

**BURNETT AND POLICE**

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

**File Ref: 95082  
Decision Ref: D01795**

Participants:

**James Maxwell Burnett**  
Complainant  
  
- and -  
  
**Police Force of Western Australia**  
Respondent

**DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - refusal of access - documents created by an exempt agency - documents of an exempt agency held by a non-exempt agency - clause 5(2) - law enforcement, public safety and property security - no applicable public interest test - clause 6(1) of Schedule 2.

*Freedom of Information Act 1992 (WA)* ss. 10(1); 68(1); Schedule 1 clauses 5(1)(b), 5(2)(a), 5(2)(b), 5(4); Schedule 2 clause 6.

## DECISION

The decision of the agency is varied. The two documents to which access has been denied are exempt under clause 5(2)(a) of Schedule 1 to the *Freedom of Information Act 1992*, and the matter deleted from the third document is also exempt under clause 5(2)(a).

B.KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

23rd June 1995

## REASONS FOR DECISION

### BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Police Force of Western Australia ('the agency') to refuse Mr Burnett ('the complainant') access to certain documents which he has sought under the *Freedom of Information Act 1992* ('the FOI Act').
2. In March 1993, the complainant applied to join the agency as a recruit constable. Over a period of some 23 months he participated in various stages of the agency's recruiting process, including completing the entrance examination, a psychological examination and the medical examination. However, in February 1995, the complainant was notified that his application had been unsuccessful.
3. Following that notification, the complainant sought and was given, an explanation by the agency's Recruiting Branch. My understanding is that that explanation to the complainant detailed the reasons why his application was unsuccessful, including the fact that the agency had taken into account information received from the Bureaus of Criminal Intelligence in this State and in the Northern Territory where the complainant had previously been a police recruit.
4. On 13 February 1995, the complainant sought access under the FOI Act to documents of the agency relating to his employment application and, in particular, to information supplied to the agency by the Northern Territory Police and, in particular, by the Northern Territory Bureau of Criminal Intelligence. The agency granted full access to one document, access to an edited copy of another document and refused access to two other documents on the ground that those two documents are documents created by an exempt agency, namely, the Bureau of Criminal Intelligence (BCI) in Western Australia, and are, therefore, exempt under clause 5(2)(a) of Schedule 1 to the FOI Act.
5. On 13 April 1995, the complainant applied to the agency to have that decision reviewed internally. On 4 May 1995, Acting Commander Hawkes, Internal Review Officer in the agency, decided that the requested documents are documents of an exempt agency and denied the complainant access to those documents. On 15 May 1995, the complainant applied to the Information Commissioner for external review of the agency's decision to deny him access to the requested documents.

### REVIEW BY THE INFORMATION COMMISSIONER

6. On 22 May 1995, in accordance with my obligations under s.68(1) of the FOI Act, I advised the agency that I had accepted this complaint for review and sought the production to me of the requested documents together with the file

maintained by the agency with respect to this matter. Those documents were provided to me by the agency on 26 May 1995.

7. After my examination of the requested documents, it was my preliminary view that the requested documents are exempt under clause 5(2)(a) of Schedule 1 to the FOI Act. The complainant was advised of my preliminary view and reasons for that view, by one of my officers on 1 June 1995 and in writing by me on 8 June 1995. However, the complainant advised me, by letter dated 12 June 1995, that he wished nonetheless to pursue his complaint. However, although he reiterated his reasons for seeking access to the documents, the complainant provided no additional evidence or submissions that went to the question of whether or not the documents are exempt.

### THE DISPUTED DOCUMENTS

8. The documents remaining in dispute are described as follows:

1	Memorandum from BCI.	27/1/95
2	Memorandum from BCI.	31/1/95
3	Recruiting Branch internal memorandum containing information supplied by BCI.	6/2/95

The complainant has been given access to an edited copy of document 3, with the matter for which exemption is claimed deleted.

9. In the first instance, the agency claimed exemption for documents 1 and 2 on the basis that they are documents of an exempt agency. Exemption was claimed for document 3 under clause 5(2)(a) and clause 5(1)(b). On internal review, without specifying the document to which he referred, the internal reviewer stated that:

*"I am not prepared to provide any information concerning your inquiry regarding the Northern Territory B.C.I. because that information is contained in a document of the Western Australian B.C.I.*

*Clause 6 of Schedule 2 does not allow me to regard the document of the B.C.I. as a document of the Police Force. The Western Australian B.C.I. is an exempt [sic] under Schedule 2 of the Act."*

### Exempt agency

10. The general right in s.10(1) of the FOI Act to access a document of an agency does not include a right to access a document of an exempt agency. Ordinarily,

that limitation means that applications under the FOI Act directed to any of the exempt agencies listed in Schedule 2 to the FOI Act must fail. However, the FOI Act recognises that documents of an exempt agency may, from time to time, be located in another agency. If that occurs at the time of an access application under the FOI Act, then those documents are documents of the agency in which they are located.

11. For example, a letter may have been written by an officer of an exempt agency to an officer of a non-exempt agency. If the original letter is located on a file in the non-exempt agency and a copy is also kept on a file in the exempt agency, then the original letter will be a document of the non-exempt agency while the copy will be a document of the exempt agency. Whilst the latter will not be accessible under the FOI Act, the former - subject to the various exemption clauses - will be potentially accessible. Therefore, as all of the requested documents are located within the files of the Recruiting Branch of the agency, I consider that those documents are documents of the agency even though they were created by or originated from an exempt agency.
12. Further, the internal reviewer has, in my view, wrongly interpreted clause 6(1) of Schedule 2 to the Act. Clause 6 of Schedule 2 provides:

*"Documents of Police and Corrective Services units*

6. (1) *A document of the Bureau of Criminal Intelligence, Protective Services Unit or Internal Affairs Unit of the Police Force of Western Australia is not to be regarded as a document of the Police Force of Western Australia.*

(2) *A document of the Internal Investigations Unit of the Department of Corrective Services is not to be regarded as a document of the Department in which it is established."*

13. The exempt agencies named in that clause are unique amongst the agencies listed as exempt agencies in Schedule 2 in that they are branches or units of agencies and are not, other than for the purposes of the FOI Act, separate agencies in their own rights. For the purposes of the FOI Act, they are deemed to be separate agencies in order that documents of those units or branches are protected from disclosure under the FOI Act. In my opinion, the effect of clause 6(1) is that a document of either BCI, the Protective Services Unit or the Internal Investigations Unit is not to be regarded as a document of the agency merely by virtue of it being a document of one of those units or branches which, other than for the purposes of the FOI Act, form part of the agency. However, as I have explained above, if a document of an exempt agency leaves that agency and enters the possession of a non-exempt agency, then that document is a document of the non-exempt agency and must be dealt with accordingly.

**Clause 5(2)(a)**

14. However, clause 5(2)(a) of Schedule 1 to the FOI Act provides that matter created by any of the exempt agencies listed in clause 5(2)(a) and (b) is, *prima facie*, exempt matter, subject to the limitations in clause 5(4) of Schedule 1 to the FOI Act applying. Clause 5(2) provides:

"(2) *Matter is exempt matter if it was created by -*

(a) *the Bureau of Criminal Intelligence, Protective Services Unit or Internal Affairs Unit of the Police Force of Western Australia; or*

(b) *the Internal Investigations Unit of Corrective Services."*

15. I have examined the three requested documents. From that examination, I am satisfied that two of those documents have been created by BCI and that those documents are exempt from disclosure under clause 5(2)(a) of Schedule 1 to the FOI Act because they consist of matter that was created by an exempt agency. Further, I am also satisfied that none of the limitations in clause 5(4) applies to those documents. As a consequence, there is no scope for my consideration of whether disclosure of either document would, on balance, be in the public interest. I find that those documents are exempt under clause 5(2)(a) of Schedule 1 to the FOI Act.
16. The third document, an edited copy of which the complainant was given access, was not created by BCI. It is a Recruiting Branch internal memorandum. However, in my view, the deleted matter consists of a short summary of relevant parts of one of the documents created by BCI. That is, it reproduces in that memorandum matter that was created by BCI. For that reason, I am also satisfied that the deleted material is exempt matter because it is matter that was created by an exempt agency even though it is not contained within a document created by that exempt agency, namely BCI. Further, I am also satisfied that none of the limitations in clause 5(4) applies to this matter either. I find that the matter deleted from that document is exempt matter under clause 5(2)(a) of Schedule 1 to the FOI Act.
17. In his application for external review and his letter in response to my preliminary view, the complainant identified a public interest in individuals being informed of allegations made against them and held by government agencies and in being given an opportunity to defend themselves against those allegations. The complainant submitted:

*"...I hope Australia is not becoming a place where innocent people can have their careers and lives destroyed by unsubstantiated allegations by people in positions of trust such as police officers."*

18. The public interest identified by the complainant is one that I recognise and have recognised as a factor in favour of disclosure. However, as I have found that the disputed documents and the deleted matter are exempt under clause 5(2)(a), the public interest for and against disclosure of that matter does not arise unless one of the limitations in clause 5(4)(a) applies. As I have found that none of the limitations in clause 5(4)(a) applies to the documents, it is not open to me to consider whether disclosure would, on balance, be in the public interest.

\*\*\*\*\*