released to the complainant edited copies of a number of those.

12. Although, given their dates, it seems that at least six of the documents produced to me did not exist at the time the agency made its initial decision on access, they did exist at the time the CEO made the decision on internal review. Having inspected them, I am of the view that they come within the terms of the complainant's access application. There may be an argument – which the agency has not sought to mount – that, as those documents did not exist at the time it made its initial decision, they cannot be considered within the scope of the decision under review. However, s.42 of the FOI Act provides that an application for review has to be dealt with as if it were an access application and the provisions of Divisions 2, 3 and 4 of Part 2 of the FOI Act apply accordingly. In view of that provision, and as those documents:

    - were in existence at the time when the agency was still dealing with the access application (on internal review);
    - have been identified and produced to me;
    - are within the scope of the terms of the access application,

    and as the agency has not objected, I have also considered whether or not they are exempt.

13. For the reasons given in paragraphs 15-23 below, I do not consider that I can confirm or deny that any documents within the scope of the access application, other than those referred to in paragraph 11 above, exist and in particular whether documents – as opposed to other objects – were required under the warrant. It seems to me that to do so would reveal something of the content of the warrant, which is claimed to be exempt.

14. One of the complainant's issues of complaint was that the notice of decision on internal review given to it by the agency *"…seems to incorrectly assume that the contents of the search warrant are the only documents requested"*. However, having investigated the matter, I am of the view that the agency did consider more than just the search warrant itself when dealing with the access application, and that it has now considered and identified to me all the documents it has which are within the scope of the access application.

NON-DISCLOSURE OF EXEMPT MATTER OR EXISTENCE OR NON-EXISTENCE OF DOCUMENTS

15. Section 76(5) of the FOI Act provides that, in dealing with a complaint, I have to include in my decision: the reasons for that decision; the findings on the material questions of fact underlying those reasons; and the material on which my findings are based. It is also my usual practice to set those out in a written preliminary view given to the parties before I make a final decision. However, s.74(1)(a) of the FOI Act requires me to ensure that exempt matter is not disclosed during the course of my dealing with a complaint and s.74(2) places a further obligation upon me not to include, among other things, exempt matter in a decision on a complaint or in reasons given for a decision.

16. Having regard to those provisions, I consider that I am constrained, in the circumstances of this case, from confirming whether other documents were identified as being within the scope of the application, because to do so would disclose matter that is claimed to be exempt. For example, without confirming or denying that it is the case, if documents were seized under the warrant they would, in my view, be within the scope of the access application. However, if I were to confirm that such documents existed, it seems to me that I would thereby reveal something of the contents of the warrant, which is claimed to be exempt. Similarly, in those circumstances, if I were to detail the documents seized, it is likely that I would thereby reveal the contents of the warrant, which is claimed to be exempt. If it were not documents but other items which were seized then, by confirming that there were no other documents within the scope of the access application, it seems to me that, similarly, I would reveal something of the content of the warrant.

17. I am also constrained from providing the complainant with my findings on some of the material questions of fact underlying the reasons for my decision and from referring, other than in general terms, to the material upon which those particular findings are based and the evidence before me which supports those reasons, because I do not consider that I can do so without revealing exempt matter and thereby breaching my statutory obligations under s.74(2) of the FOI Act.

18. I acknowledge that, in such circumstances, the complainant is at a considerable disadvantage in endeavouring to make meaningful submissions to me on the contested issues. The difficulties faced by complainants and the constraints placed upon me by s.74 of the FOI Act, and on the Supreme Court of Western Australia by s.90, were recognised by Owen J in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550. At pages 556-557 of that decision, Owen J said:

> *"If it is established that a document is an exempt document the court does not have the power to make a decision to the effect that access is to be given to the document: s 87(3). In other words, once a decision is reached that a document is exempt, there is no discretion concerning the end relief. In this respect the court is in the same position as the Commissioner.*

One provision with which I had some difficulty during the hearing is s 90, which is in these terms:

"(1) In hearing and determining review proceedings the Court has to avoid disclosure of –
(a) exempt matter; or
(b) …

(2) If in the opinion of the Supreme Court it is necessary to do so in order to prevent disclosure of exempt matter … the Supreme Court may receive evidence and hear argument in the absence of the public and any party or representative of a party.

(3) The Supreme Court is not to include exempt matter, … in its decision in review proceedings or in reasons given for the decision.

(4) …"

At the commencement of the hearing I was given a copy of Document 1 and Document 2. I think counsel for the respondent had seen those documents. Obviously, the appellant had not seen them, but nor had his counsel and solicitors. A question which arose immediately was whether the appellate process could be disposed of fairly in those circumstances. As will appear later this is a point of some significance because in some respects the fate of the appeal turns on the contents of the documents themselves. This places counsel in a position of considerable disadvantage in making submissions on a contested issue. It also places the court in a position where it is acting without the advantage of considered submissions from one of the parties. The question is whether the court is at liberty to make the contested material available to counsel (not, of course, to the party seeking access) for the purposes of the appeal.

It is apparent from the Minister's second reading speech when introducing the Freedom of Information Bills in 1991 and 1992 that the legislature had in mind the freedom of information regimes in other jurisdictions. Section 63(1) of the Freedom of Information Act *1982 (Cth) refers to "the necessity of avoiding disclosure [of exempt matter] to* the applicant*". The legislative prohibition is therefore limited to the applicant rather than his or her legal advisers. The Victorian legislation (s 56(3)) specifically empowers the court to make information available to a qualified legal practitioner under certain conditions. The* Freedom of Information Act *1991 (SA) directs the court, where application is made by a Minister or the agency concerned, "to receive and hear argument in the absence of the public and, where in the opinion of the [court] it is necessary to do so in order to prevent the disclosure of any exempt matter, the appellant's representative". This deals separately with the absence of the public and the applicant on the one hand and of the applicant's legal advisers on the other and is thus different to s 90(2) of the Act. It seems to contemplate situations in which the appellant's legal advisers could be given access to the exempt matter for the purposes of the application. Section 55(6) of the* Freedom of Information Act *1989 (NSW) is, relevantly, in similar*

terms to s 90(2) of the Act. The Tasmanian and Queensland statutes do not contain equivalent provisions.

This comparison of the statutory regimes suggests to me that s 90 ought to be construed strictly according to its tenor. The court has no discretion and, whether during the hearing or in its reasons for decision the court must not disclose exempt information to any *person including a qualified legal practitioner."*

19. Since Owen J in that case took the view that s.90 - and by implication s.74 - should be construed strictly according to its tenor, I consider that I must adhere strictly to the obligations imposed upon me by s.74(1) and (2) of the FOI Act. I am also of the view that to do otherwise would defeat the purpose of the exemptions provided by the FOI Act.

20. Further, s.74(1)(b) and (2) also require that I do not disclose information as to the existence or non-existence of a document containing matter that is exempt under clause 1, 2 or 5 of Schedule 1. I take that to mean that I must avoid disclosure of the existence or non-existence of such a document where an agency has acted in accordance with s.31 (which provides that an agency is not required to give information as to the existence or non-existence of a document containing information that would be exempt under clause 1, 2 or 5 of Schedule 1). To consider it otherwise would mean that I could never disclose information as to the existence or non-existence of a document that is exempt under one of those three clauses, even where no harm could follow from disclosure of that information and even where the agency concerned has already confirmed its existence or non-existence and has no concerns about disclosure of that information.

21. The provision in s.31 is designed to ensure that, in cases where the mere confirmation of the existence or non-existence of documents would itself reveal exempt matter or otherwise damage the public interests those three clauses are designed to protect, the agency is not required to give that information. Take, for example, a person engaged in criminal activity who applies to the police for access to all documents relating to any current covert surveillance of himself by police. If the police were required in response to tell him whether any such documents exist or not, they would thereby tell him whether or not he is currently under police surveillance. If he is, the covert police investigation will be prejudiced because he may cease his criminal activity or go about it differently to avoid the surveillance; if he is not, he may feel free to carry on with it and public safety or property security could be put at risk. In such circumstances, merely disclosing the existence or non-existence of documents would be contrary to the public interest the clause 5 exemption is designed to protect.

22. If disclosure of that information were not prohibited on external review, the purpose of s.31 would be defeated. Even if I were not persuaded that it was reasonable for an agency to rely on s.31 in a particular case – and that the documents requested would not, if they existed, contain information that is exempt under clause 1, 2 or 5 – if I were to disclose the fact of whether or not

they existed the agency's right of appeal from my decision on a question of law would be negated; the very information the agency sought to protect from disclosure would have already been disclosed.

23. For that reason I also consider that I cannot disclose information that is claimed by an agency to be exempt, even though my decision is that the document is not exempt. Therefore, even though the prohibition in s.74(1)(a) relates to the disclosure of "exempt matter", I consider the prohibition to extend to the disclosure of matter that is claimed to be exempt. If my decision is that it is not exempt, it is then for the agency concerned to either give effect to my decision (s.76(7)) by disclosing it or exercise its right of appeal on a question of law (s.85(1)).

EXEMPTION CLAIMED - CLAUSE 5(1)(b)

24. The agency claims that – other than those which have been released to the complainant in edited form – the requested documents are exempt in full under clause 5(1)(b) of Schedule 1 to the FOI Act. The agency also claims that some of the matter deleted from the edited documents it has released is exempt under clause 5(1)(b) and that other matter deleted from them is exempt under clause 3(1). Following discussions with my office, the complainant withdrew its complaint in respect of the material claimed to be exempt under clause 3(1). That material is, therefore, no longer in dispute and I need only consider the claims for exemption under clause 5(1)(b).

25. At the time the agency made its initial decision in respect of the complainant's access application, clause 5(1)(b) of Schedule 1 to the FOI Act provided that matter was exempt *"… if its disclosure could reasonably be expected to reveal the investigation of a contravention or possible contravention of the law in a particular case, whether or not any prosecution or disciplinary proceedings have resulted"*. However clause 5(1)(b) was subsequently amended and the amended provision commenced on the same day the CEO made his decision on internal review. Clause 5(1)(b) now provides as follows:

Matter is exempt matter if its disclosure could reasonably be expected to -

…

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

26. Clause 5(5) provides that 'contravention' includes a failure to comply and that 'the law' means, among other things, the law of this State. My understanding is that, in the circumstances, I am required to apply the law as it now stands rather than as it stood at the time the agency's initial decision was made.

CONSIDERATION

27. Two questions arise from the terms of the exemption set out in clause 5(1)(b). Those are, firstly, whether there is on foot, or will be, an "*investigation of any contravention or possible contravention of the law*" and, secondly, whether the disclosure of the requested documents could reasonably be expected to 'prejudice' that investigation.

Investigation of a contravention or possible contravention of the law?

28. On the basis of the information given to me by the agency and the WA Police Service, I am satisfied that the requested documents, as described, relate to an investigation into contraventions of the law which is currently being conducted by the WA Police Service. I am also satisfied, having inspected unedited copies, that the matter deleted from the documents that have been released on the basis that it is exempt under clause 5(1)(b) ('the deleted matter') also relates to that investigation, as do a number of documents of a similar nature (emails, diary notes etc) which were created in relation to the Macro Task Force's visit and which I have inspected.

29. It is well known that the Macro Task Force was established to investigate the disappearances of three young women from Claremont a number of years ago; the subsequent killings of two of them; and the suspected killing of the third. From my examination of the search warrant and discussions between my office and the Macro Task Force, I am satisfied that there is currently on foot an investigation into contraventions and a possible contravention of the law, being s.272 of the Criminal Code (unlawful homicide), among others.

30. I am also satisfied that the disclosure of the requested documents and the deleted matter would reveal something of the detail of aspects of that investigation. Clearly, the disclosure of the warrant would reveal some detail of a line of inquiry. Each of the additional documents produced to me by the agency and the deleted matter would, in my view, if disclosed, reveal all or part of the contents of the warrant. If the warrant were for documents – and I neither confirm nor deny that it was – then in my view disclosure of those documents would indicate the content of the warrant, a line of inquiry or both. In my view, therefore, disclosure of any of the requested documents (other than those the agency has disclosed) or the deleted matter would reveal something of the investigation, and they would have been exempt under clause 5(1)(b) before it was amended. The question now, however, is whether their disclosure could reasonably be expected to prejudice that investigation.

Could disclosure of the requested documents reasonably be expected to 'prejudice' the investigation?

31. The meaning of "could reasonably be expected to prejudice" was considered by all the judges in *News Corporation Limited v National Companies and Securities Commission* (1984) 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."

32. In *Attorney General's Department v Cockcroft* (1986) 64 ALR 97 at page 106, the Full Federal Court said that the words "*could reasonably be expected"* were intended to receive their ordinary meaning and required a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect the stated consequences to follow if the documents in question were disclosed.

33. The Concise Oxford Dictionary (Eighth Edition) defines "to prejudice" as meaning, *inter alia, "impair the validity or force of ".* It is also of assistance to consider the definitions of prejudice *("harm or injury that results or may result from some action or judgment")* and prejudicial *("causing prejudice; detrimental")* to reach the view that the term *"to prejudice an investigation"* in clause 5(1)(b) means to impair the progress or effectiveness of an investigation.

34. In my view, therefore, to establish the exemption under clause 5(1)(b), the agency must show that it is reasonable, as opposed to irrational, absurd or ridiculous, to expect that disclosure of the documents in dispute would pose more than a mere possibility or risk of impairing the progress or effectiveness of an investigation.

35. The Officer in Charge of the Macro Task Force advised my office that he consents to my disclosing the fact that officers of the Macro Task Force attended at the agency on or about 24 September 2004 and executed a search warrant for the purpose of gathering further evidence as part of the ongoing investigation by the Macro Task Force into the abductions from Claremont of three young women and the subsequent killings of two of them. However, the Officer in Charge of the Macro Task Force also advised my office that he strongly objects to the disclosure of the specific terms of the search warrant, any material provided by the agency in compliance with that warrant and any other information that would confirm the purpose of the search warrant in respect of the specific line of inquiry then being conducted by the Macro Task Force.

36. The Officer in Charge of the Macro Task Force also advised my office that he is of the firm view that the disclosure of that kind of information could reasonably be expected to alert a person of interest, potential person of interest or any other person who may have some involvement in the matter under investigation, to the kind of evidence being sought and the particular line or lines of inquiry being pursued. If that were to occur, the Officer in Charge submits, a person, including a person of interest, could reasonably be expected to take any number of actions that would prevent relevant evidence being identified. For example, a person may establish false alibis, destroy evidence or make himself or herself or another person prepared for any possible further

inquiries in the future. Clearly, actions of those kinds would hinder the investigators' pursuit of the truth and goal of bringing to justice the offender or offenders.

37. I have examined the documents produced to me and considered the information provided to me by the Officer in Charge of the Macro Task Force. The Officer in Charge is an experienced senior police officer in charge of a longstanding and ongoing major crime investigation. In this case, I consider that I must take into account the professional experience and knowledge of the person providing the information and give some weight to his view. He has not merely asserted that disclosure could prejudice the inquiry; he has explained to me why and how he considers that disclosure could be expected to prejudice the investigation and I consider those explanations to be reasonably based.

38. In my view, if disclosure of any of the requested documents were to occur, the outcomes described by the Officer in Charge could reasonably be expected and those outcomes are not merely possibilities or speculative conjecture. That is, I accept that the expectation of the outcomes occurring is based on real and substantial grounds. I accept that the kinds of outcomes described above would prejudice the investigation. I am also of the view that there may be a number of additional ways in which the investigation could reasonably be expected to be prejudiced if disclosure were to occur. However, for the purpose of these reasons, it is not necessary to detail all of the ways in which the investigation could be prejudiced, and to do so would, in my view, involve the disclosure of matter that is claimed to be exempt.

39. As consideration of whether or not disclosure would be in the public interest arises only in the limited circumstances set out in clause 5(4) – none of which applies in this case – it is not open to me to consider the question of where the public interest lies in this case.

The complainant's submission

40. In response to my preliminary view, the complainant submitted as follows:

"Our difficulty is evident in making submissions for the release of documents that you are unable to even confirm exist.

1. An individual served with a search warrant is entitled to obtain a copy of the warrant. There is nothing to prevent that individual showing the warrant to another party. Nor is there anything to prevent a public body showing the warrant to a third party. The search warrant in question was served on a public body. We argue that it is a public document. The Information Commissioner should not stand between the Town of Claremont and a member of the public, the applicant, in enforcing its right to the permitted disclosure of the warrant. It follows that as there is nothing to prevent the warrant from being disclosed, the commissioner's draft adverse determination re revealing the existence and type of items seized under the warrant falls away.

2. Post Newspapers Pty Ltd is aware of an email briefing sent by the Town of Claremont to its Mayor and councillors alerting them to the existence of the warrant and to the Macro Task Force's attendance at the council offices. As the Macro Task Force has no objection to disclosure of the facts of the existence of the warrant and Macro's attendance on the offices, the suppression of this email cannot be justified under clause 5(1)(b).

3. The supression [sic] *of the email noted in 2 above gives rise to real concern about the contents other suppressed documents, about which we are not allowed to know, and whether they in fact are exempt under 5(1)(b).*

4. It is absurd for the head of Macro to argue that disclosure of the contents of the warrant and/or other items seized could alert a person of interest to the kinds of evidence being sought, leading to a destruction of evidence or the creation of false alibis etc. The person of interest who is subject of the warrant is well aware that he is a person of interest. He was seized from the street, taken to police headquarters and accused of three murders alleged to have been committed nine years previously. His home in Claremont was searched by Macro in front of a phalanx of media cameras after the media was alerted that Macro was about to raid the house, in the presence of the owner. This is a matter of public record, but independent evidence can be supplied to the Commissioner if requested. The person of interest cannot destroy the items seized under the warrant. He has no access to them. Clause 5(1)(b) cannot apply on these grounds".

41. In my opinion, the complainant's first submission is misconceived. It seems to me to presume that the FOI Act creates an unfettered right of access to all government-held documents. Clearly, that is not the case. The right created by s.10(1) of the FOI Act is subject to a range of exemptions which are designed to protect significant public interests which compete with the public interest in the openness and accountability of Government and its agencies. The fact that a warrant is served on a public body does not make it a "public document" in the sense that there automatically arises an absolute right of access to it by any person; rather, it thereby becomes a "document of an agency" to which there is a right of access under the FOI Act, subject to the FOI Act, that is, subject to the exemptions contained in that legislation. Were I to accept the complainant's argument, there would be no need for the FOI Act; all documents held by government agencies would, on the complainant's argument, be available to any person who sought to access them. The exemptions contained in the FOI Act recognise that there is a need to balance the public interest in open and accountable government against the public interest in government agencies being able to continue to operate effectively and efficiently. The clause 5 exemptions are designed to ensure, among other things, that investigations into serious criminal matters are not compromised by the operation of the FOI Act.

42. The complainant's second submission, reproduced in paragraph 40 above, has been addressed in paragraphs 9 and 10 above. Following further inquiries with the agency, the document referred to in that submission was identified

and an edited copy provided to the complainant by the agency, together with hard copies of a number of other relevant emails.

43. The suspicion expressed in the third submission is understandable in the light of those documents not having been identified in response to the access application and only having been identified and produced following inquiries by my office as a result of the complainant's submission in that regard. However, in the absence of any evidence to the contrary and given the agency's subsequent decision to disclose to the complainant edited copies of those documents, I accept the agency's explanation that the failure to identify those documents in the first instance was an oversight rather than a deliberate attempt to conceal them. It seems to me, again, in the absence of any evidence to the contrary, that the failure to identify and produce in the first instance those and other documents subsequently identified and produced to me as a result of inquiries by my office arose from a misunderstanding of the scope of the access application, the agency having interpreted it as being for the warrant, anything seized under the warrant and documents relating directly to the execution of the warrant. Having since made a series of additional inquiries both with the agency and with the Macro Task Force, I am reasonably satisfied that all relevant documents have now been identified and produced.

44. The argument in point 4 of the complainant's submission proceeds on the basis of a number of assumptions. It assumes the identity of *"...* [t]*he person of interest who is subject of the warrant..."*, which I neither confirm nor deny to be the case, and assumes that the argument that disclosure of the contents of the warrant could lead to destruction of evidence relates only to the possible destruction of items seized under another warrant which was executed on that person. Neither of those assumptions is germane to the argument. The argument is that disclosure of the contents of the warrant would reveal a particular line of inquiry which, if made public, would enable any person who was involved in or had knowledge of the matters under investigation - whether or not currently "persons of interest" to the police - to destroy evidence or position themselves to answer any evidence, wherever existing, that may otherwise implicate them.

45. It is a matter of public record that no-one has yet been charged for the crimes the subject of the investigation. It is also a matter of public record that there is or has been more than one "person of interest" to the police in relation to the matters under investigation. The particular line of inquiry which, in my opinion, would be revealed by disclosure of the contents of the warrant, or other material that would reveal its contents, is not a matter of public record and has not been publicly disclosed. It is a nonsense, in my view, to argue that, because one "person of interest" knows that he is a person of interest and cannot access items seized under a warrant executed on that person, disclosure of the particular line of inquiry being now pursued by the police could not place any person in a position of being able to destroy or manipulate evidence relating to the particular, present line of inquiry.

46. In a subsequent email to my Senior Investigations Officer, the complainant asked that I determine whether the complainant is *"… entitled under FOI to*

know in a general sense what was asked for and received by Macro Police from the Town of Claremont – the nature of the documents, or other things." The right of access created by the FOI Act is a right of access to documents, not to information *per se*. In many, if not most, notices of decision in response to access applications where access is refused, an agency will, or should, at least identify for the access applicant the documents considered to be within the scope of the access application and to which access is refused. However, in some circumstances it will not be necessary to do that and in others it will not be possible to do it without also revealing matter that the agency claims to be exempt. The latter seems to me to be the case in this instance. For the reasons I have explained at paragraphs 16 to 20 above, in particular, I am of the view that I cannot disclose that information in these reasons without necessarily disclosing exempt matter and thereby breaching my obligation under s.74(2) of the FOI Act.

47. In summary, in my view, the complainant's submissions do not contain any arguments of substance which I consider require further consideration. In addition, the complainant has provided no probative evidence that the matter contained in the requested documents is matter of the kind described in clause 5(4)(a)(i), (ii) or (iii) and nothing before me suggests that it is. Therefore, the question of whether or not disclosure would be in the public interest does not arise for my consideration.

CONCLUSION

48. For the reasons given, I find that all of the requested documents, other than those that have been disclosed to the complainant, are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. I also find that the matter deleted from the documents that have been disclosed and which is claimed to be exempt under clause 5(1)(b) is exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.

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